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STUDIES

András SAJÓ—
Judit SÁNDOR

Legal Status of the "Terminally Ill" under Hungarian Law

1. The purpose of this study

This paper surveys the legal status of various conducts inconsistently and inaccurately labelled as "euthanasia" in medical ethics, and suggests a possible way of resolving the contradictions and insufficiency of this regulation.

As suggested by the complicated title of this paper, and as demonstrated by the analysis of the concepts and rules of law below, the language of the Hungarian law, in accordance with the Health Act of 1972 (hereinafter: HA) is uncertain in connection with incurable patients. Hungarian medical and ethical practice, like in several other countries, attributes diverse meanings to this term including both permitted and forbidden forms of *medical* practice.

From the viewpoint of the legal regulation, we shall address only the practices most frequently referred to under the name of "euthanasia". These questions unavoidably exceed the limits of the regulation of medical conduct. Naturally, modern medical ethics does not regard euthanasia as merely the problem of the doctor, but interprets it in terms of the *relationship between doctor and patient.* The legal regulation, in addition, should (and in fact does) enforce general constitutional and social aspects, and furthermore, it has to take into account the consistency and coherence within the legal system. Therefore, the considerations guiding the legislator or the judge do partly differ from those of pure medical ethics.

Under Hungarian law, the regulation of "euthanasia" does not attain the constitutionally desired level of predictability of law, and this would render it insufficient even if consider-

ations of medical ethics resulted in a total ban on euthanasia. The present medical practices in the treatment of incurable patients, however, also include behaviours which could be illegal at any time without specific prohibition. As a consequence of the uncertain language of the present law, even if one applies a notion of euthanasia according to which a behaviour is not to be regarded as being a case of euthanasia, still the possibility of a criminal charge against the doctor remains open. The Constitutional Court did not yet determine the exact scope and content of the constitutional requirements in this area of law, so that it remains uncertain in many respects; there are nonetheless interpretations of the constitution, under which—provided a legal framework exists offering proper guarantees—the medical practices aimed at relieving the sufferings of a terminally ill person may conform with the constitutional principles.

2. *The current definition of "euthanasia" in Hungarian law: reasons for the elimination of the notion of euthanasia in legal analysis*

In current Hungarian statute law[1] "euthanasia" is mentioned *eo nomine* only once: in Art. 20 para. 1 of the Order No. 11/1972. of the Council of Ministers of June 30, 1972, implementing the HA. Here euthanasia includes the "extinction of life in case of an incurable illness".[2] The Order mentions in giving examples of legally prohibited medical activities, i.e. it suggests—and it only suggests—that it governs exclusively the activity of the doctor. To perform what is popularly called "euthanasia" (i.e. "good death") is generally regarded as a behaviour identical with the prohibited activity, but the scope of "euthanasia" under the legal definition covers only medical behaviours. It is a conceptual

1 Here we will not tackle unlawfulness in private law. As far as private law is concerned, the request for euthanasia is a question of interpretation of the principle of *violenti non fit iniuria*, which principle presently acknowledges self-determination only to the extent to which it does not hurt or endanger social interests. (According to this principle, assent excludes delict in *private law*.)

According to Section 75 para. 3 of the Civil Code, "Individual rights are not injured by any behaviour the entitled party has consented to, provided that the granting of the consent does not violate social interests, or that the general waiver is void".

2 Although we should abstain from giving an overall definition of euthanasia, from among the possibly permissible medical practices connected to death all such cases or definitions, which are related to the devastation of people of a "reduced value", must be excluded as obviously impermissible ones. The case of an incurable, chronic disease causing permanent suffering, but not of a fatal outcome, does not fall into the same category, and is unadvisable to discuss together with euthanasia. Possibly, the doctor's behaviour is to be changed in this respect, too, regarding the consideration of the patient's wish of "suicide", and medical attitude will considerably resemble the attitude manifested in the case of incurable, terminally ill patients. In spite the possible similarity of the doctor's behaviour, there is a significant difference in legal respects between the two cases on the part of the patient and the illness. In the scope of euthanasia the cause of death is the disease itself.

Naturally, distinctions are never perfect. Regarding non-healing, but not fatal diseases, a borderline case resembling the situation of euthanasia is possible, especially when the patient will never be able to regain consciousness again. In such cases some of the principles related to incurable and terminally ill patients without sufficient mental ability, as well as those related to their doctors can be governing.

element of euthanasia under this definition—simply resulting from the fact that it is included in the HA as an example of a way of conduct prohibited to doctors—that it is realised by a doctor. In principle, separate treatment is justified by the doctor's *special standard of professional liability* and profession-scientific nature of the legal regulation.[3] The presumption that euthanasia would take place *because of* an incurable disease, is obviously inaccurate: this is only a necessary (but not sufficient) condition of medical assistance into death. The word "extinction" (*"kioltás"* in Hungarian) itself is somewhat misleading although, undoubtedly it avoids the difficulties of term "causing death" which implies active participation on behalf of the medical personnel. Reference to the difference from chronic diseases is left out of the definition.

The legal definition given in the Order apart, the acts of "helping" an incurable patient "into death", at least in certain circumstances are qualified as acts contrary to the law only in the case of a rather complicated interpretation of the law. Under a certain interpretation of the law, the conducts falling within this scope conflict not only with the HA, but with the Criminal Code, too, so that they are criminal offences. These interpretations cannot be excluded, and sometimes they are the most obvious ones, which means that in legal terms the present medical practice can be legally questionable at any time; the legal uncertainty in this subject is intolerable both in social, and in medical respects. A bitter and furious relative and an attorney agreeing with him (or her) can, at any time, initiate a criminal procedure with a reasonable prospect of success.

2.1. The regulation of "euthanasia" in Hungarian health law

The governing rules are found in paras 1 and 2 Section 43 of the *Health Act.* para. 1 states:

> ...within the given possibilities the patient has to be provided with a treatment corresponding with the current status of medicine, with the individual faculties of the patient, as well as with the stage of his disease ... and the most effective therapeutic methods

have to be applied. Furthermore para. 2 states that

> ...a doctor is obliged to treat with utmost care even a patient he regards as incurable.

In an optimal case this could mean that, with respect to the individual faculties of a terminally ill patient—if the stabilisation of his condition is no longer possible according to the current status of medicine—the treatment is to be chosen on the pure basis of medical ethics, which may as well mean in some cases also the termination or

3 For example, in the case of *mercy killing* by a relative the influence of this action on the trust in doctors, who are indispensable for curing, need not be reckoned with.

withdrawal of the treatment. In cases where the patient's condition can be stabilised at least temporarily, this interpretation will not help. In order for this kind of interpretation to work, an unambiguous legal position would be required regarding the meaning and scope of "suitable treatment". The special rule related to the case of a patient regarded as terminally ill (which, as a special rule, has priority over the general rule according to the general principles of interpretation) does not prescribe that keeping the patient alive at any price would be a doctor's professional duty. The contents of the term "utmost care" is to be determined partly by relying on the professional opinion, in the lack of any further (unfortunately missing) legal guidelines. When determining the standard of "utmost care", however, as in the case of all measures of care, social opinion, as well as constitutional requirements must also be taken into account. "Utmost care" itself can also be interpreted in such a way that it means the fullest relief of pain, the ensuring of a better actual physical condition, irrespective of its possible effect of shortening the expectable length of the patient's life. As opposed to this, according to Section 43 para. 3 of the HA, the doctor is still responsible for "neglecting the measures necessary in the interest of the treatment of the patient". Accordingly, the abandonment of the treatment would be unacceptable, except when it were clear that the meaning of "medical treatment" differs from the general meaning in the case of an incurable patient.

Given the present legal background it is not clear at all what is the legal effect of the wish of a terminally ill patient expressed in a clear state of mind, according to which he wants to withdraw himself from medical treatment, e.g. "he wants to go home to die". If, for example, according to his wish he is disconnected from dialysis, which is applied due to a complication, the doctor performing this clearly violates Section 43. On the other hand, one might ask, in the case of a *moribondus* permitted to go home, is the doctor obliged—due to his professional duties and legal responsibility—prevent direct life-danger by connecting the patient to a medical appliance in the case of the patient's indisposition or loss of consciousness?

According to another way of interpretation, however, the relationship between paras 1 and 2 is not that between a rule and an exception, but rather para. 2 is just the application of the rule given in para 1 to a special situation. In this case, the two paragraphs could be interpreted in such a way that they do not conflict with each other. Yet the overall result will not differ too much, since according to the first paragraph, the given possibilities, and the stage of the illness have to be taken into account, and a treatment corresponding with them has to be provided. It is conceivable that under certain given circumstances the "most effective" solution is just the abandonment of certain life-prolonging medical treatments: this depends on the determination of the *objective* of the medical treatment in the case of a terminally ill patient. Such an objective can be

(a) *the prolonging of the patient's life as far as possible*;
(b) the *ensuring* of the *"normal" length of life* in the case of the given disease, only offering symptomatic treatment;

(c) death by causing the *least suffering* (disregarding the time within which the death occurs);
(d) a *good death* in the sense that the patient may not lose his dignity during his dying.

According to Section 44 para. 1b of the HA, the doctor may not apply such a treatment "of which risk is greater than the risk involved in the lack of the treatment or procedure". Since the risk of healing is (*ex hypothesi*) out of question in the case of a patient regarded as incurable, it is maximum the risks—or, more precisely, *the burdens*—of suffering and the shortening of life, that are hardly comparable directly, which can be compared. The HA, however, does not even raise the question of the patient's sufferings, since in 1972 the prevailing attitude at least in Hungary was still totally doctor (and treatment) oriented, i.e. paternalist. The question of informed consent, disclosure of information to the patient is raised in the Act in connection with agreement to operation at the most, but not in the case of other medical treatments. While in the case of an operation the principle of consent is mentioned—although rather vaguely—the law does not recognize the right of the patient to chose in respect to his death. This incoherence seems to be undeniable. On the one hand, the patient has the right to refuse the operation; on the other, in case of a terminal illness, the operation required for the "prevention of direct life-endangerment"—in the words of Section 47 para. 4 of the Act—can be excluded *a priori*, since there is no operation which could prevent life-endangerment in a situation of incurability, i.e. where the patient is by definition in on the verge of death, so being constantly in "life-endangerment". However, using the same legal expression and wording, its a professional duty of a doctor to keep the patient connected to a life-sustaining equipment *even without the patient's consent*, since it is regarded as a therapy, which is applicable only at institutions for in-patients, and which prevents, or so it is supposed, imminent death. In this sense the cases of euthanasia both by *disconnecting* the patient, or by *not connecting* him to the life supporting equipment are both breach of professional duties. However, according to Section 75 para. 1 of the Act, the citizen has to be treated—in the framework of public health service—*according to his state of health*, and in the most up-to-date way available. From this it can be concluded at least that special rules of treatment can be applied to a terminally ill patient, as to a special condition, and direct life-endangerment is possibly not taken into account in such cases, since the patient will die within a foreseeable, short term and for a foreseeable reason. This definition, however, is insufficient in itself. It would obviously be unacceptable if a helpless patient suffering from AIDS, who still insists on life, were denied laryngotomy in the case of dysphasia. Even the case, when direct life-endangerment is in direct causal relation with the terminal basic disease, does not provide a satisfactory result. The consideration of euthanasia—in case it is permissible—can take place depending on the patient's *condition* in the light of his personality, in addition to the-above condition of the disease (clinical pattern). If the patient's condition violates, or even directly endangers, his personal dignity, i.e. if his status approaches that of an object rather

than that of a person, such considerations can be raised, especially if his own earlier decision enables the performance of euthanasia.

Moreover, Section 75 raises another problem. It regulates and envisages the treatments and devices available in the *given situation*. For the law, which endeavours to give general rules applicable to a great number of different cases irrespective of any other consideration, a strange paradox results from this: the practice of euthanasia depends *under the general rule* on the facilities available in the *particular case*, e.g. whether or not there is a possibility of applying life-supporting facilities at the given place. If they are not available *in the case* the question of resuscitation, dialysis, etc. is not raised at all, nor (therefore) the abandonment or stopping of such treatments, which means that euthanasia becomes a problem depending on chance (and equipment at the disposal of the hospital). Criminal law, however, can (and at any rate should) only work with general fact-descriptions and euthanasia (as the denial of treatment) may not merely be a case of chance. All this also conflicts with the constitutional requirement of equality, since it is unacceptable in principle that a dying patient's "right" of euthanasia would depend on the contingent fact that in his case there is no possibility and, accordingly, no obligation of certain life-prolonging treatments.[4] This is a clear violation of the constitutional principle of equality, requiring that similar cases should be treated similarly. Although the HA basically leaves the choice of treatment to the doctor within the framework of the current state of science and law, it seems that in the above cases the question is not merely the professional choice of the doctor—especially regarding the purpose of the treatment—but the rules of law (as seen from this analysis) do not provide the required framework and guideline.

2.2. The state of criminal law related to certain actions–within the scope of "euthanasia"

2.2.1. Homicide (Section 166 of the Criminal Code). In Hungarian law the act of killing is qualified as "intentional", even if the perpetrator does not directly intend the consequences of his behaviour, but acquiesces to them (Section 21 of the Criminal Code); it is the case of the so-called "eventual intention".

For example, the doctor who performs a risky operation according to the status of medicine, does not commit a crime, not because by performing the operation he has acquiesced himself to the possible death occurring during the operation (by assuming the risk his intention also covered the probable consequence and in this sense he could

4 Cf. with the problem emphasized by József Kovács, that, in fact, euthanasia will be the means for others to get facilities of treatment. The principle of the HA related to the assumption of the risk of treatment seems to get the meaning of the risk of the same therapy applicable to one patient at the cost of another, instead of the risk of two therapies compared to each other. KOVÁCS, J.: Eutanázia és bioetika [Euthanasia and Bioethics], *Világosság*, 1995. 7, 28–41.

be regarded as having acquiesced himself with the likely consequence),[5] but because, by acting in accordance with the HA, he acted lawfully, so that the *criminal unlawfulness is missing*—since the behaviour is lawful according to another legal rule.

One, the most frequent activities of a doctor is when he gives analgesics in an increasing dose to mitigate suffering, but also assuming the risk of death caused by the analgetic. This can also be considered as unlawful conduct under the Criminal Code but may be regarded as an activity prescribed by professional standards. While ethicists are inclined to accept this behaviour on the basis of the "double effect" principle,[6] criminal lawyers regard rather the *lack of unlawfulness* as decisive. According to Professor Tibor Horváth,[7] the doctor's consciousness covers the consequences of his behaviour, and a relation of causation between the act of the doctor and the death of the patient also detectable. It is legally recognized that the doctor has the freedom of choice (i.e. positive law recognises the assumption of risk by the victim and excludes unlawfulness on that ground, especially in the form of occupational rules). With this reasoning one concludes that the act of the doctor causing death lacked unlawfulness; which would seem to allow a conclusion to the lawfulness of euthanasia falling within this scope. Hungarian law, however, as seen from the HA, is obscure in this respect, although it does not clearly exclude this possibility of interpretation. Since in other cases of homicide, and in criminal law in general the rule of the eventual intention is accepted with a good reason, the judge would hardly exclude automatically a case of causing death—which might be justified on the basis of the double effect principle from the position of the medical ethics so that it is not regarded as euthanasia—from among the actions qualified as homicide. For this it would be necessary that the law—in our case, the HA—expressly states its lawfulness.

In other cases, homicide (and occupational endangerment) is discarded because the lack of causality can be referred to. Paradoxically, this is the situation popularly called

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5 *Per analogiam*, a person, who kicks a pregnant woman's belly, is responsible for hurting the embryo, although his intention was not necessarily aimed at abortion.

6 The Catholic Church has supported medical behaviour according to the principle of *double effect* since Pius XII until the latest (1995) encyclicals. Accordingly, the doctor's intention is related to the mitigation of suffering instead of causing death. In legal respects, however, this is inapplicable, partly because in this form the enforcement of the ethics of intention can be a source of abuse, and partly due to the criminally accepted principle of the potential intention. A separate legal provision is required for any deviation from this.

7 HORVÁTH, T.: Eutanázia és büntetőjog [Euthanasia and Criminal Law], *Állam- és Jogtudomány*, 1972. Although Horváth, who represent the still prevailing criminal law doctrine, accepts the "overdosage of morphine", but considers [all other sorts of] euthanasia as homicide punishable, since the legal norm has a guaranteeing and general nature, therefore, the distinction of life on a qualitative basis is unacceptable. This is because law can only word general facts of a case, and may not declare that life is useless under certain circumstances. Thus, since the task of the law is the protection of abstract social values, it must protect all lives in all cases. According to the supplementary argument, the permission of euthanasia undermines trust in the doctor, and is the source of abuses.

Although all this was expounded during the prevalence of socialist interpretation of the law, it can be influential, or possibly decisive even today, on the basis of the objective ethics of value, as we shall see during the survey of the standpoint of the Constitutional Court.

"disconnecting", which is frequently regarded as *active* euthanasia, where the termination of the life-sustaining treatment *can be* regarded as an act not being the cause of death, but only *letting the patient die*; since in such cases the death is caused by the diseases (e.g. on termination of dialysis). But does the doctor have the right to let a patient die once he has to provide medical treatment according to the HA? If one adopts a delicate distinction in the meaning of the expression "life", the artificial extension of life can be subject to a different judgement.[8] This, however, depends on the judgement of the Constitutional Court, or of the legislator on the basis of the decision of the Constitutional Court.[9] In the case of the cessation of lengthening of life—once the difference of lengthening is normatively recognized—the view that the action is not in causal relation with death, and there is no crime in the lack causality can possibly be argued legally.

According to the prevailing Hungarian interpretation, homicide can be interpreted only as "shortening of the length of life by forceful intervention, the indirect earlier occurrence of death by the effect of force and by the *natural* consequence of them which together result in death".[10] However, under the current interpretation of criminal law negligence and passive behaviour, or the omission of doing something (in non-euthanasia cases), on equal footing with active behaviour, are regarded as directing to prohibited effect. Moreover, the decisions on whether a life supporting system should be disconnected or not, supposes an *activity* and not a simple omission (instruction, "switching off", the pulling out of the needle). On the other hand, disconnecting the respirator of a non-terminally ill patient (moreover, leaving an akinetic person alone in a snow desert, taking his car away) are indisputable cases of homicide. But even if the doctor's conduct were not considered as homicide, still it would qualify as "occupational endangering" (leading to death) and remain still an offence; therefore, at all events, a medical-professional, or legal regulation is required in order to assure the proper handling of such situation.

2.2.2. Assisted suicide (Section 168 of the Criminal Code). It reads in its operative part:

> Anyone, who persuades someone else to commit suicide, *or provides assistance in committing it* ...

If the doctor terminates any treatment which maintains life functions upon the request of a terminally ill patient's and it causes death, a situation at least close to suicide took place. This case may be considered as assisted suicide although the cause of death does

8 The definition of *"artificial lengthening"* is possible either on a purely professional basis or the ground of medical ethics, or both—but the solution can be legally acceptable only if it exists.

9 See para. 3 below.

10 EDVI ILLÉS, K.: Anyagi büntető törvények [Substantive Criminal Laws]. *Magyar Törvénytár*, Grill. Bp. 1909. 439.

not directly result from an act by doctors's own hand, but from the dying patient's own decision. The facts of the case are indisputably realised if, for example, a medicine accelerating the patient's death is made available to the patient upon his request. Paradoxically, the ethically more questionable (because of the lack of self-determination) case, when the "overdosage" of analgesics becomes the direct cause of death together with a symptom of the disease, does not conflict with this rule of the law and it will qualify just as a "treatment of utmost care", in the case of which unlawfulness is missing for this reason. The special treatment of terminal condition is justified by the following paradoxical situation: if the patient receives poison upon his own request and takes it, it is suicide, and Section 168 of the Criminal Code should be applied, while if a life supporting medicine is no longer given to the patient upon his own request this is out of question, since the death is not caused by the patient's own hands.

It is worth mentioning that the Hungarian Criminal Code of 1878 (Section 282) created a special provision for cases when the perpetrator "was persuaded by someone's serious wish to kill [the requesting person]", as a separate crime. In practice, however, this provision had been applied mainly the joint attempts of suicide for motives love, but not in case even remotely similar to euthanasia.

2.2.3. The offence of *causing danger by violation of professional rules* is committed by a person Section 171 (paras 1, 2, 3 of the Criminal Code)

> [w]ho exposes the life/lives of someone else/others to direct danger out of negligence by violating the rules of his profession ... if the crime ... causes death. If the perpetrator causes the direct danger purposefully, ... he will be sentenced to imprisonment for two to eight years.

This section gives direct criminal support to the HA too, since the professional rules in case of a doctor are obviously those set out in the provisions of the HA, while in case of homicide, or assisted suicide the criminal offences are based on general (as opposed to professional) rules of conduct.

2.2.4. The crime of 'failure to provide assistance' can be applied to the most passive forms of euthanasia. According to Section 172 paras 1 and 2 of the Criminal Code,

> (1) anyone, [w]ho does not provide the assistance expectable of him to an injured person, or to a person whose life or bodily condition is in direct danger, commits a *misdemeanour* ... (2) The punishment is up to three-year imprisonment for the crime, if the offended party dies, and assistance could have saved his life.

The application of para. 2 again depends on what the judge regards as the cause of death—the incurable disease, or the cause of death avoidable by the concrete, active intervention (e.g. the neglect of resuscitation, that can be performed). The viewpoint that the intervention would not have saved the patient's life can also be represented. But

even in this case, the possibility of applying paragraph (1) exists. Here the question is what can be expected from the doctor if a patient's life is in direct danger and regarded as incurable. In respect of criminal law, standard of care involves the possibilities of the doctor in the given, specific situation (if he is not a surgeon, or if there is no operating theatre, he does not have to operate). When determining the professional duties of persons having other professions (i.e. not doctors) judicial practice also takes into account the professional expectations. As in all cases, at this point, too, we encounter the lack of clear professional expectations of behaviour, instead of which the rather contradictory custom is available as a norm at best. Although witnesses (that is, mostly colleagues) and experts can be heard regarding this question, but there is no guarantee that a court will accept or consider the views represented by them (which might be presumably quite contradictory, too) as governing, just as it is not guaranteed that in the question of euthanasia. A uniform and calculable practice satisfactory for curing work and also accepted socially will develop "by itself".[11]

It follows, the extinction of an incurable patient's life is prohibited by various acts of commission, not only in the scope of the word "extinction", which refers to direct causing.

On the other hand, the above expressions can be interpreted in the following way: promotion of "good death" can be lawful and the doctor's participation in it can be permitted.

Thus, according to the current law, the state of the medicine and its professional rules are decisive, although a legal rule may specify the relevant framework (in accordance with Section 43 para. 3 of the HA). According to the opinion of the Constitutional Court, in our case, this legal rule can probably be only an *act*, since the question is the restriction of a fundamental right, i.e. the right to live.

As far as homicide is concerned, certain forms of euthanasia do not fall within this category if the judge takes the view—which is justified by the interpretation of the

11 Such a uniform standpoint can be established in connection with individual cases, but it is improbable that the courts will decide in a larger number of cases of euthanasia in the forthcoming years. Furthermore, it is also possible in principle that the Supreme Court would offer guidance in a principle for the interpretation of the sections referred to. This is also improbable, however partly because the courts in Hungary refuse open jurisdiction (apart from the Constitutional Court), since they do not wish to share in its responsibility (and they are not entitled to do so). Such a viewpoint is also absolutely unlikely in technical respects, since it is basically applied to solve problems related to the unity of the law and, if there are no cases, the establishment of unity in the viewpoint of the courts is not necessary.

The settlement of the question is not expectable at all from the ordinary courts, and especially not of criminal courts. The disadvantage of the development of case-law is that it is possibly casuistic, not general, and very slow, and until some solution is established the varying judgements keep the society in uncertainty and tension—which is superfluous, at least in our case. Undoubtedly, the lawsuits can have a socially mobilizing effect. Both in the Netherlands and in the United States a few spectacular lawsuits aroused the public interest in euthanasia. Due to the peculiarities of *common law*, however, in the United States the courts still continuously review the legislative decisions in connection with euthanasia, as a result of which regulation becomes uncertain, overcomplicated, and unbearably expensive.

law—that the cause of the occurred death was not the termination of the given treatment, or the failure of providing a given treatment, but the cause of death was the incurable disease itself. The termination, or failure of the application, of dialysis gives place to the natural process occurring as a result of the given incurable disease.

This example clearly shows that the traditional distinction between active and passive euthanasia, or the connection of responsibility to this distinction is inapplicable at least in some of the cases, mainly in the case of terminating life functions by switching off the equipment. As opposed to some ethicists, the lawyers speak about *active* euthanasia if the doctor (the person providing the treatment) contributes to the occurrence of death by *active behaviour*. Therefore, it is justified to determine one by one the typical acts regarded as euthanasia in terms of legal and professional respects, as well as to judge them separately in legal terms, even if regulation is casuistic.

The legal rules analysed above can be interpreted in such a way that the extensions of an incurable patient's life is unnecessary, thus, the omission of the extension is not unlawful, moreover, it is also possible that such a treatment of an incurable patient, which shortens his life, may be qualified as lawful.

The behaviours and methods of treatment falling into this scope, however, apply only to a smaller, and rather occasional group of the cases discussed in the disputes on euthanasia. Although such an approach can be a small, necessary step in the overall handling of the problem, but it is basically wrong, since it practically avoids facing the problem, it excludes the possibility of conscious social and individual choices, it does not provide a clear guidance for the doctor, so that it makes medical procedure uncertain and is the source of distrust and attacks and, in an extreme case, it threatens the doctor even with an incalculable criminal liability.

3. Is the current legal regulation of "euthanasia" constitutional?

The current constitution includes some important sections applicable to euthanasia, but without giving an unambiguous guidance. According to Section 54 of the Constitution:

> (1) ... everyone has the inherent right to life and to human dignity, of which no one may be deprived arbitrarily.
> (2) No one may be ... subjected to brutal, inhuman, and humiliating treatment.

We will survey the nature of the right to life and to dignity, taking into account the standpoint of the Constitutional Court. In connection with para. 2, however, it has to be noted that, even in the case of life sustaining treatment the way of treatment is brutal and humiliating, it is unlawful. On this basis, therefore, the reticence of the HA related to the therapeutic method—which we have discussed already—should be interpreted in the spirit of the provision of the Constitution. This would again justify the abandonment of at least certain methods of therapy, but the legal question is, the question is who is to judge what will be regarded as a brutal, inhuman, an humiliating

treatment: is it the person concerned, or the socially accepted, general norm that counts (possibly with a correction "of the order of the profession")? In the law, "technical solutions also show the trends towards a mean protection of personal rights",[12] The general tendency, therefore, is the application of social norms, from among which the norm of the accepted medical practice is of extreme significance—especially if, according to social opinion, medical science is destined for deciding what a humiliating treatment is.[13] Since, however, in accordance with the Constitution, the protection of the rights is the obligation of the state as a whole (Section 8), it is unlikely that this could be a purely medical-professional question.[14] We come to the same conclusion from the professional side as well, since—for example, according to international documents, too—the correct treatment by a doctor is built on the concept of dignity, which actually takes into account the patient's aspects (e.g. the declaration of 1982 on Patient's Rights).

The Constitutional Court has come close to the interpretation of what the right of life and of dignity means regarding euthanasia, mainly in its decision in abortion case 64/1991. It has to be noted in advance that, according to interpretation in the narrow sense, the right of life only means that no-one may be deprived of it *arbitrarily*.[15] Thus, such an interpretation is possible in principle, according to which the treatment terminated upon agreement, or the assistance in dying offered upon an express request do not conflict with the prohibition of arbitrary deprival, especially as in the case of euthanasia in the narrow sense of the word, where nature will deprive the patient of

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12 SÓLYOM, L.: *A személyiségi jogok elmélete* (The Theory of the Personality Rights). Bp. 1982. Although in this book Chief Justice Sólyom suggests that it is not the concrete personality which is protected in law by virtue of the protection of personality rights. According to the standpoint expounded in his book, the question of life and death is a "borderline case" of personality rights (i.e. it does not involve whether it is lawful for the state to intervene—for the purpose of protection—into this question, too, which is stated with resignation in the case of other personality rights).

13 In the Conroy-case a New Jersey court recognized the individual's absolute right of self-determination (right of refusing the treatment) against the doctors.

14 "Although when establishing the contents of the regulation the legislator is obliged to take into account the achievements of the various specialized branches of science, the regulation system of the law is sovereign to the extent that it is not obliged to accommodate to them mechanically ... *When the law consciously deviates from the opinion of a specialized branch of science*, it does not mean the refusal, or supervision of the latter, but only expresses that during the establishment of legal regulation it is not exclusively the achievements of a specialized branch of science but, in addition to them, ... the behaviour tolerated, or required by the law at the given development level of society has to be determined, also considering social, economic, technical, etc. aspects."

Justice Géza Kilényi's separate opinion 64/1991 [*Az Alkotmánybíróság határozatai* (Decisions of the Constitutional Court), 1991. p. 321. — (hereinafter ABH) all references to the resolutions of the Constitutional Court apply to this series.]

15 In the United States, due to the wording of the constitution, the central constitutional question in euthanasia is whether or not the *procedure* of the deprival of life (e.g. disconnecting at a relative's request) is a due process. Cf. *Cruzan* v. *Director*, Missouri Departments of Health US 110, SCt 2841, 111 L. Ed. 2d 224.

life at all events, within a foreseeable term, and for a foreseeable cause of disease. A similar, and even more radical liberalisation of euthanasia results from the right of human dignity,[16] *if* the fundamental right of self-determination connected to the existence of the personality is meant by dignity. The meaning of dignity, however, is not necessarily identical with self-determination (meant as autonomy), it can be considered, for example, as a need for being respected by others, or use in a manner other than use of an object (and the right of self-determination is only a case of that). But even the interpretation of dignity in the spirit of autonomy (self-determination) does not mean the acceptance of the right of suicide for everyone (not even for Kant himself).

The Hungarian Constitution does not entail the interpretation of dignity as self-determination, and the decisions of the Constitutional Court do not consistently and inseparably connect dignity to self-determination either.[17] It is true that the decision of the Constitutional Court on death penalty mentions the right of life as the person's own disposal of life. But the right of self-determination (in the classical liberal sense) is not among the preferred arguments of the Constitutional Court, partly because it always emphasises that, in addition to individual rights and values, other constitutional objectives must also be taken into account (among which they give way to social arguments as well). Some members of the Court (Justice Lábady and Justice Tersztyánszky) do not regard at all the right of dignity as a directly interpretable right, but they believe that the "right of life and dignity" only "exists in an imaginary way", "before the law".[18]

Right from the beginning, however, the Constitutional Court derived from dignity the *general personal rights*, as from a core right, which is applicable in a subsidiary manner. If certain specified rights serving for the protection of the personality are missing, the Constitutional Court may establish a basic right connected to the personality, as a part of the protection of the personality. In principle, the *right to "good death"* could also be specified as such a personality right—which Chief Justice Sólyom called it earlier "the borderline case of personality rights" in his article ("the question of life and death"). Even if the borderline case fell within the scope of the personality rights, it would not mean the person's absolute right of disposal but, as in the case of the personal rights in general, it would mean a socially accepted and general protection of the individual taking into account the individual's will only occasionally, within the limits of the law, i.e. it would mean regulated and restricted euthanasia.

Although a change of this kind, or the qualification of such a regulation as constitutional cannot be excluded according to the aforesaid, the statement of the Constitutional Court most closely related to euthanasia shows another tendency,

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16 One of the numerous inaccuracies of wording of the effective Constitution is that it suggests as if in a constitutional state anyone could be deprived of his inherent right of dignity *in a non-arbitrary process*.

17 At least this was the original and express opinion of Chief Justice László Sólyom. Dignity "is a core of autonomy, and of *individual self-determination* withdrawn of everyone else's disposal".

18 Decision No. 23/1990 by the Constitutional Court. Separate opinion.

expressly indicating that euthanasia (and death penalty placed in the same package[19]) is subject to other principles than abortion.

> The qualification of death penalty as unconstitutional in more and more countries takes the development, that anyone should have the right to full legal and human status merely resulting from his quality as a human being, closer and closer to fulfilment. This will take place when the unconditional character of the right of life and dignity is also recognised, in addition to that of legal capacity. As opposed to this process, on the basis of individual criteria (guilt, the quality of life, mental and physical condition), the still existing death penalty and permitted euthanasia in the individual countries regard the rights establishing the specific human legal status as rights that can be deprived and restricted. Accordingly, the basic question of death penalty and euthanasia is the unconditional character, or possibility of restriction, of the right of life and dignity.[20]

According to this, in the case of death penalty and euthanasia, "development"[21] in the world would be characterised by the recognition of the full human, legal status, and

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19 This unfortunate linkage the Constitutional Court has been struggling with since the qualification of death penalty as anticonstitutional is based on a fundamental misunderstanding. Notably, while in the case of death penalty, it is the state which takes away the given person's life, in the case of euthanasia, it is the state health organization at the most–but not necessarily–that assists in the process. The question is whether the state has fulfilled its constitutional obligation related to the protection of the right of life, if it permits this under, or without, proper conditions. Legal protection is not an absolute constitutional obligation, but it is enough if protection is suitable in abstracto. Whether or not the Constitutional Court is entitled to decide on the efficiency of legal protection is a question of great dispute nowadays, in which the Constitutional Court itself formally takes the standpoint that it is not entitled to such a supervision, because this kind of judgement is the privilege of legislation.

In principle, therefore, the state can also fulfill the protection of the right of life and dignity if it institutionalizes by legal regulation the restriction of the practicing of these rights for a proper constitutional reason. (The present regulation does not correspond with the constitutional obligation of the protection of life even if it resulted from the Constitution that the right of life is absolute.)

The substantial contents of a fundamental right according to the Constitution may not be restricted even by a law, and the permitted restrictions are possible in the interest of another fundamental right, or constitutional objective according to the Constitutional Court (or possibly, because of another constitutional interest, or purpose of law according to some resolutions). Therefore, the right of life and dignity could not be restricted at all, since a) such rights either exist or not, therefore, restriction, or legally permitted death in some exceptional cases, is a conceptual impossibility; b) the right of life and dignity is superior to any other right, etc. (if only because it is their precondition), so there is nothing in the name of which restriction would be possible. A possible answer to the reasoning of a) is that the question is not the possibility of restricting the specific individual right, but that of the legal institution. In the case b) as well the possibility of restriction exists in the protection of another life (lawful self-defense).

20 Im. 307.

21 This is a very strange assumption. Numerous member-states of the USA support death penalty and permit euthanasia at the same time, while in Europe each western country prohibits death penalty (some of them, since the past century) and recently more and more of them permit euthanasia to a restricted extent.

this—the impossibility of restricting the law—would be desirable, which has been declared as a constitutional obligation in the case of death penalty.

All this, however, is only an indication of anti-euthanasia mood and not a conclusive argument against the liberalisation of euthanasia including proper guarantees. This part of the reasons in the decision on abortion, which part does not belong to the main line (i.e. it is said *obiter*), is not more than just an indication of mood because in this case not less than five separate opinions were elaborated, which means that the opinion of the judges differ regarding the reasons. We do not know what sorts of behaviours they regard as euthanasia, furthermore, if they wish, they can regard what they said about the sanctity of life in connection with death penalty as things not applicable to this case, since—as opposed to death penalty—, in this case the question can be the incurable patient's right of self-determination. An interesting analogy to this case the recognition of the mother's rights even against the right of life, consideration of the mother's rights as acceptable even against the embryo's right of life. At the same time, in accordance with decision No. 23/1990 of the Constitutional Court, Section 8 para. 2 of the Constitution (the substantial contents of a fundamental right may not be restricted) conflicts with Section 54, which does *not* include the absolute protection of human life and dignity (and which does regard the deprival of life in a non-arbitrary process as excluded). In the case of death penalty, however, "the substantial contents of the fundamental right are not only restricted, but ... its total and irretrievable elimination is permitted." The Constitutional Court regarded Section 8 as applicable, and *in this context* it declared the right of life as unconditional. From the unconditional right to life declared regarding death penalty, however, it is not concluded that life is subject to the same judgement (protection) in the case of euthanasia since, on the one hand, the quality of life is different (in the shade of death) and, on the other hand, the restriction of the right of life results from the given individual's own, personal disposal, which means that the right of life is opposed to the enforcement of an equivalent constitutional value (personality rights).

The decision No. 23/1990 of the Constitutional Court on the abolishment of death penalty declares:

> Human life and human dignity constitute an inseparable unity, and are the greatest values preceding everything else. The right to life and human dignity is also an indivisible and inviolable fundamental right constituting an unity, which is the source and condition of numerous other fundamental rights.[22]

They may make a distinction and may permit the enforcement of the right to self-determination, referring to the fact that the right of life—even if it is an absolute right—is given a different meaning in the light of approaching and unavoidable death which will occur within a foreseeable short time, if the patient's condition involves suffering and

22 ABH, 1990. 93.

hinders dignified life. This means that they do not attribute merely a biological sense to life, and they use a "legal concept of life" in the case of life close to death, i.e. they disregard the absolute protection of the otherwise evident "biological life". This is an effective solution if otherwise they insist on the unconditional character of the right to life.[23] In this case, only life with dignity is unconditional, but otherwise life may be restricted in the interest of dignity (it is at least the subject of self-restriction and self-determination).

It is also possible that finally the tactical solution pursued in the case of abortion will be chosen. In that case life (even the embryo's life) was regarded as a fundamental right protected by the Constitution, but not in the sense of a civic (subjective) right, but as a right to be given objective protection. This means that the state has to make *institutional* rules of protection, i.e. it may not disregard the protection of the embryo's life and may not be indifferent to abortion at the general level, but has to prevent, moreover, to hinder it. The state, however, is not responsible for the birth of the individual embryos. Due to the reticence of the Constitution, it would have this kind of responsibility only if the legislator unambiguously regarded the embryo as a human being (in the legal sense, having legal capacity). Although this reasoning of the decision was apparently endorsed by each judge—promising to such a law a glory more than to the liberation of slaves—and there was a separate opinion as well, according to which the embryo is also a human being, the Constitutional Court, at least so far, has not questioned the legislator's constitutional capacity to adopt a law which only serves for the protection of the embryo's objective (and not a subjective) right to life.

A similar observation can be made in connection with euthanasia as well, i.e. it would not conflict with the Constitution and would not be inconsistent with the decisions made, if the Constitutional Court did not undertake the decision on the merits of the case and would leave it to the legislation, irrespective of the personal sympathies of the judges. The Constitutional Court can declare that it is both constitutional if the legislator does not protect the lives of incurable patients as an unconditional right, as well as the opposite. In the previous case (moreover, possibly in the second one as well), the Court would probably emphasise the necessity of the objective legal protection, i.e. that euthanasia (or certain sorts of it) may only take place for constitutional reasons, with sufficient guarantees. More precisely, this means that, according to the principal rule an incurable, dying person has the right to life. (It has to be determined whether this means life lasting as long as possible, or the right to life involving the least possible pains.

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23 In his separate opinion appended to the decision No. 23/1990 of the Constitutional Court, Chief Justice Sólyom expressly refers to the fact that the Constitutional Court *may interpret* the right of life (i.e. it is not a biological faculty), and this interpretation "can influence the decision on other disputed cases of the disposal of life (e.g. abortion, euthanasia)".

In this separate opinion Chief Justice Sólyom indicates that the qualification of a right as inalienable and inviolable does not give any guidance in the question of the possibility of restriction — since it is the repetition of a specific solution of the 18th century as if it were a magic word. (Justice Lábady's opinion is just the opposite.)

Possibly in this case, too, the patient's decision prevails.[24]) Such a position could be made compatible with the standpoint of the Constitutional Court related to *the neutrality of the state regarding religion and conscience* (decision No. 4/1993). In case euthanasia is an ideological question, this solution would directly result from the demand for such a neutrality. Accordingly, "the state may not force anyone into a situation that would make the given person come into conflict with himself, i.e., which situation is incompatible with his substantial conviction determining his personality".[25] In a given case, the fundamental conviction related to dignified life (the thought that the person does not wish to live in humiliating defencelessness) can be qualified as such a conviction, and in this case, the state may not force the given person to bear this offensive condition. (Naturally, the state may not force anyone to participate in euthanasia either against his conscience.)

4. *The preferred constitutional solution in the present state of medicine and social consciousness*

In our opinion, the present legal regulation of the acts falling within the scope of "euthanasia" are not conform with the constitutional requirements and with those of a constitutional state. The present regulation is defective, and not transparent furthermore, although fundamentally it is against euthanasia, and expressly prohibits or punishes certain forms of it, it does not correspond with the constitutional obligation of the state related to the objective, and institutional protection of the right to life. This is because most of the relevant rules are missing. Eventually, the professional opinion in connection with the different forms of euthanasia cannot be avoided. The death

24 In a given case this kind of handling of the question merely as a right is socially unacceptable in a society with limited resources, where—as in Hungary, too—public health care, which is almost free of charge for the patient, is decisive. Even if it is the question of rights or, in a given case, that of unconditional and unrestrictable rights, the law has to face the fact that the practising of the right of life may hurt other's rights of life, e.g. because there are not enough appliances for maintaining life functions. No matter how tragic the choice is, a public and surveyable system excluding abuses and financial differences, which recognizes the possibility of restricting the otherwise unrestrictable rights against another person's unrestrictable right, is better than a secret practice institutionalizing abuses. No matter how close we get in this way to the comparison of incomparable life qualities, this is not identical with the eugenic principle of life quality of a reduced value, where the quality of life, and the condition of the ill person are compared to some absolute norm. As opposed to this, it is obviously impermissible (among other things, because it results in unacceptable pressures) that the terminally ill patient is disconnected from the sustentation equipment when a patient of a prospective status needs the sustentation equipment. In the case of the decision following the generally determined principle, the general condition of health care could be taken into account. This again is not identical with the consideration of the costs of keeping a patient connected to the equipment. The following aspect, which is ethically impermissible in itself, although it is probably not anticonstitutional, is when certain treatments of incurable patients were excluded from the scope of obligation of the state related to (free) health care. Naturally, constitutionality does not render anything as acceptable in respect of medical ethics.

25 ABH, 1993. 51.

occurring directly as a result of analgesics is a risk that seems to accompany, and be inseparable from, the doctor's practising of his obligations (relief of pain). This practice can conflict with the (arguably inviolable and unconditional) right to life, which requires objective protection, i.e. at least the exclusion of the possible abuses. This rule could only be of a statutory level, as all restrictions of fundamental rights. Such a rule is also in the doctor's interest since it exempts him from any possible and subsequent calling to account, and possibly from the moral dilemma as well. The scarcity of health resources and the fact that this phenomenon becomes public will probably also urge the disconnection the life-sustaining equipment of terminally ill patients in a vegetative condition if only by referring to the superfluity of the treatment, and professionally withdrawing the procedure from the taboo of euthanasia. In this case, a similar constitutional obligation comes into being.

In addition, assuming that the forms of doctors' conducts classified as euthanasia in the case of incurable patients are *in abstracto* acceptable constitutionally, it is worth examining what sort of regulation is desirable from point of view of medical ethics, constitutional law, and from that of the constitutional state. These arguments are valid mainly if , as according to the Constitutional Court, the Constitution is neutral regarding euthanasia, i.e. the permission of procedures not hindering, and accelerating the occurrence of death is not prohibited constitutionally, nor constitutionally obligatory in itself, based on a relevant request, or in the case of a "proper" condition. (The latter view is not excluded even if the right to life would mean free disposal of life in the shade of death.)

In addition to the prudential considerations mentioned before (the reasonable utilisation of health care facilities), in this situation, other constitutional arguments (ideological neutrality, the protection of individual choice and private autonomy) justify a certain legalisation of euthanasia for the legislator.

It *may only be statutory* regulation (since a fundamental right may be restricted only by an act of parliament). Naturally, the legislator may also adopts a framework law, leaving regulation on the judgement of the professional practice, to the state of medicine, and to the professional guidelines, while the legislator fulfils its incumbent constitutional obligation by providing a *procedural* guarantees (e.g. what kind of a committee can make a decision, in the question of whether a condition can be regarded as incurable; what are the formal requirements of the validity of consent). Foreign practice and certain comments of the Hungarian Constitutional Court permit in general the determination of the degree of risk assumption in connection with life at a level lower than the statutory level, on the basis of the current scientific-professional aspects.[26] This, however, is not identical with the present situation, since in this case the question is *not* a socially acceptable, general risk, but a decision related to the *concrete* life, i.e. the concrete restriction of a concrete right. But the statutory level is

26 See the case of the German Kalkar nuclear power plant and Kilényi's separate opinion referred to above.

also justified by the pragmatic medical aspect, notably, that if the decision in these questions would completely pass into the hands of the profession, it would surrender the professional standpoint to judicial supervision, which pursues non-professional aspects. And the legislator would not act correctly from the point of view social need to regulation if it imposes a casuistic determination of the permitted cases of euthanasia on a self-governing forum of the medical profession, since in such a decision social needs exceeding the competence of the medical profession and that of the health care organisations should be enforced (first of all, the interest of the potential, terminally ill citizens, and secondly, economic aspects, and cultural values). Legislation, however, has to ensure that decisions may not be made against the curing medical aspect (which usually means the impairment of the interest of the patient as well).

In the legislation patient's right to self-determination has to be enforced on constitutional reasons (not only because of the his personal right but, for example, on the ground of the freedom of thought and conscience); furthermore, the doctor's freedom, and mainly his freedom of conscience, have to be respected, too. As far as the latter is concerned, the Constitutional Court has clearly explained this aspect in its decision in the abortion case. Although in pursuing a profession the professional prescriptions are to be observed, a doctor may not be obliged to provide euthanasia (but he is obliged to the unconditional relief of suffering), even if this were a permitted professional practice. This is because in this case there is no question of any absolute professional duty related to the elimination of direct life-endangerment, but rather the restriction of a constitutional right (freedom of conscience).

As far as the patient's right to self-determination is concerned, in this case the law has to provide all the guarantees that ensure the *prevalence of the real will.* This partly means the inclusion into the law of the circumstances of the statement of the will, and the accurate rules related to the control of the given person's mental status, and partly the control of the medical decision-makers (teams of independent doctors, or of doctors and laymen, judicial approval).

The precondition of the right to self-determination is that the patient's *right to information* may be ensured. All this can be enforced as a general rule only if the conditions provided by the health *care system* necessary to it exist, which means that—if the legislator decides in this direction—it will be a quasi-constitutional obligation of the state to establish the institutional conditions. On the other hand—and also from pragmatic-prudential considerations—the establishment of the system can be only *gradual.* The condition of gradualness is even stronger in the most difficult case of euthanasia of the greatest practical significance, when the fate of a person incapable of stating his will has to be decided on. An especially cautious procedure has to be pursued in the case of persons incapable of expressing their will, when their will is "substituted", since in the given case the relative, or the person taking care of the patient can be an objectively an adversely interested party. Euthanasia may not take place at any event if any close relative protests against it. Due to the considerable uncertainty and the resulting difficulty of establishing the guarantees, it might be justified to exclude this form from liberalisation.

The *living will*[27] helps with solving the problem of expressing will, in connection with which it is justified that the legislator gives all assistance for applicability (the elaboration of printed forms for stating the living will, making the procedure duty-free), actively offering the possibility of making such a "testament" on the occasions when the citizen gets in connection with state administration (e.g. the obtaining of the driving licence, joining the army), possibly during admission to a hospital, although the latter is worse and more depressing in all respects.

So far we have not spoken of the sort of assistance in "good death" that will be permitted under the constitutional solution advanced here. As we have mentioned, various conducts labelled as "euthanasia" overlap each other, and it is very difficult to create legal concept encompassing all of them. A legislative or medical opinion according to which euthanasia—i.e. helping the patient into death—will be permitted from now on, can be interpreted as a indication for the society, and even for the medical profession. This is a message that should be avoided. Social and medical acceptance is facilitated by the approach—that is recommendable in respect of legal policy as well—, which permits very precisely determined behaviours, under very precisely specified and controllable, or compulsorily controlled conditions.[28] By the formation of medical and social opinion the scope of these acts can be extended, but considerations of legal policy suggest that it would not be advisable to begin liberalisation with radical, active euthanasia, e.g. with the permission of requesting for killing out of mercy, for a relative incapable of expressing his will.

It is worth examining separately what role can be given to persons other than doctors (replacing in part the judgement of the doctors) in such decisions.[29] In spite of all similarities, the two cases have to be separated conceptually, because among other things the doctor's obligation of providing assistance is very special both in legal and moral respects. The situation of a non-terminally ill, but *incurable* patient can be settled by practical steps according to other principles and guarantees. It would be unacceptable either in principle, or in practice, if helping to a non-terminally ill patient into death, or

27 The living will in itself does not exempt from the consideration of all the circumstances of the case. Occasionally, it is necessary to employ the "executor" of the living will, i.e. the curator expressing the assumed standpoint of a person incapable of stating his own will, or a permanent proxy. The "living will" should not be mistaken for the assumption of the risk of an operation.

28 In the Dutch system, which gives reason for numerous misunderstandings, euthanasia is not legalized either, but in each case the act of the doctor performed upon request and under control is taken out of the scope of euthanasia during an investigation carried out subsequently. The fact that all this has been included among the rules of autopsy and burial has legal-technical reasons, notably, because the Dutch did not want to create a law on the permission of euthanasia.

29 It is unavoidable for the jurist and for the legislator to face the question, when parents undertake the risk of imprisonment to free their child from suffering—not necessarily in a terminal condition. Naturally, the jurist is suspicious in all such cases, that possibly the parent's, or caring person's self-interests play a role in the deed. It is another question, however, to what extent this should be solved in the scope of medical ethics.

"mercy killing" committed by a relative (or a person in care) were also included in the scope of euthanasia.[30]

Parallel to the growing chance of abuse, the irreversible nature of medical intervention, and the lower level of certainty of the patient's intention permission of euthanasia requires more sophisticated guarantees. If the guarantees and the enforcement together with the confidence in these institutions are missing, then the necessary foundation of such a law has not been established yet.[31]

30 The constitutional chances of euthanasia in the narrow sense of the word (related to a terminally ill patient) are also worsened by the joint handling of the two cases, since in the case of a non-terminally ill patient, the argument related to the legal reinterpretation of life due to death that would occur at all events is dropped.

31 It is a significant difference in the constitutional respect that the right of life is restricted due to the patient's current right of self-determination, or in the patient's interest (which is assumable, or even corresponding with the facts of the case normatively specified by the law).

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Tamás LÁBADY

Constitutional Protection of Privacy (Protection of Marriage and the Family, Right to Privacy)

Freedom of Marriage

1. Art. 15 of the Constitution, the basic law of the Republic of Hungary, regulates the constitutionally protected objects of marriage and the family in Chapter I on General Provisions not in the Chapter on Fundamental Rights and Duties. Accordingly, *"the Republic of Hungary shall protect the institutions of marriage and the family"*.

Very early, in the first month of its functioning, the Constitutional Court has interpreted the place and substance of this provision in the basic law.[1] In its relevant decision the Court has stated that *the rules on marriage and the family refer to fundamental rights and duties within the meaning of Art. 8 para. 2 of the Constitution.* In the motivation to the decision it points out that Chapter XII of the Constitution contains separate provisions on fundamental rights and duties, but from the Constitution as a whole it may be concluded that such rights and duties are also contained in Chapter I on General Provisions. The highest forum for the protection of the Constitution has affirmed that "marriage and the family represent the most fundamental and most natural community" of citizens constituting the society. The rules governing relations of marriage and the family were already included by Art. 5 (e) of Act XI of 1987 among the

1 Decision No. 4/1990. (III. 4.) of the Constitutional Court, Alkotmánybírósági Határozatok (Decisions of the Constitutional Court) (hereinafter: *ABH*) 1990, 28–31.

fundamental rights and duties of citizens, but such treatment also evidently follows from the provisions of Arts 15 and 67 of the Constitution.

The insufficient regulation by the Constitution follows rather clearly from the *message* of the Constitutional Court, and not only for *formal* reasons, notably from the fact that the two objects of protection covered by a single article are regulated by the Constitution in a chapter other than that on fundamental rights and duties, but also on *material* grounds, since this provision of the Constitution fails to express the *value-content* attached by the society to the two institutions and therefor making it indispensable for them to be *regulated in the domain of fundamental rights.* Such is the case even if to Art. 15 as quoted we add para. 3 of Art. 67 in the chapter on fundamental rights, helds that *the state responsibilities regarding the protection of the family must be laid down in separate provisions of law.*

2. The protection of marriage and family life as a sphere *subject to constitutional coverage* is enunciated at several places *in the international instruments* that are binding on Hungary in consequence of its accession thereto. The Preamble to *Law-Decree No. 7 of 1976*[2] *promulgating the international Convention done at New York on 10 December 1962* recalls the Universal Declaration of Human Rights, which spells out the following:

> "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses",

also laying down detailed rules on the freedom of marriage, the conditions for, the mode of and the procedure for contracting a marriage which may be determined by States.

Art. 23 of the International Covenant on Civil and Political Rights, promulgated by Law-Decree No. 8 of 1976,[3] provides the following:

> "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
>
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
>
> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses...during marriage and at its dissolution." ...

Art. 10 of Law-Decree No. 9 of 1976 promulgating the International Covenant on Economic, Social and Cultural Rights[4] states that

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2 Convention on Mutual Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

3 The Covenant was adopted by the United Nations General Assembly at its 19th Session on 16 December 1966.

4 See note 3.

"1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particulary for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses."

Art. 16 of Law-Decree No. 10 of 1982 promulgating the Convention adopted at New York on 18 December 1979[5] provides the following:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and shall ensure, on a basic of equality of men and women:

(a) the same right to enter into marriage;

(b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) the same rights and responsibilities during marriage and at its dissolution; ...

(g) the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property...

Finally, the *European Convention on Human Rights* (hereinafter referred to as Convention), promulgated by Act XXXI of 1993, spells out, in Art. 8, that *everyone respect for his family life* and, in Art. 12, that *men and women of marriageable age have the right to marry and to found a family, in accordance with national laws governing the exercise of this right,* whereas Art. 5 of the Seventh Additional Protocol states that *the spouses must enjoy equal rights in civil-law matters and equal responsibility in relations inter se and with their children in respect of marriage, during marriage and at its dissolution.*

3. In view of the international instruments described above and considering the insufficient or incomplete regulation by the Constitution, one may conceptualize two extreme regulatory techniques in constitution-making. One, to which attention is called by, among others, István Kukorelli,[6] would be a *"plagiarism"*, in the strict sense of the word, of the international human rights conventions referred to above, notably the incorporation in the Constitution of the essential normative content of those conventions. The other is most strikingly embodied in the draft constitution "produced from the pocket" of Béla Pokol, who, like *Frederick, the Prussian* technocrat, would, as he had also postulated in (Prussian) *Allgemeine Landrecht*, want to dispense with both jurists and judges and therefore even to prohibit explanation of laws with respect to the further development of the Constitution's chapter on fundamental rights and would have the Constitutional Court inhibited from interpretation of law with a view to developing it, while failing to mention, with a light high-profile touch, the fundamental right to marry,

5 Convention on the Elimination of All Forms of Discrimination Against Women.

6 *Jogállam*, 19994. No. 2. Körkérdés-válasz (Answers to an All-Round Inquiry), 32.

the freedom of marriage and constitutional protection for the family in his draft chapter on fundamental rights.[7]

Between the two extreme approaches we, for our part, agree with András Bragyova[8] who maintains that the international treaties binding also on Hungary and the very international obligations of Hungary do not require either a *"copying"* by the Constitution of these international instruments or even direct observance thereof, but that it is inevitable for the constitution-maker to *take those instruments into account.* A prominent place among them is occupied by the *European Convention on Human Rights*, which to keep in view is also inescapably required by the future status of Hungary.

For the present consideration, this dictates the need for the new Constitution to state its position, *in an autonomous way,* but having regard for the international conventions binding on Hungary, concerning the values of this sphere which, in addition to the protection accorded by the current Constitution to *marriage and the family,* it intends to emphasize, prefer and regulate as fundamental rights, with the corresponding responsibilities of the State. As regards the restrictive provisions thereon they should be *raised to the constitutional level.* This is especially difficult to do for the added reason that what is involved in respect of fundamental rights in general and in the sphere of marriage and the family in particular are moral values, ethical principles binding on the State, and conventional precepts.

The first thesis of importance to be stated is consequently not only the impossibility for the Constitution *to remain silent on the protection of marriage and the family as institution,* but *also the need for its chapter on fundamental rights to include provisions more essential than the current regulation.* The *minimum content of regulation,* however, will have to be studied further.

4. Since the Constitution refers to the institution of marriage merely as a subject-matter of constitutional protection, the Constitutional Court had to spell out not only that to marry is a *fundamental constitutional right*, but also that the freedom of marriage is a *subjective right* guaranteed by the Constitution.[9] In the absence of its formulation by the Constitution as a subjective right, this right had to be deduced by the Court from the general personal right and from freedom of *self-determination*, and the Court pointed out that the right to marry is also part of the right to self-determination.

Such interpretation by the Constitutional Court of the Constitution in the way of developing the law is in keeping with the provisions of Art. 12 of the *Convention* as well as with the relevant rules of the other international legal instruments binding on Hungary. At the same time, it is stated in the Court decision that the freedom of marriage is *not*

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7 POKOL, B.: Egy új alkotmány felé, alkotmányjogi konferencia (Towards a New Constitution. Conference on Constitutional Law), 23 January 1994. cf. *Jogállam...*

8 BRAGYOVA, A.: *Az új alkotmány egy koncepciója* (A Concept of the New Constitution), KJK–MTA ÁJI, 1995, 65–66.

9 Decision No. 22/1992. (IV. 10.) of the Constitutional Court, ABH 1992, 122–125. See SÓLYOM, L.: Az emberi jogok az Alkotmánybíróság újabb gyakorlatában (Human Rights in the Latest Practice of the Constitutional Court), *Világosság*, 1993. No. 1.

of absolute character, namely it does not belong to the catalogue of absolute rights on which no restriction is admissible, but that this freedom falls under Art. 8 para. 2 of the Constitution, according to which only the *essential content* of a fundamental right is subject to no restriction. Consequently, the requirement of a *permit of marriage* as a procedural condition and the regulation of *non-possession* of such a permit as an impediment marriage affect the essential content of this fundamental right, amount to a disproportional restriction, yet are not inevitable. However, this *does not rule out the possibility for the Constitution to regulate certain conditions for or impediments to marriage as a requirement for employment.* Yet, in this case, any restriction of this constitutional right may only be subject to the exercise of a profession or the pursuit of a trade, and the constitutional right to the freedom of marriage may not be derogated from except in this context. This means that in the case of certain professions the right to marry, the freedom of marriage, and free choice of the person of the spouse may not be restricted except *as a cause of incompatibility* related to the particular professions. Similar restrictions may be justified by, e.g., special situations and circumstances attendant upon military life (or forms of life in other armed bodies). Thus, for instance, the requirement for persons in professional service with armed bodies to meet special conditions for marriage may be warranted by the extraordinary interest involved in the protection of state service secrets, as is known both from comparative law from traditions, or by higher moral standards, etc. Suchlike restrictions as a condition for the exercise of a particular profession may be endorsed by the Constitution.

This set of conditions for restricting the fundamental constitutional right in question is thus in keeping with the generally worded requirement of the Convention, under which no restrictions on fundamental rights may be regarded as lawful other than those which *"are necessary in a democratic society"*, notably so *in the interests of national security or public safety, the economic welfare of the country, the prevention of disorder or crime, the protection or public health or morals or the protection of the rights and freedoms of others.*

The Constitutional Court has taken a similar position in annulling the relevant sections of the Annex to Decree No. 1/1990. of the Minister of the Interior on the Service Regulation of the Police of the Republic of Hungary,[10] stating that the section in question *inadmissibly* restricts the fundamental right to the freedom of marriage by making marriage (and even partnership in life) between the persons covered subject to prior permit or consent. Since the restriction *affects the essential content of the fundamental right,* it is inadmissible under the Constitution.

It is in this sense that the new Constitution will have to formulate a substantive norm for the limitability of the fundamental freedom of marriage.

5. To formulate in the Constitution the freedom of marriage as a fundamental right, as a *subjective right* to be constitutionally enforceable, and to set out the conditions for the imposition of restrictions thereon are inevitable for the added reason that in compiling

10 Decision No. 23/1993. (IV. 15.) of the Constitutional Court, ABH 1993, 438–440.

the catalogue of constitutionally guaranteed fundamental rights it should be kept in mind that the State, by incorporating fundamental rights in the Constitution, determines a *preferred order of moral values*, i.e. codifies values as expressed by fundamental rights, that *take precedence over other values*. At the time when significant social movements are at work to erode marriage as an institution and as a living tradition, the most fundamental and the most natural community of man and woman, the constitution-maker must take a stand to the effect that *preservation of this value is of paramount importance for all society, for the entire constitution-minded collectivity of Hungary*. Therefore, in conformity with the wording of the major international human rights conventions, the Constitution must express that *marriage between man and woman*, or the freedom of marriage is to be defined as a fundamental right of *men and women*.[11]

This *choice of value* implies no discrimination against new (exceptional) forms of cohabitation emerging in our *kulturkreis* in recent decades.

At the same time, the value of marriage as an institution is also *independent* of the significant changes that in recent years have taken place with respect to the durability of marriages. The great number of divorce and the strains in families and broken families *cannot serve as a basic for eroding the institution of marriage*, as has been pointed out by the Constitutional Court in its decision[12] rejecting proposals which attacked several provisions of the Family Act.

Thus it may be stated in summary that marriage is a *natural institution, an intimate, mutually complementary relationship of man and woman, a framework for mutual support and care of spouses, a typical environment of transmitting life and bringing children in a family*. The State must provide constitutional protection for the institution of marriage also in order for the latter to facilitate for the spouses the *establishment of a family with common children as well*.[13]

Every person is free to choose a married or an unmarried state. Every man and every woman of marriageable age have the right to contact a marriage and to found a family without any discrimination. This must therefore be enunciated in the Constitution.

6. At the same time, man and woman are united in body and soul not only *according to St. Paul*, but also under Art. 24 of our Family Act providing that husband and wife owe fidelity to each other and are under duty to assist and care for each other. Consequently, in a natural complementarity between them, they enjoy the same dignity and *full equality of rights in married life*. Although it is stated in Art. 66 para. 1 of the current Constitution that *"the Republic of Hungary shall guarantee the equality of men and women in respect of all civil and political as well as economic, social and cultural rights"*, such equality *should be given special emphasis* with regard to the rights and duties of spouses.

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11 This interpretation has been reaffirmed by the European Court of Human Rights. Rees Judgement of 17 October 1986, Series A. (1987) 19.

12 Decision No. 1995/B/1990 of the Constitutional Court, ABH 1993, 515 and 520.

13 Decision No. 14/1995. (III. 13.) of the Constitutional Court, ABH of March 1995, 99–101.

Several decisions of the Constitutional Court have addressed the constitutional issue of equal rights of the spouses. In the absence of appropriate constitutional provisions the Court has deduced equality, not from the essence of marriage, but from Art. 66 para. 1 of the Constitution as quoted, although the special rule on non-discrimination with respect to widow's pension,[14] conjugal community of property[15] and other legal relationships of the spouses concerning social insurance[16] follows or can be deduced *from the essence of marriage* rather than from other provisions prohibiting discrimination. Seen in this context, *the equality rule must also be codified, in conformity with international instruments, in connection with the fundamental freedom of marriage.*

7. Given the Constitution's choice of value, there is no need to accord special constitutional protection to life-partnership and to cohabitation of homosexuals. While upholding and supporting the traditional institution of marriage, the Constitution does not rule out such new legal forms as are necessary for the recognition and protection of newphenimens. In evolving these legal institutions the persons concerned have a right, not to make use of the *same institution (of marriage),* but to be treated, in accordance with the relevant constitutional requirement, as persons enjoying equal rights and endowed with equal dignity, namely to have their respective standpoints considered with equal foresight, attention, impartiality and fairness.[17] And a regulation on the general prohibition of discrimination is *sufficient* to have this guaranteed by the Constitution.

The Right to Found a Family and Protection of the Family

1. The spouses have the inalienable right *to found a family* and to determine the spacing and number of child-births. Marriage being *a relationship typically destined for giving birth to common children and bringing them up in a family,* the State should provide constitutional protection for the institution of marriage also with to assisting spouses in *founding a family. Consequently the family is based primarily but not exclusively on marriage, is a primary and natural community which generally enjoys priority over the State and any other community.* As regards its substance, the constitutional right to a family is a *guarantee for an institution,*[18] namely it is not one of the classical freedoms, but the relevant provision of the *Constitution* is intended *to assure the maintenance of and preferential treatment for the family as an institution.* For this very reason and having regard for the international instruments analyzed above, the constitution-maker will have to *ensure inclusion* of this institution *in the chapter on fundamental rights and its special protection by the Constitution also in future.*

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14 Decision No. 10/1990. (IV. 27.) of the Constitutional Court, ABH 1990, 50–53.
15 Decision No. 589/B/1991 of the Constitutional Court, ABH 1991, 548–549.
16 Decision No. 1621/E/1992 of the Constitutional Court, ABH 1993, 765–766.
17 Decision No. 14/1995. (III. 13.) of the Constitutional Court, ABH 1995, 100.
18 BRAGYOVA: *op. cit.* note 69.

The family is not merely a legal, social and economic unit, but largely a *community of solidarity* which is more apt than anything else to teach and transmit cultural, ethical, social, intellectual and ideological values indispensable for the welfare and development of society. It is with these values kept in view that the *Constitution must provide a guide to the legislature in seeking and helping to strengthen the unity and stability of the family.* Families have a right to count on an *appropriate family policy* of the State, *without discrimination of any kind, in legal, economic, social and financial fields.* In particular, it is the so-called *large families* that have a right to a legal regulation responsive to their needs.

The *constitutional* rules on the protection of the family must therefore be formulated *as a right*, irrespective of the fact that what we have here are not rights of the individual, but so-called *collective rights.* Also, as it follows from what has gone before, the relevant regulation by the Constitution indisputably belongs to the chapter on fundamental rights, because it affects the group of constitutional rights which determine the social standing of individuals.

2. The catalogue of the *rights of the child and of parents* is of concern to constitutional regulation regarding the family. With respect to the former, the New York Convention on the Rights of the Child makes it mandatory for legislation to ensure that "the best interests of the child shall be the paramount consideration".[19] Since the related provisions of our Constitution in force are insufficient, they need *supplementing in this sense.*

Under Art. 16 of the Constitution,

"the Republic of Hungary shall devote a particular measure of care to youth's security of existence, education and training and shall protect their interests", whereas Art. 67 (1) provides that

"all children in the Republic of Hungary shall be entitled to such protection by the family, the State and society as is required for their appropriate bodily, intellectual and moral development".

Finally, under Art. 67 (3),

"the state responsibilities regarding the situation and protection of the family and youth shall be laid down in separate provisions of law".

3. The *rights of the child* have been the concern of several Constitutional Court decision in connection with the protection of the family under the Constitution in force. It should be emphasized that it was in this context that as early as spring of 1990 the Constitutional Court devised the formula of *positive discrimination,*[20] which, otherwise attacked in literature,[21] was to become a *general technique used by the Court* for the constitutional protection of the family. In its relevant decision the Court has stated that

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19 Act LXIV of 1991 promulgating the Convention on the Rights of the Child, done at New York on 20 November 1989.

20 Decision No. 9/1990. (IV. 25.) of the Constitutional Court, ABH 1990, 46, and 48–49.

21 ROMÁN, L.: A nyugdíjjogosulttá válás mint a munkáltatói felmondás jogcíme jogállami szempontból (Becoming Eligible for Pension as a Ground for Termination of Employment by the Employer in the Context of a Constitutional State), *Magyar Jog* 1993, 150.

unless a social goal not contrary to the Constitution or a constitutional right can be achived parallel to implementation of constitutional equality as narrowly conceived, *positive discrimination cannot be deemed to be unconstitutional.* It is non-discrimination in the broader sense, namely *as to equal dignity*, and the positive fundamental rights as embodied in the Constitution that are to be seen as placing limits on positive discrimination. Although social equality as a goal and as a social interest may have priority over individual interests, it may never take precedence over the constitutional rights of the individual.

In that decision the Constitutional Court has established the constitutionality of *tax relief for disadvantaged families*, pointing out that non-discrimination as stated in Art. 70/A para. 1 of the Constitution does not mean prohibition also of all kinds of discrimination, thus allowing discrimination ultimately aimed at a greater measure of social equality. The Court has expounded these same principles in connection with the care allowance due to fosterparents,[22] referring to the constitutionally guaranteed protection of the child by the family and *the State*, to *children's constitutional right to appropriate care* and to the right to social security. It is with this same line of reasoning that the Court has rejected a proposal objecting to the provisions on *entitlement to a family allowance* under the rule of inadmissible discrimination,[23] arguing that the contested provisions are precisely intended, in consideration of the constitutional precepts of family protection, to create *equality of opportunity* for children and larger families.

In several other decisions the Constitutional Court has given effect to the constitutional provisions on family protection in respect of children brought up in or outside a family. The protection as expressed in those decisions is mainly related to the social security of families, but the entitlements involved are formulated by the decisions as deriving from a *positive, subjective right.* The Court has also pointed out that the concrete forms of care for children and families, the intensity of family protection, or its degree to be determined by specific measures cannot be deduced from the basic law.[24] Therefore it would be practicable for the new Constitution to lay down the general rule that *the State may not lower the attained level of family protection and care for the child.*

In connection with the constitutional provisions establishing state objectives and state responsibilities with respect to the protection of the environment and nature, the Constitutional Court has spelled out that the State may not lower the level of protection guaranteed by law for nature except when such measure is inevitable for the implementation of other fundamental rights or constitutional values. Even in that case, however, the extent of reduction in the level of protection may not be disproportional to the objective pursued.[25] *Obviously enough, application of this same technique with respect to the protection of youth, children and the family is still more justified and*

22 Decision No. 657/B/1990 of the Constitutional Court, ABH 1990, 333–336.

23 Decision No. 1292/B/1990 of the Constitutional Court, ABH 1991, 566–568.

24 Decision No. 422/B/ 1991 of the Constitutional Court, ABH 1992, 471–473.

25 Decision No. 28/1994. (V. 20.) of the Constitutional Court, ABH 1994, 134–135.

necessary. While the basic law cannot determine the social, financial and other requirements of concrete state care for families, youth and children, it can, and the new Constitution must, provide that the level of protection secured by law may not be constitutionally lowered except in accordance with the constitutional conditions for constitutional restrictions on fundamental rights.

This also applies to other entitlements based on one's subjective right which legislation has granted *as benefits* for children living in a family and, in view of the number of children, for purposes of improving the living conditions of large families. Thus, recognition of the *period of service* allowed for the upbringing of children for purposes of social insurance benefits,[26] the state guarantee for housing support on account of children,[27] and all statutory provisions under which the *rights of the child* must be taken into account in connection with the use of dwelling the spouses,[28] their *obligation of maintenance*[29] and other obligations must be regarded as providing guidance in this respect.

4. The Family Act was amended in 1995[30] in observance of the basic provisions of the New York Convention on the Rights of the Child. The amendment was guided by the principle that *the interests of the child must be the paramount consideration vis-à-vis* the parental rights of either parent. The most important basic principle of this international instrument, which is binding on Hungary as well, *must also be incorporated in the Constitution.*

For that matter, this approach has already been expressed in some decisions handed down by the Constitutional Court on the basis of the current Constitution. Noteworthy among the related judgements are the recognition by the Court of the *child's constitutional right to ascertainment of its lineage,*[31] which the Court has deduced from the general personal right, the right to the free development of personality, *viz. the right to the freedom of self-determination.* Accordingly, *the right to one's identity and the right to self-determination include everyone's most personal right to ascertain, dispute or establish his parentelic status and to ensure that such status is not challenged by anyone other than those directly concerned in his blood relationship.* Also, in other aspects, the Constitutional Court has emphasized the *primacy of the child's interests* as a matter of principle in connection with the *custody of the child,*[32] the *execution of related court orders,*[33] the *application of artificial insemination,*[34] etc.

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26 Decision No. 1009/B/1991 of the Constitutional Court, ABH 1992, 479–480.

27 Constitutional Court Decision No. 254/D/1991 (ABH 1991, 802–804) and No. 581/B/1990 (ABH 1992, 645–647).

28 Decision No. 2299/B/1991 of the Constitutional Court, ABH 1992, 570–573.

29 Decision No. 20/1994. (IV. 16.) of the Constitutional Court, ABH 1994, 106–113.

30 Act XXI of 1995 amending Act IV of 1952 on Marriage, Family and Guardianship.

31 Decision No. 57/1991. (XI. 8.) of the Constitutional Court, ABH 1991, 272–287.

32 Decision No. 995/B/1990 of the Constitutional Court, ABH 1993, 520 and 524–526.

33 Decision No. 16/1992. (III. 30.) of the Constitutional Court, ABH 1992, 101–103.

34 Decision No. 750/B/1990 of the Constitutional Court, ABH 1991, 728–729.

In view of the foregoing it is necessary, in the course of drafting the new Constitution, to have *the interests of the child formulated as the paramount consideration, possibly as a right, in family relations among the rules governing family protection.*

5. Similarly, determination of the fundamental *parental rights* belongs to the category of family protection under the Constitution. In this respect the current Constitution contains provisions only in Art. 66 para. 2 on *support for and protection of mothers* and in Art. 67 para. 2 on *parent's rights concerning the education of their children.*

Indeed, *education* is in the focus of parental rights to be formulated as a subjective right, as parents have *an original, primary and inalienable right to the education of their* children. For this reason the State *must recognize parents as the primary educators of their children.* Parents are entitled to *educate* their children *in accordance with their moral and ideological convictions,* inclusive of the cultural traditions of the family and of the social environment which brings influence to bear on the life of the whole family. Parents are free to choose the type of school to provide instruction or training for their children or other institution deemed fit to educate their children in accordance with their conviction. In doing so they naturally must observe the statutory requirements of the State regarding compulsory education.

It is important to emphasize that *in principle* parents *enjoy parental rights with respect to children born in or out of wedlock as well as in case of separation and divorce. These rights may not be subject to restrictions other than those required by the primary interests of the child.*

6. In establishing the constitutional rights of the family, this natural, basic and universal community, one should not ignore the fact that the *Human Rights Court of Strasbourg* gives an autonomous interpretation of the category of family under the Convention. Accordingly, protection is afforded not only for *de jure* family life, but also for *de facto* family life in a sociological sense.[35] However, this *applies only to families as traditionally understood, namely to the cohabilitation of man and woman as well as children (and eventually to the living together of multigenerational families), and not to non-traditional forms of cohabitation (e.g. of homosexuals).*[36] Therefore, as has been indicated earlier, these special forms of cohabitation need not be covered by special constitutional provisions *in addition to* those on *non-discrimination.*

Protection of Privacy (Some Constitutional Rights Relative to the Private Sphere)

1. In discussing the constitutional regulation of fundamental rights relating to the *protection of privacy* it should be noted at the outset that the constitution-maker would be *mistaken to seek a full-scale and an exclusive regulation of rights concerning the*

35 See Marckx v. Belgium, Series A, No. 31.

36 See 9369/1981. X. and Y. v. UK, Decisions and Reports, No. 32, 220.

protection of the private sphere. The proposals for a closed catalogue of fundamental rights[37] disregard continuous changes in rights relating to the protection of privacy or in *personal rights* and the emergence of new personal rights and freedoms with the development of societies and science (technology) which should be taken into consideration by a constitutional State. Therefore, on this score too, we agree with Bragyova's view[38] that what is to be regarded as a constitutional value is precisely the *open-ended* nature of fundamental rights.

Nor can we support proposals under which such newly emergent personal rights, particularly the "curio" rights are to be covered by the chapter on fundamental rights. Thus we are definitely against Gábor Kardos's suggestion that the right to the dignity of death, or *euthanasia* and the right of all women incapable of natural conception to *artificial insemination* should be included in the Constitution.[39]

Again, one cannot refuse to consider on this score that the forums of Strasbourg give a wider interpretation of the protection of privacy than of other concepts prevailing in the Anglo-Saxon and continental legal systems and that this practice applies only partially to traditional concept like *"privacy"* and *"protection from publicity"*.[40] This same statement holds for the practice of the Hungarian Constitutional Court. Therefore the constitution-maker should necessarily bear in mind that the *right to the inviolability of privacy* and the different *personal rights* will be involved by the legal practice of the Constitutional Court.

2. This question is only covered by Art. 59 para. 1 of the Constitution, under which "everyone in the Republic of Hungary shall have the right to good reputation, the inviolability of the privacy of his home and correspondence, and the protection of personal data",

hereas Art. 8 (1) of the Convention provides that *everyone must have the right to respect for his privacy, home and correspondence*. Since a separate study of questions concerning the *protection of secrets and data* is in the process of preparation[41], the related problems will not be treated here.

The Constitutional Court has deduced the right to privacy from the absolute right to human dignity,[42] stressing that it considers this right as a variant of the so-called *general personality right*, the different aspects of which include *the right to the free development of personality, the right to the freedom of self-determination, the general freedom of action and the right to privacy*. Nevertheless, the right to privacy is naturally not an absolute right free from restrictions, but falls under Art. 8 para. 2 of the Constitution,

37 See Béla Pokol's draft constitution.

38 BRAGYOVA: *op. cit.* 66.

39 *Jogállam*, 1994, No. 2, 12.

40 von DIJK, P.–van HOOF, G. J. H: *Theory and Practice of the European Convention on Human Rights*, Klawer, 1990, 368–378.

41 MAJTÉNYI, L.: *Az adatvédelem és az információ szabadsága az Alkotmányban (kézirat)*. [Data Protection and the Freedom of Information in the Constitution (Manuscript)].

42 Decision No. 8/1990. (IV. 23.) of the Constitutional Court, ABH 1990, 44–45.

meaning that a fundamental right is free from restrictions only in respect of its essential content. The constitutional substance of this fundamental right has been defined by the Constitutional Court as lying in the rights to privacy, to self-realization, to the protection of autonomy, or the private sphere.[43] The Court has determined its limitability in the context of protection of public morale and the holding of public office,[44] and, in a different phrasing, it has stated that the protection of privacy is of limited scope in the case of *persons exercising public authority*, who as *participants in public life* cannot invoke protection of privacy with respect to the performance of such functions. This applies to other *personal rights (good reputation, honour, etc.) as well.*[45]

We maintain that the new Constitution now in the making must perforce express this minimum of protection for the private sphere, but it probably cannot do much more than that. *Consequently the right to the private sphere mist be specified by the Constitution as a fundamental subjective right, because the right to the freedom of privacy is a fundamental right to protection of the individual's autonomy, one that emanates from the inherent dignity of man.* In addition to this definition of substance, the Constitution should formulate the rules on limitability in the context of public morale and participation in public life.

3. The right to the privacy of correspondence, specifically mentioned in the Convention, but not in the current Constitution of Hungary, has been interpreted and given protection by the Constitutional Court as an organic part of the fundamental right to private secrets.[46] In other aspect the Court has referred to the *rights of convicts to correspondence and to the privacy of correspondence*,[47] but has stated that those rights have been modified by changes in the relevant provisions of law, which made them subject to requirements essentially expressed in the practice of the forums of Stasbourg applying the Convention.

The right to the privacy of correspondence is a classical fundamental right, and, although it undoubtedly forms part of the right to private secrets, its inclusions in the Constitution as a separate right and of its exceptional limitability by law would be warranted, if for no other reason than that of bringing it into line with Art. 8 para. 1 of the Convention.

4. It remains justified for the right to good reputation and the right to the privacy of the home as specified in the current Constitution to be covered by the new Constitution as well, but these rights should be widened to include the *right to honour,* or integrity and respectability in society's judgement, among the classical fundamental rights. One may also suggest a wording that will cover the *general personal right* and the general right to the free development of personality, and their constitutional *limitability* could be governed by that of the right to privacy.

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43 Decision No. 56/1994. (XI. 10.) of the Constitutional Court, ABH 1994, 314.
44 Decision No. 20/1990. (X. 4.) of the Constitutional Court, ABH 1990, 67 and 71.
45 Decision No. 36/1994. (VI. 24.) of the Constitutional Court, ABH 1994, 219–220.
46 Decision No. 634/B/1991 of the Constitutional Court, ABH 1993, 558–560.
47 Decision No. 710/B/1990 of the Constitutional Court, ABH 1993, 801–802.

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The Binding Force of Legal Rules — their Validity, Effectiveness and Applicability

Legal rules are general rules of conduct governing social relations. Within the sphere of state jurisdiction they are binding on all and their observance can be enforced even by public power.

The directly binding force on all is a fundamental attribute of legal rules. That is why under Hungarian law "legal rules" only include legally relevant norms with such binding force. Nevertheless, their binding force may differ by phases of the "life" of legal rules. And this issue is one that deserves special attention, both as a whole and mainly in some of its aspects, from the angle of constitutional law as well.

I

A course of conduct conforming to the legal rules can only be expected to be pursued if the persons affected are familiar with those rules. On the other hand, it is true that ignorance of the law is no excuse from legal prejudice (*ignorantia iuris neminem excusat*), which is a fundamental principle of all legal systems[1], but this principle can only be accepted, along with recognizing the requirement of legal security, if the subjects at law are in a position to become familiar with the law in advance. *It is these factors* that account for solutions which regard publications of legal rules as an organic part of legislation. Without it, a legal rule does not even come into existence and cannot be

1 See KELSEN, H.: *General Theory of Law and State*, Harvard University Press, Cambridge — Massachusetts, 1946, 44.

called one. Legislation is completed, a legal rule becomes valid, at least, formally, only upon promulgation. Under the current Hungarian law, too, legal rules become valid when those national in scope are promulgated in *Magyar Közlöny* (Hungarian Gazette) and the decrees of local self-governments in their official gazettes or in the locally customary manner as determined by the organizational and operational statutes of the self-governments concerned.[2]

Legal rules *come into existence as valid ones* by their promulgation. The coming into existence of legal rules or their provisions as valid ones are presumed until such time as the competent organ has withdrawn or annulled them retroactively to the day of promulgation. The power to withdraw legislative provisions is conferred by Hungarian law on the law-making organ, while it is the Constitutional Court which is competent to annul them because of some defect in the essentials of validity, chiefly because of unconstitutionality. Among others, when the law-making organ had no constitutional power to make law or exceeded its power by, e.g. adopting a legal rule violating the Constitution or a legal rule of a higher hierarchical order. The Constitutional Court is empowered to annul a legal rule or a provision thereof even in case of an apparently "simple violation of law", too, because the hierarchical order of legal rules is determined, practically without exception, by the Constitution itself, i.e. the Constitution contains a prohibition on issuance of legal rules contrary to those of a higher level. But on the other hand, violation of the rules of law-making procedure does not necessarily provide a basis for annulment by the Constitutional Court, except in case of violation of a rule of law-making procedure as laid down in the Constitution. In a legal sense, however, the Constitutional Court has a wider scope of action when, for instance, it is also empowered to supervise the legality of a self-government decree at the initiative of the head of the county (metropolitan) deconcentrated office of state administration.

A legal rule becomes valid upon promulgation, nevertheless, this means no more than some sort of a "prae-state"[3] of actual validity, since mere promulgation gives it no generally binding force. A legal rule becoming valid by promulgation carries with it nothing more than certain preliminary obligations or desiderata, primarily the obligation of the competent organ to issue the enforcement decree, where necessary, prior to its entry into force, for, under Art. 12 para. 4 of Act XI of 1987 on Law-making legal rules and their enforcement decrees must be put into force at the same time. And as regards

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2 It will be merely noted that under the current Hungarian law "promulgation" of laws and regulations is understood to mean publication in any of the forms mentioned. Historically and in international comparison, however, promulgation of legislative provisions, especially laws, was often far from meaning, or did not mean simply, publication in one form or another. For historical development in Hungary, see KOVÁCS, I.: *Magyar Államjog. II. kötet. Egyetemi jegyzet.* (Hungarian State Law, Volume II) Szeged, 1978, 183 et seq.

3 For more detail and for different conceptions about the validity of laws and regulations, see PESCHKA, V.: *A jogszabályok elmélete* (A Theory of Legal Rules), Akadémiai Kiadó, Budapest, 1979, 214, 177 et seq. Also see: VARGA, CS.: *A jog és érvényessége* (Law and Its Validity), Jogtudományi Közlöny, 1986, No. 1; TAMÁS, A.: *Validity of Law and the Time Factor*, ARSP Rechtsgeltung, 1986, No. 27; POKOL, B.: *A jog érvényessége* (Validity of Law), Magyar Jog, 1994, No. 2.

the "desiderata" outside the ambit of positive law, it is hardly questionable that during the period between promulgation and entry into force, no other legal rule of the same or, still less, a lower level contrary to the one in question must be issued without the latter's formal amendment. True, during the period between promulgation and entry into force *(vacatio legis)*, concrete legal relationships may be created, altered and terminated on the basis of a previous legislative provision still in force in order to ensure legal security, but application of a similar principle in respect of legislation might amount to defiance of the legislator's will and to "abuse of right" as well.

II

During the time of its effectiveness, from the day of entry into force to the day of losing effect, a legal rule is generally binding in principle. During that period there may be created, altered and terminated concrete legal relationships on the basis of the legal rule in question.

1. In Hungary, under Art. 12 para. 1 of the Act on Law-making, any legal rule must specify the *day on which it enters into force.* (Thus, as against historical examples and the solutions of some other countries, there is no possibility in Hungary for legal rules to go into effect, by virtue of a general provision of law, on the day of promulgation or at another date as from that day.) Certain provisions of legal rules may take effect at different dates, too. What is essential is obviously the need to avoid uncertainty as to the day from which the different provisions come generally binding. The practical arrangements under which the date of entry into force is determined somewhat differently from the provisions of the Act on Law-making should also be seen in this context. For instance, the arrangement under which a legal rule leaves it to another legal rule to determine the date for its entry into force or that of some of its provisions which is used with relative frequency. No serious objection may be made to this procedure if the power to specify the date of entry into force is vested in the same law-making organ. By contrast, authorization of another organ is apt to leave room for defiance of the legislator's real intention and for "suspension" of the enforcement of the particular legal regulation, too.

As is provided for in the Act on Law-making, the date of entry into force must be determined in such a way as to allow sufficient time for preparations for application. In Decision No. 28/1992. (IV. 30.) the Constitutional Court, too, considered this to be a fundamental requirement of a law-governed state, one ensuing from Art. 2 para. 1 of the Constitution, and added that in determining the period of preparations it is necessary to take into account the time realistically needed both by the law enforcement authorities and by natural and juristic persons affected by the given legal regulation to study its provisions and to prepare for voluntary compliance (e.g. purchase of technical equipment, adoption of organizational measures). Evidently enough, the fiction that the law is familiar to all cannot operate otherwise, for the possibility of acquaintance with the law has thus been created. Thereupon may follow the precept that ignorance of the law is no

excuse from legal prejudice, which may serve as a basis for legal responsibility as well. For these reasons and in accordance with Art. 8 of Decree No. 12/1987. (XII. 29.) of the Minister of Justice on Drafting of legal rules, one cannot but exceptionally declare that legal rules enter into force on the day of promulgation. In conformity with the Constitutional Court decision cited above, it is impossible to maintain the practice,[4] otherwise followed on a mass scale until that decision, that the law-making organs put into force legal rules on the day of promulgation, without being compelled by any important social interest that cannot be affirmed in any other way. To do so is possible only in cases where the intention of the State to achieve a constitutional goal could be realized either because of the nature of the regulated set of social relations or those of historical circumstances or any other reason, exclusively in a way of putting into force the legal rule on the day of promulgation, because, for instance, previous acquaintance with the substance of regulation might generate social motions likely to frustrate the goal pursued by the given regulation. Of course, antedating *Magyar Közlöny* (Hungarian Gazette) or other official journal is ruled out in this case as well. According to Constitutional Court decision No. 25/1992. (IV. 30.), it is the Government's responsibility to ensure that the official journal is delivered both to the subscribers and to the news distributors for the public by or on the day, at the latest, as indicated on Hungarian Gazette.

2. *The effectiveness of legal rules may terminate* in various ways: a legal rule is either abrogated or loses effect on the basis of legal regulation or its effect is terminated by the emergence of other situations of law.

a) In accordance with the Act on Law-making a legal rule or a provision thereof loses effect in Hungary:

— If it is abrogated by another legal rule (issued by the competent law-making organ), naturally with effect from a specified date. Given the requirement of legal security, the abrogating legal rule must name concretely the legal rule which is abrogated. For instance, inclusion of a general clause to the effect that all earlier legal rules, whether of the same or a lower hierarchical order, contrary to the given legal rule must become ineffective is insufficient. It is equally evident that the earlier legal rule does not become effective again upon the subsequent abrogation of the abrogating legal rule.

— Furthermore, under the Act on Law-making, a legal rule loses effect upon the expiration of the period specified by it.

— In accordance with Act XXXII of 1989 on the Constitutional Court, a legal rule becomes ineffective if the Constitutional Court annuls it with effect from a specified date. The date of annulation is generally, but depending on the particular case, the day on which the relevant Constitutional Court decision is published (annulation *ex nunc*), but

4 According to some studies, more than half the laws and regulations had been put into force on the day of promulgation before this decision of the Constitutional Court was handed down. From May 1992 the number of such laws and regulations fell to one half and one-third of the previous figure, but started to increase again from 1993. (See BÁRTFAI, ZS.: A jogszabályok kihirdetése és hatálybalépése (Promulgation and Entry into Force of Legal Rules), *Magyar Közigazgatás*, 1995, No. 2, 112.

it may also be an earlier day, e.g. the day of entry into force *(ex tunc)* or a later date *(pro futuro)*.

b) When a legal rule is expressly abrogated on the basis of a legal provision or it loses effect, there is no doubt about the termination of its effect in relation to time. Nevertheless, in the absence of such a legal provision, there is more or less justification for raising the question of whether or not the emergence of other situations of law results in the termination of effectiveness of legal rules, too. In such situations, however, a position can only be taken in view of the requirements of constitutionality and legality as well as that of the law-governed state [primarily as enunciated in decision No. 11/1991. (III. 29.) and later decisions of the Constitutional Court]. Let us take a look at the situations of law which, in the legal setting currently prevailing in Hungary, deserve special attention in this context.[5]

— The question may arise, for instance, of whether legal rules lose effect upon the abolition of the organ which adopted them. Since there is no strong argument, either theoretical or practical, to support the need for reorganizations of or changes in the state organization to automatically affect the effectiveness of any group of laws and regulations forming part of the unified legal system, one might say that, under the arrangement generally prevailing throughout the world, the legal rules of the abolished law-making organ remain in force in the absence of a separate abrogating provision of law. (In Hungary the abolition of the Presidential Council in 1989, for instance, did not in itself entail discontinuation in force of the law-decrees adopted by the organ.) The only exception may be a change in the system of local self-governments resulting from, e.g. establishment of a new commune or unification of communes. In such a case it is obvious that the earlier local self-government decrees affecting another area of jurisdiction lose effect in the new self-government unit, or that it is necessary to take a decision in the new unit on the question whether to keep them in force or not.

— Practically there is no evidence anywhere, nor is it disputed today, that constitutional changes did not and do not by themselves affect the effectiveness of laws and regulations issued on the enforcement of earlier constitutional provisions. In the absence of constitutional provisions expressly referring to direct abolition of certain legal institutions, such laws and regulations generally remain in force until they lose effect by virtue of a separate provision of law and, more recently, perhaps precisely on the basis of decisions of constitutional courts establishing unconstitutionality.[6] A different solution would result in a great measure of legal uncertainty, which, in the case of a new

5 For a discussion of additional situations, too, see SZAMEL, L.: *A jogforrások* (The Sources of Law), Közgazdasági és Jogi Könyvkiadó, Budapest, 1958, 138 et seq.; SÁRI, J.: A jogalkotás és jogforrási rendszer az alkotmánybírósági határozatokban: az Alkotmány "láthatóvá tétele" (Law-Making and the System of Sources of Law in Constitutional Court Decisions: Making the Constitution "Visible"), *Magyar Közigazgatás*, 1994, No. 8, 461 et seq.

6 It should be noted that a somewhat different theoretical view is held by, e.g., TAKÁCS, A. in his study entitled Gondolatkörök a normatív alkotmányról (Spheres of Thought on a Normative Constitution), *Társadalmi Szemle*, 1991, Nos 8–9, 52 et seq.

constitution, would ultimately have a paralysing effect in all everyday situations calling for legal regulation. This danger is much smaller, however, when not the Constitution or its provisions, but a lower-level legal rule or a provision thereof is abrogated (even by a mere modification of its wording) and the question arises whether or not this is coupled with discontinuation in force of the related enforcement regulations. This and the consideration that an enforcement regulation without the basic regulation is but an incomplete one may duly substantiate the approach under which the relevant enforcement regulation loses effect with the abrogation of the basic regulation or a provision thereof or with modifications in its original wording. Having regard even to the fact that such enforcement regulations have been specifically annulled by the Constitutional Court so far [see, e.g. Constitutional Court decision No. 25/1993. (IV. 23.)].

– In like manner, a differentiated approach may be required to the effect produced by changing social conditions on the effectiveness of legal rules, with allowance made for the principle of *cessante ratione legis cessat lex ipsa* (a legislative provision loses effect with the extinction of its *raison d'être*), which has long and often been regarded as an evident fact, but also as one accompanied by serious reservations. Reservations are indeed justified in connection with application of this principle. What still appears to be the most defensible approach is that a law or a regulation (or a provision thereof) loses effect if the facts or situations governed by it cannot occur after the lapse of a certain period of time. However, extinction of the underlying causes of legislation may not by itself result in a legislative provision ceasing to have effect,[7] as a contrary approach might lead to legal uncertainty, arbitrary law enforcement, a total erosion of legality.

– The applicability appears to be obvious of the old principle (which in Hungary was already mentioned in, e.g. István *Werbőczy's* Tripartitum,[8] a compilation of mainly customary law) that laws and regulations of the same or a higher hierarchical order may not only abrogate earlier ones, but earlier laws and regulations contrary to later ones of the same or a higher hierarchical order lose effect even in the absence of a separate provision of law *(lex posterior derogat legi priori)*, regardless of whether this principle is laid down in a maxim of "written" law, for it is logically impossible to concurrently abide by two legislative provisions of contending content. Hence only one of them, notably the latter, can be operative. In a large number of cases, however, it is far from obvious whether there is a real contradiction between an earlier and a later legislative provision, nor is it easy to judge whether or not a later legislative provision of the same or perhaps of higher hierarchical order makes a mere exception to an earlier general rule of law *(lex posterior specialis derogat priori generali)* or how far a later general rule of

7 See SZÁSZY-SCHWARZ, G.: *Parerga*, Atheneum Irodalmi és Nyomdai Részvénytársulat, Budapest, 1912, 49.

8 Art. 10 in Title 2 of Part Two. See the special volume of *Magyar Törvénytár* edited in commemoration of the Millenium. The Tripartitum (first edition in 1517 of the original) was translated with introduction and references by Dr. KOLOZSVÁRI, S. and Dr. ÓVÁRI, K. Explanatory notes added by Dr. MÁRKUS, D. Franklin Társulat Magyar Irodalmi Intézet és Könyvnyomda, Budapest, 1897.

law affects the effectiveness of an earlier special rule. A different approach may then lead to discordant practice, to a high degree of legal uncertainty. Recently the Constitutional Court has also stated on the first occasion that apparent contradictions or conflicts between laws and regulations of the same level must be resolved by interpretation of law on the part of agencies applying the law or by legislation. In the absence of substantive unconstitutionality, the Constitutional Court generally has no power to resolve such conflicts of laws and regulations [Constitutional Court Decision No. 35/1991. (VI. 20.)]. Subsequently, however, invoking the postulate of a law-governed state as embodied in the Constitution, the Court held that despite the correct thesis of legal theory expressed in the principle of *lex posterior derogat legi priori* the law-maker's practice of failing to expressly provide for abrogating or amending rules of law contrary to a new one does not meet the requirement of legal security as contained in Art. 2 of the Constitution, since legal security requires both the agencies applying the law and the citizens to be familiar with the laws and regulations in force at all times. A situation in which the current wording of a legislative provision cannot be established except by an all-round comparison of the entire legal material in operation is unacceptable [Decision No. 11/1994. (III. 2.)]. It is therefore necessary for a later provision of law expressly abrogate an earlier one contrary to it. Should it fail to do so, only the Constitutional Court can have the power to expressly terminate the effect of a legal rule on account of damage to legal security as an attribute of a law-governed state embodied in Art. 2 para. 1 of the Constitution.

— A situation similar to that resulting from acceptance of the principle of *lex posterior derogat legi priori* might arise in case of customary law derogating from legislative provisions. Notably, a legislative provision would lose effect with the emergence of customary law contrary to it. Formerly this possibility was also known in Hungary, as it was in the legal systems of several countries. According to *Werbőczy's* Tripartitum, for instance, actual and continuous practice contrary to statute often derogates from statute (Art. 9 in Title 2 of Part Two). While the theoretical approach was not uniform, this was also widely recognized even in this century, namely by relying on the *lex posterior* principle and proceeding from the assumption that statutory and customary law are equal sources of positive law.[9] But after the adoption in 1949 of the Constitution expressly stating the primacy of "written law" there could be no ground for upholding that view. Art. 71 para. 2 of the Constitution declared that "the Constitution as well as the constitutional provisions of law shall be binding both on all organs of state power and on all citizens of the State". This is also stated in the current text (Art. 77 para. 2) of the Constitution in these terms: "The Constitution and the constitutional provisions of law shall be binding on all organizations of society as well as on all state organs and citizens". For a long time after 1949 even the very possibility for the existence of customary law was generally denied by emphasizing the advantages of

9 See, e.g., *Magyar Jogi Lexikon.* VI. kötet (Hungarian Lexicon of Law. Vol. VI), ed. Dr. MÁRKUS, D. Pallas Irodalmi és Nyomdai Részvénytársaság, Budapest, 1907, 636 et seq.

"written law" over customary law and legal uncertainty resulting from the latter. Today, however, there can be no longer doubt that in many cases the permissive rules of concrete legislative provisions secure a place for customary law also in the Hungarian system of sources of law. The operation of customary law derogating from laws and regulations and likely to affect the substantive validity thereof is not ruled out in actual fact. In effect, in the absence of a relevant legislative provision, the *lex posterior* principle may also prevail as a rule of customary law in so far as earlier laws and regulations contrary to later ones of the same or a higher level are not applied.[10] Obviously, however, an earlier legislative provision cannot formally lose effect with the emergence of customary law derogating from written law. A contrary solution would simply be unconstitutional, amounting to nothing but disregard of the constitutional provisions that spell out the primacy of legal rules.

— Finally the question arises of whether a law or a regulation or a provision thereof becomes ineffective if there emerges no new "customary law derogating from laws and regulations", but there has occurred a desuetude *(desuetudo)*, a situation in which a law or a regulation is not complied with in general and for a prolonged period in practice.[11] For example, a large part of the pre-1848 enactments in Hungary lost effect in such a way.[12] Even today, a similar situation may unquestionably affect the substantive validity of a legislative provision as it is actually inoperative. However, in a stable system of law based on the requirement of legal security, it is no longer possible to recognize that non-compliance with a legal rule would terminate the effectiveness thereof. What is involved is merely the fact that a law or a regulation is not observed or enforced in violation of legality. Thus, in this context, one should accept under serious reserve any solution — which compilations of current laws and regulations adopt practically inevitably, albeit often without foundation — that a law or a regulation or a provision thereof is not published because it "contains outdated rules", as it were, or it "has lost its relevance".

III

The *possibility of applying a legislative provision* may differ from its effectiveness. While it is true that, as a general rule, a legislative provision must be applied in concrete cases from its entry into force to the date of its losing effect, there are several exceptions to this rule.

1. In some cases *a legislative provision in force is inapplicable.* To give but a few examples, a legislative provision is inapplicable without an enforcement decree if the latter is made absolutely necessary, mainly as a consequence of a mandatory authorization to issue it, for the former's enforcement. (If the law-making organ authorized to issue an

10 See PESCHKA, V.: A derogáló jogszabály (The Derogatory Provision of Law), *Állam- és Jogtudomány*, 1992, Nos 1–4, 14 et seq.

11 *Ibid.* 17.

12 See *Magyar Jogi Lexikon* (Hungarian Lexicon of Law), vol. II, *op. cit.* 882.

enforcement decree fails to do so, thereby creating a situation contrary to the Constitution, the Constitutional Court, acting *ex officio* or on anyone's motion, will invite that organ to comply with its obligation within a specified timelimit.) Obviously, the given legislative provision cannot be applied until the legally defined preconditions for enforcement have been created. (For example, Act LIX of 1993 on the Parliamentary Ombudsman for Civic Rights entered into force on 22 June 1993, but it was generally impossible to apply until the Ombudsman's election by Parliament on 30 June 1995.) Also, a legislative provision cannot be applied if it is annulled only *pro futuro* by a Constitutional Court decision, but at the same time the Court declares its inapplicability in a concrete pending case [see, e.g. Constitutional Court Decision No. 32/1990. (XII. 22.)]. Moreover, in judging facts or situations of law previous to the entry into force of the relevant provisions of law, the law applying agencies may, in particular cases, apply mostly the provisions of law that are in force at the time, not of law application, but only of the facts or situations of law in question. And this brings us to the discussion of the other main group of exceptions.

2. There are cases in which *a legislative provision is not in force at the time of law application, but it is applicable none the less.* The most palpable case is Art. 2 of the Criminal Code, under which a criminal offence must be judged according to the law in force at the time of perpetration (the only exception being that if at the time of judgement a new criminal law is in force according to which the act is not a criminal offence any more, or it is to be punished less severely, the new law must be applied). But a similar general requirement is that in the course of law application the lawfulness or unlawfulness of a course of conduct must be judged according to the law in force at the time the particular conduct was pursued. The effect of a fact of law generating, modifying or terminating legal relationships is judged according to the law in force at the time, not of law application, but of the emergence of the fact of the law. (An obvious example is that acquisition or termination of citizenship must always be judged under the law which was in force at the time of relevant facts of law affecting citizenship, like birth, marriage, lapse of time, etc.) In addition, in continuous legal relationships, situations of law previous to the entry into force of a new regulation, involving in particular obligations of the subjects at law in those legal relationships, are generally governed, not by the new regulation, but by the one which was in force previously.

3. Finally, there may be cases in which a legislative provision must be applied in judging facts of law occurring, or situations of law terminating, before its entry into force, or in past or future aspects of continuous legal relationships which were established previously. It is generally in such cases that one speaks of *law application (legislation) with retroactive effect.*

a) The possibility of law application with retroactive effect is obviously detrimental to legal security as, mainly in case of applicability with respect to a period of time previous to promulgation of a particular legislative provision, no one is able to consider the consequences of his conduct, but it is also in contradiction with the institution of legal responsibility, which is based on the presumption that the legislative provision is familiar to all at the point of time in question. It is therefore not surprising that in the course of

bourgeois transformation[13] legislation with retroactive effect was already prohibited by the first constitutions with a view to preventing misuse of power. For example, Art. I. paras 9 and 10, of the 1787 Constitution of the United States prohibited *ex post facto* legislation (even though the system of precedents might inherently have retained certain "retroactive" elements[14]). On the European continent, retroactive legislation was prohibited in France by the 1789 Declaration of the Rights of Man and Citizen (Art. 8) in criminal cases and later by the Declaration forming part of the Constitution of 1795 (Art. 14) in criminal and civil cases, too. It should be added, however, that shortly afterwards it was a point at issue, in the United States (before the Supreme Court) from 1798 for example,[15] whether the prohibition could be general or confined to criminal cases. Then the prohibition on retroactive legislation appeared more or less systematically in subsequent constitutional development, in the codes of the fundamental branches of law, in acts on law-making and chiefly in the international human rights instruments. By and large, it became clear that there could be no serious bar to retroactive legislation containing "authorization" or "rights" only. Nevertheless, there emerged no uniform approach to the question of whether the prohibition on retroactive legislation containing obligations or withdrawing rights extended, and in what degree, to other than criminal cases as well and whether that prohibition was to be considered applicable only to accomplished facts of law and closed situations of law or also to still continuous legal relationships which were established previously.

b) No doubt that retroactive legislation may be viewed differently according in particular to whether it is "retroactive", "quasi retroactive" or "retrospective" in nature.[16]

Legislation with retroactive effect is tolerated the least with respect to judging facts or situations of law terminated prior to the entry into force of laws and regulations governing them. The different legal systems prohibit chiefly the possibility for an act to be regarded as a criminal offence or to be punished more severely under a law becoming effective subsequently. This is well illustrated by the general acceptance of the principles of *nullum crimen, nulla poena sine lege* essentially containing this prohibition. Even though constitutional prohibition is not universal (as in, e.g. Art. 97 of the Norwegian Constitution of 1814 still in force), the inadmissibility of retroactive legislation is often given special emphasis in administrative penal law, with respect to application of administrative and financial sanctions, and in cases as well where it would result in violation of fundamental rights.

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13 For a general pattern in Hungary in earlier times, see, e. g. WERBŐCZY'S *Tripartitum* (Part Two, Title 2).

14 It will be merely noted that similar elements may also be found in norms of interpretation laid down in later times.

15 See TRIBE, LAURENCE H.: *American Constitutional Law*, Second Edition, The Foundation Press, Inc., Mineola, New York, 1988, 632 et seq.

16 For this distinction, see MODERNE, F.: *Rapport de synthèse.* (Table ronde. Le principe de non rétroactivité des lois), Annuaire International de Justice Constitutionnelle, 1990, 437.

We unquestionably have a case of retroactive (quasi retroactive) legislation also when a legislative provision is applied to a situation of law, in a formerly established but still continuing legal relationship, which existed prior to its entry into force. In this respect there is generally a somewhat weaker opposition to legislation with retroactive effect. Furthermore, taking into account the peculiarities of certain legal relationships, one may also formulate theoretical views that it is justified to apply the new legislative provision with respect to the past as well, because a longer coexistence of the two, former and later "systems of law" is undesirable in such legal relationships.[17]

It is then a separate question whether in continuous legal relationships which came into being earlier a new legislative provision may be applied *pro futuro* as from its entry into force or whether there are limits to its applicability. It can be stated that in this sense the prohibition on retroactive legislation is not recognized in general or, where the constitutional prohibition seems to be absolute, the courts interpret it in a narrower sense. In Norway, for example, setting out from the consideration that absolute prohibition would rule out any regulatory intervention by the State in existing legal relationships, any adjustment to changing social conditions.[18] But it is also recognized that there may be various limits to such interventions.

c. The Hungarian solution starts from Art. 12 para. 2 of the Act on Law-making, which provides that legal rules may not establish obligations and may not declare any conduct to be unlawful for a period preceding promulgation. In Decision No. 34/1991. (VI. 15.) the Constitutional Court regarded this rule as being of a "constitutional nature" and its observance as being indispensable for giving effect to the principle of legal security, which is organically bound up with a law-governed state as embodied in Art. 2 para. 1 of the Constitution. This rule generally requires that settled relationships, primarily those subject to regulation by criminal law, be left untouched [Constitutional Court Decision No. 11/1992. (III. 5.)] and, under the practice of the Constitutional Court, that a legislative provision be not applied with respect to the past (to the time prior to its entry into force) in legal relationships established before its entry into force but still continuing.

With respect to the future, however, intervention by laws and regulations in continuous legal relationships is not ruled out. The power to decide in a given case whether the constitutional conditions for intervention exist and with what limitations is vested in the Constitutional Court [Constitutional Court Decision No. 32/1991. (VI. 6.)]. In arriving at a decision the Court must also have regard for observance of "acquired rights" as an attribute of a law-governed state [Constitutional Court Decision No. 62/1993. (XI. 29.)]. Indeed, various limits to intervention are beginning to take shape in some Constitutional Court decisions. For example, intervention is not ruled out even in

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17 See on the subject FORSTHOFF, E.: *Traité de droit administratif allemand.* Traduit par M. FROMONT. Établissements Émile Bruylant, Bruxelles, 1969, 247.

18 See ANDENAES, M. T.—WILBERG, I.: *The Constitution of Norway. A Commentary.* Universitetsforlaget As, Oslo—Bergen—Stavanger—Tromso, 1987, 117 et seq.

civil-law contract relations, but is permissible only in exceptional cases, primarily because the external circumstances beyond the control of the parties have, in a manner impossible to foresee, changed to such an extent that maintenance of given legal relationships with unchanged substance would become intolerable, e.g. for the State (state budget) [Constitutional Court Decision No. 32/1991. (VI. 6.)]. The limit to intervention in tax-law relations consists in that amendments to the relevant regulations may not generally extend, without a longer period of preparation, to those natural and juristic persons who/which undertook a favoured activity before the entry into force of the pertinent amendment because they had counted upon the state guarantee afforded (tax allowance granted) [Constitutional Court Decision No. 9/1994. (II. 25.)]. And later, in examining the constitutionality of Act XLVIII of 1995 on legislative amendments to promote economic stability, the Constitutional Court held that services and related benefits of the system of social provisions may not be essentially modified without constitutionally sufficient cause or overnight, without an appropriate period of preparation. There must be a special reason for change without transition. Benefits are afforded the greater protection the closer they are to enjoyment, namely to the entitlement to services due to beneficiaries by subjective rights. Services already acquired or enjoyed must be given still greater protection [Constitutional Court Decision No. 43/1995. (III. 30.)].

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The Constitutional Paradigm

Since the appearance of Thomas Kuhn's *The Structure of Scientific Revolutions* more than thirty years ago, the term "paradigm" has been used to express the specific patterns, scopes and conceptual ranges of the history and theory of science, that, in a given period, have a dominant, or even exclusive control over a given science. What paradigm expresses is that the community of scholars build on such prior scholarly results that have promising future prospects, thus laying the foundations for further scientific research. Paradigm-based theoretic work implies that justifiable and relevant problems of scientific research, as well as the accepted heuristic and verificatory methods of the solutions thereof, are established within the scope of that paradigm. In order that a theory may function as a paradigm, two conditions have to be met: (i) it has to be novel and successful enough to attract more scholars who remain committed to this specific theory than any rival theories, and (ii) it has to be open enough so that, within the scope of the theory, it presents significant number of problems and tasks for generations of scholars to come.

Such an understanding of the notion of paradigm in the philosophy of science is applicable primarily for natural sciences. In humanities, and economics, a "hard core" social science is no exception either, however, no theory did gain such dominant control as in the case of natural sciences. With respect to the philosophy of law or jurisprudence, we have seen co-existing theories and notions in competition and constant debate with one another. Nevertheless, these theories have certain paradigmatic features. The term paradigm denotes a social attitude, conviction and commitment, namely that a circle of experts of the given issue, a community of scholars is in the possession of methods and means for solving problems within their competence.

Such an attitude holds true for those involved with the theory or philosophy of law. There is, however, one peculiarity that limits and, at the same time, also widens the validity of the legal philosophical paradigm. It is limited inasmuch as that commitment to a specific paradigm will not become a generally accepted norm in society, or not even in the philosophical or legal community. However rational or widespread a certain legal concept might be there is nothing to indicate that at a given time and place one can become successful only on that basis. This limitation is derived from another, complementary, attribute of the legal paradigm. A natural science paradigm tells us how to achieve what we want, it can tell us nothing about what to want and achieve. The desired goals and values, whether moral or efficiency values, are divergent, and, quite often, conflicting. Within the political community, however, a tradition has taken shape that regards constitutionalism as a basic norm, capable to harmonize desired values and goals with the efficient realization thereof. The paradigm of constitutionalism is the very conviction of a political community that modern democracies require a constitutional system: constitutionalism and democracy are interrelated; constitutionalism serves best the needs of the operation of a democratic society. The constitution is the strongest source for legitimation of a modern democratic society.

Legitimacy is the acknowledgement of the validity of a social order. According to Max Weber, any activity in a social order is adjusted to pre-definable maxims; the existing order is regarded as valid in case these maxims are perceived by the people as obligatory in some way, or as a model to be followed. People's motives to follow suit may be quite diverse, still, the very circumstance that, beside personal motives, actors comply with the existing order increases the chances that actions, in general, will also adjust to the existing order. Such legitimation might have internal, as well as external, guarantees. External guarantees are social conventions and the law. Social conventions enforce the order in such a manner that any divergence therefrom is generally and practically received with disapproval. As far as the law is concerned, a distinct group of people will apply physical and psychological force to coerce compliance with the law, or to sanction any violation thereof.

To date, the general form of legitimation is legal legitimation; people consider existing order as lawful, and comply with formally correct, customary or written rules. Even, in case of the law, it is a compulsive order, people's conception of legitimacy provides the grounds for compliance; i.e. in their understanding, power, based on such external coercion, is legitimate.

Gustav Radbruch, a famous German lawyer writes: "Democracy must be a cherished value; Rechtstaat, however, is one's everyday bread, the water one drinks, air one inhales, and the greatest merit of democracy is such that it is the exclusive means for maintaining the Rechtstaat." This is why every government these days is so eager to be acknowledged as one governed by the rule of law.

The author of that article is not as cynical as some, otherwise highly reputable legal experts, who claim that the law is but a mere means—appropriate, and applicable, for any purpose—and he, as technician of the law, is able to formulate any legal arguments supporting whatever purpose. But neither do I consider myself as a doctrinaire

theoretician who believes that, by merely asserting abstract legal principles, he will find solutions for the acceptance of vital legal principles by the citizens, and for putting into actual legal practice of the same. There is no such abstract legal theoretical view which would not be connected to a specific problem within the existing legal system. Basic theoretical issues of the law are in fact legal responses to essential moral, and in a large part, political issues.

During the last 6–8 years of the Kádár regime (from the beginning of the '80s till 1989), in Hungary, legal practice was more liberal than the legal system, and increasingly more liberal than the written law. This is highly unusual phenomenon, as it is legal practice that is generally behind written laws. During the enforcement of the law, there are several obstacles to overcome that do not seem to be obstacle in the written law.

A legitimate legal system is more than a formal system of rules. A legitimate legal system builds on legal security, justice and efficiency. A legal positivist regards efficiency as the criterium for validity, and derives the other two principles from efficiency. According to a natural lawyer, justice is the criterium for validity as well, based on what Augustinus said: "What else should become of the state in want of justice, than a gigantic gang of crooks?" The foregoing three legal principales often conflict with one another, and in order to re-establish the equilibrium, one or the other moves to the forefront. Should, however, any of them suffer a permanent violation, legal order disintegrates, and the legitimatory role of the law becomes questionable.

The reason why law can play a legitimatory role is that, among its many functions, the protective role of the law in safeguarding citizens' rights *vis-à-vis* the state is of primary import. Without such protection, order would merely be an external coercive order. In the past two centuries, and, increasingly in the last few decades, such protection of individual rights *vis-à-vis* the power has found expression in human rights. Human rights are elements of an international legal institution. In general, however, they become genuine rights provided that they are formulated as citizens' rights in the legal system of a state. There is no doubt as to the merits of natural law in advertising and legalizing human rights. Natural law, influenced by the French Revolution, claims that by virtue of birth, people are entrusted with certain rights. Namely, that people are created free and equal. According to a famous american Federalist against the newly formed idea of human rights you must defend the rights of Englishmen protected by historical tradition and convention, in other words, you shall enjoy the enacted positive rights of any country. And however great import was attributed to human rights on the basis of the natural law ideology, their enforceability has always been problematic particularly because their realization has always been more difficult than enacting them, as citizens' rights, in the constitution of a given country. One usually reverted to human rights as the ultimate ideological or moral argument in favour of citizens having already been deprived of their rights. Not even to achieve equality before the law, may legal order presume that, in every respect, people were born equal. Similarly, it may not attempt to make them equal in every respect. In the formulation of constitutional rights, and in the constitutional protection of freedom, a minimal consensus should exist, namely that the differences between the individuals may not serve as the basis for different treatment by the law, as

such differences are irrelevant with respect to constitutional rights. The contrary is true, as well—although it is a very strong statement—namely, that the constitution is not competent to set forth rights providing for relevant differences between the individuals. The constitution alone is appropriate to guarantee the basic rights of the citizens; rights that must not be violated by anyone, including the majority. In a constitutional democracy, no legitimate power shall have authority with respect to such rights.

In our modern world, the constitution is the foundation for a democratic system and society. In general, constitutions are the products of revolutions or wars. Hannah Arendt is perfectly right in saying that the purpose of revolutions is the attainment of freedom, an act not equal with liberation or being liberated. If liberation is not followed by the enactment of freedom into the constitution, i.e. the creation of legal guarantees for freedom, revolution will prove seedless. A constitution may be the product of a revolution, still, it will fail to be novel or revolutionary in merit. A constitution can *only* guarantee that the government is limited by laws, and, in defense of the citizens' rights *vis-à-vis* the government and the state, provides constitutional guarantees, however not in the form of uncontrollable promises, but as procedural safeguards. This is not a revolutionary act. Albeit, it is a revolutionary achievement.

Constitutionalism in Hungary

The fact that during the political transition Hungarian society opted for constitutional democracy was fundamentally the result not of rational considerations, but rather, and quite naturally, the consequence of a political decision. The importance of extremist and/or populist movements opposing constitutionalism was minimal. The political elite, together with the majority of the Hungarian society, deemed constitutionalism a worthy example to be followed as the only tool to maintain democratic law and order, and to prevent the recurrence of dictatorship. Therefore it is similarly understandable that, from among the ranks of the political elite, those who had a background in law came to the fore. Members of the legal profession had a theoretical, rather than practical, knowledge of the procedures and tools required for the creation of a democratic state based on the principles of constitutionalism. Thus, constitutionalism has become the strongest legitimizing force of political transition.

As one of the most important features of the constitutional paradigm, political decisions have to get a legally interpretable form in the constitution; a form that is not a manifesto, but something that offers procedural guarantees for the enforcement of the rights contained in the constitution. This, however, does not and should not imply that the law or even lawyers should decide between the often conflicting moral and political values, and neither does it suggest that any political or moral consideration can be put in a legal form.

It is no coincidence, either, that politicians of the leading parties, by making references to constitutional legitimacy, always attempted to give a constitutional backing to their decisions, which invariably, required, or would have required, the amendment of

the constitution. Legal experts, on the other hand, often used legal reasoning in order to obstruct political decisions they found objectionable. This tension was not expressly counterproductive for a constitutional viewpoint. Often, as the result of the debates, compromises were made that created stronger constitutional fundament than any debate within the boundaries of the law or politics could have ever created. The fact that none of the significant political forces reverted, too often, to employ unconstitutional methods, and the legal experts were also keen on not to understand law as the mere application of abstract principles, and the realization that law should, at least partially, be adjusted to the actual and real political and social conditions, is, without doubt, the greatest achievement of the Hungarian development.

In a society in transition, the development and perfection of constitutionalism takes a gradual course, laden with compromise and strong political and moral battles. However, the historic moment when a paradigm of legal theory, having political and moral undertones, plays a dominant role in society is quite rare.

The Hungarian political community has, after the collapse of the communist regime, been committed to constitutional democracy. For different reasons however, this commitment was loaded with conflicts. In the followings I will attempt to analyze the general background of the conflicts and some hard cases in which the difficulties of realizing the constitutional principles are especially evident.

The Hungarian constitutional history is an extremely short and simple story. Till 1946, Hungary had no constitution in the modern sense i.e. as a basic law. However, in 1222, only 7 years after the Magna Charta, a sort of feudal constitution called Golden Bull was born in Hungary. This early development has been, unfortunately, not followed by a continuous constitutional history. Up to the forties of this century no real constitution has been amended, while the Golden Bull has always been referred to as the centuries old Hungarian constitution (with special emphasis on the continuity principle). The first change took place in 1946 when the Parliament adopted an Act on the Republic which in some respect was a provisional constitution. Three years later, in 1949 the new, already socialist parliament adopted the new socialist constitution that was nothing else but a copy of the Stalinist Soviet constitution (here the radical discontinuity principle was especially emphasized). This 1949 Constitution was radically modified in 1989, and the modified version is the legal constitution in Hungary in our days. New amendments have been, of course, introduced even since that time. That is however, rather political then constitutional problem.

The political background of Hungarian constitutionalism is a longer and much more complicated problem.

Hungarian legislation faced an unusual and exceptional situation, namely a transition of the social system. Before the new general elections of 1990 under the communist regime—Hungary, in comparison with other communist countries, was a relatively liberal state. Nevertheless, it was a very special kind of liberalism. The Hungarian legal practice was more liberal than the law itself. In the last decade, the communist party and its government did very rarely enforce the that time valid antidemocratic and repressive laws. The so-called Constitution and all valid laws (including the Criminal and the Civil

Codes, respectively) were, in many respects, tyrannical. During the last year of the old Parliament, legislation (both the Constitution and the Codes) was changed and amended positively in many respects. However, the task of the new Parliament was to change basic legal principles in order to lay the foundations of a new, democratic system.

Hungary does not have a new Constitution. The old one is not completely old because it was last amended in 1989 under political pressure by the reform wing of the communist leadership and oppositional forces, as well. This Constitution already contained guarantees for basic human and civil rights. In 1990, one–third of the text was modified and some articles were changed twice or even more frequently within one month. It is not a Stalinist Constitution any more but it has many controversial articles and is not respected by public opinion. It is a widely held opinion that the Constitution is easily changeable if practical political goals demand, however, it needs a two–third majority of the votes. There is no doubt, that this Constitution is not a solid and widely respected basis for legislation. In the press and at different party meetings the extreme right politicians attacked at the Constitution as a Stalinist construction. The minister of justice in 1992 declared that it is impossible to adopt a new constitution and no need of it.

Let me mention two examples. Before the first session of the new Parliament, the two biggest parties (Hungarian Democratic Forum and Alliance of Free Democrats) made an agreement (the so-called Pact) but two important points of the agreement have caused till now basic conflicts. First, the factual competencies and obligations of the President, who was member of the AFD (the that time biggest oppositional party), were not clearly defined. The Free Democrats failed to agree on the most important economic issue, privatization, and consequently, the majority faction can make decisions alone about it (since it does not require a two–third vote). Art. 9 of the Constitution states: "The economy of Hungary is a market economy where public and private ownership shall be equally respected and enjoy equal protection." It would be a standard article in any country where private property is dominant. In Hungary, where privatization is badly needed, this provision makes it possible for the government to exert its dominant influence on the economy which seems to increasingly taking place.

The role of the Constitutional Court proved to be decisive in strengthening the democratic development in Hungary. The Court was founded by an Act of 1989, but only half of the judges were elected by the old Parliament. Its foundation and existence proved to be the most dominant element in the development of a state of law in Hungary. The Court works under extraordinarily strong political pressure, nevertheless, its judgements have mainly served the protection of constitutional and civil rights. It should not come as a surprise that the Court was sometimes strongly attacked by government forces following certain judgements.

Beyond the scope of legislation several other factors also influenced constitutional problems:

1. The mass media and the press. The coalition parties and the government have had a pretty inimical attitude towards the press. Following the general elections of 1990, this bad relationship even worsened. Consequently, the press tried to exploit any information or unchecked gossips (a great many of which proved to be true later) attacking the

legislative and executive power. As a result, in many instances the reaction of the public to certain bills preceded the actual enactment, thus exerting influence on the final text of the act. The influence of the press had a weak point. Most importantly all some leading personalities of the press are not respected by the public due to their role during the previous regime.

2. The indifference or apathy of the public to politics following the general elections and first sessions of legislation.

3. This apathy is connected to the present economic recession or even crisis situation in Hungary. It is well known that a capitalistic system and private ownership themselves do not guarantee a democratic political system. It is also true that in countries without private ownership there is nowhere democracy at all. On the other hand, democracy exists only in countries where there is private property and capitalistic economy. It is fairly problematic whether it is possible to build up a democratic political and social system in a country where the economy is in crisis. (In some Asian countries, the first steps towards democracy were taken after a strong economic growth.) As a matter of fact, in Hungary the new democratic political structure was born but with respect to constitutionalism this is not the case. The short-comings of constitutionalism are partly connected to poverty and the crisis situation in Hungary.

The four-year term of the first democratically elected Hungarian Parliament is over. However, the tendency zeroing on the elimination of the heritage of the past regime, either in the form of retribution or restitution, has further continued. As a result, the establishment of a legal framework for a new economic structure and ownership relations has been put on hold. Because the foregoing tendency gained dominance, legislation has dealt with issues relating to basic civil rights and a democratic establishment. In short: contrary to the regular legislation practice of established democracies, in most cases constitutional issues are here debated.

Since I do not share the view that constitutional issues have legal nature only, I perceive the situation as follows: Serious political issues are transformed to merely legal ones, since the only means available for the opposition against challenged government policies—due to the parliamentary dominance of the government coalition—is to route such issues to the standards of constitutionality. These are indeed borderline issues from the aspects of constitutionality, they may be understood as clearly legal ones, but by doing so, the public will have no understanding of the political and often moral implications lying behind these legal issues, and it is rather counterproductive for political democracy. Such issues involve the freedom of the mass media, the press and opinion, retribution affecting civil rights and the general mood of the public, the relationship of the president of the republic and the government, minority issues.

Due to the foregoing, the Constitutional Court continues to be a key player in Hungary, and consequently, decisions on political issues—even if in rather abstract form—is often relegated to the Court. Whether one appreciates or not this is the only establishment body which continues to act without delay, and because the others fail to perform in this manner, its role at times proves to be politically over-dominating. Due

to this, the Constitutional Court is attacked from each side, but mostly by the government and the pro-government factions of the Parliament.

Some hard cases

Case 1: The 15/1991. (IV. 13.) decision of the Constitutional Court. The collection and processing of personal data without strictly defined aim and for undefined future use is unconstitutional. It is unconstitutional to use a general and uniform personal identification symbol (personal identity number) that can be applied without limitation by any authorities. Effective as of December 31, 1991, all old regulations concerning the use of the personal identity number are deleted. This decision of the Constitutional Court was widely challenged not only by the government but also by the public in general, what is more, even by many oppositional members of the Parliament. The opponents of this decision argued with the enormous budget costs that the re-construction of the new record keeping system will cause and with quoting public interest and the difficulties of keeping track of criminals, etc. Some opponents of the decision stated that it would have been more correct and fair if the Constitutional Court had left the decision in the competence of the Parliament or at least had conducted an opinion poll or public debate prior to the judgement, as is the case with the same issue in many European countries. The critics forgot only one thing: in West European countries opinion poll was conducted prior to the introduction of the personal identity number. In Hungary, however, the personal identity number was in use for a long period and the state, in principle, could collect data and information about every citizen. This resistance shows that the principles of constitutionalism are not deeply rooted in the awareness of the population and the government and even the Parliament deem pragmatism more important than constitutionalism. This decision was one among the issues where its legal validity was recognized but the competence of the Constitutional Court was contested.

Case 2: The opponents of the activity of the Court identify parliamentarism with the unlimited power of the Parliament. They consider the majority will as a supreme value. But the Parliament has also constitutional limits. The rule of the law is the main safeguard of individual freedom, at least since the end of the XVII century. The realization of this freedom is easier in countries where for centuries the consistent constitutional requirements have existed. In Hungary where this is not the case the Constitutional Court is sometimes forced to judge on the basis by such relatively open legal principles as human dignity or equality of citizens. This does not make these judgments political ones. For example, capital punishment is a constitutional issue and to decide about it does not need any abolitionist movement or consent of the parties and public opinion. The issue of the use of the personal identity number is of similar nature. The Constitutional Court is limited only by the Constitution. Only German positivism of the last century considers the laws and the constitution as a value in itself which

lacks any substantive element. Sometimes the Court itself limited its authority, e.g. when did not apply the preliminary (before a law has been enacted by the Parliament) constitutional norm control, however the Constitution makes it possible.

The Parliament can exert influence at the Court in two ways: (i) to change or modify the Act on the Constitutional Court. But if the modifications were too much significant it would cause malaise in foreign countries. (ii) to change or modify the Constitution itself. It would be regrettable and unfortunate because it should mean that the Constitution is not more solid than any other law requiring two–third majority of the votes which may be adjusted to everyday politics.

Case 3: The amended Constitution of 1989 declared that "the Republic of Hungary is an independent, democratic constitutional state". In a constitutional sense, this signified political changes in Hungary. Constitutional statehood is a fact in part only, and in part it is a task to be accomplished. The whole legal structure has to be gradually harmonized with the Constitution: not only regulations and the operations of state institutions have to be introduced to the society, but also the conceptual values of the Constitution. Political changes in Hungary were carried out on the grounds of legality which also means that reflexive norms of the legal structure must assert themselves. The amended Constitution grew out of a formally impeccable compliance with the old norms, and as a product of the same. Every norm in force today has to be in full compliance with this Constitution, regardless of the date when any given norm was passed.

Two problems arise. What shall be done with the legal relationships arising out of the old—and by now unconstitutional—norms? And: can we consider the historical circumstances of the political changes when we pass judgements about whether the new norms applying to unconstitutional provisions of the past regime are constitutional.

If we try to answer these questions on the grounds of constitutional statehood, the requirement of legal security is of greatest importance. Legal security is especially important if unconstitutional norms are repealed, but it is even more important when the repeal affects legal relationships arising from such regulation. Or else, every regulation change of the norm would imply a revision of several legal relationships. Closed legal relationships may not be changed either by norms or by the repeal of norms in a constitutional manner. The only exception is when another constitutional principle competing with the principle of legal security makes it unavoidable but only in case it does not cause unproportionately huge harm compared to the set aim. Such an exception may be the revision of a final judgement of a criminal case for the benefit of the convicted person, if the proceeding was conducted on a later so defined unconstitutional norm. A reverse situation does not constitute an exception, i.e. it is no argument in itself against legal security that the result of the legal relationships is unjust.

The answer to the second problem is that basic guarantees of a constitutional state may not be set aside by quoting historical necessities and justice dictated by a constitutional state. No constitutional aims may be realized against a constitutional state.

According to the Constitutional Court, legal security relying on the material and formal principles of legal security shall have priority against partial and subjective justice.

In consideration of the foregoing reasoning, an act reviving the limitation period of prosecutability violates the limits of the state's penal powers, because it affects such guaranteed rights the restriction of which is not allowed by the Constitution even if other basic rights may be suspended or restricted. The basic institutions of criminal law must not be made relative because the guarantees of criminal law are the results of a prior constitutional deliberation, namely, that the risk of unsuccessful prosecution shall be borne by the state. When the limitation period expires caused by the state's inability, the so acquired unprosecutability is absolute, and it may not be subsequently reduced or revived. Historical circumstances or justice may not be quoted in this context. Should this not be the case, it would involve an obvious omission of the guarantees of criminal law which is absolutely antithetic to the principles of constitutional statehood. The law and order in a constitutional state may not deprive anyone from the guarantees of a constitutional state, because, as basic rights, they are available to everyone. Justice and morality might justify punishment, however, the legal foundation for such punishment is conceivable on the grounds of constitutionalism only.

According to the interpretation of the Constitutional Court, legal security requires from the state and legislation that the entire law, in all of its divisions and ramifications shall be clear, obvious, predictable and foreseeable with respect to their effect. In criminal law, a ban on retroactive effect, the forbiddance especially of *ex post facto* provisions, and a ban on the application of analogy are directly deducible from predictability and foreseeability. The principle of legal security requires procedural guarantees, as well. The statute of limitation in criminal law restrict in time the state's ability to exercise its criminal powers. A failure of the same shall fall on the state. In a constitutional state, the state has not and cannot have unlimited powers. The executive power itself is not unlimited, either. The executive power may interfere in the individual's rights and freedom pursuant to constitutional mandate and justification.

The criminal law system of a democratic state handles the principles of *nullum crimen* and *nulla poena sine lege* as a constitutional obligation of the state which means that the state has to codify, in advance, in law the conditions for its exercise of the criminal powers. It is not only that the state forbids crimes and threatens with punishment by law, but, further, that the individual is entitled to be sentenced in a lawful manner, and his penalty shall be meted out lawfully, as well. In a constitutional state, criminal law is not only a means, but also a protection of values, and is itself entrusted with values. Namely: constitutional criminal law principles and guarantees. Criminal law protects interest, nevertheless, it cannot serve as a means for moral purification respecting the protection of moral values. This is why the Constitutional Court declares that everyone charged with a criminal offence shall be sentenced and punished on the grounds of the laws in force at the time when the crime was committed. (Except, however, if the new law permits a lighter penalty.)

All this is applicable to the expiration of prosecutability. Expiry is a fact, but the facts determining it are legal facts. It shall be the court only that shall validly determine

whether the prosecutability of a crime has expired or not. Legislators have one single constitutional means only for having a say in the matter of expiry. Namely that it passes more favourable laws for the benefit of the accused.

The revival by law the possibility of criminal-prosecution in case an already "expired" crime is unconstitutional. With irreversibly ceases because the causes stopping to the process set a limit for the state's criminal powers. These causes may not change the qualification of an act, since a crime remains a crime. After the time limitation it is the personal right of the perpetrator not to be punished. The principle of confidence in law requires that once a cause for stopping the possibility of criminal-prosecution has materialized the process of a criminal case shall not be revived by law. Time limitation stops the process of a criminal case regardless of why the perpetrator has not been prosecuted. The failure of the state does not fall on him.

The extension of the time limitation by law is also unconstitutional. During the limitation period, expiry is meant primarily for law enforcement authorities, and according to the act, the authority may, by nullifying, revive the serving of full term without notification of the convict. The time limitation will also be extended if the authority suspends the proceedings, by indicating the duration of suspension. It is called the suspention of the time limitation. It means that however the institution of expiration provides insufficient guarantees for the anticipated stopping of prosecutability, it assures that the rules on the limitation period before its experation shall not change for the harm of the perpetrator. At the time of deliberation, the state's criminal powers are subject to the same restrictions as at the time of perpetration.

Should the limitation period be extended by a retroactive act, its unconstitutional nature may not be legitimized with the explanation that time limitation was suspended. If time limitation was indeed suspended at the time of the perpetration pursuant to then effective laws then no new act is required to announce it. If however at the time of the perpetration time limitation was not suspended, then the adjudication of expiration is the responsibility of law enforcement authorities only, and eventually that of the courts. Subsequently, legislators have no say in this matter.

It is completely unconstitutional, that, pursuant to the law, time limitation shall be revived if the state has failed to exercise its "criminal code" due to political considerations. This however may mean many different things: proceeding did not commence, proceeding was stopped without legal reasons, case was finished with unlawfully light measures, etc. It is even more difficult to clearly define what qualifies for political reasons, since the time frame of the act is so long that it has failed to consider the multiple political changes. The criminal policy of an era may subsequently be termed as unconstitutional, but it is not possible to subsequently deem non-existent the entire activities of criminal powers that functioned in contradiction with the principles of constitutional statehood, and conclude from the foregoing that time limitation with respect to the indicated matters could not have commenced.

Both the act and the decision of the Constitutional Court touch upon the basics of the establishment of constitutional statehood. The question at stake here was not whether the real felons of the communist regime will be punished or not, but rather, whether the rule

of law—which affects the future of a democratic state—shall be subordinated to the emotional needs of a segment of the population. Let me add, that due to certain political considerations, the needs of the constitutional state coincide with those of a reasonable decision. The political situation is rather simple. The political system in Hungary changed without revolution. The change, in part, is the result of compromise: they did not fire shots, we do not take revenge. The communist system was indeed inert, but one must admit: they could have fired guns.

Case 4: The freedom of the press and the electronic mass media became a constitutional problem in Hungary. A real fight or war has developed about the question how the media can be independent from the state power. Both the government and the opposition wished to have control over the media. Its ultimate logic is not only the focused role of the media and free speech in a democratic regime but also because these problems manifest the most transparently the vulnerable parts of the present Constitution.

The fairly complicated issue may be summarized the following way:

According to the government a significant piece of the media, especially the radio and the television is biased and one-sidedly anti-governmentalist (obviously, the oppositional parties claim the same too, with a counter-aspect though). Therefore the government needs to carry out a more direct and greater influence upon the media, first of all with personal appointment policy which is actually allowed by a governmental decree. The government has the political responsibility for public media, thus the nomination right of the President of Republic is just a formal action.

The Constitutional Court ruled the followings in its two subsequential resolutions. As for me, I believe that both of them has indulged the Court into the politics. It was so even if the decisions were interpreted in favour of and for both parties. It was no wonder that instead of a deeper analysis the competence of the Constitutional Court became into the spotlight being criticized by both parties (and also by the court). That is for sure though, that the Court has expressed its opinion—with abstract constitutional interpretation—on obviously political dilemmas which due to lack of relevant provisions may not be solved by the present Constitution. Besides, if provisions were existed the clarification of its blurred wordings would have required constitutional amendment.

The Decision of Constitutional Court of 36/1992 argues that the answers to the questions of the President of the Republic relates merely to those problems which have been settled by abstract interpretation irrelevant to the specific case.

Three judges (Géza Kilényi, Péter Schmidt and Imre Vörös) submitted separate opinions. Justice Géza Kilényi argues that both the president and the prime minister are

to account politically as well, but their types are different. The latter one is direct, whereas the president's one is more broad, i.e. it is not about superior or inferior responsibilities. Justice Schmidt concludes the competence and sphere of the president from the characteristics of the separation of powers. Therefore it holds the Court's scope incompetent in resolving problems which were to be elaborated by constitutional amendment. Justice Imre Vörös claims that the Court extends its earlier interpretation on the competence of the president, it orientates on political issues and deals with questions on which the Constitution is tacit.

It is obvious that the Court has been standing under a strong governmental pressure for a long time. Many of its earlier decisions have already challenged the loathing of the governing parties. Nevertheless its legally often untenable decisions are full with political consequential elements which do weaken the reputation of this highly esteemed democratic institution. However, it is more than sure that further political oppression is going to be performed upon them. There was such a case, in which the prime minister demanded that rather than doing abstract constitutional interpretations the Constitutional Court should judge wether constitutional or not that the President of the Republic did not appoint the leaders of TV and Broadcasting companies. (According to the Constitution the president can refuse the recommendation of the prime minister only in the case if it is dangerous for the whole democratic system or formally illegal. Substantively the president does not have the right to judge the appointment.) Nonetheless if the Court had been willing—under the pretext of interpretation—to read into the Constitution things on which the Constitution were tacit, may not be surprised upon such expanding legal interpretative exactions. It is also the consequences of that assertion uttered by Chief Justice László Sólyom, stating that throughout the cases the Court writes the so far invisible future constitution of the country too.

Closing Remarks

Either before the 1990 general elections, or thereafter, no Hungarian political force was in favour of making a new constitution. According to one possible scenario, the drafting of a new constitution could have commenced, provided, however, that such agreement, by and among the parties, had been reached prior to the elections. In other words, a constitutional convention should have been held. According to another possible scenario, parties should have come to a consensual agreement regarding *every* constitutional issue, followed by a gradual amending process of the constitution, thus making way for the adoption of a new constitution. This should have required compromises on both ends. Even prior to the general elections, the relationship between the different parties had deteriorated to such an extent that no mutual accord was feasible with respect even to commonly shared principle issues. This is why the two major parties of the time opted for a third possibility: a pact between the Democratic Forum and the Free Democrats. This act, however, postponed the drafting of a new constitution for many years to come. Such basic issues, as e.g. the constitution, might necessitate compromises, however, not

for tactical, but rather political considerations. Giving preference to tactics may result in unexpected consequences when, due to their unpredictability, anticipated benefits might just as well get reversed. Instead of symmetrical benefits, one sees the birth of asymmetrical drawbacks.

The current amendment-practice of the Constitution may eliminate insignificant inconsistencies, however, it will always depend on short-term political bargaining, and would not boost respect for the Constitution. The initially frequent amendments brought about practically new constitutions, and were, therefore, under constant attack. Constitution-making is not identical to legislation, including the two-third legislation, as well, as legislators would, in line with the actual political set-up, draft the constitution for their own purposes, even when compromises are reached. If the Constitutional Court drafted their own "Invisible Constitution", that would neither be desirable, as this body, however respectable, is not the embodiment of national sovereignty.

The coalition program of the new government of 1994 calls for the drafting and adoption of a new constitution. The coalition, having a two-third majority, would alone have enough power for it. A new constitution, however, is not a matter of who has greater strength. A national consensus is required, otherwise, in four years' time, a new and differently composed government might again re-draft the constitution. To date, there has been no consensus regarding either the substantive or procedural issues of the constitution-making. Nevertheless, some progress between the government and the opposition has been made; it has been agreed that there will be no unconsensual constitution-making. The constitution, however, should immediately be amended in two respects. It should be stipulated that any amendment of the constitution shall be subject to the adoption of the new constitution. And similarly, that the change contained therein, shall enter into force subject to approval by the successive parliament. Effective immediately, it should also be stipulated that the election law may be amended during the first two years of the term of the government in order to prevent any tactical abuse of the same.

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Quest for Global Harmonization of Private International Law from the American Perspective

I. Introduction

Approaching to the end of the second milenium, the global harmonization of private international law has become a vital cohesive force for the regionally segmented world community. As the European Union emerges to the model of a federal system from the perspective of private international law, the creative American experience in this field requires a comparative assessment.

Today, private international law stimulates a historical convergence between the common law and the continental civil law tradition which has been clearly manifested in the emerging new *lex mercatoria*.

On December 11. 1986, the United States deposited at the United Nations Headquarters in New York its instrument of ratification of the 1980 U.N. Convention on Contracts for the International Sale of Goods (hereinafter: "CISG", "Vienna Convention" or "Convention"). With the ratification of the United States, Italy, and the People's Republic of China, the Convention became effective on January 1, 1988.[1] This culmination of a century-long effort by legal experts and merchants of the world

1 WINSHIP: The Scope of the Vienna Convention on International Sales Contracts, in: *International Sales: The United Nations Convention on Contracts For The International Sale of Goods* 1-1 (N. Galston & H. Smit eds. 1984) [hereinafter: International Sales].

community revitalizes the ancient *lex mercatoria* it also presents the challenge of its implementation in transnational legal practice.

It is anticipated that the ratification by the United States will accelerate the acceptance of the Convention by other nations. The large number of signatures and the drafting history, which reflect sophisticated compromises between diverse jurisprudential and socio-economical views, are also encouraging signs for world-wide ratification. Despite an optimistic prognosis of future ratifications of the Convention, however, it is quite likely that a substantial number of countries will not join in the next decade. Private international law, therefore, will be needed as a guiding compass in the decentralized transnational legal environment and will continue to be a relevant vehicle to achieve universal unification and legal security.

Article I (1)(B) of the Vienna Convention relies on the rules of private international law of the potential forum in an attempt to extend the scope of application of this Convention. The United States, along with several other ratifying countries, ratified the Convention subject to a reservation to Article I (1)(B). The United States adopted the position that the Convention applies only if both of the contracting parties have their places of business in countries that ratified the Convention; rules of private international law of the forum cannot lead to the application of the Convention. For practical purposes, therefore, either the Uniform Commercial Code or the relevant foreign commercial law apply unless both of the individual contracting parties are from a Convention state. The unsettled and unpredictable status of private international law prompted the United States' limited adoption of the Convention.

Thus, it remained even after ratification a critical goal for world trading nations to unify the choice of law rules applicable to the international sale of goods. This objective was realized in the course of a unique joint conference with the participation of United Nation Commission on Unification of International Trade Law ("UNCITRAL") and the Hague Conference on Private International Law. This conference prepared he Hague Draft Convention on the Law Applicable to Contracts for the International Sale of Goods ("Hague Draft Convention" or "Hague Convention") which takes great steps toward resolution of legal and socio-economic differences in the world community of trading nations.[2]

This Article assesses briefly the potential implementation of the Hague Draft Convention from the standpoint of the American interest in the world-wide unification of international trade law.

II. Lack of Separate Private International Law in the United States

Private international law developed on the continent of Europe as a result of the gradual disintegration of the *ius commune* which was founded on the Roman law heritage.[3] As private laws gradually became "nationalized" by the emerging sovereign nation states in

2 *Id.*

3 See generally RABEL, E.: *The Conflict of Laws: A Comparative Study*, 1960, 1-48.

the final framework of national codification, private international law became a unique guiding and harmonizing legal force. The principle of national sovereignty set the foundation for the creation of rules of private international law, and a unique body of domestic laws developed which provided solutions for international jurisdiction and choice of law problems.

It is not surprising that the founder of the American conflict of laws, Justice Story, relied on the well-developed European traditions of private international law, in *Commentaries on the Conflict of Laws*, which transplanted the European tradition into American soil.[4] As the United States' complex federal system developed in the 19th and early 20th century, conflict of laws primarily served the interests of the American interstate system; the truly international cases and problems suffered relative neglect. In the present era, the lack of a unique well-developed body of private international laws engenders substantial uncertainty and legal insecurity for both Americans and foreigners contemplating the establishment of legal relationships across national boundaries.[5]

The United States' want of a separate body of private international law presents major problems in the course of attempts at international unification of laws applicable to the international sale of goods. Since the United States joined the Vienna Convention subject to reservation, its implementation will begin with a restrictive approach; the United States will disregard rules of private international law as a potential source leading to the application of the uniform laws. At this time, it is critical for the United States' interests to reassess the significance of a unique separate body of private international law applicable to international sale of goods. It is well recognized that in the United States, the international conflict of laws basically covers questions such as judicial jurisdiction over foreign defendants, choice of law, international judicial assistance and cooperation, and questions of recognition and enforcement of foreign country judgments. Lack of a uniform and separate body of laws governing international conflict of law problems has inhibited the United States' ability to participate effectively in the international unification process thus far. The ratification of the Vienna Convention likely presents a fresh opportunity for progress in internal unification of American rules of private international law.[6]

One of the most burning problems for the United States in our decade lies in its sliding performance on the world markets. The staggering trade deficit calls for effective legislative action by the United States Congress to secure greater protection and performance of the American industries within the legal framework of the GATT

4 STORY, J.: *Commentaries on the Conflict of Laws* (8th ed. 1883).

5 See SCOLES, E.—HAY, P.: *Conflict of Laws*, 1982, 8–34.

6 GABOR, F. A.: Emerging Unification of Conflict of Laws Rules Applicable to the International Sale of Goods: Uncitral and the New Hague Convention on Private International Law, 7 *Northwestern Journal of International Law & Business*, 1986, 696, 699–700.

System.[7] While this work is progressing on the level of public laws and public international law, the private transactional aspects of international trade should not be neglected. The unsettled status of international trade on the level of the private transaction can be considered a unique "non-tariff trade barrier". Thus, it is critical that the United States make significant progress toward the harmonization and eventual unification of private laws and in particular, private international law governing international sale of goods. The United States' ratification of the Vienna Convention signifies progress in this direction.

III. Recognition of Party Autonomy

As long as the United States does not have a separate codified or even harmonized body of laws dealing with private international law, the most effective legal safeguard for American transnational contracts lies in the nearly universally recognized principle of party autonomy. Thus, the contracting parties' freedom to control their transactions shall be examined on the levels of both legislative and judicial jurisdiction. For all practical purposes, the two levels of party autonomy are very closely related to each other. Experienced legal counsel, in drawing up contracts, generally designates the forum whose law will be applicable to the contract in the form of a stipulation of an effective choice of law clause. In other words, the private international law rules of the selected forum will determine the perimeters of the parties' choice of law options.

1. Freedom of Choice of Law

In a transnational contract, a properly drafted choice of law provision effectively reduces risk in the transnational legal environment. A survey of national codifications and the prevailing common law approaches in the United States, United Kingdom and other Commonwealth jurisdictions, as well as the most recent international codification of conflict of law rules, leads to the conclusion that the principle of choice of law freedom of the parties is almost universally recognized at the present time.[8] The essential differences lie in determining the criteria, limitations, and general perimeters for the parties' exercise of choice of law freedom.

The Uniform Commercial Code (U.C.C.) adopts a modern and liberal approach for party autonomy in § 1–105, providing:

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7 For an excellent and comprehensive discussion by leading authorities, see Symposium, U. S. Trade Policy: Problems and Options, *New York University Journal of International Law*, 1986, 1075.

8 GABOR, supra note 6, at 706–708 (for the United States). See PELICHET, M.: *Report on the Law Applicable to International Sales of Goods* (Prel. Doc. No. 1, Sept. 1982), 95–119. See also JOHNSTON: Party Autonomy in Contracts Specifying Foreign Law, *Wilhem & Mary Law Review*, 1966, 37.

> When a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.[9]

Thus, § 1–105 codifies a two-tier test. First, the parties must agree on the governing law. Second, the transaction must bear a reasonable relation to the state of the chosen law. The official comment to § 1–105 does not define the term "reasonable relation". Subsequent case law has identified a number of relevant factors to be considered in determining whether a relation is reasonable. The factors include the location of the signing of the contract, the parties' principal places of business, the place where the greater part of performance occurred or was to have occurred, and the location of any property subject to the contract.[10]

In American conflict of laws, therefore, § 1–105 of the Uniform Commercial Code offers a flexible framework for the parties choice of law freedom, which has been further refined by leading judicial decisions.[11] Restatement (First) of Conflict of Laws did not provide choice of law freedom for the contracting parties, based on theoretical grounds that denied the parties' rights to become legislators in their private contract.[12] Judicial practice, even in states holding this traditional approach to conflict of laws, gradually recognized party autonomy in choice of law.[13]

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9 *Uniform Commercial Code*, § 1–105. See also LEFLAR: Conflict of Laws Under the Uniform Commercial Code, *Arkansas Law Review*, 1981, 91–100.

10 LEFLAR: *ibid.* 9, at 91–100.

11 One annotation of the *Uniform Commercial Code*, illustrates this point:

Where a loan agreement between Venezuelan corporate borrower and Swiss corporate lender contained choice of law clause naming New York law as governing, and there were considerable contacts with New York, New York law governed.

Where a Venezuelan corporation borrowed money from Swiss corporation with principal place of business in New York, notes were delivered to lender in New York. New York was the place where lender paid to guarantor's commission on guarantees, and prior loan agreement between parties provided New York law would govern, New York law governed second loan agreement, which contained no choice-of-law provision. Corporation Venezolana de Fomento v. Vintero Sales Corp., 629 F. 2d 786 (2d Cir. 1980), cert. denied, 449 U. S. 1080., 1 University of Los Angeles, 15 (1986).

12 See Note, Effectiveness of Choice of Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination, *Columbia Law Review*, 1982, 1661.

13 See Pritchard v. Norton, 106 U. S. 124 (1882) ("presumed intention"); Siegelman v. Cunard White Star, Ltd., 221 F. 2d 189 (2d Cir. 1955). A more recent case, Goodwin Brothers Leasing, Inc. v. H & B, Inc., 597 S. W. 2 d 303 (Tenn. 1980), retained the traditional approach of the Restatement of Conflicts of Law § 332 (1934) [hereinafter: Restatement]. In this case, the corporate parties stipulated the law of a state which permitted the extraction of a higher rate of interest on loans than did the law of the other interested state. The Tennessee Supreme Court relied on Seeman v. Philadelphia Warehouse Co., 274 U. S. 403 (1927), in recognizing the validation principle in contracts. As long as the contract has a substantial natural relationship with the law of the validating state, and the difference between the two interest rates is not substantial, the parties' expectation shall be given effect. The Tennessee Supreme Court further referred to Uniform Commercial Code, § 1–105 as the uniform foundation for the parties' autonomy. It is interesting that leading provisions of Restatement (Second) of Conflicts of Law (1971) [hereinafter Restatement (Second)], Chapter

Today most of the states follow the modern approach of Restatement Second of Conflict of Laws. Article 187 provides a more refined premise for the parties' choice of law decisions.[14] Here the "reasonable relations" requirement is replaced by the requirement of "substantial relationship" to the parties or to the transaction, or as an alternative, a "reasonable basis" requirement for the recognition of parties' choice of law. The parties' choice of law freedom can control any particular issue. Thus, Articles 1 and 7 recognizes the notion of "depacage" by initially isolating the legal issues and applying a separate choice of law analysis to each of them. If the substantial relationship test is not satisfied, the alternative reasonable basis requirement can be satisfied by a properly drafted choice of forum clause.[15]

An additional major limitation on the parties' choice of law freedom is based on "the fundamental policy of a state which has a materially greater interest than the chosen state and which would be the state of the applicable law in the absence of choice of law by the parties".[16] In practical terms, an effective choice of law provision should be stipulated with reference to the conflict of laws system of the potential forum which will determine the applicable law in the absence of choice by the parties, or in the case when this choice is disregarded. On this basis, the fundamental policy of the otherwise applicable law and the forum must be analyzed and assessed, and then the factual contacts should be closely scrutinized between the jurisdiction and the selected law to determine which state has a materially greater interest in applying its own policies.

In comparison to the relatively restrictive American approach to party autonomy, that of civil law countries, generally provides more freedom for the parties' choice of law.[17]

6, and Chapter 8 §§ 186, 203, were also analyzed and relied on in making the proper evaluation of the parties' autonomy. See also JAMES: Effects of the Autonomy of the Parties on Conflict of Laws Concial Contracts, *Georgian Law Journal*, 1958, 260; WEINBERGER: Party Autonomy and Choice-of-Law: The Restatement (Second), Interest Analysis, and the Search for a Methodological Synthesis, *Hofstra Review*, 1957, 553; Note, Commercial Security and Uniformity Through Express Stipulations in Contracts as to Governing Law, *Harvard Law Review*, 1949, 647.

14 See Note, supra note 12 (an interesting analytical approach opposing party autonomy).

15 For a comprehensive overview, see GILBERT: Choice of Forum Clauses in International and Interstate Contracts, *Kentucky Law Journal*, 1976, 1.

16 Barnes Group, Inc. v. C & C Products, Inc., 716 F. 2d 1023 (4th Cir. 1983) (a restrictive covenant is found to violate fundamental state policy). See also Southern International Sales Co. v. Potter & Brumfield Div. of AMF, Inc., 410 F. Supp. 1339 (S. D. N. Y. 1976) (invalidating a clause permitting termination at will of a dealer's contract and choosing Indiana law as controlling, because the clause was enforceable and the defendant's operations were based in Indiana. Plaintiff, a Puerto Rican corporation, successfully relied on a Commonwealth statute protecting against unilateral termination clauses to override the choice of law).

17 A Swiss Draft was published in 10 Botschaft zum Bundesgesetz über das internationale Privatrecht BBl 82.072 (1982). The Federal Republic of Germany Draft was published in 5 Praxis des Internationalen Privat- und Verfahrensrecht (1983). The Austrian Federal Statute on Private International Law is found in 15 Bundesgesetz (June 1987), Bundesgesetzblatt No. 304, translated in *American Journal of Comparative Law*, 1980, 197.

For the People's Republic of Hungary approach to conflicts, see A Magyar Népköztársaság Elnöki Tanácsának 1979. évi 13. számú törvényerejű rendelete a nemzetközi magánjogról (Law-decree No. 13 of the Presidential Council of the Hungarian People's Republic on Private International Law), *Magyar Közlöny*,

Generally, civil law countries do not require a "reasonable" or "substantial" nexus between the chosen law and the essential elements of the transaction or the contracting parties. The parties may choose any law. The Vienna Convention recognizes the parties' autonomy in flexible language stated in Article 6: "The parties may exclude the application of this Convention, ... derogate from it or vary the effect of any of its provisions."[18]

Article VII (1) of the Hague Draft Convention supplemented this relatively general and vague provision by providing more specifically that:

> A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be expressed or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract.[19]

This threshold provision allows the parties complete freedom margin to choose the law applicable to their contract. There are two alternative requirements in drafting the criteria for the proper choice of law provisions according to the Hague Draft Convention. First, the choice of law should preferably be made expressly in the contract. Second, as an alternative, an implied choice of law by the parties is acceptable under the Hague Draft Convention.[20] It is obvious that no further requirement for the parties' choice of law, in particular, no nexus between the law and the parties or the transaction be met. On the other hand, if the other sections of the Hague Draft Convention are considered, Article

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1979, 495, translated in GABOR, F. A.: A Socialist Approach to Codification of Private International Law in Hungary: Comments and Translation, *Tulane Law Review*, 1980, 63, 80.

For the USSR approach, see Fundamental Principles of Civil Legislation of the USSR and for the Union Republics, Law of Dec. 8, 1961, 18 Ved. Verkh. Sov. SSSR no. 525; Fundamental Principles of Legislation of the USSR and of the Union Republics on Marriage and the Family, Law of June 27, 1968, 8 Ved. Verkh. Sov. SSSR. See also GABOR, F. A.—MAVI, V.: Harmonization of Private International Law in the Soviet Union and Eastern Europe: Comparative Law Survey, *Review of Socialist Law*, 1984, 97. For Czechoslovakia's approach to private international law, see Code of International Trade, discussed in Glos, The Czechoslovak Law of Sale, *Review of Socialist Law*, 1978, 107. For the Polish approach, see Law of Nov. 12, 1965, Concerning Private International Law, 46 Dziennik Ustaw Polskiej Rzecrypospolitej Lodowej item 290, discussed in LASOK: The Polish System of Private International Law, *American Journal of Comparative Law*, 1967, 330. For the German Democratic Republic's private international law, see Law of Dec. 5, 1975, [1975] *Gesetzblatt Der DDR* I 748, discussed in JUENGER: The Conflicts Statute of the German Democratic Republic: An Introduction and Translation, *American Journal of Comparative Law*, 1977, 332. See generally MÁDL, F.: *Foreign Trade Monopoly-Private International Law*, 1967, 53; ROMAN: Socialist Conflict of Laws Rules and Practice in East-West Trade Contracts, *Law and Policy in International Business*, 1975, 1113.

18 Sales Convention, art. 6.

19 GABOR: supra note 6, at 706–708. See also DORE: Choice of Law Under the International Sales Convention: A U. S. Perspective, *American Journal of International Law*, 1983, 521, 529–536.

20 See Travaux Préparatoires, in *Hague Convention Minutes* No. 6 of Commission I: Intervention Nos. 45–65, (1985).

17 and Article 18 refer to both the traditional negative and the more recent positive form of public policy of the forum state as controlling the parties' choice of law freedom.[21]

In sum, the parties' choice of law provisions of the Hague Draft Convention and the Uniform Commercial Code can be reconciled in future judicial practice. Both Article 7 of the Hague Convention and § 1–105 of the Uniform Commercial Code reflect the need for flexibility in international commerce. The essential difference lies in the requirement of the UCC of a "reasonable relationship" as additional criteria. In judicial practice, however, the public policy of the potential forum and the other closely interested and related states can also maintain effective control over the parties' autonomy, and the reasonable relationship test may become superfluous.

2. *Forum Selection Clauses*

The revitalized *lex mercatoria* of the Vienna Convention and the Hague Draft Convention will be applied by national courts and arbitration tribunals. It is an unavoidable reality that the legal and cultural background of each decision-maker will influence his implementation of the interpretation of the uniform laws. For this reason, both Article 8 of the Vienna Convention and Article 16 of the Hague Draft Convention address the threshold problem of effective interpretation. These provisions can be considered a key to the future success of the Conventions. Accordingly, the interpretation of the Convention should be based on its international character and on the need to promote uniformity in its application.[22] An ideal solution to more effective interpretation of the new *lex mercatoria* is the designation of an internationally recognized judicial or arbitration authority for consistent and binding interpretation of the relevant Conventions.[23]

For the immediate future, however, the pragmatic implementation of the uniform commercial laws can be based on the contracting parties' autonomy in controlling the perimeters of the dispute settlement. It is an encouraging development that forum selection or prorogation clauses and arbitration clauses are almost universally recognized by the world trading nations.[24] While forum selection clauses are universally recognized,

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21 *Id.*

22 GABOR: supra note 6, at 723. Article 16 of the Hague Draft Convention addresses one of the more significant threshold questions of effective interpretation, a key to the future success of the Convention. Article 16 provides that "[i]n the interpretation of the [Hague Draft] Convention, regard is to be had to its international character and to the need to promote uniformity in its application". In a decentralized transnational legal environment, the decision-makers in disputes must rely on this provision in order to escape their respective national heritages and biases in interpreting transnational contracts. Thus, the emphasis is on recognizing the importance of the international character of transactions and the objective of uniformity in the construction of the Hague Draft Convention. This guideline for interpretation coincides with the basic guidelines provided in Article 8 of the Sales Convention.

23 *Id. at* 726.

24 See FARQUHARSON: Choice of Forum Clauses: Brief Survey of Anglo-American Law *International Law*, 1974, 83, 91–93; SHUZ: Controlling Forum Shopping, *International and Comparative Law Quarterly*. 1986, 374, 377.

the actual criteria and requirements for their recognition show significant differences. International unification of forum selection clauses would serve a very useful purpose. Unfortunately, the Hague Convention on the Unification of Choice of Forum Clauses did not receive wide support and has not received a sufficient number of ratifications to become effective at the present time.[25]

Traditionally, American courts expressed hostility toward forum selection clauses. The courts believed that this type of clause could deprive the court of its legitimate jurisdictional power; therefore, in many cases they rejected it as violating the public policy of the otherwise available forum court.[26] In 1972, the United States Supreme Court, in the landmark decision of *Bremen v. Zapata Off-shore Company*,[27] adopted a new approach to forum selection clauses in transnational contracts. In this case, Zapata, a Houston-based American corporation, contracted with a German corporation, Unterweser, to tow the parties' drilling rig from Louisiana to Italy. The contract between them provided that "any dispute arising must be treated before the London Court of Justice".[28] In addition, the contract contained two clauses exculpating Unterweser from liability for damage done to the barge being towed. As the result of damages suffered to the drilling rig, law suits were filed in the United States and English courts.[29]

The English Court of Appeals refused to stay the English action, stating that Zapata had failed to show the strong reasons necessary to overcome the prima facie presumption that forum selection clauses are valid.[30] Zapata had argued that some of the witnesses

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25 DAVID: The International Unification of Private Law, in 2 *International Encyclopedia of Comparative Law*, 1976, 145–148.

26 This traditional judicial hostility has been changing, as reflected in Restatement (Second), supra note 13, § 80. Today, choice-of-forum agreements have been enforced except when it is "unfair or unreasonable" to do so. See Model Choice of Forum Act (a uniform law adopted by four states and withdrawn in 1975), reprinted in *Handbook of The National Conference of Commissioners on Uniform State Laws*, 1976, 351.

27 407 U. S. 1 (1972).

28 The Chaparral/Bremen Litigation: Two Commentaries, *International and Comparative Law Quarterly*, 1973, 329. See also JUENGER: Supreme Court Validation of Forum-Selection Clauses, *Wayne Law Review*, 1972, 49; NADELMANN: Choice-of-Court Clauses in the United States: The Road to Zapata, *American Journal of Comparative Law*, 1973, 124; REESE: The Supreme Court Supports Enforcement of Choice-Forum Clauses, *International Law*, 1973, 530.

29 Bremen, 407 U. S. at 2.

30 Today an English court would apply the European Economic Community Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, Sept. 27, 1968, 15 *J. O. Comm. Eur.* (No. 299) 32 (1972) (entered into force for original member states Feb. 1, 1973), translated in 3 *Common Mkt. Rep.* (CCH) 6003 (1977) [hereinafter Brussels Convention]. One of the parties to the agreement, Unterweser, was domiciled in the Federal Republic of Germany, a country which ratified the Brussel Convention; the forum selected, England, was also a party to this Convention. Thus, Article 17 of the Brussels Convention would apply and the English courts would be required to enforce this forum selection clause. This result was achieved by the English Court of Appeals which considered this case. Unterweser Reederei G. M. L. H. v. Zapata Off-Shore Co., 2 Lloyd's Rep. 158 (C. A. 1968). See also GIARDINA: The European Court and the Brussels Convention on Jurisdiction and Judgements, *International and Comparative Law Quarterly*, 1978, 263–267.

to this action were Americans and that evidence relating to issues of fact was in the United States. However, Justice Willmer observed that a number of the witnesses were German, and the tug was German and manned by German crew. The fact that the majority of the witnesses were in America was insufficient to stay the English action. As the contract between the parties provided for the application of the English law, the court did not have to consider the effect of applying a foreign law.[31]

Meanwhile, in the United States, suit had been brought in the United States District Court in Tampa, Florida. Unterweser's attempt to dismiss this action eventually reached the United States Supreme Court.[32] The Supreme Court adopted the English view and announced the prima facie presumption in favor of the validity and enforceability of choice of forum clauses. This presumption, the court believed, was merely the other side of the proposition recognized in *National Equipment Rental Ltd. v. Szukhent*,[33] which indicates that parties to a contract may agree in advance to submit to the jurisdiction of a given court. As a result of this presumption, the party bringing the suit in a court other than the contracted choice of forum bears a "heavy burden" of proof. The parties resisting the choice of forum provision have the burden of clearly showing either that the clause is invalid because of fraud or overreaching, or that enforcement of the clause will be unreasonable or unjust under the particular circumstances of the case.[34] In these circumstances the court found no evidence of fraud or overreaching, and England was held not to be an unreasonable forum, due to neutrality and expertise of the London Court in admiralty cases. In addition, litigating in England would not place an unreasonable burden on Zapata.[35]

The Supreme Court indicated that a contracted choice of forum may not be enforceable if enforcement would contravene "a strong public policy" of the forum in which the action is brought.[36] Zapata had argued that exculpation clauses contravene public policy, and since these were enforceable in England, that the forum selection clause should not be enforced. The United States Supreme Court found, however, that the exculpation clauses in international towage contracts did not violate public policy.[37] On the other hand, if a contracted choice of forum provision would result in the violation of a binding federal regulation, public policy would be violated and the provision would not be enforced.

Although *Bremen* was an admiralty case involving a foreign forum, its holding is not limited to admiralty cases but applies to all federal court cases involving forum selection clauses, even if a domestic forum is chosen and the action is between parties

31 Zapata 2 Lloyd's Rep. at 160–161.
32 Bremen, 407 U. S. 1 (1972).
33 375 U. S. 311 (1964).
34 Bremen, 407 U. S. at 15.
35 *Id.*
36 *Id.*
37 *Id.*

of different states.[38] Moreover, a number of states have also adopted the *Bremen* decision.[39]

The *Bremen* rationale was adopted by the United States Supreme Court in *Sherk v. Alberto Culver Co.*[40] to enforce a contract clause providing for settlement of disputes by arbitration before the International Chamber of Commerce in Paris, France. Despite this clause, the American party to the agreement brought suit in the Third District Court in Illinois. The Supreme Court held that an agreement to arbitrate before a specified tribunal is in effect a specialized kind of forum selection clause that designates not only the site of the suit, but also the procedure to be used in resolving the dispute.[41]

Party autonomy to control the method of dispute settlement in a transnational contract is almost universally recognized. One of the most important regional developments in this area is the ratification by most of the members of the European Economic Community ("Brussels Convention")[42] of the Brussels Convention on Jurisdiction and Judgment. Article 17 of the Brussels Convention allows the contracting parties to confer jurisdiction on the courts of the member's state by agreement. Agreement to confer jurisdiction overrides all other bases of jurisdiction, except in those matters in which a court has exclusive jurisdiction.[43] The requirements for drafting a valid prorogation clause under the Brussels Convention are strictly construed by leading cases submitted for interpretation to the European Court of Justice.[44] The forum selection clause must be in writing and must designate precisely the jurisdiction of the court and reflect a valid agreement by both parties. Thus, the essential criteria for evaluation of the parties' choice of forum clause is comparable to the American approach outlined in the Bremen decision, the court will examine the agreement for overreaching, unequal bargaining positions or any other illegalities in the consent which invalidate the contractual choice of forum. As long as the parties manifest a valid consent in writing, however, the European courts will not go further to scrutinize the potential hardship on one of the parties or the possibility of violation of public policy of the otherwise available forum.

Arbitration provides a more internationally accepted form of dispute settlement in transnational contract disputes. In 1970 the United States became a party to the 1958 United Nation Convention on the Recognition and Enforcement of Foreign Arbitration

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38 See JUENGER: supra note 28, at 59. The Bremen rationale was adopted by the United States Supreme Court in Sherk v. Alberto Culver Co., 417 U. S. 506 (1973). To enforce a contract clause providing for settlement of disputes by arbitration before the International Chamber of Commerce in Paris, France. Despite this clause, the United States party to the agreement brought suit in the Third District Court in Illinois. The Supreme Court held that an agreement to arbitrate before a specified tribunal is, in effect, a specialized forum selection clause that designates not only the site of the suit, but the procedure to be used in resolving the dispute as well. *Id. at* 519.

39 Manrique v. Fabbri, 493 So. 2d 437, 439, 439 n. 3 (Fla. Sup. Ct. 1986).

40 Sherk v. Alberto Culver Co., 417 U. S. 506. Lawyers edition, Second. 270 (1974).

41 *Id.*

42 Brussels Convention, supra note 30.

43 *Id.*

44 *Id.*

Awards ("Arbitration Convention").[45] In light of this globally adopted Arbitration Convention, arbitration offers a more uniform method of dispute settlement in a transnational contract at the present time. The major advantage of arbitration from the American perspective is the internationally assured recognition of arbitration awards under the Arbitration Convention and the United States' well-established bilateral treaty network in this area.[46] At the same time, the United States has no international treaty relationship on recognition and enforcement of its judicial judgments abroad or *vice versa*. This presents one of the most unsettled and disturbing areas of the American private international law. Therefore, the effective exercise of party autonomy should also extend to the planning of the recognition and enforcement of the final judgements.

In sum, the most effective implementation of the Vienna Convention from the American perspective lies in the full recognition and refined application of the contracting parties' autonomy. The relatively unsettled state of private international law governing transnational contracts places a greater responsibility on international legal counsel in drafting an enforceable, valid choice of law and forum selection provision in every major transnational contract. The exercise of party autonomy should be based on the following step-by-step analysis:

1. a solid understanding of the newly revitalized *lex mercatoria* of the Vienna Convention and other related conventions;

2. a comparative law assessment of the commercial law heritage of both countries in the transnational contract;

3. selection of the proper forum for dispute settlement which is recognized by both the country of the seller and the buyer, as well as other interested countries; and

4. assessment of the private international law rules of the selected forum and the other connected states (at least the private international law system of the state of the seller and the buyer) as a condition for drafting an effective and enforceable choice of law provision.

Even experienced international legal counsel faces considerable difficulty in following this step-by-step analysis in drafting an effective choice of forum clause. Publication of a comprehensive digest covering the relevant municipal and transnational legislative and judicial sources with authoritative scholarly interpretation on the effective exercise of the contractual party autonomy would provide a useful guide. Such a publication might also aid in achieving early uniformity in such provisions.[47]

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45 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Approved Sept. 1, 1970, 21 U. S. T. 2517, T. I. A. S. No. 6997, 330 U. N. T. S. 3.

46 See *International Chamber of Commerce, International Arbitration*, 1984.

47 There are several multi-volume publications covering transnational commercial laws, such as *Digest of Commercial Laws of The World* (G. Kohlik ed. 1985). This proposal would focus on the private international law aspects of the transnational contracts.

IV. Applicable Law in the Absence of an Exercised Choice

It is certainly the preferred solution for the contracting parties to exercise their autonomy and to stipulate an effective forum selection and choice of law clauses in their contract. Both national and international codifications of private international law strongly prefer and rely on the exercise of the parties' contractual autonomy. In the absence of choice of law by the parties, national laws provide more or less comparable directions for the applicable law. The analysis of this article now turns to a comparison of the prevailing American approaches set out in the Uniform Commercial Code and Restatement Second on Conflict of Laws with the most recent conflict of law rules applicable to international sale of goods set out in the Hague Draft Convention.[48]

The 1972 official text of the Uniform Commercial Code provides only a very brief choice of law rules to govern in the absence of the contractual choice of the parties. Section 1–105 of the UCC provides:

> Except as provided hereafter in this section, [and] failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

The major objective of this section is to extend the scope of application of the Uniform Commercial Code as far as possible. The permanent editorial board of the UCC and leading legal scholars believe that the application of the UCC should be extended. They justify this extension with a number of factors, including its comprehensiveness, the uniformity that it provides, and its reformulation and restatement of the law merchant, its role in furthering the understanding of the business community of transnational contracts.[49]

The Uniform Commercial Code truly became the uniform substantive law within the United States by the middle of the 1970s, and as a result interstate conflict of law problems diminished. At the same time, the very simple and misleadingly straightforward language of § 1–105 did not seem to be sufficient to cover the complexities of transnational contracts. The "appropriate relation" test refers to the choice of law system of the particular forum. Thus, it is an unsettled and unharmonized choice of law system of each of the fifty American jurisdictions which will determine when the UCC or the particular foreign commercial law will control the transaction.

Jurisdictions following Restatement First on Conflict of Laws still retain the relatively simple, jurisdiction-selecting connecting factors.[50] Accordingly, all relevant questions

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48 Restatement (Second), supra note 13, §§ 188–221.

49 See, e.g. LEFLAR: supra note 9, at 100–103.

50 Restatement, supra note 13, § 332:

LAW GOVERNING VALIDITY OF CONTRACT

The law of the place of contracting determines the validity and effect of a promise with respect to

(a) capacity to make the contract;

(b) the necessary form, if any, in which the promise must be made;

relating to the substantive validity of the contract will be determined by the law of the place of acceptance, while the subsequent legal questions concerning the performance of the contract should be referred to the designated place of performance.[51] In addition to these two prevailing rules, most of the courts following the First Restatement also give some recognition to the parties' implied or tacit choice of law in the form of the principle of validation.[52]

Today we are facing the definite trend that Restatement Second of Conflicts of Laws, which was published in 1971 (just a year before the publication of the most recent official version of the Uniform Commercial Code) is gradually becoming the controlling source of authority in most of the American jurisdictions.[53] Restatement Second analysis

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(c) the mutual assent or consideration, if any, required to make a promise binding;
(d) any other requirements for making a promise binding;
(e) fraud, illegality, or any other circumstance which make a promise void or voidable;
(f) except as stated in 358, the nature and extent of the duty for the performance of which a party becomes bound;
(g) the time when and the place where the promise is by its terms to be performed;
(h) the absolute or conditional character of the promise.

Section 358 provides:

LAW GOVERNING PERFORMANCE

The duty of the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to
(a) the manner of performance;
(b) the time and locality of performance;
(c) the person or persons whom or to whom performance shall be made or rendered;
(d) the sufficiency of performance;
(e) excuse for non-performance.

51 See supra note 50. Exclusive reliance on rigid connecting factors, such as *lex loci contractus* (law of the place of the contract), has been strongly criticized by most authorities in both common and civil law countries. Section 188 of Restatement (Second), supra note 13, § 188. Cf. Convention on the Law Applicable to Contractual Obligations (European Economic Communities), *Official Journal European Communities* (No. L. 266) 1 (Oct. 1980) (abandonment of mechanical choice of law rules in regional codification) [hereinafter Rome Contractual Obligations Treaty].

52 E.g., Pritchard v. Norton, 106 U. S. 124 (1882) ("presumed intention" as a basis for validation of interstate commercial contracts). See generally 3 EHRENZWEIG, A.: *Private International Law: A Comparative Treatise on American International Conflict of law*, 1977, 15–33.

53 Cases relying heavily on the Restatement (Second) include: Bankers Trust Co. v. Crawford, 781 F. 2d 39 (3rd Cir. 1986) (holder in due course rights governed by law of place of transfer of cashier's check); Partrederiet Treasure Saga Co. v. Joy Mfg. Co., 804 F. 2d 308 (5th Cir. 1986) (forum non-conveniens case, § 145.2); Syndicate 420 at Lloyd's London v. Early Am. Ins., 796 F. 2d 821 (5th Cir. 1986) (forum non-conveniens case, § 188); Kashfi v. Phibro-Salamon, Inc., No. 83–4358 (S. D. N. Y. 1986) (forum non-conveniens case, § 202); Johnson v. Ronamy Consumer Credit Corp., 515 A. 2d 682 (Del. 1986) (§ 194); Webb v. Dessert Seed Co. Inc., 718 P. 2d 1057 (Colo. 1986) (§ 191); Nationwide Ins. Co. v. Ferrin, 487 N. E. 2d 568 (Ohio 1986) (§ 188).

Restatement (Second) § 191 was also used to inject meaning into the "appropriate relationship" test contained in Uniform Commercial Code, § 1–105(2). Alpert & Wolfman v. Thomas, 643 F. Supp. 1406 (Vt. 1986). Moreover, Restatement (Second) is becoming the standard of reference in most cases using the "modern" approach, not just those which explicitly adopt it, and there is an increasing tendency to use its presumptions as localizing factors. See KOZYRIS: Choice of Law Cases in 1986, *A. B. A. Sec. Conflict of Laws Newsletter* (Dec. 1987).

relies on the modern policy-oriented approach. The innovative starting point is the identification of the relevant legal issue, the isolation of the issue, and application of a complex analysis to this particular issue. This new starting point is called "depacage" and is an innovative American method of resolving choice of law problems. Unfortunately, the same analysis shall govern, without regard to the nature of the problem, whether it is interstate or international in its essential character. The starting point for determining the relevant legal issues related to the validity of a contract for the sale of interest in movable property (chattels), should be the presumptive rule of Article 191 of Restatement Second. It provides:

> The validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in Article 6 to the transaction and the parties, in which event the local law of the other state will apply.

In the context of "the appropriate relation" clause test of the UCC, the core of Article 191 refers to the place of delivery by the seller. The place of delivery is the place where, in the words of § 2–401 of the Uniform Commercial Code, the seller "completes his performance with reference to the physical delivery" of the chattel.[54] In the case of F.O.B. or C.I.F. contracts for instance, the place of delivery generally will be in the place where the seller surrenders the physical possession and control of the goods and delivers them to the carrier or other intermediary party for final shipment to the buyer.[55] The relatively simple solution of Article 191 is a presumptive choice of law rule, which always can be replaced if the particular issue has a more significant relationship to another state under the general principles of Articles 6 and 188. The comments of the Restatement Second following Article 191 however, recognize that in the majority of the cases, the place of delivery will be the state where the seller has his domicile or principal place of business. Therefore, Article 191 frequently leads to the application of the sellers' law. On the other hand, the law of the buyer's domicile or place of business will usually be applied, in the absence of an effective choice of law by the parties, if the delivery of the contract takes place in that state.[56]

The most important question for analysis is whether the prevailing American approach to choice of law in the international sale of goods manifested in Article 191 and Article 188 of the Restatement Second can be effectively reconciled with the emerging new unification of private international law set out in Article 8 of the Hague Draft

54 Uniform Commercial Code, § 2–401. See also Restatement (Second) supra note 16, § 191 comment d.

55 Restatement (Second), supra note 13, § 191 comment d.

56 *Id.* comment f and illustrations.

Convention. This Convention worked out a sophisticated compromise in Article 8, which forms its core. Article 8 (1) provides that:

> To the extent that the law applicable to a contract of sale has not been chosen by the parties in accordance with Article 7, the contract is governed by the law of the state where the seller has his place of business at the time of completion of the contract.[57]

Accordingly, in the absence of choice of law by the parties, the law of the seller's principal place of business shall govern. The rationale for this choice of law rule lies in the legal and socio-economic foundation of the international sales contract. In a typical case, the seller bears the more complex and demanding performance in the transaction. The seller's range of obligations are in relative terms, less precisely defined. Moreover, the seller faces more uncertainty in the transnational environment in the course of fulfilling contractual obligations. Therefore, the seller's reliance on the seller's own legal system to govern all aspects of the transnational contract contributes a great deal towards certainty, uniformity, and a sense of legal security.[58]

The prevailing American approach under Restatement Second does not distinguish between domestic and transnational contracts. The majority of American cases nonetheless reach a result comparable to that of Article 8(1) of the Hague Draft Convention, pointing to the law of the seller. On the other hand, the exceptions to the basic premise form the core of the Hague Draft Convention. The major shift from the law of the seller's state to the application of the law of the buyer's state is found in Article 8(2). This provision states that:

> The contract is governed by the law of the State where the buyer has his place of business at the time of conclusion of the contract, if
>
> (a) the negotiations were conducted, and the contract concluded by and in the presence of the parties, in that state; or
>
> (b) the contract provides expressly that the seller must perform his obligation to deliver the goods in that state; or
>
> (c) the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid. (a call for tenders).[59]

The three major exceptions in Article 8(2) reflect the legal and socio-economic interests of buyers in international sales transactions. Most of the developing countries supported

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57 Hague Draft Convention, art. 8(1).

58 PELICHET, M.: supra note 8, at 85–91. See also JAFFEY: The English Proper Law Doctrine and the EEC Convention, *International and Comparative Law Quarterly*, 1984, 531; LIPSTEIN, K.: Characteristic Performance-A New Concept in the Conflict of Laws in Matters of Contracts for the EEC, *Northwestern Journal of International Law & Business*, 1981, 402, and 406–407.

59 Hague Draft Convention, art. 8(2).

these exceptions for purposes of restoring the balance in favor of the potentially economically weaker buyer.[60] The first exception has a narrow scope of application. It disregards to some extent the realities of modern international trade in that both negotiation and signing of the contract do not typically take place in the buyer's state.

The second exception presents more of a controversy. The practical impact of this exception is much more substantial, because it refers to the determination of the place of delivery of the seller. This requires a characterization of the essential elements of the contract by the potential forum. As long as there are no uniform laws in effect on this point, the injection of this exception creates inherent uncertainties in the application of the Hague Draft Convention.

The most controversial provision of the Hague Draft Convention lies in Article 8(3) which establishes the general escape clause from the application of Articles 8(1) and 8(2). This section reads:

> By way of exception, where in light of the circumstances as a whole, for instance, any business relations between the parties, the contract is manifestly more closely connected with the law which is not the law which would otherwise be applicable to the contract under paragraphs 1 or 2 of this Article, the contract is governed by that other law.[61]

The adoption of this general escape clause generated heated debate among the delegates to the Hague Draft Convention. Many of the civil law countries, including the one-time socialist countries, strongly opposed this clause, emphasizing that it would create an inherent, dangerous uncertainty in the effective application of the Hague Convention. The delegates of the civil law countries, relying on their legal heritage, emphasized the need for clearly defined a priori choice of law rules as the basic foundation for creating international legal security in this area.

At the same time, most of the common law countries, including the United States, placed more weight on the need for practical flexibility in determining the private international law governing the international sale of goods. The delegates from common law countries insisted that a general escape clause such as Article 8(3) forms a necessary part of the overall compromise to work out effective and uniformly recognized choice of law rules dealing with the international sale of goods.[62]

The general escape clause of Article 8(3) of the Hague Draft Convention clearly expresses the American interest manifested under Restatement Second of Conflict of Laws and other modern approaches to conflict of laws.[63] It is well recognized in the United

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60 Hague Convention Minutes, supra note 20, Intervention Nos. 5–10.

61 Hague Draft Convention, art. 8(3).

62 See GABOR: supra note 6, at 718–719.

63 See generally CURRIE: The Verdict of quiescent Years, *University of Chicago Law Review*, 1961, 258; CURRIE: Conflict, Crisis and Confusion in New York, *Duke Law Journal*, 1963, 1; 3 EHRENSWEIG, A. and JAYME, E.: *Private International Law* (spec. pt. 1977); KEGEL: Paternal Home and Dream Home: traditional Conflict of Laws and the American Reformers, *American Journal of Comparative Law*, 1979, 615;

States that Article 191 of Restatement Second expresses only a presumptive choice of law rule which can be replaced by referring to a policy-oriented analysis under the general principles of Article 188. The most significant relationship test of Restatement Second can be viewed as a discretional escape clause for the American judges. Thus, the general escape clause of the Hague Convention is quite consistent with the modern American choice of law methodology; its adoption by the United States will be very easy. The crucial question, still left open, is whether the American choice of law system effectively governs interstate legal relationships in a constitutionally coordinated federal system where the semi-sovereign states share common harmonized legal traditions. The federal system permits and necessitates legal flexibility. On the other hand, in the decentralized transnational legal environment, where there exists 185 sovereign municipal legal systems relying on their own unique national legal tradition, the question remains whether the same level of flexibility and uncertainty can be easily adopted.

V. Proposal for Implementation of International Uniform Laws

1. Vienna Convention

Revitalization of the ancient *lex mercatoria* is one of the major achievements of our century. The creation of a uniform substantive law applicable to the international sale of goods eliminates a major "non-tariff trade barrier" to the free flow of goods and services across national boundaries. The United States has a vital interest in becoming an active participant of this process, as evidenced by its ratification of the Vienna Convention.

The next phase of the unification of international trade law leads to the challenge of implementing the new rules on international and national levels. On the international level, the most important interest of the United States lies in the stimulation of global participation in the unification process. The signs are quite encouraging, as the drafting history and the large number of signatory states point to a potential world-wide ratification of the Vienna Convention.[64] A major stumbling block for effective implementation lies in the unsettled status of private international law as excluded by the United States' and other countries' reservations.[65]

The effective implemention of uniform laws should be based on the consistent and harmonious interpretation of their essential provisions. The most encouraging measure to achieve this goal lies in the creation of a central authority for authoritative interpretation of the provisions of the new uniform laws. One successful example of this method, provided

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NADELMANN: Impressionism and Unification of Law: The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, *American Journal of Comparative Law*, 1976, 1. But see ZWEIGERT: Some Reflections on the Sociological Dimensions of Private International Law or What is Justice in the Conflict of Laws?, *University of Colorado Law Review*, 1973, 283 [This article was published in German as Zur Armut des internationalen Privatrechts an sozialen Werten, *Rabelszeitschrift*, 1973, 435].

64 See WINSHIP: supra note 1, at 8–10.

65 Sales Convention, U. S. reservation to art. 1(1) (6).

in the protocol which was adopted to the Brussels Convention on Jurisdiction and Judgments,[66] gave jurisdictional power to the European Court of Justice for binding interpretation of the Brussels Convention. A similar protocol is also attached to the new Rome Contractual Obligation Convention establishing uniform choice of law rules to contracts for the member states of the European Economic Community the ratification of which is expected in the near future.[67] The same central authority obviously cannot be as easily established in the more diversified transnational community. An attempt should be made however, to designate a court or an arbitration tribunal for potential binding, or at least advisory, authority for interpretation of the Vienna Convention.

As a more feasible alternative, a Digest should be established for the regular publication of leading national court and arbitration decisions relating to the Vienna Convention. Such a publication would promote consistent national implementation and interpretation of the Convention. A status table of the relevant ratifications with reservations and the significant scholarly and expert assessments of the leading provisions and cases could also be included in this comprehensive Digest.[68]

On a national level of implementation of the new *lex mercatoria*, the United States should focus on its complex federal system. The Vienna Convention was ratified by the United States as an international treaty; therefore, under Article VI of the United States Constitution it is the binding law of the land. It is a self-executing treaty which does not require further legislative enactment.[69] Accordingly, it is to be hoped that American courts and arbitration tribunals will give a consistent interpretation of this convention and that the leading cases will be published in an appropriate form.

2. Hague Draft Convention

At the same time, American private international law applicable to the international sale of goods requires prompt action on federal and state levels. The long-term American interest would most likely be best served by federal legislation in this area. Congress has the constitutional power to enact such legislation under the enabling legislation section of

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66 Brussels Convention, supra note 30.

67 The Rome Contractual Obligations Treaty, supra note 50, incorporates a joint declaration providing:

The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland, on signing the Convention is applied as effectively as possible; Anxious to prevent differences of interpretation of the Convention from impairing its unifying effect;

Declared themselves ready:

1) to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to this effect;

2) to arrange meetings at regular intervals between their representatives.

68 GABOR: supra note 6, at 726.

69 See generally McDOUGAL, M.—LASSWELL, H.—MILLER, J.: *The Interpretation of Agreements and World Public Order*, 1972.

Article 4 paragraph 1 of the Full-Faith-and Credit clause. It is true that Congress never utilized this constitutional power in this area, and the overwhelming majority of conflict of law problems have been left for the individual states in our federal system. At this stage of international unification of commercial law, however, it is critical that the United States speak "in one language" with the rest of the world. Reliance on the conflict of law systems of fifty states creates a sense of uncertainty and confusion in transnational commercial relationships. The modern policy-oriented approaches to judicial and legislative jurisdiction of the Restatement Second can function effectively within our federal system where the Constitution and the common legal heritage present a strong cohesive force among the member states. The same rules and approaches, however, can be self-defeating and confusing if applied in a truly transnational context. Thus, the creation of order in the form of a federal unification is an essential step forward in the effective implementation of the new *lex mercatoria* in the United States.

If a federal level of unification of international conflict of laws cannot be accomplished in the immediate future, another alternative for harmonization at the state level could be explored. The National Conference on Uniform State Laws can be used as an effective vehicle to implement international unification of private international law. The commissioners of uniform state laws can draft model legislation on subjects where state legislation might help implement international treaties of the United States, or where world unification would be desirable.[70]

The Hague Draft Convention could serve as an acceptable basis for drafting model legislation to extend the application of § 1–105 of the Uniform Commercial Code. Article 26 of the Hague Draft Convention particularly takes into consideration the interest of federal systems.[71] Uniform legislation is the preferred form of implementation of the Hague Convention for the United States. It could take several years of experimentation on the state level before the legislation could be universally adopted. The United States is free under Articles 26 and 29 of the Hague Draft Convention to make selective reservations and suggest a revisions of the Hague Convention based on its experience in its federal system. The Permanent Editorial Board of the Uniform Commercial Code should carefully consider and analyze this new Hague Draft Convention for future adoption as model legislation. Realistic national unification by this vehicle can contribute to the elimination of a major "non-tariff trade barrier" for our free competition on the world market.[72]

VI. Conclusion

In sum, the United States' interest would be well served by its "legal adoption" of the Hague Draft Convention, which represents thus far a neglected stepchild of the new *lex*

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70 See *Handbook of The National Conference of Commissioners on Uniform State Laws and Proceedings of The Annual Conference Meeting in Its Ninety-Second Year* 220–47 (1983).

71 Hague Draft Convention, art. 26.

72 LANDO, O.: Contracts, in *International Encyclopedia of Comparative Law*, 1976, 3–8.

mercatoria. The core choice of law provisions of the Hague Convention can be reconciled with the prevailing American judicial and arbitration practices under the Uniform Commercial Code and Restatement Second of Conflict of Laws. The scope of Section 1–105 of the Uniform Commercial Code can be extended by any of a number of alternative implementations of this uniform private international law regime of the new *lex mercatoria*.

It is premature to assess the future international reception of the Hague Draft Convention. The widespread ratification and implementation of the Vienna Convention certainly will significantly influence this process. In the meantime national choice of law solutions will be applied which according to Professor Reese's insight quite frequently will lead to comparable substantive results. Thus, the common underlying principles of different national approaches may lead the world trading nations to the acceptance of unavailable compromises manifested in the Hague Draft Convention.

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Biojurisprudence: A New Current in Jurisprudence

The outline of the problems

The moment of conception is the undeniable beginning of all deliberations on human life. as the supreme good that conditions the utilization of other goods. Human life, no matter how explained and justified, is unanimously regarded as the value of values. Human birth is the natural entry into the social and natural environment just as inevitable human death is also a natural way out. Man's biological nature alone determines, by conception, birth and death, the objective boundaries of deliberation on his life.

The uniqueness of human life consists in the entwining of man's biological nature and rational nature, and of the two with social nature. One-sided descriptions of human nature led to the formulation of one-sided paradigms that did not show all its sides: biologism, naturalism, evolutionism, rationalism, culturalism, sociologism, psychologism, legalism etc. The interconnections of all sides of human nature are manifested more fully when its descriptions are subjected to evaluation and regulation in particular normative systems.

The experience of all history of humankind demonstrates that different sides of human nature can be permeated both by good and evil. Good, unlike evil, does not require any normative regulation. Evil, which hurts the body with pain, can arouse evil in human rationality, which in turn provokes evil in man's social interactions. Other directions of evil penetration are also possible. Conceived in the rational or social layer of human nature, evil can affect its bodily side. Normative systems aim at preventing evils resulting from different sides of human nature, or at least at minimizing their effects.

Descriptions, evaluations and norms concerning different aspects of human nature are the object of cognition consolidated through scientific knowledge of man forces narrow

specialization wherein fragments of the particular sides of the rich and interesting human nature can be known. Scientific specialization hampers a comprehensive and coherent description of human nature. There is therefore considerable truth in the words of Edgar Morin, a well-known French philosopher, that the last continent not yet explored by man is man himself. The comprehensive and coherent cognition of human nature is hindered by the rapid development of technology, which interferes in the life of man situated in the life of the natural environment. Scientific knowledge and resultant technology raise both great expectations and just as great fears. This is particularly evident in the development of human nature and the natural environment.

The aiming at an overall and coherent understanding of human life leads to the formation of new currents of thought and the resultant new branches of knowledge. These holistic trends of thought belong to anthropology in the broadest sense. They produce new branches of knowledge that integrate the knowledge of different sides of human nature, segmented by narrow specialization. The most interesting branches of scientific knowledge concerned with that goal are at present those which, basing on the descriptions of human life discovered by the biological sciences, formulate new value judgments derived from the ethical sciences, for the possible application of the medical and technological sciences regulated by the legal sciences. We can thus discern the contours of bioanthropology, anthropoethics, anthropopolitics, bioethics, biopolotics, biomedicine and other branches of science.

Investigating the problems that combine the achievements of biological sciences in describing human life and the environment with their evaluation by the ethical sciences, for their frequently risk-laden (since experimental) application in medicine and technology, I find sufficient grounds to present the outline of a new current in jurisprudence called biojurisprudence that accounts for the comprehensive and coherent treatment of some new problems.

Characteristics of biojurisprudence

I derive the name of biojurisprudence from the Greek word *bios* or life and the Latin word *jurisprudentia* – legal knowledge and wisdom.

Biojurisprudence as the name of a new current in jurisprudence directly points to the connection between its subject matter and biology and jurisprudence. However, it does not directly indicate the existing links with medicine and ecology. These are manifested primarily in the application of technological achievements, sometimes hazardous for human life and harmful for the life of the environment. Biojurisprudence does not cover the whole subject matter of the aforesaid branches of science. It embraces only those parts that relate to human life and the life of the environment, often threatened by the risk-laden (since experimental) application of technology and thereby requiring legal protection.

The subject matter of biojurisprudence covers all threats to human life from the moment of conception until death, requiring legal protection on account of frequent risk-

laden experimentation. It also covers the protection of the life of the natural environment as the obvious condition of human life. In view of the natural rhythm of human life: birth preceded by conception, life and death, three segments of biojurisprudence can be distinguished: biojusgenesis, biojustherapy and biojusthanatology.

Biojusgenesis deals with threats to human life that require legal protection from the moment of conception until death. The origins of the legal protection of this stage of human life *(nasciturus)* go back to early Roman law, which, using legal fiction, treated the nasciturus as the born child whenever his or her good was involved *(nasciturus pro iam natu habetur quotiens de commodis eius agitur).* The development of the legal protection of the nasciturus in Roman law and the related systems was characterized by the scattering of regulations in various branches of law. It is currently included in international law as part of human rights. It is confirmed by national constitutional law. It is further specified by civil law within the scope of being a carrier of rights, legal capacity, and in property and non-property relations. It is consolidated by family law. It is broadened by contract laws, to especially include the law on offenses arisen during fetal life. It is recognized by succession law, which treats the nasciturus as a potential heir. It is protected by criminal law against unjustified annihilation. The catalog of situations that demand the intervention of the law during the period from the moment of conception to man's birth is widened by the dilemmas accompanying the conceptions of the right to life, genetic engineering, eugenics, assisted fertilization techniques, and techniques preventing conception and birth. All those manifestations of the nasciturus, rather uniform but artificially scattered in legal systems, are comprehensively and coherently embraced by biojusgenesis as a segment of biojurisprudence.

Biojustherapy can be extended to cover both human life and life of the natural environment. With regard to the protection of human life, biojustherapy deals primarily with the highly controversial problems of transplantation of some cells, tissues and organs in order to improve the quality of and save human life. No less controversial is the complex of doubts about the advisability and scope of the legal regulation of euthanasia. The problem of suicide belongs to the subject matter of biojustherapy insofar as it stems from factors outside human nature that can be regulated by law. A highly specific character is displayed by the normative and legal aspects of population policy. The scope of biojustherapy also includes the issues of the protection of the life of the environment. Since these have been comprehensively regulated in environmental law, they need not be dwelt upon. It must, however, be stressed that environmental law can be treated as a special model for an overall and coherent solution as described by ecology and evaluated by ecological ethics. A similar comprehensive and coherent treatment would be desirable in the case of the scattered legal norms that protect human life. The conceptions of the right to life provide the conceptual ground for an overall treatment of the legal protection of human life and the life of the environment.

Biojusthanatology is especially concerned with the regulation by law of the end of human life: man's death. Descriptions of death symptoms are provided by the advances in the biological, medical or even sociological sciences. The biological sciences treat of biological death, medical sciences of clinical and brain death, and finally the sociological

sciences deal with man's social death. Each of those kinds of human death can arouse a number of doubts that require, nevertheless, unequivocal solution by law. The doubts are mainly as to who, on what condition and for what ends decides about another man's death. Unequivocal legal solutions, with definite legal consequences caused by human death, belonging to biojusthanatology, could be developed on a broader plane of thought: that of biojusgenesis and biojustherapy as segments of biojurisprudence. The legal norms protecting human life from its conception until death could make up a branch of law called the *human life protection law*.

The characteristics of jurisprudence is further deepened and enlarged by showing its links with the biological, medical, ethical and legal sciences.

Biology and jurisprudence

The juxtaposition of biology and biojurisprudence cannot miss the question about what unites and divides the two realms of scientific knowledge. For one thing, they are united by the first and divided by the second constituents of their names.

The common subject matter of biology and biojurisprudence is manifested in the interest in human life as a continuous process in the natural environment, yielding to adaptation, accommodation and assimilation factors. However, while biology mainly describes human life and the life of the environment, jurisprudence, on these grounds and following selected axiological criteria, postulates the protection of life. The more precise the biological description of life and the more lucid the criteria of axiological evaluation of life, the easier it is for biojurisprudence to formulate postulates of regulating it.

An extreme form of biologism or even panbiologism as a preferred way of explaining the world, both natural and social, from the biological viewpoint. Certainly, biologism, even less so panbiologism, does not leave much room for traditional jurisprudence, or even modern biojurisprudence in explaining the dilemmas of the protection of human life and the environment. Biologism, reinforced by spectacular achievements in genetics, embryology, genetic engineering, physiology, and bionics, developed peculiar worship of the biological sciences. Biological strands penetrated some currents in jurisprudence, notably in the form of evolutionism, racism, psychoanalysis, and behaviorism. However, biologism is most markedly felt in those doctrines of natural law that recognize the biological side of human nature as the proper source of moral and legal duties. Those doctrines, often without good reason, have in a way included the sphere of ethos in the sphere of bios. Biojurisprudence, while emphasizing the importance of advances in the biological sciences for the protection of life, does not reduce them to the extremes of biologism.

An extreme form of biojurisprudence would be total legalism consisting in the attempts to regulate by law the whole of human life and the whole of the natural environment. Although the history of mankind has known such ideas, they should be decidedly rejected in view of the objectives of jurisprudence. For jurisprudence postulates regulation only of that scope of human life and the life of the environment that is

threatened by the often risk-laden (since experimental) application of scientific discoveries through technology. Total legalism, as confirmed by the tragic experience of mankind, admitted arbitrarily of criminal exceptions, despite declarations of the total protection of human life and the life of the environment. Following political criteria, total legalism deprived of such protection the lives of whole groups of people exterminated for racial, national, religious or other reasons. Biojurisprudence firmly dissociates itself from the extremes of total legalism.

Unlike biologism influencing jurisprudence, the impact of jurisprudence on biology has never been very great. This impact can be felt, probably not very distinctly, through the connections of the philosophy of law with the philosophy of biology. For the two philosophies meet on the common ground of the philosophy of life also encountered under different names: practical philosophy, philosophy for everyone, wisdom of life, the art of life, the forming of life.

Medicine and biojurisprudence

The word medicine, derived from Latin *mederi*, has had many meanings in its long history. Two of them, however, are the most important: 1. the science of health and disease, 2. the art of healing as a practical skill of preventing disease and treating the sick. It was largely the second meaning that contributed to the formation of the subject matter of biojurisprudence. Medicine alone as a science does not have a direct influence on human life. This influence is only evident in the practice of treating disease, the more so if it utilizes techniques that are often risk-laden as they are experimental. Therefore, biojurisprudence attaches less importance to the art of healing in accord with medical canons or *lege artis*, as lawyers call it. For biojurisprudence far more important is the opposite of the art of healing called medical malpractice. However, biojurisprudence is primarily concerned with defining the legal grounds for risk-laden experimentation in the art of healing.

Risk-laden experimentation in medicine became possible due to the advances in biological and technological sciences. The advances in the former define for medicine the range of risk-laden experimentation while the advances in the latter provide the means: medical techniques. Risk-laden experimentation in medicine certainly raises great expectations and equally great fears; it challenges the existing norms of the protection of human life and calls urgently for the making on new norms. The main task of biojurisprudence is thus to comprehensively and coherently present the conditions of the scope of regulation by law that provides the legal grounds for risk-laden experimentation in medicine. This is the task of the state authorities, which regulate and control medicine with the help of the law. Here, too, the extremes are possible: from full liberalism based on complete trust in the professional and moral competence of physicians to total legalism, which we reject, that tends to regulate by law everything that can be regulated.

The two extremes are a theoretical model rather than a solution that could be consistently applied in medical practice. Medical practice, manifested through the art of

healing, will probably remain, as always, in the sphere of various compromises trying to balance divergent interests.

Biojurisprudence, in its comprehensive and coherent treatment of that problem, can assist medicine in balancing divergent interests. This is possible provided that biojurisprudence itself attains such normative equilibrium that will be situated on the changing points between the protection of human life as the supreme value and the value of risk-laden experimentation in the art of healing. In determining these points, we can apply the taxonomy of the ways of legal regulation and medical techniques. The taxonomy of the ways of legal regulation can concentrate on the values protected (human life), medical techniques, motives for the protection of values and application of techniques, organizational structures of the protection of human life, admitting the use of these techniques. The taxonomy of medical techniques alone can be reduced to evaluations of technology that remain the object of intensive scientific investigation. The right combination, in the area of biojurisprudence, of the results of the two kinds of taxonomy can become an alternative both for groundlessly fatalistic and uncritically optimistic views.

Morality and biojurisprudence

The sense of the term 'morality', close to the Latin term *moralitas*, denotes the whole of judgments, norms, models and rules of conduct that protect the values of good, rightness and justice binding through social acceptance. Theoretical views on morality are called ethics, but it is not only in scientific discourse that the term morality embraces both morality and ethics. Morality together with ethics is of paramount importance for biojurisprudence because not only does it judge and evaluate the objects of legal regulation but also provides models of such regulation in the form of moral norms. The crucial importance of morality for biojurisprudence can be expressed by means of two questions: 1. what is the connection of the legal status of norms with the moral status of norms?, 2. what is the scope, if any, of the necessity and admissibility of enforcing moral norms by means of legal ones?

Question one prompts a search for the answers in ethical thought, which is home to extremely divergent views but in respect of the protection of human life it remains exceptionally unanimous. The connection of the legal status of norms with the moral status of norms is a reflection of the vast problems of the relation between morality and law. The existence or non-existence of this connection is justified by the thought essential both for ethics and jurisprudence. It is clearly substantiated by the thought of natural law and the accompanying thought of natural rights, whereas its existence is strongly denied by the thought of legal positivism. In the thought of the social contract (contractualism) this connection is manifested indirectly while in highly influential utilitarian thought it is immaterial. All those currents of thought, however, are important for biojurisprudence, which seeks justification for the scope of regulation by law of the protection of human life and life of the environment against the threat of risk-laden experimentation.

Morality, also on account of its multiplicity of currents of thought, comprises the broadest scope of the protection of life. This is expressed by morality in general and by particular ethics built upon it, for example the ethics of the protection of life, ecological ethics, medical ethics etc. The scope of the protection of life by law is narrower because the scope of regulation by law is narrower. The task of biojurisprudence lies in comparing the ranges of regulation of the protection of life and indicating the scope that deserves to be regulated by law. There are thus instances of the scope of the protection of life regulated both by morality and by law, exclusively by morality or by law, and possibly neither by morality nor by law. The agreement between legal regulation and moral regulation is favourable to both of them with respect to their social acceptance. Disagreement of that kind weakens first of all the effectiveness of the law because the ineffectiveness of morality is less measurable and thereby less conspicuous.

The other question leads to the answer that biojurisprudence has grown from a conviction of the necessity to enforce some moral norms that protect life by means of legal norms. This answer is too general: it should be developed on the vast scale of moral judgements ranging from moral scepticism (which expresses doubts in the possibility of knowing and rationally justifying moral judgements) to different varieties of moral relativism (referring judgements to relativized facts rather than to the criteria of universal rationality) to moral absolutism (which maintains that only one moral structure is acceptable: the divine command) and moral egoism (which seeks praxeologically effective means to realize the ends of subjective interests, not necessarily contradictory to moral altruism). The choice of particular moral judgements as the grounds for justifying a legal regulation belongs to the realm of politics, which formulates its law — making decisions in the broad systemic spectrum from democracy to dictatorship. Biojurisprudence is probably unable to overcome the antinomy, especially evident in newer moral systems, between the conceptions of the sanctity of life and those of the quality of life. The conceptions of the sanctity of life are included in religious moral systems, notably in Catholicism, demanding the extension of legal protection over the whole of human life from the moment of conception to natural death. They uphold, like all moral systems, the prohibition to kill a human being and the duty to protect, sustain and save human life without any exception. However, the secular conceptions of the quality of life, while they likewise uphold the prohibition to kill, yet they admit of numerous exceptions in respect of the protection of human life ('justified' war, the state of necessity, self-defense, death penalty, euthanasia, experimentation risk, inevitable traffic accidents). Biojurisprudence cannot and will not compete with the religious conceptions, therefore it relates to the secular conceptions.

Jurisprudence and biojurisprudence

Biojurisprudence is one of the currents in jurisprudence that reflects some effects of advances in the modern biological and technological sciences and in medicine, demanding regulation by law. The subject matter of biojurisprudence is the whole of legal thought,

legal norms in force and postulated, and legal practice concerning the protection of human life and of the natural environment. Like all other currents in jurisprudence it is incapable of promoting good directly. It can indirectly consolidate good by endeavours to prevent evil or, when this proves to be unsuccessful, to minimize its effects.

Jurisprudence embraces the whole of legal thought, legal norms and practice, derived from the term *ius* used by Roman lawyers as unmatched masters in the art. Biojurisprudence primarily relates to that sense of the term ius, which Celsus, an eminent Roman lawyer, formulated in a maxim: law is the art of applying that which is good and right *(ius est ars boni et aequi)*. Jurisprudence has always been influenced by other branches of knowledge in its scope of the catalogues of protected values and their justification, less so with respect to the legal constructions and procedures themselves. These influences come from the older trends in jurisprudence, mainly natural law and legal positivism, and from its newer currents, for example jurisprudence of concepts and interests, and analytical jurisprudence.

It would be difficult to overestimate the vital importance of the conception of natural law for the whole of jurisprudence and also biojurisprudence. Based chiefly on philosophical and ethical assumptions, the conceptions of natural law construct universal norms of the protection of man under rationalized freedom. It would hardly be possible to say same thing about the conceptions of legal positivism. Relating primarily to philosophical and politological voluntarist thought, the conceptions of legal positivism resolve conflicts between the protection of man and the protection of the state's interests in favour of the latter. Although the conceptions of natural law are decidedly closer to the assumptions of biojurisprudence (one can even say that it exhibits some features of natural law), yet the latter cannot ignore the conceptions of legal positivism characterized by greater realism.

Biojurisprudence should also be generally situated among the newer currents in jurisprudence. Jurisprudence of concepts (*Begriffsjurisprudenz*), developed in the circle of German thought, points to the crucial or even law-making sense of legal concepts. This indication remains important also for biojurisprudence because precision of concepts is an immanent value of the whole of jurisprudence aiming at the univocality of concepts, strict formulations and clarity of constructions. A similar relationship obtains between biojurisprudence and Anglo-Saxon analytical jurisprudence, recognized as a variety of legal positivism based on the experience of the practice of common law. If jurisprudence of interests, having European origins, treats law as a means of resolving conflicts of interests in society, then biojurisprudence is entirely jurisprudence of interests but concentrated on the 'interest of interests'—the protection of human life and the life of the environment. Finally, sociological jurisprudence, developed on North-American soil, and other possible currents in jurisprudence: economic, politological, psychological, anthropological, and integrative, reflect primarily those contexts of law that are signalled by their names. All those contexts are found together in biojurisprudence since the protection of human life and the life of the natural environment are entangled in the whole complex of social relations.

Filiations between sciences

Biojurisprudence, like every current in science, cannot claim a monopoly of the subject matter with which it deals. It has numerous and more or less complicated filiations with other branches of knowledges. Besides the problems that belong exclusively is its subject matter, it includes topics that partly overlap, intersect with or border the subject matter of other branches of science. As most branches of knowledge are interested in human life and many of them in the life of the natural environment, these filiations are extremely well developed. In order to mark the contours of the subject matter of biojurisprudence more clearly it is enough to mention its direct filiations with, on the one hand, two branches of knowledge with an ethical character and on the other hand, also with two branches with a jurisprudential character. In the former we touch upon some filiations of biojurisprudence with bioethics and medical ethics, and in the latter some filiations with medical law and forensic medicine.

Bioethics derives its name from the combination of the Greek word *bios* or life and *ethos* or custom in the sense of morality. It is a new branch of knowledge, developed only since the 1960s. Like biojurisprudence it deals with the normative knowledge of the protection of human life and the life of the environment against the threats accompanying risk-laden experiments in utilizing the achievements of the biological sciences. In that sense, together with jurisprudence, it is included in the 'science of survival' of man and the environment. However, while bioethics strives for that survival by means of sanctions arising out of moral norms, biojurisprudence tries to do so with legal sanctions. And it is at that point that main differences between the two should be discerned.

Medical ethics is a set of principles and moral norms that should bind physicians in the practice of their profession. As the ethics of one profession it is a specific concretization of the principles and norms of general ethics. Biojurisprudence relates both to particular medical ethics and general ethics. Numerous codes of medical ethics, worked out for millennia, contain universal contents accepted by biojurisprudence. In most general terms, they focus on the patient's good, taking into account the interests of society. There are, however, fundamental differences of principles and norms between different kinds of medical ethics about whether it is advisable to endow them with legal sanctions. According to the conceptions of the autonomy of medical ethics the regulation by law of the professionalism of physicians brings more harm than good because it restricts their freedom of decision. According to paternalistic conceptions, however, the law should determine the limits of the physician's freedom of decision-making because this follows from the state's function towards medicine. Biojurisprudence favours the paternalistic conceptions but at the same time it emphasizes the necessity to limit to the necessary minimum the legal regulation of the professional practice of physicians.

Medical law has marked its separate character mainly in the Anglo-Saxon countries. As a separate branch of law it does not reflect those divisions of legal systems into branches of law that are preserved in traditional jurisprudence. Therefore medical law

contains legal norms that are, on the one hand, so much homogeneous as to be interest for medicine, and, on the other hand, so much heterogeneous as to belong to various branches of law: from civil law to contract law and tort law to criminal law. It must be pointed out that this solution is very close to the assumptions of biojurisprudence. For its aim is to break the existing ties of legal norms protecting human life with various branches of law and to collect them, following the model of the law on the protection of natural environment, into a uniform and coherent whole. In its most general terms, medical law regulates the relations between physicians and patients and the organization of medical institutions. It includes the legal criteria of distinguishing between good medical practice *(lege artis)* and medical malpractice. Important rules of medical law concern the patients consent as to the form and range of therapy, the confidential character of information on his condition, the treating of the dying persons and the pronouncing of death. Medical law treats of these norms from the medical point of view while biojurisprudence mainly from the standpoint of law. Moreover, the treatment by biojurisprudence of the problems of the protection of human life is more universal than their treatment by medical law.

Forensic medicine is a branch of medical science whose objective is to apply it practically for the needs of the administration of justice. While biojurisprudence, bioethics, medical ethics and medical law have a normative character, forensic medicine is more of a descriptive nature. Forensic medicine is even indispensable in some civil cases (for example to establish paternity) and most often in criminal cases (to establish the cause of death). It thus plays an important role in lawsuits and criminal proceedings in discovering the objective truth, which is the basis of just adjudication. While the normative branches of knowledge create the norms of the protection of human life, forensic medicine serves to help in their practical application.

Summary

Biojurisprudence, whose concepts I present, is a new current in jurisprudence concentrated around the problems of the legal protection of human life and the life of the natural environment. This current seeks to integrate both the law-making thought scattered by narrow specialization and the law-making practice concerning the protection of human life and the life of the environment. Biojurisprudence provides a scientifically well-grounded foundation for new branches of law bring to the fore, emphasize and protect human life and the life of the environment.

The subject matter of biojurisprudence embraces all threats to human life and the life of the natural environment. Taking into account the natural rhythm of human life from the moment of conception to birth, and life until death, I distinguish three segments of biojurisprudence: biojusgenesis, biojustherapy and biojusthanatology. This tripartite division, with appropriate modifications to avoid anthropomorphism, can also apply to the protection of the life of the environment.

I show the connections of the subject matter of biojurisprudence with the subject matter of many branches of knowledge, primarily with biology, medicine, ethics and jurisprudence. Biological knowledge provides biojurisprudence with descriptions of life. Medical knowledge has aroused the interest of biojurisprudence in the ways of utilizing the biological knowledge about human life and the life of the environment, sometimes requiring regulation by law. Ethical knowledge, with its judgements of life and the ways of saving it, provides the ground for legal regulations. The knowledge of jurisprudence is to some extent the source and broader background for biojurisprudence.

I also indicate the interesting filiations of biojurisprudence with some other sciences, whose goal is also the protection of human life and the life of the environment: bioethics, medical law and forensic medicine. I see the urgent need to develop a new branch of law, after the model of environmental law, which could be called human life protection law. This law would collect into one uniform and coherent whole all legal norms concerning the protection of human life that are now scattered in many branches of law.

I find it a peculiar paradox that law created by man for man has pushed man himself into the background in its systems. In the traditional systems of law prominence is given to property and non-property law, substantive and non-substantive law, proprietary and non-proprietary right, private and public law etc. but there is no law on the protection of man. There is an urgent need to change the situation by for example instituting the code of the protection of life (of man and of the environment), which would assert the primacy of life in the hierarchy of values protected by law. Biojurisprudence gives the impetus to the indispensable changes, for example in the legal systems, by the all-round treatment of the whole of problems concerning the legal protection of life.

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KALEIDOSCOPE

Diversion and Mediation in Austria*

Since 1985 the Austrian administration of criminal justice applies the settlement of conflicts as a possibility of a governmental reaction to criminal acts within the criminal law, relating to the young offenders. What has begun first as a test within some few judicial districts is determined by law since 1989, when the Act on Juvenile Courts 1988 became effective. The government's declaration to the beginning of a new legislation period dated December 18, 1990 intends expressly within the legal sector to utilize the good experiences with a modern Act on Juvenile Courts also for the penal law concerning adults. By that the course to a settlement of conflicts for adults has been traced out. Recently the model-test of a settlement between the delinquent and the victim within the penal law for adults is going on in several Austrian judicial districts.

I. *With regard to the 1988 Act on Juvenile Courts*

A juvenile is a person upon completion of the 14th year of life and before completion of the 19th year of life. Minors under the age of 14 are not punishable.

A juvenile committing a penal offence is not punishable if he or she is not mature enough for certain reasons to understand the wrong of the offence and to act according to this understanding, or if he or she commits a misdemeanour under the age of 16 without severe guilt and the application of the Act on juvenile Courts is not required for special reasons in order to prevent the juvenile from criminal offenses.

The public prosecutor shall desist from criminal prosecution of a juvenile offence that is punished only a fine, by a prison sentence of not more than 5 years or such a prison

* Thanks to the Chief State Prosecutor, Dr. Christoph MAYERHOFER (Department Head of the Ministry of Justice, Vienna), for providing information concerning the existing system of mediation in Austria.

sentence together with a fine, if it must be assumed that the court will provisionally suspend the proceedings pursuant to Art. 9 of the Act on Juvenile Court or it will not impose a penalty according to Art. 12 of the Act on Juvenile Courts and further measures are not deem as necessary to prevent the suspect from criminal offenses. In any case there is no desistance from criminal prosecution if the offence caused the death of person.

If it seems necessary to warn the suspect about the wrong of offenses as charged against him or she and the possible consequences, the Guardian Court or the Tutelar Court shall perform that warning upon request of the public prosecutor.

According to Art. 7 of the Act on Juvenile Courts the public prosecutor may declare a desistance from criminal prosecution in conformity with Art. 6 of the Act on Juvenile Courts conditional on the shown readiness of the suspect to accept the responsibility for the offence and to settle the eventual consequences of the offence in an appropriate way according to the circumstances, particularly compensating for the damage to the best of his or her ability (settlement of the offence out of court).

The public prosecutor may request persons and authorities having practice in social work, especially within the association for the assistance of persons placed on probation, to instruct the suspect about the possibility of a settlement of the offence out of court and to give a lead and assistance about such a settlement if he consents to it. The victim shall be included in these efforts in so far as he is willing to do so.

The settlement of the offence is based on two elements in one respect on the pedagogical influence on the offender, who shall be made aware of the social relevance of his offence. Therefore the underfounding of the values is in the foreground. In another respect it should come to settlement with the victim in order to establish the social peace. The first mentioned element is in the foreground, because the law does not speak about a settlement between the delinquent and the victim resp. about a settlement of conflicts. The compensation for damage is not the decisive point of view. For this reason public prosecutor may aim at a settlement of the offence even if the damage should have been paid. In such a case the elaboration concerning the relation between the delinquent and the victim, the illumination of the personal conditions as well as the supervising of the agreed compromise and its reliability are just the goal.

Regarding the definition of the conditions for the settlement of the offence out of court the legislator prefers the formulation that the suspect "shows the readiness to accept the responsibility for the offence and to settle the eventual consequences of the offence..." By that it is expressed that the person concerned must show his or her readiness to deal with charged offence and its wrong and to take the responsibility.

The aim of the settlement of the offence is a complete admission of guilt. In some special cases one may accept a mitigation of the admission (confession of negligence instead of criminal intent, reliance on legal excuses or reasons for the lack of guilt). But the denial of causality as such excludes the application of any settlement of the offence.

As one of the minimum standards for a settlement it is necessary that the delinquent has taken *action* in some way. It is not sufficient that the parents or the insurance have paid for damages without his or her action, that means without his or her efforts. Just as insufficient is the mere renunciation of the victim without any discussion about the

damage and without any reflections on its amount. The delinquent must take an action towards the victim, and that requires at least the credible working off concerning the wrong of the offence by the delinquent.

But the existing readiness of the victim to assist a settlement of the offence out of court is not considered as a condition for its carrying out. In principle a missing readiness of the victim (who must be quite at liberty to do so) shall not exclude the execution of a settlement of the offence out of court.

Normally the delinquent shall come to a meeting upon request of the victim, but cases are thinkable, in which such a meeting is unreasonable for the juvenile, particularly if the victim follows other interests than reconciliation. Local distances can be an obstacle to a meeting, too.

As a rule the recovery of damages shall be the principal item of the settlement of the offence out of court, but ways of an indirect and symbolic reparation, compensation or satisfaction (for instance also the voluntary service within public welfare institutions) upon to the apology offered to the victim are conceivable.

A work for the welfare of the public must always be related to the injured person. Works for the welfare of the public to be done for third persons are provided under conditions according to Art. 19 of the Act on Juvenile Courts. But should it be a case of Art. 7 of the Act on Juvenile Courts, the said work must be performed within the sphere of the victim and without any consideration to the consent of third persons. Delinquent and victim may not agree that the offender should render a service in a hospital for 3 days, except the offence is directed against the institution of the hospital.

A settlement of the offence may also be carried out with legal entities, particularly if they can be personified by accepted representatives (the managing director of a department store or the mayor of a municipality).

A settlement of the offence with persons remained unknown is possible and may also be used in view of offenses where the victims cannot be personified (e.g. offenses against the Military Penal Code).

Concerning the compensation by paying a sum of money it is not necessary that the whole damage is paid, as the victim demands it, because the settlement of the offence shall be a playground for revenge and "neurotic claims". Therefore claims of compensation under civil law may continue to exist.

The damage shall be compensated "to the best of the ability", and for this reason the indemnity may be less than the amount of compensation payable according to a civil law claim. Where the offender receives only an apprentice-remuneration, the settlement of the offence will be also considered as carried out, if he compensate, for a partial amount by installments corresponding to the best of his ability. The property of a juvenile is subject to payments, the provisions of Art. 151, and 154 of the Civil Code (consent by the authority of guardianship) shall be observed.

Agreements between delinquent and victim shall be accepted as far as possible, if they are not unrealistic, immoral or even unlawful.

Just in view of the experiences made by the model test "settlement of conflicts" and with regard to the need of proceedings, which shall be as far as possible undivided for the whole federal territory, now only probation officers can be taken into consideration for this task (officers and state employers within the association for the assistance of persons placed on probation, established as a permanent institution of the Ministry of Justice, who satisfy the requirements of Art. 2 of the Act on Probation). But the service of other persons and authorities, having practice in social work, to a later time shall not excluded as such by the tenet of the law.

Concerning the choice of the cases an unanimous opinion of lawyer and probation officer about the qualification would be desirable.

The law does not provide any time limit for the carrying out of the settlement of the offence. The period of limitation goes on during the time, in which the settlement is tried.

The facts communicated by the public prosecutor are the bases for the negotiations of the probation officer. The probation officer is not an authority for investigations like security organs. In case new facts appear when trying the settlement, if particularly the number of facts or the extent of guilt of the offender are changed or outlooks for the future must be judged in a seriously different way in view of the personal circumstances of the deliquent's person, then the probation officer has to inform the public prosecutor about it. A frustrated settlement of the offence causes more damage than it might be useful.

Above all it appears advisable that the probation officer informs the public prosecutor that the assignment of a probation officer is necessary in order to deal with the personal problems, which cannot be solved by the settlement of the offence (special-preventive impediment to a settlement of the offence).

The settlement of the offence does not include a social care for the victim.

If delinquent and victim had settled the damage autonomously in the meantime without knowledge by the public prosecutor about it, then it shall be communicated to the public prosecutor, who may decide to desist immediately from criminal prosecution without a settlement of the offence. (Art. 47)

Before the opening of the trial the court shall examine the possibility of a settlement of the offence out of court officially or on request of the accused or the injured party, if the public prosecutor did not yet apply for it. (Art. 48)

The court shall provisionally suspend the proceeding for juvenile offence, if the facts appear sufficiently clarified, the fault cannot be considered as severe guilt and the imposition of penalty is not necessary in order to prevent the accused from criminal offenses. The provisional dismissal is only possible (Art. 49)

1. for a probation time from 1 year to 2 years;
2. under the order of one or more conditions (Art. 19 of the Act on Juvenile Court), to which the accused declares himself prepared to accomplish them.

The dismissal for a probation time may be made conditional on the declared readiness of the accused to comply with certain orders or to accept the care by a probation officer. A reasonable time limit shall be determined for the accomplishment of a condition. This period and the probation time are not counted in the terms of limitation.

A provisional dismissal of the proceedings according to Art. 9 of the Act on Juvenile Courts should not be chosen just as a "way out" in cases with doubtful evidence. On the contrary the precondition is that the facts have been sufficiently clarified, and in this connection the taken evidence must speak for a penal guilt of the person being prosecuted for a juvenile offence in the sense of a "prima-facie-evidence" according to the subjective conviction of the judge. As a rule there will be a confession of the accused — just as a result of the provided requirement of consent; but also a confession shall not be a prerequisite for the application of this legal institute. Regarding the application of § 9 of the Act on Juvenile Courts one has to observe in any case the presumption of innocence under Art. 6 para. 2 of the European Convention for Protection of Human Rights continues to be valid for the accused.

At any time the accused may apply for the continuation of the criminal proceedings, for instance to invalidate a suspicion against him.

If the determination of a probation time as the only measure is not sufficient, a probation officer may be appointed or conditions may be issued. A connection of the two orders is admissible.

An extension of the period for good reasons is not excluded.

In case of a provisional dismissal of the criminal proceedings the court may order one or more of the following conditions for the accused under Art. 19 of the Act on Juvenile Courts:

1. to pay a sum of money at once or in partial amounts in favour of a public welfare institution;
2. to render gratuitously certain services during the leisure time in the public interest, for example the assistance in institutions for the care of juveniles, physically handicapped and elderly people, medical welfare or environment protection;
3. to compensate for the damage produced by the offence to the best of the ability or to contribute to the settlement of the consequences of the offence;
4. to participate in courses for instructions or continue such instruction or another appropriate event.

Conditions are unlawful, which would effect an infringement of personal rights or an interference with the way of living.

The legislator proceeds from the assumption that the specification of the conditions, which may be ordered for an accused in connection with a provisional dismissal of the criminal proceedings under Art. 9 para. 1 n. 2 of the Act on Juvenile Courts, should in fact remain as an exclusive one, but the definition of the four mentioned types of conditions are formulated in such a wide manner that as good as all of the possible measures are covered by it.

In the view of the legislator "another contribution to the settlement of the consequences of the offence" under n. 3 does not require a civil reconciliation with the injured party, who possibly is not prepared to do so. On principle every appropriate material or immaterial contribution to the reparation, which is agreed by the accused and reasonable for him, can be made to the subject of a condition. In its general sense under

application of Art. 7 para. 2 of the Act of Juvenile Courts the corresponding possibilities may be found out by charging a social worker.

Above all by such services in favour of the public the understanding can be strengthened that the damaging of objects, which are owned by a territorial authority or a public institution and belong therefore in a wider sense to the public, like benches in park-grounds, telephone boxes, facilities of transport services, does not carry less weight than the damaging of private property. In view of a correct understanding of the inner meaning of the conditions one will observe that the juvenile can relate the conditions to the offence, although in an indirect way (active assistance in the restoration of damaged objects, assistance in the care of old people, if the offence has been committed against old people, assistance in the care of sick persons or participation in courses of first aid or traffic psychology, if the offence has caused a bodily injure, etc.). But the conditions must be also related to the offender and that means, that the physical and mental abilities of the juvenile have to be taken into consideration.

Furthermore conditions are only useful, if the juvenile does not understand them just as a pressure or an authoritarian order, but if they are based on his readiness to do a service. Therefore the law demands the consent of the juvenile to a condition. This consent shall not be made only under the pressure of the impending criminal proceedings, but it shall signify a substantial agreement. For that purpose it will be necessary that the judge discusses the nature and the meaning of the condition with the juvenile and, if it is possible, also with the person vested with the right of his education.

II. *Settlement of conflicts concerning adults*

At the moment a settlement of conflicts within the criminal law for adults is only possible under Art. 42 of the Penal Code, which provides a desistance from criminal prosecution according to reasons of impunity *inter alia* if the consequences of the offence are essentially eliminated, compensated or settled in another way. By means of an initiative of the administration of justice aiming at a settlement between the delinquent and the victim also for adult suspects by the settlement of conflicts a considerable number of charges could be deal with in a more prompt and effective way than within the other formal proceedings with a trial, with a verdict of guilty and with the connected consequences of a condemnation.

The thinkable scope of application for the settlement of conflicts concerning adult persons shows certainly a more comprehensive spread than this one under the penal law for juveniles.

First of all naturally those cases suggest themselves, in which juveniles and adults are involved in an offence. In this connection a procedural equal treatment is simply obvious. In fact there has been already repeated occasions in practice to combine a settlement of the offence out of court pursuant to Art. 7 of the Act of Juvenile Courts concerning a juvenile with a settlement of conflicts under Art. 42 of the Penal Code concerning an adult (although only slightly older) accomplice. The common settlement of damages and the reconciliation with the victim leads to a desistance from prosecution under Art. 6 of the Act on Juvenile Courts with regard to the juvenile and on the other hand the distance from prosecution by reason of Art. 42 of the Penal Code regarding the adult.

Within the range of violent crimes there are many scopes of application for a settlement of the offence. Acts of violence causing injuries, dangerous menaces among hostile neighbours or intimidations within the family organization, which result from conflict bearing case histories, could be composed to the greater part more lasting and to the total effects more favourable already on the level of the preliminary proceedings with the attempt of reconciliation. The underlying emotional tensions of the persons concerned can be solved within informal proceedings through the intermediary of a neutral person, who is charged with the settlement of conflicts, in an essential prompter and—as the experience in the field of the criminal law relating to young offenders shows—more effective way than it could be achieved by the judge during the trial. The lacking stress of an impending condemnation, the closer distance to the victim, who does not appear against the accused only as a complainant for indemnity and formal opposing party, and the directly responsible acting of the conflict parties promote this settlement among the persons involved in the aggression.

Within the group of the offenses against property the settlement of conflicts is the obvious choice as instrument for sanctions. By their structure they are directed to a compensation for damage. Already during the experimental phase of the settlement of conflicts within proceedings for juvenile offenses the advantage of a settlement between the delinquent and the victim has been shown particularly in the field of property delinquency. The prompt satisfaction of the social framework, which had been disturbed by the offence, especially the direct and complete integration of the victim, but also the effective feeling of the consequences of the offence for the suspect, have been considered as a positive experience by all of the persons involved. With regard to the offenses against property one can distinguish between delinquents and victims in many cases without difficulties. Furthermore the size of the caused damage can be established in a relatively exact way. By that the settlement between the delinquent and the victim can be started on without problems for the most part.

The charges for violation of the liability to provide maintenance under Art. 198 of the Penal Code are based many times on conflict situations of the involved family members. Pending divorce proceedings, the dispute about the rights of care and custody or "only" the controversies about the extent of the visitation right produce frequently the starting point for a refusal of payment made by the person obliged to provide maintenance. To create a settlement in this connection appears certainly more useful than to increase the gravity of the situation by criminal proceeding and a condemnation breaking off by these means definitely the contact among the family members.

The goal of the experimental phase should be to create the basis for legal embodiment of the idea of diversion in the general criminal law and to open up the possibility also for the adult offender to legalize the unworthy of his delinquency by his or her own action. In addition to this the significance of the victim of the offence could be apprehended even more distinctly than in the past also within the penal law for adults.

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BOOK REVIEW

Arthur KAUFMANN: **Grundprobleme der Rechtsphilosophie** (Eine Einführung in das rechtsphilosophische Denken), C. H. Beck, Munich, 1994, pp. 246

First of all the title of this writing demands an explanation: what a nonsense it is, even to imagine that one of the most prominent figures of contemporary philosophy of law, Arthur Kaufmann, addresses dilettantes in his book constituting an exponent of the fundamental problems of the philosophy of law. Nevertheless, it is the author himself who claims that his book with the subtitle "Introduction to the thinking of philosophy of law" is intended for those who are dilettantes in the sense of the word adopted by Jacob Burckhardt. For those who are specialists within a particular field of jurisprudence, but as regards to the totality exceeding their field of proficiency, they are dilettantes lacking a general overview, who still foster a sympathetic attitude towards the subject and who have a vocation and ability to immerse themselves in the totality of jurisprudence. The point is that lawyers consider fundamental theoretical grounds such as those laid down by the history, philosophy and sociology of law as luxury, therefore it is no wonder if nowadays an educated lawyer is more of a rarity. These lawyers who like the subject and possess the necessary skills for the immersed understanding of connections of law, are primarily designated to read his book [*Ibid*, at 1]. The modesty, maybe false modesty of the author is refuted by the content and thoughtfullness of his work. It is a summarizing work embracing a whole treasury of thoughts, where the issues and particular questions of the philosophy of law are not simply raised and presented in an objective manner but always from the aspect of the author's standpoint concerning the questions of philosophy of law. It is not a book exclusively for dilettantes, in fact, it is not for dilettantes in the first place. If it is admissible to refer to the fundamental category of hermeneutic philosophy that Kaufmann obviously praises positively, this book modestly intended for dilettantes can hardly be understood without the relevant "preliminary" knowledge in philosophy and

philosophy of law. However, in possession of this "preliminary knowledge", it is a highly inspirational piece of writing that enjoyably stimulates many thoughts.

One more general remark about the work: about the way the author addresses and analyses the questions and problems of philosophy of law, about the spirit the whole book is pervaded by. Kaufmann cannot stand dogmas, he is firmly devoted to understanding, dialogue and tolerance. It is his ambition to teach the thinking of the philosophy of law by his book; his realist philosophy of law rests on experience, and does not, in any way, vindicate itself the right to make "firmly established" statements but it solely contains questionable judgments, and never statements containing irrefutable conclusions [*Ibid*, at 2].

Before having a closer look at the discussion of principles of philosophy of law, it is indispensable to briefly outline the extremely rich content of his work. The book discusses almost exclusively "substantial questions", it attempts to expound a "material philosophy of law" dealing with the problems of our age [*Ibid*, at 2–3]. Within this framework it discusses the following subject matters: The substance and task of philosophy of law, delimiting the borders of philosophy of law, theory of law, and legal dogmatics. An overview of the history of problems of philosophy of law, concentrating first of all on the relationship between natural law and legal positivism, searching for a third solution beside natural law and legal positivism (Radbruch, legal hermeneutics, argumentation theory, the general principles of law and Critical Legal Studies). Subsequently it introduces to legal methodology, to the process of knowledge of law, to the theory of jurisprudence; in the center of these contemplations the attempt to create a harmonious legal methodology can be found that searches for the balance of law-making and finding of law, primarily with the method of hermeneutic understanding. Then the exposition of the author is directed at the explanation of the general concepts of law (general legal theory). Within this section he analyses the basic elements of the concept of law, the notion of legal norm, sources of law, statement of facts and the subjects of law. The relation of law and language constitutes a separate issue. Thus we have arrived to the intimately substantial problems of the philosophy of law: concept of law, law and statute, the relation of "to be" and "ought to be" (Sein and Sollen), validity of law, the right of resistance and civil disobedience. All that is exceeded by the question of legal idea, and the relations of its constituting elements: justice and equality, justice and expediency, justice and rule of law, law and morals (morals, custom, tradition). The final chapters of the book presents the modern streams of the philosophy of law and the tasks of contemporary philosophy of law.

In order to make perceptible, with what a care and circumspect the author studies the problems of legal philosophy and how he attempts to solve them, I must confine myself to the brief outline of two interrelated and substantial expositions of the work.

The first is the attempt to create a harmonious legal methodology [*Ibid*, at 71-81]. The starting point is part of the history of legal theory, the traditional legal methodology elaborated by Savigny. The central issue is the relation of law-making and finding of law. The way leading to the solution is the gradual structure of law (Thomas of Aquino, Hans Kelsen). Kaufmann distinguishes three stages within the

process of implementation of law: a) abstract-general principles of law that are beyond positiveness and beyond history; b) concrete-general, positive law in the formal sense that is valid for a more or less long period of time; c) concrete historic law that is positive in the material sense. The scheme is briefly as it follows: principle of law (legal idea)—legal norm—legal decision. Further comprehension demands two basic prerequisites: a) none of the above-mentioned stages can be missing from the process of implementation of law; b) none of the stages can simply be deducted from the one that is above it according to a certain logic. With the help of the first statement Kaufmann distinguishes himself from the views claiming that it is possible to make law without according any values to it (theory of power, theory of will, theory of interest, empirical sociology of law, the theory of the "nature of things" or of "factual normativity"). The second statement is really a refusal of all kinds of one-sided normativist theories. The author arrives at the conclusion that finding of the law always happens in an analogous way, in a deductive-inductive manner [*Ibid*, at 72–73]. The solution recommended by the author is to understand the legal method in a way offered by hermeneutic philosophy.

In relation to discovering the process of implementation of the law, hermeneutic philosophy does not mean the hermeneutic aspect as a transcendental-philosophy but as a method. It is the major argument against hermeneutics as a method that it is irrational, subjectivist and unscholarly. This objection could be raised, however, against the legal method in general, since legal method is not purely rational, exact and unambiguous. And it is exactly this legal method the author wants to understand in a hermeneutic, and if possible, rational way.

What does it mean to understand the legal method in a hermeneutic way? It means nothing else but the hermeneutic circle of the process of legal understanding. It is the essential point in this hermeneutic circle that transformating a norm into a statement of facts prescribed by law (interpretation) happens based on the case, and transformation of the case into statement of facts (construction) always happens based on the legal norm. This transformation, construction is always a creative, constructive action that precedes subsumtion. Case and legal norm are the raw material for the methodological process, they have to be formed and elaborated in an inter-related manner so that they become suitable for "matching" each other (analogy), that means in an actively creative action they have to bee made "equal". This is no determination, neither subsumtion, nor interpretation, but it is a decision (decisio) [*Ibid*, at 76–77].

Traditional positivist methodology considers "application of law" to be the normal case, and the case of "finding of law" it only treats as an exception differing significantly from the application of law. In contrast with the positivist view, "the imperfect (incomplete) nature of law" is not a defect but it is a priori and necessary. A statute cannot be formulated unambiguously, because it was created for an countless variety of cases. The notions used by the law are not unequivocal, they do not fall into the category of abstract-general notions, but in fact they are notions of "types" or "classes" concerning which instead of either-or the applicable expression is more or less. [*Ibid*, at p. 79. See my reservations concerning this statement in

Peschka, Type and analogy in law, Law and Philosophy of Law, Budapest, 1980. pp. 355–369. Kaufmann' comments on that: Analogie und "Natur der Sache", Heidelberg, 1982, 75–76.] Consequently the way of thinking pervading the process of application and finding of law is not a simple subsumtion, it is a type-making and analogy-based way of thinking. In the course of application the law, objective interpretation of the law always constitutes a complex, "deductive-inductive, analogy-making process, the division of attention among the statement of facts incorporated in the provisions of law and the actually existing facts". "It is only due to this analogy of the normative statement of facts and the facts of life, due to this polarity that law can exist and develop, that it is entitled to a share of the historic structure of existence." [KAUFMANN, *Grundprobleme der Rechtsphilosophie*, 112].

The second problem of philosophy of law that the reader's attention is being directed to constitutes the core of Kaufmann's legal philosophy: the concept of law, with special regard to the relation between law and right. The question deserves attention also for the reason that Hungarian constitution declares Hungary to be a rule-of-law state. Similarly, Kaufmann analyzes the concept of law from the perspective of the rule-of-law state, laying emphasis on the fact that the famous saying of Kant according to which "lawyers still keep on searching for the definition of law" is still valid, at least in the sense that neither today is an equivocal and final definition of law possible. Then, after having analyzed the definitions available in the doctrine, he finally concludes accepting the formulation by E. Bodenheimer saying that "law is bridge between is and ought" [*Ibid*, at 123]. The core of the problem is the relation between law (*lex*) and right (*ius*). The starting point for theoretical expositions is the statement made by Thomas of Aquino, stating that law is embodied in the authority of the drafters of the law, whereas right is *per se* a rightful action, and thus right decision in concrete situations. [*Ibid*, at 127.] Having studied the development of the modern concept of law and expounding on the concept of law the author arrives at the conclusion by the end that just as the legal norm cannot be deducted purely from the idea of law, similarly, legal decision cannot be simply deducted from the legal norm. Both legal idea and legal norm only provide law with possibilities, and the question is whether they will serve as basis for the emerging of law in its full reality? The answer is no, since the basis for that will be concrete facts of life. As a concrete statute can only be enacted from the abstract legal idea in consideration of the possible life conditions to be regulated, concrete law can only emerge from the statute with reference to virtual life conditions. It is just as impossible to create normative law from the state of being as it is impossible to do so merely from the category of ought to be. "Real law evolves only where norm and facts, be and shall be correspond to each other: *law is the meeting of is and ought.*" [*Ibid.* at 135–136.] Law is not of a substantial but of a relational nature, law is more than complex of paragraphs, it is a unit composed of relations instead of norms. The historic realization of law embraces a process of concretization and positivization from legislation to the legal decision. Since this concept of law combines formal and material principles of law, it exceeds the scope of conflict between natural law and positivism.

That was only a small part of the thoughts Kaufmann's book is full of. Its major characteristics are erudition, sensitivity towards problems, moderation, tolerance and the elegance of its style. Every educated lawyer should necessarily read this book, and also those wishing to attain legal education.

Vilmos PESCHKA

István DIÓSZEGI: **A hatalmi politika másfél évszázada, 1789–1939,** [One and a half centuries of power politics], MTA Történettudományi Intézete, Budapest, 1994, pp. 477

"Law is the servant of politics. Reading Diószegi's new book reminds the reader of this saying. The one and a half centuries of domination politics studied by the author (1789–1939) clearly proves the rightness of this statement, since all international treaties, alliances, international organizations which had been formed during that period turned out to be pure formalities, ornamental or simple framework for the real political aspirations in the background.

By placing foreign relations into the forefront, Professsor Diószegi creates a colourful fresco about the events of the hundred and fifty years concerned. The expression "colourful fresco" was used here on purpose: the book is written in an exciting, highly readable style which is easy to understand for the wider public, as well. At the same time the book lives up with the requirements of scientific standards. Each chapter is divided into short subchapters which only extend to two or three pages, but within this structure the author has managed to analyze the events from more than one viewpoint, from the aspect of the foreign policies of several states. The work is intended to contain a global view, for it does not merely concentrate on Europe but in the center of the study there are the ambitions for power and domination ruling the whole world.

The presentation of the time period is started at the French Revolution, which opened a new era in history through winding up the feudal system and through the rising of new social powers. This is the starting point of the first part of the work, the title of which is "Decades of transformation". István Diószegi describes the historic events in details and in the course of that demonstrates how the opposing powers, namely the ones supporting dinastical legitimacy and the others fighting for the creation of a civil—national state first collided. This period lasted from the destroyment of Bastille through Napoleo's ruling until the restauration carried out by the Holy Alliance and even after that, till the first gaps became visible and the preparations for national revolutions beginned.

The next period starts from the date when Europe has been "set on fire". This section describes the intricate way through which German and Italian national unities could be reached, ending with the establishment of the new South Slavic national states. The third period is concerned with the evolution of the allies systems in the framework of colonializing aspirations which had preceded the *First World War*. Finally, the last section of the book deals with the period following the "first burning down of the world", which was extremely

complicated from the viewpoint of history of diplomacy.

The author of this review does not intend more than to sketch a rough, perhaps even superficial, outline of the historical topics discussed in the book. There are, from the legal point of view, two groups of thought of special interest to be found in the work, concerning the direction of foreign affairs and the system of movements in international politics. We wish to concentrate on outlining and expounding these thoughts in our review.

I. The study of the inner, cohesive and coherent structure of the foreign policy of a state should arouse the interest of all the readers connected with the legal sphere. The author examines important institutions in his work, though concentrating exclusively on the period of dynastic legitimacy (to use his own expression) and the birth of the first modern, national-ethnic states before *World War I.* Perhaps some attention should have been given to drawing a picture yet again of the contemporary legal institutions, administrative mechanisms and tools of government, when discussing the colourful events following the War. Professor Diószegi opts instead for giving a more detailed account of the structure of international diplomacy and, concentrating on a few states, and on the supreme control of foreign policy in his study of the structure of foreign policy.

Throughout the centuries it was the supreme ruler who controlled the foreign policy of a country. Beside the right of the Crown to declare war, conclude peace treaties, send and receive diplomatic envoys and sign international treaties, the state was always represented by the sovereign. The first significant blow at the exclusive role played by the monarch in directing foreign policy was struck by the French Revolution. In May 1790 the National Assembly decreed that the right to declare war or conclude peace passed to the nation. The importance and effect of this decleration surpasses by far the constitutional changes effected in England during the preceding decades. It also contributed to the violent reaction of the contemporary absolutist dynasties, manifested in the war against France.

It would be worthwhile to examine the way Professor János Sári analyses the weakening of the exclusive power of the sovereign (SÁRI, János: *The historical dimensions of the division of power and its significance in our days or the inner logic of constitutional systems.* Doctoral Dissertation. Manuscript. Budapest, 1996). He states that the realization of the ideology concerning the the division of power parallelled the gradual loss of the exclusive power of the monarch. As the representatives of the feudal society are pushed more and more into the background, he loses his political support, has to act in an "empty space". This historical process is completed by the French Revolution, or namely by the emergence of the idea of the sovereignty of the people. The effects of this were far reaching, as Diószegi also pointed out.

If we continue to study the historical fate of the power vested on the sovereign, we will encounter two possible directions of development. One is the case of the United States, where the president possesses the means to interfere with the legislative processes (except the right to disperse the Congress). His political privileges as the head of the state reminds us in many ways of those of a monarch. In the parlamentary systems, on the other hand, it is the parliament and the government that executes the duties of

governing, and the head of the state is usually considered to be "outside the system" for he has no political liabality. In these countries "the first man of the state" loses his real influence on the executive power, could even be said to run a course of his own. Naturally this also means a diminuation of his role played in foreign politics.

But let us return to the train of thoughts followed by Professor Diószegi. The Holy Alliance coming into existence after the Napoleonic Wars, rooted in the idea of dynastic legitimacy, conserved and reinstated the old conditions on the continent. These condition prevailed, at least partially, even after the revolutions of 1848 that demanded constitutional state. The author considers 1871 the end of this phase. In 1871, with the birth of the German Empire, the establishment of the new Republic of France, the appearence of an independent Italy and the dualistic Austro-Hungarian Monarchy that took place a few years earlier, the constitutional forms of government finally emerged victorious.

István Diószegi uses the inner structure of the French Republic of the 1870s as his model. The president of the republic, functioning as the head of the state, plays a merely formal and representative role in foreign policy, limited to the duties of protocol. The real decisions in foreign politics were made by the government (ultimately responsible to the parliament). Beside the head of the government foreing policy was determined to great extent by the minister of foreign affairs, after all the actual realization and execution were among his duties. The minister of foreign affairs also had to bear the burdens of the institution of ministerial responsibility, a phenomenon that became established during this period. He was held responsible for the work of the whole office, including the activities of the foreign legations. In his decisions he could rely on the advice of the ministerial council of foreign affairs consisting of heads of political departments and deputy chieves. The structure and operational mechanism of the ministry is best reflected in the course and fate of an official report by a deputy. (As regards diplomatic envoys and deputies, it should be noted, that the document regulating the status of the heads of diplomatic service proved to be one of the regulations of the 1815 Congress of Vienna, that continued valid with time.)

A diplomatic agent sent his report to the ministry of foreign affairs through couriers enjoying special privileges. Even though the report was invariably addressed to the minister of foreign affairs, it had to pass through the bureaucratic administration. According to the nature of the different tasks and problems the ministry was divided into departments, where the report was forwarded to the heads of the groups responsible for the different countries. The head of such a group gave a short account of the report to the head of the political department (the most important organ of the ministry). Only the reports considered really significant ever reached the minister himself, while the rest were dealt with in the lower regions of the ministry. Only in exceptional cases (situations threatening with war or diplomatic crisis) could the agent communicate with the minister personally.

It might not be beside the point to add some extra information to the description of the author. The minister, usually the chief adviser of the head of the government in foreign affairs, did not personally supervise the activity of the office. The actual work of supervising and directing was done by

his permanent deputy chief. In England it became a constitutional costume for the organization directed by the deputy chief of the minister to withdraw from the daily political battles. The responsibility of making desicions about foreign affair rested on the politicians, and not on the members of diplomatic service.

Returning to the work of the author: Professor Diószegi contends that the parliament used interpellation as the means of controlling the activity of the government. If the parliament refused to accept the answer it could eventually lead to a crisis between the parliament and the government. The budget extended to foreign affairs was also voted by the parliament. The government declaring war needed the consent of the "House" for the military expenses. Thus foreign policy depended on the legislative body at the last count (although the declaration of war was never voted against by the parliament, after all there is no historical example of such an event.)

The author finds that the English and the American parliamentary practices, as regards their basic elements, are similar to the French, albeit with some notable differences. The English sovereign has retained certain rights to interfere with foreign policy, and the constitution of the United States combines the role of head of the state and the head of the government in the institution of the president.

We would like to add some further considerations to the English and American system of directing foreign affairs, for the sake of a more detailed picture.

As a result of the developements effected in the period discussed by professor Diószegi foreign affairs were and are under the joined supervision of the Crown, the Parliament and the Cabinet. The rights pertaining to the Crown can be divided into two groups: royal prerogatives, exercised by the monarch and those that were relegated to the Cabinet. These are the following: deciding the courses taken in foreign policy, concluding treaties with other states, declaring war, recognition of a state or a government and joining international organizations. There is no strict boundary between these two groups of prerogatives, for the monarch continues to exercise some traditional rights that might actually influence the foreign policy of the United Kingdoms. Such rights are: constant contact with the ministers, "encouraging" (meaning that in certain cases the monarch might express personal opinions), approving the documents of the Ministry of Foreign Affairs, personal correspondance and conferences with foreign heads of state, contact with the leaders of diplomatic missions. These and the "remembrance of the past and the traditions of religion"—to use the expression of Benjamin Constant—secure the influence of the sovereign in England till our days.

According to the English law the most important part in foreign policy is played by the Prime Minister, who might transform his secretariat into a "private ministry of foreign affairs" in order to gain more information for the successful performance of his duties. The Prime Minister might also choose to retain the portfolio of foreign affairs—as did McDonald between the two World Wars. The position of the Prime Minister is reinforced by the fact that he is in charge of drawing up the suggestions and compromises concerning foriegn affairs and he is the one to decide whether and when they should be discussed by the Parliament. The Cabinet has an ascendacy over the Parliament in the supervision of foreign affairs. The Parliament has only limited rights in this matter (for

example the majority of the international treaties concluded by the Government does not need the consent of the Parliament). There is no constitutional rule demanding, that an international treaty concluded by the government could not be signed by the monarch without the assent of the Parliament.

The United States is a federation of member-states, that may not become parties to international treaties or foreign alliances according to the Constitution. Their rights to interfere in foreign affairs are limited and they need the consent of the Congress to exercise them. The process of making decisions concerning foreign affairs is best described by John Spanier and Eric M. Uslaner. (J. SPANIER—E. M. USLANER: *Foreign Policy and the Democratic Dilemmas.* (3rd ed.) New York 1982. 81. p.—quoted by G. KARDOS: "The Foreign Polic of the United States" in: *The Special Characteristics of the Foreign Policy of Some Capitalist Countries.* Budapest 1987. 53–54.) They visualisé this process, taking both historical development and present conditions into consideration, by depicting four concentric circles. The innermost circle is that of the president and his advisers, this is followed by the level of the government, the armed forces and the scientists, then comes the Congress, the political parties and syndicates, and the final circle represents the media and the public opinion. The influence of the heads of the important institutions depends on the extent they are capable of gainig the president's confidence by their formal positions, for in the US the only function of the central government offices is to help the president.

In the direction of foreign affairs the president could be said to possess unlimited power. He is the commander-in-chief of the armed forces, he might conclude international treaties, might appoint ambassadors and consuls, and is authorized by the Constitution to take extraordinary measures. According to the Constitution the ministers are directly and solely responsible to the president. Although the consent of the Senate is necessary for their appointment, the president is entitled to appoint one of his followers as the minister of foreign affairs.

On this level the absolute power of the president is limited by the Committee of Foreign Affairs of the American Senate, where the most important audiences take place, and the motions for a possible amendment, the conditions of ratification are discussed in detail. As the the international treaties concluded by the president gain the status of law in the country according to the Constitution (Art. 6), the Senate might voice its opinion through giving advice, furthermore the required consent of the Senate (at least two-third of the votes) counterbalances the dominance of the president in foreign affairs.

The author in his examination of the period in question arrives at the conclusion, that Germany and the Austro-Hungarian Monarchy was characterised by an amalgam of constitutional and absolutist forms. The illusory nature of the German parliamentarism is well documented by the fact, that the Imperial Council, although born on the principle of universal suffrage, did not rise above the level of a consultative body, because the majority party could not form a government nor was the leading minister liable to the Council. Nor could refusing to accept the answers given to the interpellations made in the Reichstag lead to a crisis, for this had no constitutional legal consequences of any kind. The Empire had no central government in any case, since

only the dignities of the Emperor and the Chancellor were considered Pangerman functions, the empire was otherwise governed by the Prussian ministry. Foreign policy was formally and practically alike considered the "entailed property" of the Emperor and the Imperial Chancellor.

In the Austro-Hungarian Monarchy the governments of the Austrian and of the Hungarian territories were formed by the majority party. Joint ministries were set up to deal with the common affairs including foreign affairs. At the top of the bureaucracy stood the Austro-Hungarian Cabinet (Council of Ministers) supervising all common affairs. The national Parliaments had no say in the supervision of common affairs this being the task of the delegations meeting once a year. The author views the appointment of the common ministers, in which the Parliaments had no authority, as a relic of royal absolutism. He regards the figure of the sovereign chairing the common Cabinet (or Council of Ministers) in a similar way. Like in Germany the foreign policy came under the jurisdiction of the "King and Emperor" and the common Minister of Foreign Affairs. The changes described by Professor Diószegi determined the formal ground, the possible movements and the structure of the foreign policy of the decades to come. The First World War put an end to this period, many fledgling states were born as a result of the "cartographical changes" and in the next few decades new forms of state organization came to existence (meaning primarily the socialist Sovietunion, the fascist Italy, the national-socialist Germany and Japan of the Far East). The author of this review would not have minded reading something on the special characteristics of the structure of the foreign politics employed by these new formations. After all the foreign activities of these countries played a decisive role in forming the events of history. In the case of the Sovietunion, for example, the special forms of its state organization grew to "worldwide proportions" after the Second World War.

II. In his epilogue the author presents the essential connections, the key motives in historical processes he arrived at after a thorough examination of foreign politics. He seems to share his own musings on the nature of foreign politics (he actually gives this subtitle to the chapter).

The primary importance of the interests of the state, as the main motive, might be divided according to different views when its concrete massage in foreign policy is considered. In the analysis of István Diószegi sovereignity and security stand at the first place. Both are connected with the international position of the state, thus the author calls them positional relations.

There is no such thing as absolute and uncontaminated sovereignity, with the posssible exception of England in its period of "glorious isolation". Those states that do not opt for an arbitrary isolation, enter a system of mutual dependence through their contacts and alliances, so we had perhaps better speak of a limited sovereignity in their case. The category of limited sovereignity includes a wide scale of possibilities, that might extend from the system of agreements, pacts and contracts entailing international rights and duties to the (albeit reluctant) acquiescence in the temporal or permanent occupation of a country or countries. This occupation might be founded on the terms of a peace treaty dictated by the victor after a war. The states take into account, in fact have to do so, in their relation to each other the possible limita-

tions, but their final aim in foreign policy is to obtain and retain as complete a sovereignity as possible.

The other motive of positional relations in foreign politics is security. The author does not mean millitary security, nor the state's ability for self-defense, nor security guaranteed by treaties (with the enemy, or in alliance with other powers against the enemy), but political security. According the definition of Professor Diószegi this means that a country limits, liquidates or subordinates a country or countries that threaten its own existence.

The sovereign power that is exclusive and autocratic by nature cannot suffer a division of power, and should this become permanent its unhealthy nature becomes more and more pronounced eventually leading to a permanent state of civil war—like in the case of the recent events in the Balcans. Opposed to the logic of internal politics the plurality of international life is evidently unavoidable, in spite of this the ideal (for the country) is a state of complete and absolute security, that is an arbitrary elimination of international plurality. The struggle to achieve this ideal state is and has always been present in international power politics, but it has never attained in its perfect form.

What substitutes it is a pursuit for relative security—says Diószegi. On the first level of this manylayered concept of security we find the idea of local security. According to the definition of the author this is but the conservation of the conditions prevailing on the borders, with the aim of eliminating any actual or possible threat, and preventing the neighbours from gaining excessive strength.

This could be achieved by treaties and pacts, by subordination of the other country and, at the last resort, by annexing it. The "positive" reason for this last move is to abolish the source of danger, the "negative" is to prevent occupation by other powers. A good example of this last case is Poland, that was divided on three occasions.

On the second level is the question of regional security, that is the state's efforts to quench any threatening tendency in the sorrounding territories. This is achieved by the same measures than local security, asserts the author, that is the country tries to conserve the other small countries in a state of division (as did France throughout the centuries trying to prevent the realization of a German unity), or might subordinate, make them dependent, or at the last step annex the states to its territory—history has produced many examples of these two last cases.

The last and highest level of relative security is the continental security, that consists of a series of measures taken on the behalf of security politics regarding a whole continent. The existence of this tendency can be pointed out in the Russian, the German and the French foreign policy, but apart from achieving some minor results it was never given a definite shape, though it kept haunting the foreign policy of the aforesaid countries. Professor Diószegi mentions only the United States as a historical example, that using all the means available managed with the obstinacy of a bulldog to draw the whole North-American continent under its political supervision and legalised these proceedings on an international level by having the Monroe-principle accepted.

The author considers desirable the introduction of a new category of security as a consequence of the changes following the Second World War: the category of international security. He argues that the latest manifestations of world politics can be

expressed only by the help of this new "terminus technicus".

The reader could ask with some justification: was it not the task of the Security Council of the United Nations to help maintain exactly this kind of security. Considering that the suggestion of the author regarding the category of international security makes it evident that his observations on the nature of foreign politics are not strictly based on the one and a half centuries examined by him, he should have made his statement more unambigous.

In his study of foreign politics the other great group Professor Diószegi examines is that of territorial connexion. The question of obtaining, preserving and regaining territory has alway been at the forefront of foreign politics. The countries accept the concept of international plurality in their relations with oneanother, but this does not automatically mean respecting the territorial integrity of the others. The historical changes did not spare the territorial borders, and the different states have often changed their position on the same geographical territory, alternating between the role of trying to preserve and the role of tring to regain the same teritory. The author first expounds the category of obtaining territory, that might mean an addition of new territories, or even the restoration of independence lost previously. In the age of dynastic legitimacy the extinction of the direct line to inherit was considered a legal ground for obtaining new territorities. Such examples are the Spanish or the Austrian wars of successions.

Géza Herczegh [Magyarország külpolitikája, 896–1919. *(The Foreign Policy of Hungary 896–1918)* Kossuth Könyvkiadó, Budapest, 1987. 385 p.] writes, that in medieval Europe the Christian countries considered the territories of the others inviolable, and wars to gain territories could only be fought on the ground of some "real and justifiable" cause. The most frequent cause was provided by the extinction of a royal house. Consanguinal ties with such a royal family—the result of the intricate system of royal intermarriages—entitled the relatives to claim the right of inheritence, the right to obtain the territory considered an unviolabe unity. The wars were always aimed at enforcing the claim of inheritence in an absolute sense, that is at obtaining the whole territory of a country. The first deviation from this practice establishing a precedent was the repeated division of Poland, but this happened during the last act—to use the term utilized by Professor Diószegi—of dynastic legitimacy.

Returning to the train of thoughts followed by István Diószegi: In the age of national governments and ethnic states the question of obtaining territory gains in importance and becomes a central problem on the stage of international relations. The final aim of a state organised on national basis has always been to contain its whole ethnic stock within its own borders—an aim achievable only by a radical readjustment of the existing borders. In this new state of affairs legal principles untill then considered inviolable soon lost their validity. To give an example: during the process leading to the realization of German unity dynastic legitimacy was no longer considered a dogma (which led to the disappearance of the smaller states). During the realization of the other classical unity, the Italian unity, another political formation that so far seemed to be eternal, the secular power of the Pope, was overthrown—emphasizes Professor Diószegi. Although these changes were effected under the flag bearing the

legend "ethnic states", the executives of this ideology quite often overstepped the mark: the ethnic boundaries fairly often did not correspond with the borders of the state. New borders did not include the whole ethnic stock (German unity did not include German speaking Austrians, therefore the dream of Great-Germany was not fullfilled) or they contained ethnically alien nationalities as well (in the case of Germany Prussia preserved its Polish speaking territories), or again they might have struck a deep wedge into the body of other nations (Poland after the First World War).

Out of security considerations ethnically neutral states also had their say about the development of local problems brought about by obtaining territories under the pretext of establishing ethnic states. Professor Diószegi brings up as examples the oppression of the Hungarian revolution and war of independence by the Russian intervention in 1849, the attemps of France to prevent the unification of Germany in 1870 and the dissection of the Austro-Hungarian Monarchy by the Allied Powers following the First World War. In each case the explanation offered to the public was different, but behind it lurked the constellation of a more complicated national interest of political security.

The book next considers the problem of preserving territory. The question of preserving territorial integrity becomes of primary importance for a country when alien powers challenge the valid state of affairs. In this event the preservation of the *status* quo becomes vital. In the age of dynastic legitimacy the heirs of the collateral line of descent supported their claims to the territory by claiming primacy, continuity or legality. As the dubious quality of these claims often led to wars, Maria Teresia for example preserved her throne at a great cost in human life, beside the existence of dynasties legitimate forms concerning state territories evolved during the course of centuries. Beginning with the Middle Ages the idea of territorial integrity became connected with certain symbols, usually crowns. Thus state territories were also called the countries of certain crowns, for example the Hungarian Crown, or the Crown of the Holy Roman Empire. The most eloquent testimony of the legitimate power attributed to the concept of integrity intertwined with sacral symbols is given by the example of the Hungarian Crown. When the ethnic states first appeared, the legal pretext previously used to obtain a territory was again utilised to retain it, and all types of arguements were thrown in to support "legal claims". To quote István Diószegi: "The unviolable nature of state borders drawn up on the grounds of security considerations, and of both justified and unjustified territorial claims, was often declared of universal interest by the very men who drew these borders. The members of the Holy Alliance called the Treaty of Vienna of 1815 a manifestation of divine justice, and after 1945 there was a great deal of talk about the state borders drawn up after the war serving the peace and security of Europe. Now, after the collapse of the Berlin Wall, the victors of the Second World War will have to do a plenty of thinking about the new legitimacy."

The third and last category discussed by the author, the category of regaining territory, is the one that presents us with the most problems. Professor Diószegi thinks that the title of heir and the idea of dynastic legitimacy gradually lost ground during the centuries as legal claim for the regaining of some territory. It was ousted and substituted by the legal pretence of a nation's right to

regain territories. It is especially in our region that this legal ground still holds valid and the demographical maps of ethnically mixed countries provide a good excuse for militant, aggressive groups.

The author calls these claims justifiable and legally founded—as opposed to conquests that might not be justified by the reasons listed above. Researching the beginnings of expansion, Professor Diószegi alludes to those constituents of human nature, human instincts that are represented by the behavioural forms of collecting, augmenting, and the purposeless activity of accumulating possession for its own sake. The volume of the book probably prevented him from expounding this territorial motive of foreign policy more thoroughly, though it doubtlessly sounds convinincing, when the author asserts, that "After all it stands to reason, that one can get rich more easily and quickly by taking away what belongs to some other man than by struggling to produce new assets." The former, economically motivated aspirations had to be supported by apparently legitim arguements and this always led to the elaboration of the necessary ideology that tried to justify these claims. Beside the usual economic considerations there might be other reasons behind the conquest. István Diószegi starts with presenting the military-security considerations reinforcing the defensive position of the state, by describing the constant political stuggle of France to make natural boundaries its official borders. The object of the foreign policy of Russia documents the other motive, the effort to obtain access to the sea or ocean. There can be found may illustrations of conquest made to gain prestige from Napoleon through Mussolini to the "tyrants" of our days. Expansional politics on the other hand might threaten the security of another powerfull country, thus inducing other conquests motivated by considerations of security, and leading to a chain reaction of expansions culminating in catastrophe.

The author deals with the concept of "protection" as the third idependent feature of foreign policy. The role of the protector means, that the protecting state "raises its voice" in order to ensure that the other country treat its protégés in the same manner than the rest of the population, or even give them special privileges. This is discussed as an independent feature by the author, for these efforts are not related with safety or territorial considerations. Of the motivations behind the role of protector religion is the most ancient—we must remember the diplomatic memoranda "worrying" about the situation of Christians living in Turkey. Professor Diószegi asserts that the demand to have the category of minority rights recognized and guaranteed, a hot issue these days in our own region, or even the demand for autonomies of different types are all the fruits of the institution of protection, a legacy of the period of ethnic states, where the manifestations of the role of the protector were not exercised by the mother country alone, as the function performed by the ethnically neutral powers is reflected in the articles on the protection of minorities in the Peace Treaties of Paris and in the creation of a court of appeal in Leauge of Nations.

The politically motivated protection is a category of its own. According to the definition of the author: "The state that is in the position of the protector makes its own social-political organization and ideology the role model, and excepts the other country not to discriminate against those citizens who choose to follow this model. Any kind of discrimination is retaliated by the state in the

position of the protector." The war declared by France in the name of revolutional solidarity in 1792, or the proletarian solidarity of the Sovietunion actively helping the cause of world revolution in the 20s could be viewed as such a retaliation. The author suggests the new term "democratic solidarity" for designating the manifestations of political protection of our days, when a group of citizens protests against the violation of the democratic and human rights of a group of their co-citizens by the supreme power (Charta' 77, Solidarity' 81), and than these groups are extended the protection of the model state or states—in our examples the Western states.

It might be mentioned, that giving the adjective "democratic" to the concept of solidarity may raise the problem of relativity. It might be more fortunate to operate with ideologically less coloured and partial expressions, that do not evoke conditional reflexes. Beside the "classical" antithesis of socialist-capitalist, the relative nature of the concept of democracy is also demonstrated by the radically different interpretation—and practice—of democracy in the economically developed countries, for example in the United States or Taivan or Singapur. The legality of active protection based on "democratic solidarity" is a complicated question in any case. The Sovietunion spoke of democracy in 1979 in Afganistan, and so did the US in connection with Haiti quite recently. In both cases the sovereignity of the protected states was violated in the course of a legally rather dubious protection of democracy. The question is made even more complicated—or perhaps legitimate in this case alone—by the democracy-protecting actions effectuated within the framework of the United Nations, for example in the case of the Kuwaiti crisis culminating in the Golf War (although constallation of security-policy were also raised in the case of Kuwait). Without becoming even more entangled in the analysis of these latter problems, we point out, that we merely wished to draw attention to the danger of choosing adjectives categorically.

The author, summing up his own thoughts, concludes that the role of protector is only an additional motive of foreign policy. It comes to the fore, when the manifestation of protection is compatible with the main considerations of the foreign policy of the country extending the protection, but when it ceases to be so, the question of protection is quickly forgotten. Effectiveness is not among the virtues of political protection, after all interventions of this type always violate sovereignity, which no state can tolerate, therefore its realization becomes possible only by exercising constraint, or in extreme cases by utilizing armed forces, but this might happen only if such a drastic measure is vindicated by other, safety or territorial considerations of the foreign policy.

After making an account of the most important motivations in foreign politics, István Diószegi arrives at the conclusion that there is no absolute fixed order of values between positional and territorial considerations, and such a choice is necessary only in case of conflict. However the author is of the opinion that in these cases the territorial motivation gains ascendancy, at least in the majority of the examples, over sovereignity and security.

Of course this is not an exhaustive list of the components of foreign policy, there is the extensive collection of scientific, cultural, legal-economical relations, the testimonies of the ideological solidarity, that might even gain priority in certain cases, or

might rise to the most privileged position, but ususally remain far bellow the safety and territorial consideration of foreign policy.

The book of István Diószegi is a significant work, for the influence of the events and new ideologies of the one and a half century analysed extends to our days. Studying this thorough, detailed and readable work might contribute to the formation of a new perceptive, a new ground for academic investigation, a "pair of glasses" constituted of conscious pieces, through which connections hitherto unpercieved might become visible and the behaviour of countries in international life might be understood. Among the books recently published on power politics the work of Professor Diószegi is certainly a worthwhile reading material, due to his unique perception of the history of diplomacy and his interesting observations.

Károly KISTELEKI

Imre VÖRÖS: **A tulajdonhoz való jog és az önkormányzatok** [The property and the economic activities of local governments], Települési Önkormányzatok Országos Szövetsége, Budapest, 1994, pp. 119

The monograph written by Imre Vörös is from many aspects an *exciting* reading.

The subject of the work in itself already combines multiple aspects. I do not believe that there is any expert dealing with the activities of municipalities in practice, the attention of whom would not be caught by the up-to-dateness of this book. I doubt if there was anybody regarding himself as "homo politicus" who would not be interested in this study of the separation of public and private spheres in the light of the right to property. And I am also convinced that every colleague of Imre Vörös at the Constitutional Court will read these more than a hundred pages with professional excitement.

The main reason for the attention paid to the book will most probably be that, although the judges of the Constitutional Court may attach separate opinions to the judgment, or, eventually, concurring opinions, the judges still lack a forum to criticize the judgment or—let us put it correctly—to criticize the views of their fellow judges. I think that this will give birth to a completely new literary form in Hungary. This new literary form is the analysis of the differing views of the members of the Constitutional Court. Such an analysis can be regarded as an interior study—from the aspect of the author's employment status, however since it addresses the public, it can also be regarded as an external study.

In my opinion, Justice Vörös has played a very prominent role in laying down the basis for this tradition. His work was inspired by passionate professional adherence to a legal institution, to a fundamental right; one can sense his responsibility among the lines. His readiness to take responsibility could be characterized with the words of the famous Hungarian poet, Miklós Radnóti, as "confession and commitment". Therefore the book tells us about more than the properties of the local governments, it deals with more than constitutional adjudication on the issue; the book is primarily about the modern concept of the "inviolability of property".

This book is thus exciting because of the collision of pro and contra opinions. The book is in fact a *romance about the right to property*. Its subtitle could be, maybe

with an air of exaggeration: "Fight against the lack of concepts—with a concept".

The backbone of the study is formed by criticism in connection with the properties of the local governments, and suggestions inspired by the former. This theoretical link between *de lege lata* and *de lege ferenda* is based in the first place on a critique of the valid legal norms. (Part "A": The properties of the local government and its economic activities *de lege lata*). After the analysis of the controversies and deficiencies in the legal regulation, the author begins to scrutinize the relevant practice of the Constitutional Court. [Part "B": Art. 12 para. 2; Art. 13. para. 1; Art. 44. para. 1 b, of the Constitution in the light of the decisions of the Constitutional Court]. This part is divided into three section with an additional summary at the end. Firstly, following the threefold structure, Justice Vörös separately examines the right to property as a fundamental right, then he studies whether and to what extent the local government can be a subject of fundamental rights and finally he elaborates on the particular right of local governments to property in details. In the next part of the book dealing with *lege ferenda* (Part "C": Proposals concerning the constitutional regulation of the properties of local governments and their involvment in economic activities) the reader learns about the author's concept and proposals, which have been worked out and summed up on the basis of a valuation of foreign experience.

In Part "A" the author emphasizes the fact that whereas property may exist without economic activity, no economic activity exists without property—therefore he treats the question of economic activities as being *inferior to property.*

After having examined the provisions of both the Constitution and the Act on Local Governments, the author considers the most serious problem to be that the strive for regulating the fundamental collective right of self-government (Art. 42 of the Constitution) is not absolute in any of the legal norms, but rather conditional. It is not clear, what are the principal, conceptual grounds for the independence of local governments. As a logical consequence of this, restrictions to be imposed upon this independence are not clearly set forth, either, i.e. the "limits, the methods and the legitimacy of restrictions" are not clearly determined. The author criticizes the provisions of the Act on Local Governments (which came into force in 1974—ed.) in an especially harsh manner. In his eyes the structure of the Act is most similar to a rick of straw which was scattered pell-mell all over the ground, and it is completely wrong from the viewpoint of codification technique. Imre Vörös leaves no doubt in the reader's mind when he shows that the drafters of that particular Act had *absolutely no affinity to civil law.* Although his argumentation is strongly biased for civil law, because of his own subject, his style is nevertheless full of wit. The following expressions are good examples of criticism: a civil law balderdash, linguistic and legal nonsense, meaningless verbosity, etc.

In the first chapter of Part "B" Justice Vörös sets forth that for a certain period of time he used to consider the practice of the Constitutional Court as correct and consistent. Later on his professional convictions urged him to "take Cassandra's role", i.e. to stand up for an idea everybody else refuses to believe in as long as they recognize it is true. The relevant decisions were the following: the decision concerning

indemnification, the decision concerning former church properties, and the one concerning the question of housing.

With regard to the problems of indemnification Imre Vörös believes that the solutions are in some way related to actual political aims. He even points out that the Constitutional Court has revised one of its former decisions as a result of a compromise between the parties to the coalition. Concentrating strictly on questions of the law, he is convinced that insertion of the category of a "statutory option" in fact *creates a possibility for taking away of property*, thus eliminating the autonomy of the owner. Imre Vörös has already in his separate opinion expressed his fears regarding that such a decision might effect a *loss of legitimacy* of the constitutional guarantees of the right to property. In his opinion, Act No. LXXVIII of 1993 serves as *evidence* for proving that his fears had been well-established, in so far that this Act incorporates an *obligation* imposed upon local governments *to alienate* their property under the name of option.

In connection with the decision concerning the legal status of former church property [4/1993. (XII. 22.)], the author thinks that no distinction has been made between imposing burden on the property and the taking away of the proprietary rights.

According to the decision of the Constitutional Court concerning housing [64/1993. (XII.12.)] a burden imposed by the force of administrational law can result in that the particular right concerned, which is, in the present case the right to property, will be deprived of the protection provided by the guarantee to its substance and this protection will be reduced to a guarantee to the value of the property instead. The author claims that this *per se* violates the Constitution, and it completely contradicts the rule of law principle, since the owner will be unable to foresee, whether in the given case the Constitutional Court will rather protect the substance of the property or only its value. Hence the protection of proprietary rights under civil law becomes the subject of the discretionary decision of the Constitutional Court, the right to property gets meaningless. "The so-called guarantee to the value of property is nothing more than a fig-leaf that is supposed to cover the too obvious political agreement in the background of the decision concerned, i.e. an attempt to legalize the taking away of proprietary rights."

The decision, since it has adopted a one-sided, emotional interpretation protecting exclusively the interests of the tenant, does not take into consideration that an apartment shall not solely function as a "shelter" but it also serves other purposes, such as ensuring the basic life conditions, and not only for the tenant, but also for the owner. The above described constitutional possibility for acquisition of proprietary rights possesses the danger that it can be extended with regard to both the subjects and the objects of these rights. According to the author the most harmful consequence of the decision is that the actual object of the right to property comes out of the scope of constitutional protection of the right to property (Art. 13 para. 2 of the Constitution) without that, at the same time, it would fall under the protection provided by the constitutional provision on expropriation (Art. 13 para. 2). Thus it is "no longer a proprietary right" because of its undetermined object and confused interpretation. Imre Vörös agrees with professor Depenhauer, member of the German Constitutional Court on the subject

matter. The basis of legitimacy for the German Federal Constitutional Court is exclusively the positive constitutional law. For the Hungarian Court, on the other hand, the concept of invisible constitution provides with an opportunity to get involved in politics, absent an express authorization for that.

In the authors view reference by the Constitutional Court to the practice of the European Court of Human Rights, and especially to the James-case is false and misleading. Firstly, because the Court should have reasonably referred to this decision in case of the annulment of the statutory option provided by the Housing Act, and secondly because he is convinced that a provision of a legal norm has been declared void despite of that the reasoning of the judgment proves just the opposite, i.e. that the norm concerned complied with the Constitution.

Based on the foregoing, Imre Vörös claims to be sufficiently demonstrated that although the Constitutional Court had recognized the right to property as a fundamental constitutional right before, nevertheless it reversed its consistent decisions later on, so that the constitutional guarantees to the substance of the property have been turned into guarantees merely protecting its value. The author of the monograph disagrees with this. He is convinced that the fundamental right to property can only be effectively protected in the totality of its three composing elements: "protection of the ability to acquire property, and protection against both the taking away and the restriction of proprietary rights", for in the absence of these, at the present stage of development, "neither democracy, nor social market economy exists". The protection of the first two elements out of the three shall be absolute, whereas restrictions shall be tested against the requirements of proportionality and necessity. The socially bound nature of property, as well as the wider authorization of the legal persons of public law to impose restrictions, and determination of the limits of restriction by law may serve as possible basis for imposing restrictions on proprietary rights.

In the second chapter of Part "B" Imre Vörös takes the position, arguing against the relevant decisions of the Constitutional Court, that it is ineligible from the viewpoint of a jurist to *transform* questions of fundamental rights of the local governments (Art. 44/A of the Constitution) *into questions of authorization* [4/1993. (II. 12.)]. In the concrete cases the local governments are subjects of the civil life just *like any other subject of private law.*

The author declares decision 4/1993. (II. 12.) of the Constitutional Court to be *inconsistent* because it narrows the right to property of local governments so that only the legal position of the owner will be protected and it excludes from the protection the several proprietary rights.

Decision 64/1993. (XII. 22.) even forgets about the protection of the legal position of the owner, since this cannot be included into category of guarantee to the value of property. Besides, the statement concerning value-connected guarantee cannot be based on any provisions of the constitution.

In the summary of Part "B" Justice Vörös repeatedly states that though the practice of the Constitutional Court has been influenced by the actual problems of politics, it still protects—but with a particular uncertainty—the legal status of local governments, however the content of this is also rather uncertain. Hopefully when it comes to the taking away of the property of local governments, their proprietary rights will

lonly in a limited number of cases stand under the protection of the guarantees to ther value of the property. In these particular cases Vörös concerns it to be regrettful that the Constitutional Court has not taken into consideration Art. 8 para. 2 of the Constitution, since it declares that the substantial meaning of fundamental rights shall not be restricted.

In conclusion the author sums up the consequences to be drawn from foreign experiences and he formulates his current message, his concept regarding the ongoing process of constitution-making. His proposals concerning the regulation of the legal status of local governments refer to certain changes in terminology, and the text he proposes outlines a flexible, but at the same time accurately elaborated model. In this model local governments possess the complexity of rights but their rights can be subjected to restrictions provided that the necessary guarantees are available.

To date, it has more or less turned out, what are the portions one is entitled to (if at all) of the "dish of the political transformation. On the back cover of the book the author" presents "the song of the changes, which in his opinion only those will sing who get a share of the spoil. But the question of the near future is whether who can intone the "hymn of constitution-making". This is the reason why I considered to be important to write about this book.

Viktor PÁRICSI

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PREFACE

FINNISH–HUNGARIAN SEMINARS ON CRIMINAL LAW AND ADMINISTRATIVE LAW*

Within the framework of the co-operation agreements between the Finnish and Hungarian Academy of Sciences, a series of bilateral seminars began at the end of the seventies. Every two or three years since then there have been meetings for criminal and public lawyers of both countries. These seminars brought together Finnish and Hungarian scholars to discuss the most timely issues of penal law, constitutional law, administrative law and international law. All those conferences were attended by scholars, government legal officials and practitioners, the attenders presented papers, made comments and participated in discussion.

In 1996 Hungary hosted two seminars with Finnish colleagues, the fifth seminar of administrative law held in March and the seventh seminar on criminal law in September. That conferences will undoubtedly remain in our memory as one of the most fruitful and warm academic events. The publishers extends its thanks to the participants for their contributions.

The papers made at those seminars together with the opening remarks are edited for publication in this volume.

Finally, again the publishers wish to express their deepest appreciation to Adjunct Professor Balázs József Gellér, who edited the conference material, as well as to Caroline MacMahon–Gellér, MA (Cantab.), who was the linguistic editor of these articles and turned as much of them as we would allow her into English.

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At the opening session of the 7th Finnish–Hungarian Seminar on Criminal Law Professor Tibor Horváth welcomed the participants to the conference with the following words.

"Ladies and Gentlemen, Dear Guests, Dear Colleagues! It is my pleasure to greet our guests from Finland here at the University of Miskolc, and to welcome all the participants in this Finnish-Hungarian Criminal Law Seminar. My pleasure is not only at the presumably high standards of this academic conference, but also at the fact that Finnish-Hungarian academic co-operation has continued in this specific area with uninterrupted energy.

It is well known to all of you how much the social and political changes and the changing international political situation have influenced—indeed, more often impeded rather than assisted—the developing cultural relationship between our two countries. The Second World War and its political, or rather geopolitical, consequences meant an essential break in this process. Only in the 1970's were there important changes, when a kind of cultural co-operation was forged with the signing of the Helsinki Accords.

It is my satisfaction to point out that representatives of Finnish and Hungarian jurisprudence played an active part in this process, and themselves contributed to the pulling down of cultural borders. This mutual effort has now been acknowledged. There are several cultural agreements between our two countries, of which one is the academic agreement regulating co-operation in the area of jurisprudence.

However, it is also true that co-operation in the field of jurisprudence has developed slowly, irregularly, and accidentally. We, the lawyers and criminologists, were lucky when our interest turned towards Finland at the beginning of the 1970's. We desired to acquaint ourselves thoroughly with Scandinavian criminal law; we were, additionally, aware of the relationship between our nations, and we watched with undeniable curiosity the developments in this economically and culturally kindred nation.

I myself visited Finland at the beginning of the 1970's, and I was to learn more about Finnish jurisprudence in Helsinki and Turku, where I met outstanding scholars and experts such as Professor Lahti, who at that time was working at the University of Turku. As far as the development of our academic relationship is concerned, it was undoubtedly important that I met Professor Antilla, the then directress of the Legal-Political Institute in Helsinki, who was a criminologist well-known in the western world. My second visit took place in 1975, and by that time Professor Antilla and myself were already exploring the possibilities of future Finnish-Hungarian co-operation. It was after this that Professor Antilla proposed the establishment of an official academic co-operation, and also the idea of a Finnish–Hungarian criminal law seminar such as we have today. The Institute of Political and Legal Sciences at the Hungarian Academy of Sciences accepted the offer of official co-operation with pleasure, and the first Finnish–Hungarian criminology meeting was organised in this spirit in 1979 in Budapest. I would like to take this opportunity to acknowledge Professor András Szabó, Constitutional Court Judge, and Professor Imre Wiener, who also participated, along with myself, in the organisation of the very first Finnish–Hungarian Seminar.

This first meeting was followed by a second one in Helsinki, organised by Professor Antilla and Professor Lahti. Intellectually and emotionally these first two meetings were, for myself, the most memorable. In addition to the academic content of the seminars, all of us were impressed by the kind attention and friendly attitude with which we were treated by our Finnish colleagues in Helsinki and Turku; to give just one example, the Lehtimaja family greeted us in their own home with Hungarian words and music. The first and second meetings were followed by two more in Budapest and in Helsinki, and now we are together again, this time in Miskolc, where the University of Miskolc Institute of Criminal Sciences is hosting the 7th Finnish–Hungarian Seminar.

This setting was not accidentally chosen. As a professor of the legal faculty, founded in 1981, I have always consciously worked to develop co-operation with Finnish jurisprudence, primarily with the universities and research institutes, through the Miskolc Legal Faculty and the Institute. My work has not been without success. We have invited speakers from Finland, such as P. Koskinent and T. Utriainent, to lecture to our students; we then established a relationship with the University of Rovaniemi. E. Riepula, the rector of the University of Lapland and the present Dean of the Legal Faculty there, was also our guest.

Our connections with Finnish jurisprudence are not, of course, one-sided. I am very proud of the fact that the majority of the members of the Institute are participating in some way in the information exchange built up between the institutions. For example, as HEUNI scholarship holders, some of them have spent time at the Institute of Helsinki, and some of us have given lectures in Rovaniemi. I myself was greatly honoured when the University of Lapland conferred on me the degree of *honoris causa* for my academic work and my participation in the development of Finnish–Hungarian academic co-operation.

Dear Colleagues, I believe that the academic topics which are on the agenda of the Finnish–Hungarian seminars have a special theoretical and practical importance for both countries. Therefore it was not by accident that the first meeting discussed sensitive questions of the sanction system and the imposition of punishments. The social and political changes in Hungary are compelling Hungarian jurisprudence to search for ways in which to harmonise our laws more fully with those of the rest of Europe. This conference could give enormous help to this ambition, particularly when we note that in the field of criminal law and criminal justice both Finland and Hungary have similar legislative and juridical problems.

When we are in the process of solving these problems we should not be indifferent to the fact that although Finnish and Hungarian legal thinking were formed in different historical backgrounds, we are linked together by our common European culture. There are more factors which link us together than there are those which draw us apart. Let me refer briefly to the fact the both the Finnish and Hungarian criminal codes from the end of the last century were based on classical criminological principles, and that the later development of both countries' legislation was influenced by reforming tendencies. Last, but not least, the further development today of both countries is influenced by the principle of a democratic constitutional state, and dependent upon the guarantee taken

from the principle of *nullum crimen* and *nulla poena*, and the requirement of a penal system based on rationality and humanity.

Ladies and Gentlemen, it is my intention to open the 7th Finnish–Hungarian Criminal Law Seminar with these thoughts, and I hope that the issues which are to be discussed will help to develop the trend towards European legal harmony in our countries, will foster better mutual understanding between our two countries, and will further co-operation and friendship between Finnish and Hungarian experts."

At the opening session of the 7th Finnish-Hungarian Seminar on Criminal Law Professor Imre A. Wiener after welcoming the participants all paid tribute to Dr. Márta Bittó, who died in Budapest on the 16. October, 1995.

"Márta Bittó was always an active organiser and participant at the Finnish-Hungarian Seminars. Dr. Bittó had worked for the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences since 1972. For twenty years it was my pleasure and my privilege to work with her and to witness her achievements in the field of criminal law. In the seventies her research activities focused on foreign juridical systems; in the eighties on the protection of the environment and questions of administrative offences within the framework of the European Convention on Human Rights. For some years professional negligence was her main research subject, and this was explored in her dissertation entitled *Labour Protection and Criminal Law*, for which she received her doctoral (PhD) degree. From the late eighties onwards she taught at the School of Public Administration.

Her international scholarly activity was concerned firstly with the Association Internationale de Droit Pénal (AIDP). During her relationship with the AIDP, she participated in many conferences and made many friends in the international scholarly and professional world. She was a national reporter at the XIV and XV International Congresses of Penal Law. She organised several scholarly international conferences in Hungary and also prepared reports on those held abroad. Her participation at numerous international conferences increased the knowledge of her work and personal qualities among many jurists throughout the world.

The Finnish–Hungarian Seminars on Criminal Law, held every three years, offer excellent opportunities for the research workers of our Institute and the professors of the Faculty of Law of the University of Helsinki to discuss contemporary questions of criminal science. Márta Bittó was a prominent participant in these Hungarian-Finnish seminars. She will be remembered for her affability and kindness. I believe that she is also missed by our Finnish colleagues who, like us, remember her fondly.

Imre A. WIENER

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STUDIES

Risto EEROLA

Comparative Aspects of the Criminal Responsibility of Government Members in Western Europe

1. Introduction

The reasons for choosing this topic for an article can be seen at two levels. Firstly, there have been some recent cases in the Nordic countries where the question of the criminal responsibility of government members has become an issue.

In Denmark a case was brought against a former Minister of Justice in 1993. Two years later he was convicted of intentionally breaching his official duties. The sources for these duties are to be found in the Fundamental Law, other laws, or the nature of his position as a minister.[1]

During the same year there was a case in Finland against a former Minister of Trade and Industry who was accused of demanding payment as a condition for certain state financial transactions relating to banking and industry. The Finnish High Court of Impeachment convicted him of accepting a bribe and of violating his official duties.[2]

These cases may be described as the factual background for considering this topic to be of current interest. I also considered this topic to be suitable for discussion under

1 The judgement of the High Court of Impeachment was given on 22nd June 1995 and can be found (in Danish) in *Ugeskrift for Retsvæsen* (1995) 672 R. This judgement has given rise to much debate in Denmark. In particular, the question has been raised as to whether the Danish High Court of Impeachment in its present form is a suitable forum for dealing with these matters. See, e.g., VILTOFT, H.: "Rigsretinstitutionen", *Juristen*, 1996, 255, and KIERKEGAARD, A.: "Rigsretinstitutionen", *Juristen*, 1996, 260.

2 The judgement was given on 29th October 1993.

the title of the seminar: *The Rule of Law and Criminal Law*. The criminal responsibility of government members is—at least in my opinion—an appropriate topic for demonstrating the functioning of the principle of the rule of law (or the idea of *Rechtsstaat*) at the highest level of the state hierarchy. At this level the fields of criminal law and constitutional law can be seen as being intertwined.

Secondly, there are other reasons for my selection of this topic which are connected with some legislative reforms that have been made in this area, especially in Finland. At the beginning of this year a committee was appointed with the task of planning a total reform of Finnish constitutional laws.[3] Relevant parts of these laws concerning the criminal responsibility of government members will also be reformed.

I shall not attempt to give a detailed presentation of this theme here; rather, I shall simply sketch out some outlines. Firstly, I shall deal with the question of whether special legislation concerning the criminal responsibility of government members is necessary—and, if the answer is in the affirmative, what is the reason for that conclusion. Consideration of these questions will lead us to draw some conclusions about the different starting points or differing background assumptions regarding the systems of Western European countries. Following this, I shall make some brief remarks on the role of special legislation on the criminal responsibility of government members.

2. *Is There a Need for Special Legislation Concerning the Criminal Responsibility of Government Members?*

If we look at the constitutions of Western European countries, we can make an important observation: in nearly all of these countries there are regulations concerning the criminal responsibility of government members. Furthermore, it can be seen that parliament features prominently in the process because in almost every country it is parliament (or at least one of its chambers or committees) which decides whether to bring a case against a member of the government.

Exceptions to this procedure can be found in Germany (about which, more will be said below) and France. In France the constitutional sections on the criminal responsibility of government members were reformed in 1993.[4] Before this reform, parliament's role in the process was also significant in France. In order to bring a case against a government member, a decision made both in the National Assembly and in the Senate was required. Now, after the reform, every citizen who claims to have suffered harm as a result of a minister's action has the right to complain to a special Commission of Investigation (*commission des requêtes*), which is composed of judges. This commission

3 The committee will have to publish its report by the end of March 1997. Its main task is to consolidate the four constitutional laws of Finland into a single constitutional document. The name of the committee is very illustrative: "Constitution 2000", that is, a reformed constitution for a new millennium.

4 The constitutional basis of this criminal liability is to be found in Article 68-1 of the French Constitution.

has the power to decide whether the process will continue. In connection with this reform, a new court was also established to deal with such cases.[5]

The other remarkable exception is Germany, where there is no separate regulation concerning the criminal responsibility of members of the federal government. The German Constitution only regulates the process for bringing a case against the President of the Federal Republic.[6] This represents a clear departure from the Weimar Constitution of 1919, according to which Parliament could bring a criminal case against a member of the government.[7]

This difference between the Weimar Constitution and the new Constitution of 1949 was not created by chance, but was the result of a deliberate decision. The reason for this was that Parliament's right to bring a criminal case against government members was considered to be part of a different political system, that is, *that of a constitutional monarchy.*[8] In this system the idea was that the monarch himself or herself was not legally responsible for any of his or her actions.[9] The legal responsibility for actions and decisions, therefore, lay elsewhere, which meant the monarch's advisers, that is, the members of his or her cabinet.

Now we should ask whether the specially regulated criminal responsibility of government members is really an old-fashioned phenomenon belonging to another political era. Almost always when this question is raised it is said that parliament's right to bring a criminal case against a member of the government was necessary because it

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5 The new court is called *La Cour de justice de la République.* It consists of 15 judges of whom 12 are elected by the French Parliament. Three of the judges are members of the Supreme Court (*Cour de Cassation*). For the situation before the reform see DUVERGER, M.: *Le système politique français. Droit constitutionnel et systèmes politiques.* 1986, 436, and HAURIOU, A.–GICQUEL, J.: *Droit constitutionnel et institutions politiques.* Paris, 1980, 1136.

6 See Article 61 of the German Constitution (*Grundgesetz*). This solution has been criticised; see, e.g., MAUNZ, T.–DÜRIG, G.–HERZOG, R.: *Grundgesetz. Kommentar. Band III. Art. 38–91,* München, 1991, comments on Article 61, margin no. 7. It is interesting to note that Parliament's right to bring a criminal case against a minister can be found in the constitutions of the German states (*Landesverfassungen*). There are, however, some exceptions to this rule: the constitutions of Berlin, Hamburg, Rheinland-Pfalz, Schleswig-Holstein and the constitutions of "*die fünf neuen Länder*". See BENDA, E.–MAIHOFER, W.–VOGEL, H-J.: *Handbuch des Verfassungsrechts des Bundesrepublik Deutschland. 2., völlig neubearbeitete und erweiterte Auflage. Studienausgabe. Teil 1,* Berlin, 1995, 559 margin no. 54.

7 See ACHTERBERG, N.: *Parlamentsrecht.* Tübingen, 1984, 487, and von MÜNCH, I.: *Grundgesetz–Kommentar. Band 2 (Artikel 21 bis Artikel 69),* Wemding, 1976, 695.

8 See von BEYME, K.: *Die parlamentarische Regierungssysteme in Europa. 2., durchgesehene und ergänzte Auflage.* München, 1973, 357: "*Man sah eine solche Bestimmung mit Recht als überlebtes Relikt aus der konstitutionellen Zeit an.*"

9 It must be noted, however, that there are also different versions of constitutional monarchy. For example, the criminal liability of ministers was included in the French Fundamental Act (*Charte*) of 1814. The Act itself was, however, promulgated (*octroyé*) by the monarch as is shown in the preamble. This preamble was revoked during the July Revolution of 1830. The process has been described in detail in JYRÄNKI, A.: *Lakien laki. Perustuslaki ja sen sitoviuus eurooppalaisessa ja pohjoisamerikkalaisessa oikeusajattelussa suurten vallankumousten kaudelta toiseen maailmansotaan.* Mikkeli, 1989, 179, 189.

had no power to control government politically.[10] After gaining that power, the institution of impeachment (and corresponding institutions) has been said to have played its role in controlling government.[11]

To my mind there are, however, strong arguments for a negative answer to the question raised above. The different solutions to the problem of the criminal responsibility of government members may be seen as representing different views of the relationship between politics and law in general. *The main question is how to control the use of power and how to prevent its misuse.* Answering this question also means the need to define the role of criminal law as part of broader means of control.

There are basically two different models of the relations between government and parliament: the German model in which Parliament plays no role in deciding to bring a case against a member of the federal government, and another model in which the power to start criminal proceedings against a minister is vested in Parliament.

When we consider the relationship between government and parliament, the German model may be seen to reflect a different kind of emphasis from, for example, the model used in the Nordic countries. In Germany, Parliament can control government only politically; legal control lies elsewhere. Therefore, we can say that the focus of the German control mechanism lies in political control. Parliament has very effective means of carrying out this control; in particular, through its investigation committees as mentioned in Article 44 of the German Constitution.[12] These committees are a very important means by which the opposition can monitor the government's actions. Whenever a quarter of the members of Parliament demands an investigation, Parliament has an obligation to set up an investigation committee.[13] This right is often used.[14]

The other model treats the controlling powers of parliament as a whole. This, again, opens the door to the possibility of translating political questions into legal ones in parliament. This kind of procedure may be a tempting alternative for those parliamentary groups that do not have enough parliamentary power to raise questions for political debate by any other means. For example, in Finland a complaint concerning the unlawfulness of an official act of a member of the Council of State may be filed in Parliament

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10 See, e.g., concerning the corresponding Danish institution VILTOFT, *op. cit.*, 249.

11 Concerning Great Britain, see DICEY, A. V.: *Introduction to the Study of Law of the Constitution*, London, 1924. 439: "The process ... is, and has long been, obsolete ... it is laid aside among the antiquities of the constitution, nor will it ever, we may anticipate, be drawn again from its scabbard." See also YARDLEY, D. C. M.: *Introduction to the British Constitutional Law*, 6th edition, Chatham, 1984. 27, and PHILLIPS, O. H.–JACKSON, P.: *Constitutional and Administrative Law*, 6th edition, Norwich, 1978. 125 who seem to hold a similar opinion.

12 The corresponding article in the Weimar Constitution was Article 34.

13 Parliament can, of course, decide to set up an investigation committee by a majority. The work of this kind of committee is known as *Mehrheits-Enquête*. See MAUNZ–DÜRIG–HERZOG, *op. cit.*, margin no. 31.

14 These committees may be said to carry out investigations on behalf of the minority in Parliament (*Minderheits-Enquête*). MAUNZ–DÜRIG–HERZOG, *op. cit.*, margin no. 31, margin no 35 and von MÜNCH, *op. cit.*, 486. A list of the committees (up to 1975) can be found in *ibid.*, 498.

by five deputies.[15] It goes without saying that such complaints are widely publicised in the media. It is interesting to compare this institution with that of *interpellation*. Deputies may address an *interpellation* to a member of the Council of State for consideration in Parliament. The Speaker can, however, only forward this *interpellation* to the competent member of the Council of State if at least twenty members, including the *interpellators*, have supported the *interpellation* in writing.[16] These *interpellations* and the responses to them may be considered as major political debates in Parliament.

In this second model, we can also see an interesting feature: there is either no possibility of setting up a special investigation committee, or this possibility is seldom used. For example, it is not possible to set up a special investigation committee of parliament in either Finland or Sweden.[17] In both countries the Constitutional Committee of Parliament, however, plays a very important role in controlling government.

In each of these countries the Constitutional Committee of Parliament also has powers relating to the legal control of government. In Sweden, the Committee has the power to decide to initiate impeachment proceedings,[18] whilst in Finland, its counterpart first investigates the alleged illegal acts and then gives its report to a plenary session of Parliament which has the power to decide whether there are sufficient grounds to start criminal proceedings against a minister.[19]

In Denmark, it is possible for Parliament to set up special commissions consisting of Members of Parliament.[20] This possibility is, however, very seldom used: the last time this kind of special commission was set up was in 1945 in order to investigate the responsibility of government members and certain other persons for the German occupation.[21] The rare use of this kind of special commission may be explained historically. The setting up of such a commission is understood to be a preparation for criminal proceedings in the High Court of Impeachment.[22] There has been some debate as to the need to constitute a parliamentary investigation committee that would be a standing committee.[23]

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15 Section 2 of the Ministerial Responsibility Act. This Act is one of the fundamental laws of Finland.

16 For details see Section 37 of the Parliament Act.

17 In 1990 the Finnish Parliament Act was, however, amended so that the competent Ministry shall present with a committee of the parliament an account of any matter within the competence of the committee requested thereby. If necessary, the committee may after that provide the Ministry with a statement. See Section 53 of the Parliament Act.

18 See section 3 in Chapter 12 of the Swedish Constitution Act and for comment, HOLMBERG, E.–STJERNQUIST, N.: *Vår författning. Tionde upplagen*. Göteborg, 1995, 199.

19 For details see Sections 4 and 6 of the Ministerial Responsibility Act.

20 The legal basis for this is to be found in Section 51 of the Fundamental Law of Denmark.

21 See CHRISTENSEN, J. P.: "Ministeransvaret – i lyset av tamilsagen", *Nordisk administrativt Tidsskrift*, 1993, 13; BUSCK, L.: "Offentlige høringer i Folketinget", *Juristen*, 1989, 97; and ESPERSEN, O.–ROSS, A.: *Dansk Satsforfatningsret I*, Viborg, 1980, 461.

22 See BUSCK: *op. cit.*, 97 and ESPERSEN–ROSS: *op. cit.*, 253.

23 In 1989 the Danish Parliament Act was amended so that nowadays the parliamentary committees may organise hearings (*høring*) to which, e.g., ministers may be invited. These hearings may be held in public.

The first conclusion that can drawn on the basis of the previous consideration is that the role of parliament is seen somewhat differently in these two models. The German model reflects the idea of parliament as a controlling body—but one which exercises only political control. In this model, the exercise of legal control over government lies outside parliament. The reason for this again may lie in German history: legal control may have deliberately been taken out of the hands of politicians. The other model recognises that the parliament also has the possibility of starting criminal proceedings against a member of government.

The second conclusion might be that in the German model the work of the government is not seen as being very different from the work of the administration because basically the same regulations apply both to members of federal government and to civil servants. The other model would then be built on the idea of government work as qualitatively different from that of the administration. In this model the work of government would not be seen as administrative, but rather as the formulation of policies. This in turn would lead to the situation in which *the essential elements of the criminal responsibility of ministers must be different from those of civil servants.*

This conclusion seems, however, to be a hasty one. Noting that the same legislation applies both to government members and to civil servants does not necessarily mean that the legal position of a minister and a civil servant would actually be the same. If this is true, it would mean that the special position of a minister is not taken into account according to the letter of the law, but according to actual practice. This assumption leads us to reformulate the second conclusion. In both of the models the difference between the work of government and the work of administration is seen and recognised. In one model (for example, in Finland, Sweden and Denmark), the difference has been recognised by the enactment of special legislation concerning the criminal responsibility of ministers. In the German model, in turn, it is possible that the difference is recognised through the general doctrines of the criminal law.

I would dare to say that both of these models may basically lead to (almost) the same result. If we consider the model in which there is special legislation on the criminal responsibility of government members, we can see that it is a very difficult task to formulate the essential elements of the criminal responsibility of government members. The reasons for this difficulty are obvious. Firstly, these essential elements should cover a wide range of actions carried out within different institutional frameworks: for example, work in government plenary sessions, work in committees set up within the government, the work of an individual minister in his or her ministry, and so on. Secondly, the essential elements should cover the acts of a minister in different international organisations and bodies, such as the European Community. Thirdly, if the idea of the qualitative difference between the work of government and the work of administration is taken seriously, every wrongful act or omission cannot carry the threat of punishment. Government has to deal with very many matters, often within a very tight schedule. An overly legalistic attitude would quickly and effectively act as a hindrance to the work of government. Fourthly, it must not be forgotten that the ministers also have other roles: they may be party leaders (or at least have a prominent

position in their party), they may be important figures in a trade union or in private business, or they may participate in the administration of a municipality. This problem of multiple roles is often present when we consider a statement that a member of the government has given to the media: it is not always easy to know in which capacity the minister has acted.

All this means that the essential elements of the criminal responsibility of government members must be rather open. This again raises some doubts from the point of view of the principle of legality. The legislator must therefore try to find a balance between these two requirements: the problem is therefore *how to formulate the essential elements of criminal responsibility of government members so as to make them open enough to cover the various tasks of government without being too imprecise in describing the punishable acts and omissions*?

These problems may be very well illustrated by quoting the relevant Finnish legislation on the criminal responsibility of government members which is now (or should I say, still) in force (Section 7 of the Ministerial Responsibility Act, which has the force of a constitutional law):[24]

"The following shall be considered unlawful acts for which charges under this act may be brought against a member of the Council of State or the Chancellor of Justice:

If, in an official act, he has aided or abetted manifest unlawfulness;

If he has intentionally abused his official position to manifestly harm the country, and the abuse is to be deemed an offence in office; or

If he has otherwise in some official act proceeded in a manifestly unlawful manner."

In the corresponding Swedish legislation, the essential elements are formulated in a somewhat similar way (Swedish Constitution Act chapter 12 section 3):[25]

"A present or former member of the Council of State may be held liable under criminal law for an act or omission in office only if he has manifestly breached the duties of his office. The Constitutional Committee of the Parliament shall decide whether to bring charges and the case shall be dealt with in the Supreme Court."

The important words in both of these sections are those that define the character of a punishable unlawful act in office. The act or omission must be manifestly unlawful, the minister must have assisted or abetted manifest unlawfulness, and so on. This means that the legislator has given a government member more freedom of action than civil servants have in general. In order to be punishable, the acts and omissions of government members must clearly be against the law or in other words, it must be obvious that a certain act or omission is prohibited by law. If this is translated into the modern language of criminal law, it may be said that the *area of tolerated risk* (*erlaubtes Risiko*) is much wider in the work of government than in the work of civil servants. The threshold of forbidden risk taking is higher.

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24 The translation is from a booklet (*Constitutional laws of Finland—Procedure of Parliament*) published by the Parliament of Finland, the Ministry for Foreign Affairs and the Ministry of Justice in 1996.

25 My translation [R. E.].

Generally speaking, there are two reasons for this solution. Firstly, as has been noted above, government has to deal with so many matters that an individual minister cannot reasonably be expected to be deeply involved in all the affairs of government. All he or she can do is to rely on the other members of government, especially on that minister who is responsible for the specific matter in question. Secondly, the duties of a cabinet minister are not at all clear. They are seldom written down anywhere in detail, which means that it is often established practice that provides the minister with any guidelines. And at different times and in different situations the minister must implement this practice in a way he or she considers is relevant and appropriate.

The kind of regulation concerning the criminal responsibility of government members that we can find in the constitutional laws of Finland and Sweden can easily be criticised for being too open from the point of view of the principle of legality. The argument that can be put in favour of that kind of regulation is that the ultimate purpose of this legislation is to limit the criminal responsibility of government members in comparison to civil servants.

So the end result seems to be rather similar to that in a system where the special status and tasks of a minister are recognised only by implementing the general doctrines of criminal law. For example, in a criminal case against a German federal minister, it may be assumed that the concrete situation would be considered from rather similar starting points to those that have been the background ideas in Finnish and Swedish legislation. The assessment of the act or omission would be made from the point of view of the doctrine of forbidden risk taking. If this is correct, it is possible to put the question of whether it would after all be better to try to write out this kind of limitation of criminal responsibility in the legislation, rather than to try to reach the same end through the general doctrines of the criminal law.

3. *The Role of the Special Regulation on the Criminal Responsibility of Government Members*

Finally, it is possible to make some brief remarks on the overall role of the special regulation of the criminal responsibility of government members. When we think about the political system as a whole, we can say that if questions concerning the criminal responsibility of government members were to be part of everyday life in a political system, then that system would not have a sound foundation. This must not, however, lead us to think that the regulation of the criminal responsibility of government members would only be applied during special proceedings in parliament or during proceedings of the High Court of Impeachment. If the political system is a healthy one, then the possibility of criminal responsibility proceedings is really seen as the legal system's ultimate threat in controlling the use of political power. *And that threat may have a strong preventive impact*: for example, it may make ministers seek legal advice before a decision is taken by the government. In Finland, the Chancellor of Justice has become more of a legal adviser to the Council of State than an official exercising legal control over that body.

In a constitutional system there can be several measures which prevent situations that might result in criminal charges being brought in the High Court of Impeachment. It may, for example, be laid down in the constitution that members of the government are prohibited from engaging in work or taking up a position that would endanger their ability to carry out their duties or endanger their impartiality. The Finnish Constitution Act was amended by this kind of provision in 1995 (Section 36 c):

"During his term of office as a minister, a member of the Council of State shall neither attend to the duties of a public administrative position nor perform any other task which could hamper the performance of his ministerial duties or undermine public confidence in his activities as a member of the Council of State."

In addition to this, the Government must inform Parliament about the details of the commitments of its members without delay. This communication to Parliament must contain, for example, the details of private enterprise activities of government members as well as information about their property ownership and debts. A debate, if necessary, will be held during a plenary sitting of Parliament.

In this way the institution of the criminal responsibility of government members can be seen as a part of the control system focusing on the use of political power. Though criminal charges are actually seldom brought against a minister, the institution of the criminal responsibility of ministers must not be considered as being obsolete. On the contrary, it may be seen as the ultimate recourse in the control of the use of power and, in this capacity, as an essential part of the system. A totally different question is whether there is a need for a special court for these cases, and which would be the most suitable procedure when deciding to bring a charge against a minister.

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The Constitutional Limits of the Efficiency of Criminal Justice

I. Efficiency in Criminal Justice

Efficiency is the indicator of the traditional criminal justice system that provides information on the ratio of the performance of traditional criminal procedure to the amount of costs and expenditures invested.

The efficiency rate of the criminal justice system is traditionally given in index figures that indicate the quantitative and time co-efficients of criminal investigation and punishment. The general principle employed, with which we do not agree, is that actual efficiency is not included in this approach. By efficiency is meant the extent to which the re-occurrence of criminal acts is affected. The overall performance of jurisdictional systems is defined by different types of expenditures: for example, financial, personnel and educational.

These index-numbers make up the indicator of efficiency which also implies the general limits of the system. We would contend that it is not necessary to prove that the evaluation of efficiency is justified if it concerns the whole system, when it is taken into consideration how the re-occurrence of crime is affected. This does not exclude the examination of different sub-systems; on the contrary, it strongly supports our view that such an examination is necessary. In order to make sense, this examination must be extended to the whole system. The scope of recent efficiency research, if these examinations can be labelled in such a fashion, has been restricted to the examination of the efficiency of the organisational conditions of a given jurisdictional sub-system: that is, whether these conditions are met by other sub-systems or differ from them, which is frequently the case. Therefore, the aim of these examinations is

to respond to the efficiency indices set up and followed by different organisational sub-systems:

— those of the police (regardless of whether or not there is close co-operation with the Prosecution, whether the police are independent or play an auxiliary role): the improvement and development of "clear-up rates", that is, the investigation of more persons and the termination of fewer investigations and follow-up investigations. The rate of success may vary depending on the different authorities participating in the criminal process having differing tasks. These tasks may vary as a result of the different criminal procedure regulations of different countries;

— those of the Prosecution: higher efficiency rate of prosecuting;

— those of the courts: more cases terminated and fewer successful appeals;

— those of prison agencies: period of imprisonment passes without any problems.[1]

2. *The Connections Between Criminal Policy and Prosecution*

A criminal justice system does not only aim to fulfil the efficiency indices set up by its own organisations, but also to meet the expectations of a given society and government in the fight against crime. These expectations and the general demands for criminal justice are set out in criminal policy. This expression first appeared in German legal literature in the 1820's and 30's, and was, like many other Hungarian legal terms, borrowed from the German. It has gone through several changes in meaning since then, and it is interpreted in a much broader sense now. Its contemporary meaning covers the following areas: from the various acts of prosecution of crime to the legal and non-legal actions of the state or social organisations. In the definition of criminal policy, the broad interpretation which refers to criminology and prosecution has become commonly accepted. Jeschek,[2] for example, uses the term as an expression to show how criminal justice can be most successfully modified so as to be able to fulfil the task of the protection of society. Kaiser[3] interprets it as the term applied to those social strategies and techniques, including sanctions, that aim to control crimes. The means applied to achieve this control are humanity and repression.

With the following statement that is based on the past one hundred years' experience, we can claim that the more successfully a given legal system is able to fulfil its tasks with its legal devices and strengthen the sense of security in society, the more applicable a humanitarian and liberal criminal justice system becomes in the long run.

The rate of criminality in England between the two World Wars shows a very good example of this. As Radzinowicz points out, the rate of violent criminal acts was low, as was also the number of politically-motivated crimes. There were hardly any organised

1 FARKAS, Á.: "Az igazságszolgáltatás hatékonyságának alapkérdései" (Fundamental Questions of the Efficiency of Criminal Justice), *Rendészeti Szemle*, 1992, No. 7, 20–26.

2 JESCHEK, H.-H.: *Lehrbuch des Strafrechts, Allgemeiner Teil*, Berlin, 1978, 16.

3 KAISER, G.: *Kriminologie*, Heidelberg, 1976, 57.

crimes and the rate of criminal drug dealing was also negligible. Due to the liberal legal principles applied at the same time, these factors resulted in a shortening of the time of pre-trial detention. The number of short- and long-term imprisonments also considerably decreased. The guiding principles of penalty-imposition were also modified and the economic conditions of culprits were taken into consideration to a much larger extent when imposing a penalty. Probation and measures related to it were commonly applied. According to statistics, the efficiency rate of the so-called "borstal system" for juvenile delinquents was 75%, and served as an example to the whole world.

The more tension that can be observed between the expectations from a criminal justice system (that is, the sense of security of society, and the efficiency of a legal system) the more probable is the formation of a repressive and/or authoritative criminal policy. A good example of this is the current development of criminal policy.

The overall aim of contemporary criminal policy is to achieve the optimum result in the fight against crime, and to use the different means of criminal policy in the most efficient way by applying legal and non-legal devices that are the most appropriate at a given level of civilisation (in its broadest sense). Following this concept, Imre Békés[4] claims that "[c]riminal policy falls out of the scope of the sphere of law and it does not deal with criminal justice, it rather focuses on its social content and goals." Let us add one thing to this: that is, criminal policy is politics in this sense, and thus it is related to social politics and policy.

This statement, however, needs further clarification because the aims of criminal policy must be formulated within the framework of criminal justice. They ought to appear in criminal law and criminal procedure law, as well as in the regulations of prison law; they should also go through the various stages of legal procedures and be applied by law, because criminal policy can gain legitimacy only in this way. Therefore, criminal policy is not unified, as it conforms to the characteristic features of a specific branch of law and those of a given organisational system. There is no doubt about the fact that the expectations set up by criminal policy and doctrine in criminal justice are interpreted in a different way according to the view taken of the basic principles of criminal procedure and its doctrinal characteristics. Criminal policy also depends on the characteristic features of a given branch of law in which it is applied, and so the inherent limitations of these branches may have an influence on it. It is a fact that there are different criminal policies existing in parallel within different branches of law, and these depend upon the topic of regulation.

This also reflects those contradictions that appear because different criminal policies co-exist, and they are not related to each other in a unified system. An excellent example of this is the development of European criminal justice in the last decade, which demonstrates that specific types of punishment have definitely become more severe, in accordance with the basic principle of criminal policy whose aim is to set up

4 BÉKÉS, I.: "Dogmatika és büntetőpolitika" (Dogmatics and Penal Policy), *Jogtudományi Közlöny*, 1986. No. 12, 592.

obstacles in the way of the increase of crime, and the rapid change in the forms of crime, such as terrorism, drug abuse, and organised crime. One of these obstacles is the application of repression, but we can also note the humanisation of the sentencing policy, the decreasing number of prison sentences and the increasing number of less severe sanctions. Similarly, we can also observe that the demand of criminal policy which states that the norms of human rights have to be respected, has been fulfilled. There is a tendency to speed up and to simplify criminal procedure, to apply secret police devices and, at the same time, to ease the guarantees in the procedure.[5]

This tendency and its hidden contradictions call our attention to the fact that there are limits to expedience, which also set limits to efficiency. As Jeschek claims, "[n]ot everything proves to be lawful that is rational."[6]

We must also see that the grounds on which criminal policy has been based are insecure, as Schwind points out. The doubt in criminal statistics, the inadequate amount of information available about the genuine reasons for the commission of crimes, and about the possible ways of preventing them, may make us uneasy about the best definition of the aims of criminal policy (but not about the need for it).[7]

As Zipf claims, criminal policies are based on value selection, which is axiomatic rather than ontological; they determine and establish values. In the history of law the scope of the choice of values has been restricted to the binary value of humanity and repression.This is the background to any kind of codificatory process: for example, the scope of the accused's rights, the rights of different authorities in criminal justice, or the rights of the accused in Criminal Procedure. Criminal justice, as well as criminal procedure law, contains elements of repressive characteristic features. The scope of repression and the dominance of pure expedience have been gradually restricted by the recognition of humanitarian values. This tendency has resulted in human rights becoming a standard and has led to the definition of a constitutional state. These factors can also not be neglected in the formulation of criminal policy.

Another important factor in defining criminal policy is organisational interests. The criminal justice system, like any other organisation, wishes to fulfil its tasks efficiently by achieving good results, because this is the way in which it justifies its existence and the need for further development, maintenance, and operation. Criminal justice is the creation of a balance between crime and a sense of social security by the investigation of crime, the definition of responsibility in terms of criminal justice, the application of sanctions (and their being carried out), and it (criminal justice) also has relevance with respect to crime prevention. In these ways it performs a duty set by a legal demand. However, this demand for legality is not always properly satisfied. That is the reason

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5 ESER, A.—HUBER, B. (eds.): *Strafrechtsentwicklung in Europa 3 Landesberichte 1986/1988*, Teil 1 und 2, Freiburg im Berisgau, 1990. On this, see FARKAS, Á.: "Fejlődési tendenciák a büntetőjogban Európában" (Developmental Trends in Criminal Law in Europe), *Magyar Jog*, 1994, No. 3, 185–189.

6 JESCHECK: *op. cit.*, 17.

7 SCHWIND, H.–D.: "Unsichere Grundlage der Kriminalpolitik", in HIRSCH, H–J.—KAISER, G.—MARQUART, H. (ed.): *Gedächtnisschrift für Hilde Kaufmann*, Berlin, New York, 1986, 86–99.

why, as recent studies have shown, criminal justice is selective and sets up priorities.[8] A considerable part of these features is reflected in recent trends of criminal policy, including the following: the alteration of material or procedural law, the definition of the rate of intensity in crime investigation, and the formation of a codification process. To modify and affect criminal policy may be regarded as a normal component of legal activities. The main emphasis in shaping criminal policy is on the reduction of its responsibilities, and the gaining of more independence from the restrictive demand for legality, including the loosening of its ties.[9]

Therefore criminal policy is based on values, which can be encompassed by the binary value of repression and humanity. This definition allows the formulation of further values. These new values are further supplemented if there is an overlap between criminal policy and other types of policy, such as economic, social, juvenile etc. The dominant factor that plays an important part in the formulation of criminal policy is expediency, concepts of which are further modified by the latest results of criminal science: for example, those of criminology, victimology, etc. The other factors which support the former statement are that expediency is also affected by the way in which criminal justice maintains a balance between social demands and a sense of social security (including the rate of social tension and organisational interests). Criminal policy is not homogeneous; it always corresponds to the characteristic features of a given branch of law. But it further sub-divides into smaller sub-categories of criminal policy. All these features reflect the diversity and shortcomings of criminal policy

Criminal policy functions as the primary filter of those demands, expectations, and wishes that the state and government are supposed to meet and fulfil in the fight of legal, social, and state organisations against crime. It classifies, ranks, and sets up priorities of those issues that become objects of the codification process and are eventually passed into law; it also determines those criteria that are to be applied in law (for example, in prosecutions).

3. The Limits of the Efficiency of the Criminal Justice System

The limits of efficiency are firstly, social; secondly, financial; and thirdly, legal. Changes in crime constitute social limits. Financial limits are expressed in economic terms, that is, the budget of a given country is never capable of subsidising its legal system (financially, educationally, and institutionally) to the extent that it could reduce the rate of crime for a longer period of time because of the limits of economic resources. The available amount may only cover those expenses that are to stabilise this rate at a certain level by improving technical facilities, introducing institutional reorganisations, or updating the existing training system. Every organisation works towards this goal of

8 BÁRD, K.: *A büntetőhatalom megosztásának buktatói (Obstacles to the Derision of Penal Power)*, Budapest, 1987, 53-131.

9 *Ibid.*

stabilisation, and recent changes in crime rates are often depicted as a decreasing tendency in order to support this aim, which is questionable.

The third limit is set by law with all its contradictions (for example, those between criminal law and criminal procedure law) and norms that hinder criminal justice in becoming expedient, and also restrict its discretion. The doctrinal system of criminal justice and the requirements of a constitutional state belong to this category, which we wish to analyse in detail.

If we set the organisations of criminal justice the task of carrying out a quick and efficient procedure, we may take it for granted that there will be more abuse of authority to achieve the desired goal during criminal procedures, and procedural actions are likely to become arbitrary and lack the necessary guarantees. Therefore, if a legislator wishes to express his demand for better efficiency and expediency, he must incorporate the appropriate guarantees in criminal procedure, with the help of particular rules whose chief task is to provide a legal remedy in case they are violated.

The task of criminal procedure is to examine the facts of the case thoroughly without omitting a detail by keeping to legal rules. The basic principles are enlisted among the legal guarantees,[10] but as we will see later, the proper application of the basic principles may temporarily prevent the authorities from accomplishing the tasks set by Hungarian Criminal Procedure.

From the point of view of legal security, the definition of procedural guarantees and the way they are kept is an important component of criminal procedure in a constitutional state.

All the guarantee regulations applied in criminal procedure can be traced back to the ones found in international human rights conventions, or they can be found–more or less–among the provisions of the basic rights in the Constitution.

The human rights codified by different conventions and state constitutions are taken to be inalienable. They can be restricted only by regulation, supplemented with very strict guarantees, by any state, and there must be a firm reason for doing so. If a state and its institutions do not keep the rules according to this principle, a person deprived of his rights may bring an action for damages and submit a petition against the state at the European Commission of Human Rights in Strasbourg. If his rights are violated by a citizen–either a government office clerk or civil servant–this violation of law will probably be regarded as a criminal activity and/or serve as the basis for compensation. It is precisely criminal procedure that produces one of those "firm reasons" that may restrict human rights. There are two contradictory interests in this debate: one is the interest of the state in justifying the demand for an efficient criminal justice system, and the other is that of the individual who expects his human rights to be guaranteed. The latter is insured by the state in international agreements, and in its constitution; but the state has also to be responsible for the former interest, because ever since private revenge

10 CSÉKA, E.–VIDA, M.: *A büntető eljárási jog vázlata I (An Outline of Criminal Procedure Law)*, Szeged, 1996, 10.

was replaced by state repression, the state, and its organisations, has had to satisfy the demand for criminal justice. This is not only the right of a given state, but has also for a long historical period been its duty. The solution to this contradiction has resulted in the collection of those norms which define the conditions and requirements that make it possible to restrict the human rights of individuals, or to deprive individuals of their human rights altogether.

It is the international conventions that are the highest level of regulation containing these guarantees, even if it is not always the case at the level of the source of law because in order to overtake and pass a regulation of an international agreement as an internal legal norm, a new regulation has first to be approved by an Act of Parliament. International conventions occupy this superior position because the contracting parties accept the fact that by joining these conventions they are to introduce the same or similar regulations in their domestic norms.

This tendency can be seen in the constitutional acts of our country. As long as the XX Act of 1949 only touched upon human rights in a few words, the regulations of Act XL of 1990 introduced essential modifications to bring our Constitution into line with the text of the European Convention on Human Rights.

The guarantees of criminal procedure are best described by the basic principles. One of the basic principles of classification in Legal Science classifies basic concepts according to their sources. One of these groups consists of constitutional basic concepts, that is, those which are also incorporated in the Constitution. Ervin Cséka points out that the choice of constitutional concepts was previously not consistent. Today the importance of the basic concepts is expressed in the Constitution, where they are listed amongst the regulations.[11] The Constitution also contains a few basic operational principles together with organisational ones: for example, the presumption of innocence, the right to a legal remedy, the basic concept of defence, and the defence of individual freedom are also mentioned.

In the next section we will focus in detail on three basic constitutional concepts. These are the presumption of innocence, the basic principle of defence, and individual freedom and other civil rights. They will be examined from the viewpoint of how the scope of their application can be restricted, and how efficient criminal procedure appears to be.

According to the principle of the presumption of innocence, nobody can be regarded as guilty until his criminal responsibility has been stated by the final judgement of the court. The function of this presumption is to create a favourable and objective legal situation for the accused during the procedure, and to leave the task of providing evidence to the authorities. One of the evidentiary rules says that the accused cannot be obliged to prove his innocence, as the authorities have to provide proper evidence of it beyond any shadow of doubt. It is only the innocence of the accused that may be presumed, although the implicit assumption of guilt can be seen during the criminal

11 *Ibid.*, 38.

procedure.[12] This statement is the equivalent, with respect to the authorities, of a red rag to a bull, but this practice has been observed and the fact of its existence is supported by the analyses of the relevant data. Therefore we may be almost certain that a court will find the accused guilty when there is an equal amount of evidence proving either his guilt or innocence, even if it is not permissible to find the accused guilty of an offence which lacks any incontestable evidence which would prove his guilt. This follows from the presumption of innocence. By following the principle of *in dubio pro reo*, Tibor Király suggests a solution: "If a slight doubt remains because the court was unable to investigate the whole truth, the accused is acquitted, which is his right according to the presumption of innocence".[13] To illustrate this implicit assumption of guilt, we can imagine a case where the accused has protested his innocence and only at a later stage of the criminal procedure makes a confession of his guilt. The question of why events should take this turn is not raised, and instead the court regards this confession as superior evidence, and believes in its validity. The accused is therefore found guilty, and a verdict is reached in good conscience. However, in contrast to this is a case in which the accused later changes the confession he made at the beginning of the investigation and denies committing the crime; he is then interrogated several times and expected to explain thoroughly why he had earlier made an admission of guilt if his latter confession is in fact true. If he gives the unwise answer that a member of the investigating authorities had put mental, but not physical, pressure on him by saying that he would be released if he admitted committing the crime, and if did not, then his pre-trial detention period would be served in full, then the response in a better situation is usually a benign smile. In a worse situation it can be a reprimand about the consequences of a false confession. The principle of the presumption of innocence has recently been at great risk; there is a gradually increasing tendency to reverse the burden of proof in a few cases of criminal investigations where finding evidence requires great efforts. Although the evidentiary rules at the level of basic principles have remained the same, everyday practice is different: for example, if a person accused of tax fraud does not try to produce evidence of being "innocent", he cannot expect a favourable end to his case.

The basic principle of defence contains all those rights which the accused may make use of and refer to in order to be able to become aware of why he has to go through a criminal procedure, to express his opinion about it, to be able to defend himself, make remarks and propose a motion, and to apply for defence. The authorities must also provide the accused with information on his rights in this case, according to the general practice with regard to rights and duties. At this point we may point out again that guarantee regulations lose their importance from time to time.

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12 OROSZ, B.: "Büntető jogalkalmazásunk az Európai Közösség normáinak tükrében" (Our Criminal Law Practice in the Light of European Community Norms), *Rendészeti Szemle*, 1993, No. 11, 32–33.

13 KIRÁLY, T.: "A büntető eljárási jog reformja elé" (Before the Reform of the Law of Criminal Procedure), *Magyar Jog*, 1993, No. 5, 258.

In order to ease the job of the investigating authorities, the records of interrogations are similar to official printed forms with the text of the warnings printed on in them in advance. It is true that this part has to be signed separately by the interrogated person, but most of the accused do not read the records and simply sign the paper where the interrogator shows them to do so. If there is no counsel for the defence present at the interrogation, it is very difficult later to refer to the warnings if one has never been told of them. Warnings are also often used in a threatening manner: for example, the accused is informed of his right to remain silent, but in this case he will have to wait to go home to his family. It is especially juveniles who can be affected by this method. There has already been a case where the accused, who was a policeman, eventually gave in and made a confession after such a warning.

The next question, which is not so troublesome as far as the application of law is concerned, is at which point in the proceedings the accused may claim for a defence counsel. According to the 3rd paragraph of the 6th article of H.C.P. (Hungarian Criminal Procedure), the accused can choose a counsel at the beginning of the procedure who can be in charge of any stage of the procedure on his behalf. Since most accused persons are not aware of the particular rules of H.C.P., they do not even say they are going to make an admission in the presence of their counsel after having been warned about the possibility of authorising one. The participation of a counsel is compulsory only in a few types of case, and it is the authority that officially appoints a counsel for the defence if the accused does not give authorisation to anyone within three days.[14] During these three days the investigation authorities may still continue to carry out a very efficient job by keeping efficiency in mind; they may interrogate the accused several times, who usually happens to be in pre-trial detention.

The situation is further complicated by the fact that the appointed counsels for the defence do not try to get in touch with their clients as soon as possible. They usually first meet with their imprisoned clients during the interrogation, but even this meeting does not necessarily take place because the presence of the counsel is only compulsory during the court trial. The investigating authorities do not generally approve of the extension of defence rights, and they consider it to be a factor which works against efficiency.[15] Another common shortcoming is the conduct of counsels, which is often detrimental to the duration and the efficiency of the procedure. Counsels are often late in submitting proposals, sometimes handing them in only at the trial. It is quite probable that had an evidence proposal from the defence side been submitted in time, a more favourable result at an early stage of the procedure may have been forthcoming. Thus the counsels may put the accused at a disadvantage as a result of a faulty defence (for example, remand detention which could have been avoided).

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14 On these questions see KONKOLY, C.: "Hézagok a büntetőeljárási törvényben" (Gaps in the Criminal Procedure Code), *Rendészeti Szemle*, 1991, No. 2, 62–67.

15 See BORAI, Á.: "A büntetőeljárási törvény módosításának tapasztalatai" (Lessons of the Modification of the Criminal Procedure Code), *Rendészeti Szemle*, 1991, No. 7, 14.

Although we ourselves often work as defenders, we must admit that the practice of state appointed counsels does not make possible an efficient defence in most cases. As has already been mentioned at several conferences, the solution to the problem might be the establishment of a Public Defenders Office. The members of this office—whose work, hopefully, would be sufficiently remunerated—would work exclusively for the defence in cases by appointment, and the accomplishment of this task would be monitored. The creation of conditions where legal assistance could be offered freely would be a significant step forward in developing this system, because the current practice is for the accused to pay the costs of his defence if he is sentenced. The state only pays a "deposit" for him.

H.C.P. makes it possible for the appointed counsel to ask for an obligatory payment order, thus creating an official legal relationship between himself and the accused. Although counsels for the defence do not usually make use of this opportunity, we find it unjustified that the accused is obliged to pay the standard commission price even if he does not appoint anybody as his counsel. It is especially unfair if the counsel performs only the usual duties of defence, that is, he participates in the procedure when H.C.P. declares this to be compulsory and applies sanctions in cases of a counsel's absence.

With regard to the defence of individual freedom and other civil rights, we will focus on coercive measures, briefly examining the anomalies related to our topic without going into detail on the reasons of specific procedure regulations.

Pre-trial detention raises the most problems amongst coercive actions which restrict individual freedom, as this is the action that has the greatest practical impact on human rights. Although the rules of H.C.P. do not permit it, often the only purpose of detention is to simplify the whole procedure; that is, the accused can be presented and interrogated without being summoned, and the trial does not have to be postponed because the accused, being at liberty, does not appear on time. The new codificatory concepts appear, however, to make the requirement of constitutionality secondary to the interests of efficiency, because according to the recent draft of the new H.C.P., it will become possible to order the pre-trial detention of the accused in order to simplify the procedure, with the presumption that the presence of the accused is best ensured only in this fashion. In comparison to this, the basic criminal principle of constitutionality is that the pre-trial detention of the accused should only be applied if there is a firm reason for doing so. This principle has already been described in the recommendations and resolutions of the Council of Europe[16] and the conclusions of conferences.

Amongst the enforcement actions that restrict individual freedom we must mention the problem of the prohibition of leaving residence, which has now been resolved. H.C.P. did not clearly state that the prohibition on leaving one's home could only be ordered in the cases listed as the reasons for pre-trial detention before Act XXVI of 1989. In fact, H.C.P. referred to this in its Ministerial explanation attached to the Bill

16 See Resolution (65) 11 (adopted by the Ministers' Deputies on 9th April 1965) and Recommendation No. R. (80) 11 of the Committee of Ministers to Member States concerning Custody Pending Trial (adopted by the Committee of Ministers on 27 June 1980 at the 321st meeting of the Ministers' Deputies).

without any result, because order No. 40/1987 of the Minister of Interior on the police investigations of criminal activities, and that of the Attorney General, No. 7/1987, on the investigations of the Prosecution in criminal cases, extended the scope of the conditions for the application of coercive measures, and the prohibition on leaving residence could be ordered in many cases even if it was not listed amongst the reasons for pre-trial detention. It undoubtedly served efficiency, but contradicted the constitutional basic principles which claim that basic civil rights may only be restricted by statutes passed by Parliament.

The existence of reasons for ordering pre-trial detention is often questioned, as is often the case when the authorities are simply cautious and assume, for example, that the accused may escape, or get in touch and act in collusion with his fellows, or contact the witnesses. Our experience has shown that the danger of collusion often does not exist. Pure logic helped to justify it: in a case when each accused and witness had been interrogated and confronted with one another, the pre-trial detention lasted for several months.

This superfluous caution occurs in those cases when the prosecutor and the court giving out the order both refer to all three reasons for pre-trial detention, believing that one of them at least will be found justified by the next forum. Authorities often do not meet the requirements set for them as they do not terminate pre-trial detention the moment it becomes justified. Even more frequently the next forum does not find pre-trial detention to be justified any longer when the time for prolonging remand has expired, although weeks or months are likely to have passed by then.

Interpreting efficiency as a time factor, we find mistakes in pre-trial detentions. The so called "prisoner" cases, when the accused is in remand custody, take priority, but it can still happen that it takes a year or two until the sentence is pronounced. In the case of minor criminal activities, a tendency to take time spent in pre-trial detention into consideration when handing down a sentence can be seen. It is not unimaginable that the accused would have been able "to get away" with a few months' less imprisonment if our legal system made possible a quicker procedure.

Therefore, we generalise in the following fashion: the interests of the accused held in detention are to go through the criminal procedure within the shortest period of time, although at the same time the prolongation of the proceedings is a favourable factor for those who are defended at liberty, because delay in the criminal procedure may have a favourable influence on sentencing.[17]

Finally, let me briefly draw a few conclusions on the limits of efficiency:

(1) The number of investigated criminal cases is gradually increasing; their structures and methods are changing and improving.

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17 "Delays in the Criminal Justice System. Reports presented to the 9th Criminological Colloquium (1989) European Committee on Crime Problems", *Criminological Research*, Vol. XXVIII. 1992.

(2) Criminal justice cannot keep up with these changes and developments either financially or technically. It has never been able to do so. The number of un-investigated criminal activities (latent crime) is considerable.

(3) The criminal justice system is also not able to cope with the investigated cases, a situation which cannot be significantly helped by the improvement of the staff and subsidies in criminal justice. The consequence of this is that criminal justice tries to get rid of a considerable number of cases by allowing the principle of opportunism to shape changing policy.

(4) Constitutional and human rights guarantees have strengthened the position of the accused and his counsel, which considerably restricts the scope of activity of legal authorities.

(5) The reforms in criminal justice and, in particular, of criminal procedure (regardless of which direction they point in) aim to simplify and speed up the procedure, in order to solve criminal cases on the basis of consensus, which is often achieved by giving up the principles of "material truth" and the adversarial trial.

(6) These facts show that the criminal justice system has started to shift in the direction of bureaucratic self-absorption, thus, unless this view is changed, making itself incapable of working efficiently and of preventing the reproduction of crime to any extent, in view of the criteria we have analysed above.

A criminal justice system fulfils its social role by merely existing. It creates an opportunity to give an account of responsibilities after criminal activities have occurred, and it also reflects and strengthens those values that are preferred by society. In other words, it functions as a "cane hanging on the wall". And that is already some kind of an achievement.

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Lenke FEHÉR

European Integration: The Legal Situation of the Victim in Criminal Procedure*

Over the past decade and a half, and especially from 1990 onwards, "victim policy" has consistently been a research priority in Hungary. This research has made an important contribution to the development of practical "victim policy" through many publications, as well as by direct communication between the various organisations which deal with the problem of crime and its victims.

During this period several non-governmental organisations specialising in victim support—such as the White Ring, ESZTER, or ESCAPE—started to function. In the experiences recorded by the White Ring, the great majority of victims need support of a legal nature (for example, to write requests, to represent them in court, to provide support when negotiating with insurance companies), and financial support (monetary help, financing of everyday expenditures, repairing broken locks, etc.). Other, more specialised victim support services, such as ESZTER, which deals with victims of sexual crimes, or ESCAPE, which deals with the victims of forced prostitution and trafficking in persons, are more active in giving psychological support and treatment according to the individual needs of the victims.

"Victim policy", dealing with the victims of crimes, has developed in two different directions: on the one hand, within the framework of criminal law and criminal procedure law; and on the other hand, with the activities of social organisations.

At the present time, criminality has greatly changed in both a qualitative and a quantitative sense. It appears that the traditional criminal procedural law is no longer

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able to handle effectively the problems which now arise. The nature of the procedure is too formal, and too bureaucratic, and in consequence the victims and witnesses cannot regard the procedure as a considerate process relating to them which serves their own interests. On the contrary, the requirement to frequently appear before the authorities and the court creates a feeling that the procedure is a harassment, instead of an action undertaken on their behalf.[1] This is especially true in the case of victims of sexual crimes, who suffer new traumas due to repeated interviews and hearings in the course of investigation and court procedures. "Sex crimes are a special problem, because many victims, particularly raped women, are forced into the role of a defendant by police officers, prosecutors, defence counsellors, and judges, who use indecent and insulting examination methods in their investigation."[2] In cases where the victims are minors, it is generally necessary to pay special attention to Article 16 of the Declaration of the Rights of Children. However, it is also very important to provide the option of a judge—possibly in the presence of a psychologist—attending the hearing, and then this record can be substituted for repeated cross-examinations at trial.[3]

It is not a problem facing only us, but rather a world-wide phenomenon, that courts deal with too many cases and files; consequently, it is more and more difficult to maintain a balance, to finish the procedure within a reasonable period of time, to focus on the rights and interests of the victim, and to attain the goals of criminal policy.[4] All of this leads us to conclude that in the field of criminalisation, as well as of criminal procedure, there is a tendency to decrease the competence of the criminal law. Minimising intervention, however, means placing more responsibility, control, and social participation in the criminalisation process.[5]

With reference to the sanction system, there is a tendency towards humanisation. This means the humanisation of the conditions of prison life, as well as the existence and use of a number of alternative punishments. From this arises the question of retributive or restorative justice. In a broader sense, every criminal justice system has retributive and restorative purposes and tendencies, that is, a restoration of the legal order which was violated by the crime. The infliction of a punishment, however, always means a *malum*, a negative experience for the offender; in other words, a retribution for the crime committed. Restorative efforts have appeared from time to time in the history

1 ERDEI, Á.: "Hagyomány és korszerűség" (Tradition and Modernity), *Börtönügyi Szemle*, 1995, No. 1. 8.

2 SESSAR, K.: "Tertiary Victimization", in GALWAY, B.—HUDSON, J. (eds.): *Criminal Justice, Restitution and Reconciliation*, New York, 1990, 38.

3 *A bűncselekmények áldozataink jogi helyzetére és kártalanítására vonatkozó nézetek és javaslatok (Opinions and Suggestions on the Legal Status and Compensation of the Victims of Crime)* (Előterjesztő: Fehér Gyűrű Közhasznú Egyesület), Budapest, 1995, Kézirat, 9.

4 LÉVAI, M.: *Társadalmi, politikai változások és a bűnözés (Societal and Political Changes and Criminality).* Válogatás a 11. Nemzetközi Kriminológiai Kongresszus előadásiból, Budapest, 1993, aug. 22–27, 123.

5 KIRÁLY, T.: "A büntető eljárási jog reformja elé" (Before the Reform of the Law of Criminal Procedure), *Magyar Jog*, 1993, No. 5, 257–261.

of criminal law. This restoration sometimes has a symbolic, and sometimes a more instrumental, character.[6]

The vast majority of crimes are defined as dangerous to society, even if the victim is a natural person. The prevailing criminal justice system must, in the name of the society, prosecute the criminal offender, bringing charges and instituting proceedings against him at trial. This method is more guaranteed and efficient than an individual victim's action. The state's monopoly on accusation has a special consequence: the response to the crime given by the criminal law is more repressive than reparative or restitutive. The transformation of an individual harm to a social one however, should not neglect the victim's interests, either on a general, or on individual level. I am convinced that in present criminal law we require a harmonious blend of the different features and interests. New variations of sanctions or responses are directed towards the victims' demands for restitution, compensation, and conciliation. However, to convert criminal law into civil law or social conflict-management, is not a real alternative. Crime should be considered as a special kind of conflict, a transgession of public rule, an infringement of the abstract juridical–moral order, as well as a harm to the victims, a threat to social peace, a violation of public order and safety. Reactions or responses to the crime should be in accordance of these competing values.

There is an increasing belief of many scientific scholars, that "restorative justice" could be a serious alternative in responding to crime. This response is based on a socio-ethical approach which stresses the responsibilities of the parties to find a constructive solution to the crime-conflict. The approach therefore offers the potential for more peacekeeping in society as a whole.

"At the heart of the idea of restorative justice–according to Martin Wright–is the recognition, that crime is not merely lawbreaking: it causes harm–to individual *victims*, to community, the state or the environment. The *first* response should, therefore, be to try to remedy the harm, as far as possible, or if necessary to make things better than before. *Secondly*, when *offenders* are known, they should be required to contribute towards making things right as much as they are able. This may be paying compensation, meeting the victim, working for charitable organisation, or co-operating with a rehabilitative programme. *Thirdly*, the *community* should play its part by offering support to the victim, for example through Victim Support, and by enabling offenders to make amends, for example by providing employment so that they can earn money with which to pay compensation. The *fourth* leg of the restorative justice model is a specific strategy for crime prevention."[7]

Restorative justice has come to mean a great variety of things to many different people. The roots of the restorative justice paradigm date back to the early 1970s. Social

6 FEHÉR, L.: Alternative penal sanctions. *Acta Juridica*, 1994. No. 36., 46.

7 WRIGHT, M.: Family group conferencing: is it restorative? is it just? *Paper presented at a workshop at the International Conference: Restorative justice for juveniles–potentialities, risks and problems for research*, Leuven, 1997. 1.

and political forces coalesced with other efforts 1) the search for informal justice and dispute resolution processes, 2) increasing scientific scepticism regarding the deterrent effect of a punitive system, and 3) the rise of the victim support movement.[8] Prior to 1990 it was seen as an incomplete *attempt* at a "paradigm shift" away from the existing retributive response to crime. Since 1990 however a number of developments have dramatically changed the face of the restorative justice *movement*. The practice of restorative justice, which was largely synonymous with victim–offender reconciliation programs (VORPs) in 1989 were provided by the important institution of the Family Group Conferences (FGCs) as the official response to juvenile offenders in New Zealand, based on a western-style adoption of aboriginal Maori practice. In the same year (1989) the Australian John Braithwaite published his theory in his book "Crime, Shame and Reintegration". The idea–underlying restorative justice–have attracted the prison abolition movement, as well as the critical criminology and the feminist movement, too.[9]

According to Van Ness, "restorative justice teaches us about moral conduct. It helps us to focus on the harm that often results when people fail to act morally, and to seek for responses that repair the harm and reinforce moral conduct."[10] "Crime is not only an injury to a victim, but also disobedience to a rule. That is, it is the injury comes when the rule is disobeyed. This is an important concept to retain for basic human rights reasons (no one should be "punished" for something they did which was legal at the time they did it)".[11]

In the development of juvenile justice system there are several existing models, like the welfare (or rehabilitative), the classical retributive, the non-intervention, the corporation or the restorative one.[12] However these models hardly even develop in pure forms, on the contrary, elements of the various models co-exist and make colourful the features of the others.

The restorative model of justice takes into account the needs of the victim reacting to the crime by implementing various techniques of intervention, instead of imposing punishment or rehabilitation. These interventions–reparation, reconciliation, mediation, compensation, community services etc.–are aiming primarily to restore the damage

8 MESSMER, H.–OTTO, H.-U. Restorative Justice: steps on the way toward a good idea. In: Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation–International Research Perspectives. Netherlands, Kluwer Academic Publishers. 1992. 1–12.

9 McCOLD, P.: Restorative Justice Variations on a Theme. Appendix: Delphi Responses. *Paper presented at a workshop at the International Conference: Restorative justice for juveniles–potentialities, risks and problems for research.* Leuven, 1997. 17.

10 McCOLD: *op. cit.* 4.

11 *Op. cit.* 3., 18. Paper presented at a workshop at the International Conference: Restorative justice for juveniles–potentialities, risks and problems for research. Leuven, 1997. 17.

12 See GATTI, U.–CERETTI, A.: Italian experiences. Paper presented at a workshop at the International Conference: Restorative justice for juveniles–potentialities, risks and problems for research. Leuven, 1997. 3–4.

caused by the crime, to arise the sense of responsibility in the wrongdoer, without stigmatising him.

"A distinguishing feature of restorative justice is that the victim should benefit from it at least as much as the offender."[13] It is therefore necessery to ask what victims want. The victims needs has been summarised by Reynolds as follows:

- Help with the practical/emotional effects of crime
- *To be treated sensitively and with respect*
- To know what's happening in the case
- To understand what's happening in the case
- *To be heard and taken seriously*
- Public acknowlegement that wrong has been done
- To feel it is worth pursuing the case
- *Quick resolution of the case*
- *To know "Why me?"*
- To know that the offence will not be repeated
- Some want *an apology from the offender*
- *Some want compensation*
- Some want retribution (most do not)
- Most want to be free of responsibility for decisions about the offender.[14]

Criminal punishment is a special kind of social reaction to the crime, that is by its nature *responsive*. Additionally, the *repressive* character, the inclination towards stabilisation of law and social order, cannot be denied. From the victims' viewpoint, to punish an offender also serves as a moral judgement. However, in most cases the victim's aim is connected with material compensation.

Compensation for the harm suffered by and damage to the victim as a consequence of crime can be attained partially or wholly by way of restitution or compensation given by the offender; state compensation; victim-support services; insurance compensation. From this catalogue—according to Hungarian law—state compensation still does not exist; victim-support services do not have enough funding; insurance compensation is very problematical; and compensation given by the offender can be reached within the criminal proceedings through the so-called "adhesive procedure", but there is very little hope that it can be successfully enforced. In Hungarian criminal procedure (Article 55 of the Criminal Procedure Code), the victim, his successor, or the prosecutor can assert a *civil claim* to receive compensation for the losses incurred by the crime committed against him. This happens within the framework of the so-called "*adhesive procedure*".

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13 *Op. cit.* 1., 3.

14 REYNOLDS, T.: The victim's perspective. *Paper to ISTD/Mediation UK conference "Repairing the damage: restorative justice in action"*, Bristol, 1997.

In Hungary the present legal system does not allow for mediation procedures. *Elements of mediation*, as elsewhere, can be found in our *substantive* and *procedural criminal law, too*.[15]

The ideas of restitution given by the offender (*Schadengutmachung*) and mediation are closely connected. Mediation means reconciliation between the offender and the victim. It is a possible model of dispute settlement. Reconciliation as a procedure takes place *outside criminal procedure*, as well as in its initial *pre-trial phase*.

The persons involved in mediation act in the roles of the *offender*, the *victim*, and the *mediator*. An important starting point of mediation is the *voluntary consent* of the parties (offender and victim) to act in the proceedings, coupled with an admission of guilt by the offender.

Communication in the mediation process is directed by the mediator, who concentrates on creating conditions and forms of compensation which are acceptable to both parties. At the same time, it of course includes a detailed discussion of the crime, thus providing a release from emotional tensions, aiding the interpretation of events, and negotiating a way out of the conflict. The aim is reconciliation and the attainment of an appropriate form of compensation. This means that the victim can more quickly get compensation for material losses and damages. The mediator is responsible for keeping the negotiations on the right track, and for maintaining concentration on the most important questions.

It is necessary to stress that *mediation* in the case of adult offenders *is not an equal alternative to the traditional fine or imprisonment*. Emphasis on the *formal* as well as on the *substantial* difference between mediation and other sanctions, which precondition its careful application, is unavoidable. I would like to stress, however, that mediation is a situationally adequate and flexible tool. There are numerous arguments favouring mediation. It forms a new and more humane kind of sanction which can be regarded as an alternative to short-term imprisonment; it is a means of substituting for the criminal process. Another point of view is that it solves the conflict at the place where it originated, and it maintains social peace. It eliminates the disadvantages of courtroom communication by an informal atmosphere, by actively involving the parties concerned, and it helps the offender to face his crime and to understand the victim's viewpoint. At the same time it hopefully develops a higher level of conflict management in society.

Mediation can be a stage of the procedure which can solve the problem, but in the case of failure, the machinery of criminal justice can re-start. Consequently, it is necessary to form a structure which can be integrated into the present system as mediation, and can be *re-integrated* when mediation is unsuccessful.

In any case, it is of primary importance that we clarify our expectations concerning this form of diversion from the criminal process, its price, and the balance between costs and benefits. In this connection, we cannot avoid re-thinking the entire criminal policy

15 FEHÉR.: *op. cit.*, 50.

and the criminal justice system. The criminal justice system has to be able to give a prompt and adequate answer to criminality, to react quickly and effectively to its evolving tendencies. The changes and development of the system cannot disregard the experiences of our legal history and the values of our legal traditions. At the same time, it should be modernised and harmonised with European trends, standards, and principles.

All over the world great attention is being paid to the protection of human rights. This also has an effect on criminal procedure as embodied in the rights of the defendant, in the principle of fair procedure, and the "equality of arms" between the actors in the criminal procedure. The principle of publicity—which is a guarantee against judicial arbitrariness—makes witnesses and victims vulnerable; in the case of organised and serious crimes, the actions of terrorist groups or criminal gangs especially endanger these actors in the criminal process. This has made witness-protection a necessary provision.

The victim's needs and interests are manifest in three different areas. The *first* is in the initial phase of the investigation, where he or she is acknowledged and treated as a victim. In this phase it is necessary to provide more information for the victim, and to extend the right to be present at certain procedural acts. The authorities also have an interest in avoiding de-humanising treatment of the victim, because "frustrated victims are bad witnesses".[16]

The *second* critical point is the participation of the victim in the criminal procedure. In this phase he or she has the right

- to make proposals;
- to make remarks;
- to be informed;
- to obtain legal assistance.

The victim cannot put questions directly, but can only propose questions to be put. The rights of the victim are greatest in the case of private prosecutions, and are more limited in public prosecutions. There is a necessity for co-ordinated participation during the main trial proceedings, when the victim may be permitted to be a subsidiary prosecutor or intervener, and have the right to complain alongside the public prosecutor (*Nebenklage*). In this case he has the same rights as the public prosecutor, except for changing, widening, or dropping the accusation, and for appealing for an increase in the punishment. Efforts are being made to replace the institution of subsidiary private prosecution for special cases when the public prosecutor does indict the offender or does not represent the case.

The *third* area is the decision-making process and the right to appeal. It is necessary to widen this last point in the future. I would also strongly support the provision of a state-appointed victim advocate in special cases, to parallel the state-appointed defence counsel of the defendant.

16 SESSAR: *op. cit.*, 38.

Victims of crimes "are not more vindictive than non-victims".[17] Moreover, victims of property crimes are more interested in receiving compensation and restitution than in punishing the offender. Lack of restitution, however, may encourage the retributive needs of the victim, which helps to justify punishment for the offender.

Hungarian criminal procedure should be regarded as relatively modern, and is in principle in accordance with European norms, expectations, and obligations. This statement, however, does not deny the necessity of its further developing, based on the traditions of and according to European tendencies, and in keeping with efforts at integration.

17 GOLDSTEIN, A. S.: "Defining the Role of the Victim in Criminal Prosecution", *Mississippi Law Journal*, 1982, No. 52, 515–561.

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Hate Speech in Hungarian Criminal Law

I. Hate Speech in Criminal Law from the First Criminal Code until the Code of 1978

The first Hungarian Penal Code, the *Csemegi Code* of 1878, was already concerned with the strength of words. In its Article 172 (2) it stated that "whoever during some assembly publicly incites a certain class, nationality or denomination to hatred against another, through words, or through distribution of printing, writing, depiction, commits a crime."[1]

The second important step in the development of the criminal law of seditious libel—which had been the form of criminalisation used against hate speech—was the III Act of 1921 *On the More Effective Protection of State and Social Order*, which in its Article 7 punished "whoever states or spreads such an untrue fact, which is suitable to impair the appreciation or violates the credibility of the Hungarian state or Hungarian nation";[2] Article 8 imposed punishment for a misdemeanour on those "who use reviling expressions or commit such an act against the Hungarian state or Hungarian

1 Article 172 (2) of V Act of 1878; The *Csemegi Code* (named after its drafter Károly Csemegi) was the first Hungarian Penal Code enacted by the Parliament in 1878 (V Act of 1878). See also GYÖRGYI, K.–KÓNYA, Mrs. I.–MARGITÁN, É.: *Az állam elleni bűncselekményekre vonatkozó rendelkezések módosításáról (About the Modification of Regulations on Crimes Against State)*, Budapest, 1990, 17 and 30/1992. (V. 26.) AB határozat (Decision of the Constitutional Court), 197.

2 Article 7 of III. Act of 1921; GYÖRGYI–KÓNYA–MARGITÁN: *op. cit.*, 20.

nation."[3] Subsequently expanding the protection, the V Act of 1941 tried to protect the national feelings of nationalities living on the territories re-integrated into Hungary.[4]

Following the Second World War, the VII Act of 1946 *On the Penal Law Protection of State-Order and Republic* replaced the regulation of the Csemegi Code with *Sedition* and *Seditious Libel Against the Democratic State-Order, Democratic Republic, and the Freedom and Equality of Citizens.*[5] Additionally, the XVIII Act of 1948 widened the circle of criminal legal protection and punished similar actions against the Hungarian nation, nationality, and any denomination.[6] In 1952 a compilation of the criminal statutes in effect was edited—the *Official Compilation of the Substantive Criminal Law Rules in Effect*—which basically upheld the offences of the VII Act of 1946 and the XLVIII Act of 1948 under the Chapter of *Crimes Against the Internal Security of the State.*[7]

The situation persisted until the Code of 1961 modified the definition of *Seditious Libel* in several respects and created a new crime, *Affronting a Community*, as an offence against public order.[8] This new criminal offence was given, however, the same wording as *Seditious Libel*, an *Offence Against State* with severer punishments. The law enforcement was advised to apply the latter crime if mitigating circumstances, such as the motive for the crime, the circumstances of its commission, and the personality of the offender would allow it.[9] To distinguish between the two types of crimes proved to be a difficult and uneasy job for the authorities; the legislator therefore tried to add to the distinctive factors of these offences in the next criminal code.[10]

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3 1921. évi III. tc., 8. Cikk. For studies on the Act see ANGYAL, P.: *A magyar büntetőjog kézikönyve. Az állam és a társadalmi rend védelméről szóló 1921:III. T.C. (Handbook of Hungarian Criminal Law. III. Act of 1921 On the More Effective Protection of State and Social Order).* Budapest; VÁMBÉRY, R.:, "A rendjavaslat" (The Draft of the Law on Social Order), *Jogtudományi Közlöny*, 1921, No. 6; DEGRÉ, M.: "Az állam és társadalmi rend védelméről szóló új törvény" (The New Act on the Protection of State and Social Order), *Magyar Jogi Szemle*, 1921, No. 2.

4 V Act of 1941; GYÖRGYI–KÓNYA–MARGITÁN: *op. cit.*, 23.

5 VII Act of 1946; GYÖRGYI–KÓNYA–MARGITÁN: *op. cit.*, 23–24; 30/1992. (V. 26.) AB határozat (Decision of the Constitutional Court), 197.

6 Article 19 of the XVIII Act of 1948; GYÖRGYI–KÓNYA–MARGITÁN: *op. cit.*, 26; 30/1992. (V. 26.) AB határozat (Decision of the Constitutional Court), 197.

7 GYÖRGYI–KÓNYA–MARGITÁN: *op. cit.*, 26; 30/1992. (V. 26.) AB határozat (Decision of the Constitutional Court), 198.

8 Articles 127 and 217 of the V Act of 1961.

9 GYÖRGYI–KÓNYA–MARGITÁN: *op. cit.*, 28–29; 30/1992. (V. 26.) AB határozat (Decision of the Constitutional Court), 198.

10 30/1992. (V. 26.) AB határozat (Decision of the Constitutional Court), 198.

II. Hate Speech under the Penal Code of 1978 until the XXV Act of 1989

The structure which regulated hate speech remained almost the same in the third Penal Code (PC) of Hungary, the IV Act of 1978[11]—which is still in effect, although with enormous modifications.

Before 1989,[12] the PC contained two separate offences, the aims of which were to ensure the peacefulness of the political and social public mood.[13] One crime was defined in Chapter X of the Code of 1978 dealing with *Crimes Against State—Seditious Libel* (Article 148)—whilst the other offence, called *Affronting a Community* (Article 269), was set out as a *Crime Against Public Order* in Chapter XVI of the Code.[14]

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11 V Act of 1978.

12 XVI Act of 1989 and XXV Act of 1989; HALMAI, G.: *A véleményszabadság határai (The Limits of Freedom of Expression)*, Budapest, 1994, 237; GYÖRGYI–KÓNYA–MARGITÁN: *op. cit.* XVI Act of 1989 abolished the death penalty for Crimes Against State, whilst the XXV Act of 1989 completely redrafted the whole Chapter X of the PC containing these offences.

13 ERDŐSY, E.–FÖLDVÁRI, J.: *A magyar büntetőjog különös része (The Special Part of Hungarian Criminal Law)*, Pécs, 1994, 285.

14 In the unmodified Code of 1878: "*Seditious Libel*

Article 148. (1) Whoever in the presence of others, with the purpose to arouse hatred against

a) the Hungarian nation or some nationality,

b) the constitutional order of the Hungarian People's Republic,

c) international relations aimed at alliance, friendship or other forms of co-operation of the Hungarian People's Republic,

d) any nation, religion or race, as well as against—because of their socialist conviction—particular groups or individuals, commits an act fit for such purpose, is punishable for a felony with deprivation of liberty from one to five years.

(2) The punishment is two to eight years deprivation of liberty if

a) seditious libel is committed in wide publicity or as a member of a group,

b) seditious libel in case of paragraph (1) point c)–d) results in the disturbance of the international relations of the Hungarian People's Republic.

(3) Whoever commits preparation to seditious libel as defined in paragraph (2) is punishable for a misdemeanour with up to two years, in the time of war for a felony with one to five years deprivation of liberty.

Affronting a Community

Article 269. (1) Whoever in the presence of others commits an act fit to excite hatred against

a) the Hungarian nation or some nationality,

b) the constitutional order of the Hungarian People's Republic,

c) international relations aimed at alliance, friendship or other forms of co-operation of the Hungarian People's Republic,

d) any nation, religion or race, as well as against—because of their socialist conviction—particular groups or individuals, is punishable for a misdemeanour with deprivation of liberty up to two years.

(2) Whoever in the presence of others uses an expression offending or degrading to the Hungarian nation, the constitutional order of the Hungarian People's Republic, furthermore—because of their nationality, religion, race or socialist conviction—groups or individuals, or commits other such acts, is punishable for a misdemeanour with up to one year deprivation of liberty, reformative-educative labour, or fine.

(3) Whoever commits the offence defined in paragraphs (1) and (2) as a member of a group or in wide publicity, is punishable for a felony with up to three, and for a misdemeanour with up to two years deprivation of liberty."

The *Crimes Against State* (Chapter X, Article 139/A–Article 151 of PC)–and especially *Seditious Libel* (Article 148)–were the *ultima ratio* of the party-state's fight against plurality of opinions,[15] even though according to the *Ministerial Reasoning* of *Seditious Libel*, the Hungarian People's Republic secured the fundamental rights of the citizens, amongst other things freedom of expression; however, it continued that "the freedom of thought and criticism does not mean that anybody using such a pretext could aspire to undermine the constitutional order, and to disturb the peaceful building work of our socialist state."[16]

Since *Seditious Libel* had been defined as a *Crime Against State* its *legal object*[17] was the state, social, or economic order of the Hungarian People's Republic. The Code, however, contrary to the other crimes against state, enumerated in the definition of this offence the *direct legal objects* as well. These were: the constitutional order of the Hungarian People's Republic; international relations aimed at alliance, friendship or other forms of co-operation of the Hungarian People's Republic; any nation, religion or race, or the Hungarian nation or some other nationality; and certain individuals or groups, because of their socialist conviction.[18] The exact meaning of these obscure terms–interestingly enough–did not cause interpretative problems for the judicial

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15 *Supra* note 10.

16 *1978. évi V. törvényjavaslat és miniszteri indokás (The Draft and Ministerial Reasoning of the V Act of 1978)*, Budapest, 1979, 208 (I shall cite this source as 'Reasoning').

17 In Hungarian criminal law, according to a widely accepted theory, the offence has a legal object, which is also referred to as the object of the crime. Some crimes have an object of perpetration as well. The legal object (object of the offence) is the interest or right (individual or social) which is protected by the criminal law and violated or endangered by the commission of the certain crime. The object of perpetration, however is the person (passive subject) or object towards which the conduct of perpetration is directed. Thus, for example, the object of theft are the proprietory rights, whilst the object of perpetration is the thing actually stolen (e.g. a bag). See NAGY, F.–TOKAJI, G.: *A magyar büntetőjog általános része (The General Part of Hungarian Criminal Law)*, Szeged, 1993, 63–65. Some writers also distinguish between general legal object, special legal object and direct legal object. General legal object is the system of legally recognised interests. From another viewpoint, the legal system itself, the special legal object is the system of similar or related rights protected by the law, and the direct legal object is the concrete interest endangered or violated by the commission of the offence. For example, the Hungarian legal system is the general legal object of homicide, human life and bodily integrity is the special legal object (Chapter XII of the PC), and human life is the direct legal object, while the object of the crime is in this case a human being, called the passive subject against whom the crime is directed. See BÉKÉS, I.–FÖLDVÁRI, J.–GÁSPÁR, Gy.–TOKAJI, G.: *A magyar büntetőjog általános része (The General Part of Hungarian Criminal Law)*, Budapest, 1980, 106–107.

18 LÁSZLÓ J. (ed.): *A Büntetőtörvénykönyv magyarázata (Commentary to the Hungarian Penal Code)*, Budapest, 1986, 407. (I shall refer to this source as 'Commentary'). One of the objects of the crime was the constitutional order of the Hungarian People's Republic which comprised–amongst other things–the protection of the Hungarian Socialist Worker Party (the Communist Party). See Reasoning, *op. cit.*, 209 and Commentary, *op. cit.*, 409. Thus it was held that when the defendant announced that the Hungarian state is not independent as a result of her social order and this does not foster the nation's interest, such statements are suitable to arouse hatred against the state and social order of Hungary and violate, therefore, Article 148 (1) b) BJD 3897 (BJD is an abbreviation of Criminal Law Decision).

practice, and I shall examine the possible reasons for this when looking at the new legislation.[19]

Seditious Libel was an *endangering* crime; in other words it was not necessary to its completion that the act should really *trigger hatred*, but it had to be *suitable to arouse such*. It could be committed by any act which by its nature was fit for the above purpose.[20] The act had to be suitable in an abstract fashion (abstract endangerment), which would mean in practice that the action's suitability to arouse hatred was examined objectively, purely on the grounds of the content and meaning of the act, and regardless of the impact it had on the environment (audience).[21]

Any act suitable to trigger hatred qualified as a *Crime Against State*, namely as *Seditious Libel*, if it had been committed with the *aim of arousing hatred* against the described groups or individuals. Direct intention (*dolus directus*)[22] was needed to commit *Seditious Libel*, meaning that the offender had to foresee that his act was fit to arouse hatred, and had to wish that this end should be realised. Hungarian criminal law distinguishes between different forms of *intention*,[23] the *motive* of the crime, and the *aim*. For an offence to be fully committed all objective elements of its definition (fact-pattern) must be met and—in the case of an intentional crime—covered by the perpetrator's intention; the *aim* of a crime is an end, the achievement of which is the purpose of the criminal conduct but its realisation is not necessary for the crime to be complete. This latter *aim*, however, must be differentiated from the *motive* of the crime.[24] Article 148 (1) defines the basic conduct of perpetration of the crime whilst paragraph (2) states some qualifying circumstances (commission in wide publicity, as a member of a group etc.), and paragraph (3) declares that the preparation of this offence should be punishable as well.[25]

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19 The offence did not define an object of perpetration; nevertheless an attack directed against a corporeal object, for example, a flag, qualified as this crime. See *Commentary op. cit.*, 409.

20 Reasoning, *op. cit.*, 209; Commentary, *op. cit.*, 409.

21 Commentary, *op. cit.*, 409.

22 *Dolus directus* and *dolus eventualis* are defined in Article 13 of the PC: *"Article 13. The offence is committed intentionally if the perpetrator wishes the consequences of his conduct or acquiesces in these consequences."*

23 *Ibid.*

24 NAGY–TOKAJI: *op. cit.*, 62–63.

25 The general definition of preparation as a phase of the offence is set out in Article 18 of the PC: *"Article18. (1) Where the law orders it so specifically, whoever with the purpose of committing an offence provides the conditions necessary thereto, or facilitating it, invites to, offers himself to, undertakes its, or agrees in its common perpetration is punishable for preparation.*

(2) Not punishable for preparation is

(a) who, due to his voluntary desistance the commencement of the offence fails to come about;

(b) who in order to avert commission retracts his invitation, offer, undertaking, or endeavours to make the other participants desist from the commission of the offence, provided that the commencement of commission of the offence, for any reason fails to come about;

(c) who reports the preparation to the authorities.

The PC defined two different offences under the title of *Affronting a Community* in Article 269.[26] Article 269 (1)—as already mentioned—corresponds to *Seditious Libel* as defined in Article 148 (1), with the difference of lacking the *aim* of arousing hatred; conduct of perpetration was only an offence against public peace.

As we have seen, in the terminology of both crimes the objects of the offence[27] were the same, and also the conduct of perpetration.[28] The difference lay on the *mens rea* side of the crimes, since *Seditious Libel* was an *aimed crime*, but in the case of *Affronting a Community*, the "*aim to arouse hatred against a certain community*" for the purpose of violating the interests of the state, was lacking; otherwise the wording of both crimes was the same.[29]

In criminal practice this differentiation caused serious problems since both of these offences were crimes requiring intention on the *mens rea* side, and the only difference was that in the case of *Seditious Libel* this above-mentioned particular aim (to arouse hatred against a certain community) was also an element of the subjective side, whilst such a purpose, defined as hostile to the state, was missing in the case of *Affronting a Community*.[30] Judicial practice tried to differentiate between these two crimes, which was of major importance due to the great discrepancy between the punishments attached to them.[31] Thus it was held that it is not *Sedition* but *Affronting a Community* if there are no facts to prove that the offender made his remarks out of hostile political purpose.[32] Facts referring to such an aim could be the place, time and circumstances of commission, but the personal conditions of the perpetrator (for example, his ancestry[33]) were of importance as well.[34]

Usually from the intoxicated state of the offender the conclusion was drawn that there was not any aim against the state.[35] In another case, however, in which the perpetrator threw a large quantity of leaflets from a train window, the court concluded that this mode of perpetration indicated an aim to arouse hatred and thus he was found guilty of *Sedition* (Article 148).[36]

Article 269 (2) defined the second and less severe form of *Affronting a Community*, which was also called in practice *reviling*. Contrary to paragraph (1), the act of

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(3) Where in case of paragraph (2) the preparation is in itself another offence, the perpetrator is punishable for this latter offence."

26 Commentary, *op. cit.*, 772.

27 HALMAI: *op. cit.*, 237; 30/1992. (V. 26.) AB határozat (Decision of the Constitutional Court), 198.

28 ERDŐSY–FÖLDVÁRI: *op. cit.*, 285.

29 *Ibid*, at 285–286.

30 *Ibid.*; HALMAI: *op. cit.*, 237.

31 Commentary, *op. cit.*, 441, 772.

32 BJD 9104.; 278. sz – BH 1982/7.

33 *Ibid.*

34 Commentary, *op. cit.*, 773.

35 *Ibid*, at 773.

36 BJD 9105.

perpetration in paragraph (2) was not arousing to hatred but meant any conduct impairing the honour of the direct legal objects.[37]

III. The Law Following the 1989 Modification of the Criminal Code

Since, as previously stated, the *ultima ratio* for limiting freedom of speech is criminal law,[38] the first product of the "Roundtable Discussions"—which, although informal, was the most important institution conducting discussions between the communist regime and the opposition, and which drafted the script for peaceful transition—was the development of a draft modification for the Penal Code.[39] One of these important modifications—also created by the "Roundtable"—was the above-mentioned XXV Act of 1989,[40] abolishing the whole Chapter X on *Crimes Against State* of the PC and introducing, amongst other things, the new law of seditious libel: *Sedition Against a Community.*[41]

Because of the problems set out above, this modification of the law of sedition was inevitable. The draft of Kálmán Györgyi for the modification suggested that some sort of sedition should be kept as a *Crime Against State*, which would have protected the State of Hungary, the national flag and the national anthem. Acts involving hate speech were to be incorporated in a new crime against public peace.[42] The XXV Act of 1989 went half-way down the road envisioned by the draft, but abolished, however, both the former *Seditious Libel* (Article 148) and *Affronting a Community* (Article 269), and created only one new offence, placing it amongst the *Crimes Against Public Peace* (Title II of Chapter XVI). The *Explanation to the Modification's Draft* reasoned that conducts suitable to affect the public mood—hate speech, for example—are *per se Offences Against Public Peace.*[43]

The new crime of *Sedition Against a Community* (Article 269) originally had two paragraphs in which two types of the offence were defined.[44] Paragraph (1) defined

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37 Commentary, *op. cit.*, 773.

38 HALMAI: *op. cit.*, 237; 30/1992. (V. 26.) AB határozat (Decision of the Constitutional Court), 201.

39 *Ibid.* at 198.

40 1989. évi XXV. törvény.

41 HALMAI: *op. cit.*, 237; 30/1992. (V. 26.) AB határozat (Decision of the Constitutional Court), 198; ERDŐSY—FÖLDVÁRI: *op. cit.*, 286.

42 GYÖRGYI—KÓNYA—MARGITÁN: *op. cit.*, 52–53.

43 ERDŐSY—FÖLDVÁRI: *op. cit.*, 286.

44 *Sedition Against a Community* (Article 269) reads as follows:

"Sedition Against a Community

Article 269. (1) Whoever in wide publicity incites to hatred against

a) the Hungarian nation or some nationality,

b) some nation, religion or race, furthermore certain groups of the population, commits a felony and is punishable with deprivation of liberty up to three years.

[(2) Whoever in wide publicity uses an expression offensive or degrading to the Hungarian nation or some nationality, nation, religion or race, or commits other such conducts, is punishable for a misdemeanour with

a felony, whilst paragraph (2) set out a misdemeanour form of the offence. However, the misdemeanour [Article 269 (2)]—known also as *reviling* in earlier Hungarian criminal law terminology—was abolished by the Constitutional Court on the grounds of unconstitutionality.[45] The two forms of the crime differed slightly in their protected objects—paragraph (2) did not enumerate "*certain groups of population*"—but more importantly, the conduct of perpetration was also different. Whilst in the felony form of the crime the conduct required for perpetration was "*inciting to hatred*", which according to the *Explanation of the Code* might be suitable in itself to disturb public peace (since it has violence or the threat of violence inherent), the same could not be said of *reviling expressions* (the conduct of perpetration of the second—the misdemeanour—form of the crime).[46]

In this new Article 269 (1) the *legal object* of the offence was the public peace of Hungary, which means general positive mental, emotional and convictional relations towards state, social, legal and economic institutions and ideas.[47] As in the preceding formulations of a similar crime, the legislator lists the *direct legal objects* (the Hungarian nation, any nationality, any nation, religion or race, and certain groups of the population). A number of cases raising the issue of the *meaning* of race, religion, or groups of population were expected; however, neither this offence nor its successor[48] has been widely used in criminal practice. Nevertheless, it can be assumed that the courts will either use the internationally accepted meanings of these terms,[49] to which they are encouraged by Article 7 (1) of the Hungarian Constitution and the *53/1993. (X. 6.) AB határozat* decision[50] of the Constitutional Court, or use the following logical and linguistic interpretation.[51]

The previous sedition crimes under Article 148 and the old Article 269 (1) were endangering offences; thus any act qualified as conduct of perpetration if it had the potential to arouse hatred, which—as explained above—was viewed objectively.

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deprivation of liberty up to one year, community service or fine.]" This paragraph was abolished by the decision of the Constitutional Court [30/1992. (V. 26.) AB határozat].

45 30/1992. (V. 26.) AB határozat (Decision of the Constitutional Court) *Hatályos Jogszabály Gyűjtemény* Vol. 19.

46 HALMAI: *op cit.*, 237; ERDŐSY—FÖLDVÁRI: *op. cit.*, 285, 287.

47 ERDŐSY—FÖLDVÁRI: *op. cit.*, 283, 286.

48 See *infra* Chapters C, E.

49 See for example the fundamental concept of 'race' as defined very broadly in Article 1(1) of the "International Convention on the Elimination of All Forms of Racial Discrimination (1966)", in BROWNLIE, I. (ed.): *Basic Documents on Human Rights*, 1994, 149–150. Similarly Article 1 (1) of the "Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)" may give some idea of the extent of the freedom (*ibid.* at 109–110).

50 Hun. Const. Article 7 (1): "*The legal system of the Hungarian Republic accepts the universally recognised rules and regulations of international law, and harmonises the internal laws and statutes of the country with the obligations assumed under international law*". See 53/1993 (X. 6.) AB határozat (Decision of the Constitutional Court).

51 NAGY—TOKAJI: *op. cit.*, 9.

Therefore, the court always established whether it was possible for a certain action to have aroused hatred against—for example—a certain race or religion. To fuel hatred against a religion is only possible if it is viewed as such by the potential mass developing this hostility, but at the same time it is independent of any official assessment of what is a religion or race etc. In consequence, had the court been able to establish that, for example, a speech urging the assault of Krishna believers, was fit to create hatred against persons having this faith, even if such a religion was not officially recognised as 'religion', the crime would have been committed.

The problem with this type of logical analysis as regards *Sedition Against a Community* according to the 1989 modification, was that it was not clear whether the *conduct of perpetration*: *inciting to hatred* was an endangering type of conduct like the conduct of the previous Article 148 (*act fit to arouse to hatred*). This question will be scrutinised below, but it will be shown (and indeed, as regards *Seditious Libel*, has been shown[52]) that *incitement to hatred* comprises only the objective fitness to trigger hatred in other persons. It is also true concerning the new sedition law, that even if officially (for example, biologically) a certain group may not be identified as a race, or having a religion etc., if there is an objective possibility of creating hostile feelings against this identifiable group of individuals on the grounds of the actual conduct (speech) and the public perception of the attacked people, the act qualifies as incitement to hatred, and the group as protected.[53] This interpretation also follows from the fact that *Sedition Against a Community* is a *Crime Against Public Peace*, and thus its commission must violate or endanger such. This violation or endangerment is independent of the official (i.e. legal) perception of these terms; it is dependent instead upon the actual inciting conduct and the dispositions of the recipient. Obviously, the meaning given in this fashion to these *direct legal objects* would then become a legal notion through the application of criminal law endorsing such interpretation.

The intention of the legislator to widen as much as possible the range of protected *direct legal objects* can also be seen in the incorporation of the term *certain groups of the population*. The Constitutional Court points out that this term indicates the intention to protect persons with differing views (political parties, associations, movements etc.) or who are different for any reason.[54] This interpretation makes it undoubtedly compulsory to charge a perpetrator under this crime if he incites to hatred against—for example—HIV-positive persons.

The *conduct of perpetration* is *incitement to hatred* against the *direct legal objects*.[55] In interpreting the exact meaning of this term one must refer to the Constitutional Court's decision examining the constitutionality of this offence;[56] in its decision the Court dealt

52 See Chapter II.

53 Such a definition was not given by the courts; however, it is the only logically possible interpretation of their decisions.

54 See *supra* note 45, 202.

55 ERDŐSY–FÖLDVÁRI: *op. cit.*, 287.

56 See *supra* note 45, 202.

extensively with the meaning of this vital term. The Court first looked at the common language meaning of the word *hatred*,[57] which is according to the *Magyar Nyelv Értelmező Szótára* (Hungarian Language Dictionary), the most extreme negative, hostile temper of the highest degree.[58] Whoever *incites* (considering the meaning of the Hungarian equivalent: '*uszít*'), encourages hostile, damaging behaviour against an individual, group of people, organisation, or measure. Since already in the Csemegi Code the *conduct of perpetration* was *sedition to hatred*, which basically is identical in the Hungarian language with the term here scrutinised, the judiciary was able to rely on more than 100 years of legal practice in interpreting the *conduct of perpetration* of the offence in question.[59]

The *Curia* (the supreme court in Hungary before the Second World War) had already defined the meaning and scope of the *conduct of perpetration* in its decisions at the turn of the century.[60] The Constitutional Court, quoting the *Curia*'s definition, stated that under the term of *sedition* the statute does not mean any unpleasant and offending expression, but exclusively such turbulent outbursts which are liable to inflame the passions of a larger mass of people to a high level, and out of which hatred may develop, and which thus can lead to the disturbance of society's order and peace.[61] The Constitutional Court also cited another decision, saying that criticism, negative expressions and even offensive communication is not sedition; we can only speak of sedition if the expression does not target the sense but the feelings of the other, and is fit to arouse hostile passions. It is completely irrelevant whether the stated facts are true or not, it is only important that these 'facts'—if they are facts—should be fit to arouse hatred.[62]

The 1989 Act made the term *in wide publicity* (which was a qualifying circumstance in the previous sedition law) an element of *Sedition Against a Community*. The PC only says in Article 137 point 10 that "in wide publicity includes the perpetration of a criminal offence by press, by other means of mass media and by multiplication too."[63] Following the *Ministerial Reasoning* and a court decision, *in wide publicity* can be established if at the time of the commission of the crime a large number of persons were present or there was a chance that a not predetermined large number of persons would obtain knowledge of the act.[64] The body of persons present is large if their number cannot be estimated by looking at the crowd. This vague definition was interpreted by further court decisions, which held that a crowd of 20–25 people could qualify as '*in wide publicity*' even if it is in someone's home.[65] Courts also decided

57 Obviously the Hungarian meaning was scrutinised.
58 See *supra* note 54, quoting *Magyar Nyelv Értelmező Szótára*, Vol. II, 1132.
59 *Ibid.*
60 *Ibid.*
61 *Ibid*, citing BJD Vol. 7, 272.
62 *Ibid*, citing BJD Vol 1, 124.
63 PC, § 137, point 10.
64 BJD 8834.; BH 1981. 223. sz.; BH 1986. 315. sz.
65 BJD 660.

that this element can be established even by the tearing down of posters or other materials from walls.[66]

In the past few years several procedures were initiated on the basis of the second form of *Sedition Against a Community* (Article 269 (2), *reviling*).[67] In August 1991 police confiscated the 4/94 issue of the Anarchist Newspaper, the newsletter of the Anarchist Group of Budapest, published for the Pope's visit to Hungary, on the grounds that they had probable cause ("*well-founded suspicion*" in the wording of the Hungarian Criminal Procedure Code[68]) to believe that the misdemeanour form of *Sedition Against a Community* had been committed; on the first page of the newsletter the headline was: "May your Kingdom not come!". The writer of the piece went on to elaborate his opinion that the Church is not based on issues of faith but on power.[69]

The most important case, however, arose out of articles published in the "Szent Korona" (Holy Crown) newspaper. The Prosecution for the X and XVII District of Budapest filed charges against the editor-in-chief, his deputy, and the responsible editor in February 1991, alleging that the newspaper in its issues of the second half of 1990 published 14 statements violating Article 269 of the PC.[70] The president of the court in session decided to suspend the trial in order to bring the question of the constitutionality of Article 269 before the Constitutional Court.[71]

The issue which had arisen during this case pending before the Central District Court of Pest was that the Article 269 of the PC might contradict Article 61 of the Constitution, guaranteeing freedom of expression and the press,[72] as well as Article 60, ensuring freedom of thought,[73] and Article 65, stating the right to asylum. The judge

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66 BJD 4924.

67 HALMAI: *op. cit.*, 238.

68 Article12 (1) of the Criminal Procedure Code of Hungary (CPC) says: "*The criminal procedure can only be initiated on the bases of the conditions set out in this statute, in case of well founded suspicion and only against whom the well founded suspicion of a crime is burdening.*" Such a regulation is in conformity with Article 5 1/c of the "European Convention of Human Rights and Fundamental Freedoms (1950)"; See also Eur. Court H. R., Fox, Cambell, Hartley v. United Kingdom judgment of 30 August 1990, Series A No. 182.

69 See *supra* note 67.

70 *Ibid*, 242.

71 *Ibid*, 243.

72 Hun. Const. Article 61:

"*(1) In the Republic of Hungary everyone has the right to the free declaration of his views and opinions, and has the right of access to information of public interest, and also the freedom to disseminate such information.*
(2) The Republic of Hungary recognises the freedom of the Press.
(3) The law on the public data and information and the law on the freedom of the Press require for ratification the support of two thirds of the votes of the MPs present"

73 Hun. Const. Article 60:

"*(1) In the Republic of Hungary everyone has the right to the freedom of thought, conscience and religion.*
(2) This right includes the free choice or acceptance of religion or any other conviction according to one's conscience, and the liberty to express, or refuse to express, to exercise or teach one's religion and conviction through the performance of religious acts and rites, either individually or together with others, either publicly or in a close circle."

of the Central District Court, using the right laid down by Article 38 of the XXXII Act of 1989 *On the Constitutional Court*,[74] suspended the trial and referred the question to the Constitutional Court, reasoning that the disputed section of the Penal Code is contrary to Article 61 (1) and (2) with regard to Article 8 (1)–(2) and (4)[75] of the Constitution.[76]

At the session of the Court, the President of the Supreme Court and the Chief Prosecutor stated their view that the motion is not well-founded, and that the section in question is not unconstitutional.[77]

The Constitutional Court had firstly to define the actual question of constitutionality. In order to do so it started with the historical examination of sedition and related offences.[78] As a second step it observed that Article 269 does not have any conflicting points with freedom of thought (Article 60 of the Constitution) and the right to asylum (Article 65 of the Constitution). It stated that "[t]he Article 269 means the actual limitation of freedom of expression defined in Article 61 paragraph (1) and the freedom of the press indicated in paragraph (2) of the Constitution, and marks out the borders with the heaviest tools of the liability system: with criminal law sanctions."[79]

Thirdly, the Court—now that it was ascertained that freedom of expression has a point of contact with Article 269—had to set out its interpretation of freedom of expression. According to the Court, freedom of expression has a distinguished role amongst the basic constitutional rights; in fact it is a 'mother right' of other freedoms, the so-called 'communication freedoms'. That is, other rights can be derived from this fundamental freedom, such as freedom of speech and the press, and the right to information. In a wider meaning freedom of expression comprises the freedom to create and distribute art, and of scientific activity.[80] Freedom of religion is also connected to freedom of expression.[81]

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74 1989. évi XXXII. törvény, Article 38.

75 Hun. Const. Article 8:

"*(1) The Republic of Hungary recognises the inviolable and inalienable rights of persons. Ensuring respect and protection for these rights is a primary obligation of the State.*

(2) In the Republic of Hungary the rules on fundamental rights and obligations are determined by Act of Parliament, but must not limit essential contents of the fundamental right.

(3) (irrelevant)

(4) In times of emergency, national crises, or extreme danger, the exercise of fundamental rights may be suspended or limited—except the fundamental rights specified in Article 54–56., Article 57. paragraphs (2)–(4), Article 60., Article 66–69. and Article 70/E."

76 See *supra* note 45, 197.

77 *Ibid*, at 197.

78 *Ibid*, at 197–198.

79 *Ibid*, at 198.

80 *Ibid*.

81 Usually freedom of religion and conscience is placed outside communication rights, obviously because this right is inherent to the intimate inner sphere of the individual; thus it is generally not part of the communication process. The Hungarian Constitutional Court with one of its decisions of 1993 placed—in certain aspects—freedom of religion amongst communication rights. The reasoning of the judgement, in interpreting

Only at this stage did the Court define the real constitutional issue: Article 8 (2) of the Constitution says that "in the Hungarian Republic the rules on fundamental rights and obligations are determined by Act of Parliament, but must not limit essential contents of the fundamental right." Therefore, the crucial constitutional question was whether the legislator by enacting Article 269 (1) and (2) violated Article 8 (2) of the Constitution, by limiting *the essential content of freedom of expression* and the press as ensured in Article 61 (1) and (2).[82]

The Constitutional Court referred in several of its decisions to the prohibition on violating the essential content of a certain right and set out a test for establishing whether, because of its violation of Article 8 (2), a certain limitation imposed on a constitutional right is arbitrary.[83] In this case the Court rephrased the test:

"*The state can only apply the measure of limiting fundamental rights if the protection or success of another right and freedom or the protection of another constitutional interest cannot be achieved otherwise. For the constitutionality of fundamental right limitation it is, therefore, not enough in itself that it is applied for the protection of another right or freedom or in the interest of some constitutional end. It is necessary, however, that it should meet the requirements of proportionality: the importance of the end to be achieved and the extent of the harm to the fundamental right should be in proper proportion to each other. The legislator is compelled to use the mildest means suitable to achieve the given end while applying the limitation. The limitation of the right's content is unconstitutional if it is exercised lacking any compelling reason, arbitrarily, or if the extent of the limitation is unproportional compared with the end to be achieved.*"[84]

In other words, a limitation of a fundamental right is not arbitrary if:

a) a limitation is *necessary* for the protection of another fundamental right or freedom or another constitutional interest;

b) the employed measure is *suitable* to achieve this end;

c) the importance of this end has to be *proportionate* to the extent of the harm caused by the limitation;

Article 60 of the Constitution, mentions three elements of the freedom of religion: freedom of belief (faith), freedom in exercising the religion, freedom to the joint and public exercise of religion. In the view of the Constitutional Court the second element, freedom in exercising religion (traditionally cult freedom) is clearly a communication right, and they expressed their view that the text of the Constitution defines freedom of belief through freedom of communication since it defines the subject of freedom of religion as the right to freely choose or accept religion. See HALMAI: *op cit.*, 113–114; 4/1993. (II. 12) AB határozat (Decision of the Constitutional Court).

82 HALMAI: *op. cit.*, 244.

83 This test can be found in its clearest form in the decision 20/1990. (X. 4.) AB határozat (Decision of the Constitutional Court), or in the decision abolishing the death penalty, 23/1990. (X. 31.) AB határozat (Decision of the Constitutional Court).

84 See *supra* note 45, 199.

d) the applicable limitation has to be the *least intrusive*.[85]

The question was then asked: what can be said about the existence of these conditions as regards Article 269 of the Penal Code? As already elaborated,[86] sedition had two forms, the conduct of perpetration of which was different: "*incitement to hatred*" [Article 269 (1)] in the first case and "*reviling*" [Article 269(2)] in the second. This difference justified a separate examination of the constitutionality of the two forms of this crime.[87]

The Court began by examining the first type of sedition. The *conduct of perpetration* of this offence was "*inciting to hatred*". The Court ascertained that it is the duty of the state not only to honour but to protect fundamental rights.[88] This, as set out in the decision on abortion,[89] includes the duty of the state, in cases of fundamental individual rights, to take measures to ensure their effectiveness. Article 61 of the Constitution declares not only the individual subjective right to freedom of expression, but also the objective side of this freedom. Therefore, beside the individual freedom of expression (subjective right), Article 61 comprises a "state duty to ensure conditions for the development and functioning maintenance of democratic public opinion."[90] The Court concludes that the "objective, institutional side of freedom of expression does not only concern the freedom of the press, freedom of education etc., but points to the other side of the institutional system, which places freedom of expression in general amongst the other protected interests. Therefore the constitutional limits of freedom of expression must be defined in such a way that they should consider, beside the basic right of the individual making the expression, the indispensable interest for democracy of the development of public opinion."[91]

As it has been shown above, "*incitement to hatred*" is an extremely serious act, which—according to the Court—prohibits certain communities of people from living in

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85 The Court does not explicitly point out the suitability of the applied limitation as a separate condition; however, it is inherent to its analysis. I slightly disagree with Halmai, who whilst also listing these elements as prongs of the test, places the condition of suitability in third place. In my view the Court always examined the suitability of the applied means as second only to the basic question of the necessity of the limitation. See HALMAI: *op. cit.*, 244. Halmai also draws a parallel between the Court's assessment and the so called theoretical view. He cites J. Kiss' opinion [KISS, J.: *Az abortuszról. Érvek és ellen érvek (On Abortion. Reasons and Against)*, Budapest, 1992, 32] who lists the conditions as follows: a) the limitation has to have a reasonable cause; b) it must be relevant from the point of view of the reason; c) it must be necessary; d) it must be of necessary extent. In my opinion this set of conditions does not follow the logic of the Court's decisions, and is contrary to legal logic.

86 See Chapter II.

87 See *supra* note 45, 199.

88 Hun. Const. Article 8 (1).

89 64/1991. (XII. 17.) AB határozat (Decision of the Constitutional Court), *Hatályos jogszabályok gyűjteménye*, Vol. 19, 201.

90 See *supra* note 45, 199. This principle was also invoked by the Court in its decision declaring the crime *Affronting an Authority or Official* unconstitutional. [36/1994. (VI. 24.) AB határozat (Decision of the Constitutional Court), MK (1994) No. 24, 2512].

91 See *supra* note 45, 199.

harmony with other groups. According to Article 2 (1) of the Constitution, Hungary is a democratic state under the rule of law. The notion of democracy is extremely complex, but it beyond doubt includes the right to be different, the protection of minorities, and the giving up of force and the threat of force. Incitement to hatred, being the preparation to violence, is a denial of these principles. It would be contrary to democratic principles to tolerate these forms of expression. It is necessary therefore to limit freedom of expression in this respect.[92]

The Court did not really discuss the question of whether Article 269 (1) is suitable for limiting free expression, since it had already declared that criminal law is the *ultima ratio* in the legal system. However, it still had to look at the proportionality of the intrusion and whether this type of limitation is the least intrusive. The Court stated that since the offence in paragraph (1) basically punishes speech which incites to hatred as a preparation to violence, its criminalisation is not disproportionate; and sedition is not a *Crime Against State* anymore, and is therefore not too severe (after the changes in 1989 its scope has been enlarged but its severity softened). Thus also the requirement of the least harmful limitation was satisfied.[93]

Scrutinising the second paragraph, the Court found the following, as interpreted in Halmai's analysis:

1. Using expressions offensive or degrading to the Hungarian nation, or some nationality, nation, religion etc. Article 269 (2) obviously indirectly also offends the individuals belonging to these groups, but this does not mean that such individuals' human dignity as protected by Article 54 (1) of the Constitution[94] would be directly harmed by such conduct.

2. Similarly, it cannot be contended that the rights of freedom of conscience and religion (Article 60 of the Constitution) or the national and ethnic minority rights (Article 68 of the Constitution) would be violated by such expressions, since the person asserting his opinion is not in a position to limit these rights.

3. Furthermore, the right against discrimination (Art. 70/A) cannot be brought into connection with offensive or degrading expressions either, and it is quite plain that this provision does not apply to private individuals in limiting their discriminatory behaviour.

4. It is hard to find international obligations deriving from international instruments to which Hungary is a party, and which incorporate rules needing criminal law protection as provided by Article 269 (2).

It seemed conclusive that *reviling*, as defined in paragraph (2) of Article 269, was not sanctioned because a constitutional right was being protected; thus the sufficient

92 *Ibid*, at 200.

93 *Ibid*, at 202.

94 Hun. Const. Article 54:

"(1) In the Republic of Hungary every human being has the innate right to life and human dignity, and no one may be arbitrarily deprived of these rights."

cause was missing which would have justified the limitation of the fundamental right to free expression.[95] Therefore, the very first condition of the limitation of fundamental rights was not satisfied in the view of the Court. The penalisation of reviling speech and similar conducts by criminal law is thus unconstitutional.

The Court nevertheless pointed out that:

a) "The constitution ensures free communication—the individual behaviour and the social process—and the fundamental right of free expression does not concern its content. There is space for every expression in this process, for good and harmful, pleasant and offensive as well—especially because the evaluation of the expression is the product of this process."[96]

b) Article 269 (2) does not create an external limitation to freedom of speech (external means in protection of another constitutional right), but an internal, protecting the person from offending and degrading speech. To determine what is offending and degrading is not a question for criminal law. The harm to public peace caused by reviling speech is a presumption which cannot justify the limitation of such a fundamental right as freedom of expression.[97]

In conclusion, the second form of *Sedition Against a Community* defined in paragraph (2) of Article 269 was declared unconstitutional, because it limited the right to freedom of expression and the press as laid down in Article 61 (1) and (2), violating therefore Article 8 (2) of the Constitution, which prohibits the limitation of the essential content of a fundamental right but allows—in conjunction with Article 8 (4)—some narrowing of certain freedoms under conditions of meeting the four points of the test discussed above.[98]

IV. Article 156 and Hate Speech Before the Modifications in 1996

A new aspect was added to the possible penal answers to hate crimes under Hungarian criminal law by a highly publicised trial: the 'Skinhead Case', which resulted in the conviction of 46 juveniles (out of 48 indicted) for *Serious Bodily Harm Out of a Base Reason*.[99]

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95 See *supra* note 93.

96 See *supra* note 45, 203. This statement has been quoted in the decision 36/1994. (VI. 24.) AB határozat (Decision of the Constitutional Court), MK (1994) No. 68, 2513.

97 See *supra* note 45, 203.

98 *Ibid.*

99 Fővárosi Bíróság 5.B.311/1992/86. The PC defines *Bodily Harm* as follows:

"Article 170 (1) Whoever violates the bodily integrity or health of another, where the injury or sickness heals within eight days, commits light bodily harm, and is punishable with deprivation of liberty up to one year, community service, or fine.

(2) Where the injury or sickness heals in more than eight days, the perpetrator commits the felony of serious bodily harm, and is punishable with deprivation of liberty up to three years.

(3) If bodily harm is committed out of a base reason or purpose, the punishment for a felony is, in case of light bodily harm up to three years, in case of serious bodily harm up to five years deprivation of liberty."

The legal problem arose around Article 156 of the PC, which defined the *Crime Against Ethnic, National, Racial or Religious Group* as follows:
"Crime against Ethnic, National, Racial or Religious Group Article 156. Whoever causes serious bodily or mental injury to a member of an ethnic, national, racial or religious group because he belongs to such a group, commits a felony and is punishable with deprivation of liberty from two to eight years."

This crime has been created according to the requirements of the *Convention on the Prevention and Punishment of the Crime of Genocide (1948),*[100] which was incorporated into the Hungarian legal system by the act-decree, *1955. évi 16. sz. tvr.*[101] Under the obligation to undertake necessary legislation in order to give effect to the provisions of the Convention, placed on the Contracting Parties by Article V of the Convention,[102] the Penal Code of 1961[103] included offences in Articles 137 and 138 which were equivalent to the crimes laid out in Article II and III of the Convention.[104] The PC of 1978 took over without any modification Article 138 in its section Article 156, criminalising an act similar to the one defined in Article II (b) of the Convention.

Crime Against Ethnic, National, Racial or Religious Group was placed in Chapter XI, *Crimes Against Humanity*, which contains two titles, *Crimes Against Peace* and *War Crimes*. Therefore, the *legal object* of the offence in Article 156 was 'humanity' and 'peace'. The *object of the crime*, however, was twofold. Firstly, it was the interest of the person who has suffered serious bodily or mental harm to his physical and mental integrity and health; secondly, it was the right of the same individual to belong to any ethnic, national, racial or religious group.[105]

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100 *Basic Documents on Human Rights, op. cit.*, 31 (the United Kingdom has also ratified the Convention: Genocide Act, United Kingdom Statutes, 1969, c. 12, in force 30 April 1970).

101 Commentary, *op. cit.*, 426.

102 *Supra* note 100, 32.

103 V Act of 1961.

104 "*Article II*

In the present Convention, genocide means any of the following acts committed with the intention to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about the physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group

Article III

The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide." (*Supra* note 100, 31–32).

105 Commentary, *op. cit.*, 427.

Article 156 set out a *material* crime; that is, its definition required a certain result for the full commission of the offence. The result in this case was *serious bodily or mental injury*. The offence was defined in an *open fact-pattern*.[106] Thus no specific behaviour was required for the commission, it was enough that an intentional act of the perpetrator should cause the result (serious physical or mental injury), and this result was covered by the offender's intention. This crime must be examined, for even though serious physical harm cannot—under any circumstances—be caused by hate speech, theoretically speaking serious mental injury can be. Serious bodily harm must be understood—in the absence of another definition—to be an injury healing after eight days, in compliance with the result of *Serious Bodily Harm* (Article 170 (2) of the PC). It is not impossible to commit the offence under Article 156 by causing light bodily harm within the meaning of Article 170 (1) (that is, causing injury which heals earlier than eight days), if, besides such, the assault has also caused serious mental harm to the victim.[107] The Commentary defines serious *mental injury* as a state caused either by physical or mental assault on the person, in which the victim's mental integrity and stability is overturned—at least for a time—and this experience remains a lasting and painful memory.[108] Using again the definitions and practice of *Bodily Harm* [Article 170 (1), (2)], we may assume that mental injury is a type of *sickness* (one of the results required for *Bodily Harm*[109]); it follows, therefore, that *serious mental injury* is a pathological deviation from the normal mental state of the victim, which heals after eight days.

The seriousness of this offence was not only indicated by the terms of punishment attached to it (two to eight years' imprisonment), but by the lack of *limitation period*, which in the case of most crimes terminates punishability after a period of time. According to Article 33 (2) b) punishability did not lapse in cases of *Crimes Against Humanity*.[110]

The debate unleashed by the *'Skinhead Case'* focused on the following questions: 'What is the scope of Article 156's application? Is it a mere declaration in order to satisfy an international obligation, thus being an invalid norm, or is it possible to use it as a means to fight hate crimes, and so hate speech?'

The undisputed facts of the case can be summarised very concisely as follows: a large group of skinheads and sympathisers marched through the outskirts of Budapest breaking up into smaller groups, with the proven intent of assaulting gypsies, blacks, and Arabs. They had several encounters with members of these ethnic groups and races,

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106 Open fact-pattern is a mode of defining the crime in the statute. In such a case the statute does not describe the actual conduct of perpetration, only the result. Any behaviour leading to this result in a culpable manner will qualify as criminal: see BÉKÉS–FÖLDVÁRI–GÁSPÁR–TOKAJI: *op. cit.*, 117.

107 See *supra* note 105.

108 *Ibid.*

109 "Sickness means a pathological deviation from the normal physical and mental state of the human being." (Commentary, *op. cit.*, 476).

110 PC Article 33 (2) b).

in the course of which the skinheads used abusive speech and caused light bodily harm during several incidents, and inflicted serious bodily harm on one victim. As a consequence, two of the black victims have terminated their studies in Hungary and left the country, and all three of them have suffered serious depression and fear, and have virtually isolated themselves from the outside world.[111]

The case was brought to the Metropolitan Court[112] by the prosecution under Article 156. This first instance court changed the charge and in its judgement qualified the acts as *Serious Bodily Harm Out of Base Reason* [(Article 170(3)]. However, the Chief Prosecutor of Hungary backed the appeal filed by the prosecution, and the case came before the Supreme Court.[113] The Chief Prosecutor summed up his opinion in the appeal, saying that the *legal object* of the crimes in Chapter IX (*Crimes Against Peace*) of the PC cannot be narrowed down to peace between states; it also includes the protection of peaceful relations between ethnic, national, racial and religious groups within the state. The defendants assaulted the victims exclusively because of their skin colour, their nationality, or their race. Such a motive rendered these acts as directed not only against the specific individuals, but also against the groups they represented. He therefore concluded that it endangered the peaceful relation between the ethnic, national, racial and religious groups, and thus attacked the *legal object* of Article 156.[114]

The Supreme Court rejected the appeal and upheld the Metropolitan Court's judgement. In its decision the basic question it had to answer was: can Article 156 be used in cases in which the offender(s) caused serious bodily harm and mental shock to the victim with an intentional physical and verbal attack motivated solely by the ethnic, national origin, race or religion of the attacked?

The Supreme Court negated the question, giving two reasons:

1. Historically, legal practice used sedition offences (*Seditious Libel, Affronting a Community*) in conjunction with other crimes to deal with similar acts, and the fact that those crimes do not exist anymore does not justify the unprecedented use of Article 156.[115]

2. The acts in question do not endanger or violate the *legal object* of Article 156, and thus do not attack the interest protected by Article 156. Therefore, it is *per se* unfit to be used against such behaviours.[116]

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111 BH 1994. 299. sz.

112 Criminal Procedure Code Article 25 b).

113 The Supreme Court and the Constitutional court are two different courts. According to the Constitution: "*Article 45 (1) In the Hungarian Republic, the Supreme Court of the Hungarian Republic, the Metropolitan Court and the county courts, and local courts administer justice.*" I Act of 1989 (1989. évi I törvény) prescribes the creation of the Constitutional Court, and XXXII Act of 1989 (1989. évi XXXII. törvény) defines the basic functions and operation of the Constitutional Court. The Court is outside the court system and does not adjudicate individual cases, but only as far as the constitutionality of a certain norm is concerned.

114 See *supra* note 111, 417.

115 *Ibid.*

116 *Ibid*, 417–418.

Elaborating on these statements, the Court looked at the historical development of the criminal law regulation of such acts. It established that until the PC of 1961 they were covered only by the sedition laws (which I have mentioned above). The Supreme Court also found that from 1961 until 1989 similar conducts—acts which offended the person on racial, ethnic, national or religious bases—were still dealt with under sedition (if necessary concurrently with some other offence, for example *Serious Bodily Harm*), even though the PC already contained the *Crime Against Ethnic, National, Racial or Religious Group* defined in Article 138 of the Code of 1961, and Article 156 of the Code of 1978.[117] Such a qualification of hate crimes focused on the political side of the offences, making hate behaviour a *Crime Against State* (using *Seditious Libel*), or *Crime Against Public Order* (using *Affronting a Community*).

According to the Court, following the modifications of 1989 (elimination of *Seditious Libel* as a *Crime Against State*) legal appreciation of the fact that such acts undoubtedly still endanger the internal peace of the state (in attacking the relations of ethnic groups, nationalities, religions and races) seemed to be possible. The situation that the offenders' special motivation (namely, to upset the relations between these social groups) cannot be taken into account except as *base reason* (a general qualifying circumstance of *Bodily Harm*), does not provide sufficient grounds for employing an offence which protects a completely different interest, and which additionally has never been used in judicial practice; in contrast, *Bodily Harm Out of Base Reason* [Article 170 (1), (2), (3)] had been previously applied.[118]

The dispute did not fade away after the decision of the Supreme Court. Endre Bócz, Chief Prosecutor of the Capital, published a detailed attack on the decision.[119] He maintained that the reason why previous practice relied on *Seditious Libel* and *Bodily Harm* is that *Seditious Libel* was an endangering crime; thus it was not necessary to prove a result in order to prove the commission. Additionally, before the Code of 1978 it was not even an *aimed crime*. Therefore, to prove a charge under sedition was much easier than to do the same under Article 156.[120]

Bócz is undoubtedly right in alleging such a motivation on behalf of the law enforcement. However, I believe that the background reason for not using Article 156 was irrelevant. It is true that the legal practice has no legally binding force on any court,[121] but there is nevertheless an *unofficial* judge-made law. Law courts abide by the published decisions of the superior courts for the simple reason that they do not wish to be overruled on appeal.[122] As a consequence, there is *judge-made* law in the form of interpretations in the Hungarian legal system.

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117 *Ibid*, 417.
118 *Ibid.*
119 BÓCZ, E.: "A skinhead-ügyek és a Btk. 156" (The 'Skinhead Cases' and Article 156 of the Penal Code), *Magyar Jog*, 1994, No. 6, 347.
120 *Ibid*, 351.
121 *Supra* note 117.
122 *Ibid.*

The Constitution forbids that anyone should be pronounced guilty of, or sentenced for, any act that was not considered a criminal offence under Hungarian law at the time it was committed;[123] the PC also limits the retroactive use of criminal statutes to *in favorem* cases.[124] Unfortunately, the Constitutional Court, in elaborating on the meaning of the principles *nullum crimen sine lege* and *nulla poena sine lege*, did not deal with the question of retrospectively changing interpretations and revival of invalid norms.[125] Fuller is, however, quite correct in insisting that "the evil of the retrospective law arises because men may have acted upon the previous state of the law and the actions thus taken may be frustrated or made unexpectedly burdensome by a backward looking alteration in their legal effect."[126] However, Kelsen too is quite clear on this matter: "A norm is not regarded as valid, which is never obeyed or applied. In fact, a legal norm may lose its validity by never being applied or obeyed by so-called desuetude."[127]

As the facts are, Article 156—for whatever reason—had not been used against the perpetrators of hate crimes, and its application would have been more burdensome on the defendants than the then valid practice; what is more, it had to be regarded as an invalid norm in these cases. In my opinion, its sudden usage in similar cases had contradicted the *nullum crimen* principle.

The most important objection to the prosecution's qualification of the offence was grounded in the difference of *legal objects*. Article 10 of the PC says in paragraph (1) that "the offence is an act, committed intentionally or—if the law also punishes reckless perpetration—recklessly, which is dangerous to society and for which the law orders the infliction of punishment." Under paragraph (2) it continues, that "an act endangering society is such activity or omission which harms or endangers the state, social, or economic order of the Hungarian Republic, the person or rights of the citizens."

This means that a criminal offence has three major elements according to the PC: culpability (intention or recklessness), social danger, and a definition as punishable. Though a vast number of theories has interpreted these and similar elements throughout the history of criminal law,[128] it can be said that today it is generally accepted that

123 Hun. Const. Article 57 (4).

124 PC Article 2.

125 11/1992. (III. 5.) AB határozat (Decision of the Constitutional Court), MK (1992) No. 23, 937–938.

126 FULLER, L. L.: *Morality of Law*, New Haven, 1964, 80.

127 KELSEN, H.: *Pure Theory of Law*, 1978, 213. Kelsen asserts that "since the validity of a norm is an ought and not an is, it is necessary to distinguish the validity of a norm from its effectiveness. Effectiveness is an 'is-fact' that the norm is actually applied and obeyed. ... A norm that is not obeyed by anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid norm. A legal norm is no longer considered to be valid, if it remains permanently ineffective." (KELSEN: *op. cit.*, 10–11).

128 Some of the most influential discussions of the topic can be found in: ANGYAL, P.: *A magyar büntetőjog tankönyve (Textbook of Hungarian Criminal Law)*, Budapest, 1920, 60.; HELLER, E.: *A magyar büntetőjog általános tanai (General Principles of Hungarian Criminal Law)*, Budapest, 1937, 60; SCHULTEISZ, E.: *A bűncselekmény tana (Principles of the Offence)*, 1948, 13; BÉKÉS I.—GYÖRGYI, K.—PAPP, L.: *A magyar bün-*

a criminal offence is a *behaviour*, which is *unlawful* (i.e. has violated a statutory provision—social danger is interpreted in this way), and which corresponds to a definition of an offence (fact-pattern likeness) and is *culpable*.[129]

Article 10 (2) lists five basic *general legal objects*: the state order, social order, economic order, the person, or rights of the citizens which must be harmed or endangered by the act or omission in order to constitute a crime. The Chapters and Titles of the PC incorporating the different offences give further indication of the *direct legal object of the crime*. The argument of the prosecution was—as mentioned above—that the *legal object* of the crimes in Chapter IX (*Crimes Against Peace*) cannot be narrowed down solely to peace between states.[130] The Supreme Court based its analyses of the *legal object* on arguments proving legislative intention, examined by methods of historical and systematic interpretation.

The Court looked at

a) the reason for creating the offence, its place in the criminal legal structure;

b) the seriousness of the crime.

a/1) The Court established that *Crimes Against Peace*—Article 156 is one of them—were placed in Chapter IX (*Crimes Against Humanity*) together with *War Crimes*, showing legislative opinion that both groups of crimes attack the relation between states and nations;[131]

a/2) except for one offence (Article 154), all others were incorporated into the PC on the basis of international instruments;[132]

a/3) Article 156 was created to incorporate Article II b) of the Genocide Convention[133] as indicated in the *Ministerial Reasoning of the Draft*.[134] Furthermore, Article 155[135] of the PC corresponds with all other crimes set out in Article II and III of the

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tetőjog általános része (The General Part of Hungarian Criminal Law), Budapest, 1979, 22–28; TOKAJI, G.: *A bűncselekménytan alapjai a magyar büntetőjogban (Foundations of the Principles of the Offence in Hungarian Criminal Law)*, 1984, 23–70, 90–96.

129 NAGY–TOKAJI: *op. cit.*, 31.

130 *Supra* note 111, 416.

131 *Ibid*, at 418.

132 *Ibid.*

133 *Basic Documents on Human Rights*, *op. cit.*, 31.

134 Commentary, *op. cit.*, 426.

135 *"Article 155. (1) Whoever, in order to completely or partially exterminate an ethnical, national, racial or religious group,*

a) kills a member of such a group,

b) forces the group under living conditions that threaten it, or some of its members, with destruction,

c) takes measures aimed at preventing births within the group,

d) forcibly transfers children belonging to the group to another group,

commits a felony and is punishable with deprivation of liberty from ten to fifteen years or for life.

(2) Whoever makes preparations for genocide is punishable for a felony with deprivation of liberty from two to eight years."

Convention. Article 157,[136] which is based on the Apartheid Convention,[137] is however a subsidiary crime to Article 155 and Article 156, meaning that it can only be applied if the Article 155 or Article 156 are not applicable. It follows that Article 156 must refer to a more serious crime than Article 157 (this is also supported by the difference in the terms of punishment attached to these crimes). All these facts show—according to the Court—that Article 156 is penalising a form of genocide as defined by international law in the Genocide Convention, and so establishing the jurisdiction of an international tribunal.[138]

b) the facts scrutinised above already indicate the seriousness of the crime. Additionally, such an offence is not subject to a *limitation period*, and thus the punishability does not cease; after any length of time the perpetrator can be charged with such an offence. It also follows from the origins in international law of the *Crime Against Ethnic, National, Racial or Religious Group* (Article 156) that the simple motivation of *inflicting injury because of membership of the described groups* cannot be interpreted narrowly. It must instead be understood as requiring an intent according to Article II of the Genocide Convention: *intent to destroy, in whole or part* these groups.[139] If this offence is not interpreted this way it means that a perpetrator's action which caused serious bodily or mental injury to the victim because of their ethnic, racial etc. origin, would establish a crime which is always prosecutable and the jurisdiction of an international tribunal.[140]

Bócz's main argument can be summarised as follows:

a) the legislator created a separate crime of Article II b) of the Convention in Article 156 of the PC, whilst incorporating the other forms of genocide in Article 155;

b) Article II a), b), where individuals are the victims of genocide the Convention uses plural form (*members of the group*), whilst the PC in Article 155 and Article 156 uses singular: *member of the group*;

c) the *intent to destroy these groups* required by the Convention is incorporated into the definition of Article 155 but not in Article 156.

All the above show that the Hungarian legislator wanted to broaden criminal liability compared with the Convention.[141] These arguments support the main objection that the interpretation of Article 156 so that it should require an intent to destroy these

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136 "*Racial Discrimination*

Article 157. A person who commits an act prohibited by international law in order to help some racial group to bring another racial group under its rule, or to keep up such rule, or systematically oppresses the other racial group, unless that act constitutes a more serious offence, shall be punished for a felony with deprivation of liberty from one to five years."

137 *Basic Documents on Human Rights, op. cit.*, 162–164.

138 Article VI of the Genocide Convention (1948). See Basic Documents on Human Rights, *op. cit.*, 32.

139 *Supra* note 111, 418.

140 *Ibid.*

141 Bócz lists several other convincing details, the discussion of which would extend beyond the limits of this article. BÓCZ: *op. cit.*, 350.

groups is in the end judicial law-making, which is not permissible under Hungarian law. Such intent is not an element of the definition of Article 156 in the PC, even if it is part of genocide according to the Convention.

I completely agree with most of the reasons the prosecution gave in this argument, but arrive at the opposite conclusion. In my understanding, the *application* of Article 156 to hate crimes (in this context hate speech) would have been judicial law-making burdening the defendant, which is contrary to the constitutional principle of *nullum crimen sine lege*. Even if the Hungarian legislator intended to widen the spectrum of acts criminalised under Article 156, it clearly did not change its *legal object*, *Crimes Against Humanity*; additionally the crime became invalid in this respect because it had not been used at all, let alone in cases such as the one under discussion. Thus it seems that the widening of liability under Article 156 did not entail the changing of the protected interest allowing the usage of the crime in cases in which the threat to humanity was extremely remote.

V. The Modification of 1996

The application of Article 156 proved to be so controversial and problematic that, taken in conjunction with the limitation that the Constitutional Court's judgement placed on *Sedition Against A Community* (Article 269) by the abolition of its paragraph (2), even behaviour which could still have been criminalised fell outside the reach of penal law. Therefore the legislature decided to modify these sections of the Penal Code.

The *Ministerial Reasoning* to the Bill, which later became XVII Act of 1996,[142] explains that whilst the previous Article 155 of the PC tried to meet the requirements of the Genocide Convention, it did not punish all behaviour punishable under that Convention. As discussed above, criminal conducts defined by Article II b) were incorporated in Article 156 of the PC—omitting, however, the general "intention to destroy, in whole or in part, a national, ethnic, racial or religious group".[143] The XVII Act of 1996 therefore abolished Article 156, and incorporated all the acts criminalised under Article II of the Genocide Convention, thus requiring a general intent to destroy specific target groups.[144]

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142 Reasoning of the XVII Act of 1996.

143 *Supra* note 104.

144 *"Article 155 (1) Whoever - with the aim of the total or partial extermination of a national, ethnic, racial, or religious group —*

a) kills members of that group,

b) causing serious bodily or mental harm to members of the group, because of their belonging to that group;

c) constrains the group to such living conditions as threaten the group or certain members thereof with death,

d) takes such a measure, which aims at the impediment of births within the group,

e) displaces the children belonging to the group into another group

commits a felony, and is punishable with ten to fifteen years' or life imprisonment.

The new law also added another offence to the PC in Article 174/B, *Violence Against Members of National, Ethnic, Racial or Religious Groups.*[145] This new crime punishes assaults and threats motivated by bias, clearly differentiating these from the genocide-like acts criminalised in Article 155.

The most interesting change, however, concerns the modification of *Sedition Against a Community* (Article 269).[146] The modification widens the scope of punishable behaviour, in comparison with the previous offence, now additionally encompassing that fit to arouse hatred. This formulation is clearly most ambiguous, since it leaves questions open as regards the *mens rea* of the person performing acts fit to arouse hatred: Does such a person need to have an intention to arouse hatred, or is it enough if he only intends to commit the specific act? The fitness of acts to arouse hatred also seems to be a somewhat vague concept, although not unknown to penal regulation, as discussed above.[147] It appears that, whilst the legislature succeeded in clarifying the situation with respect to hate crimes concerning genocide-like acts, this is not the case as regards *Sedition Against a Community.* The basic difficulties of the criminalisation of hate speech, that is, the problem of necessary intent and the extent of such intent, have not been settled; neither has the problem of 'fitness to arouse hatred' been solved. It is true that, in the already abolished offence of *Seditious Libel*, the suitability of an act to arouse hatred was examined in an abstract (objective) fashion, as mentioned above;[148] but as far as the predecessor of the presently valid Article 269—*Affronting a Community*—was concerned, finding an act "fit to excite hatred" caused grave practical difficulties, which were partly answered by using *Seditious Libel* as a point of 'navigation'. The result was that no specific intention to arouse hatred was needed to commit *Affronting a Community*, only an intention to perform the actual act (for example, to say specific words in a speech). This confusing situation seems to have

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(2) Whoever commits preparation for genocide, is punishable for a felony with two to eight years' imprisonment."

145 *"Article 174/B (1) Whoever assaults another person because of his or her belonging or believed belonging to a national, ethnic, racial, or religious group, or coerces him or her, by way of force or threat, to do, not to do or bear something, commits a felony and is punishable with imprisonment up to five years.*

(2) The punishment is two to eight years' imprisonment, if the crime is committed

a) armed,

b) with a weapon,

c) causing a significant injury to interests,

d) by torturing the victim,

e) in a group

f) in a criminal alliance."

146 Sedition Against a Community: *"Article 269. (1) Whoever in wide publicity incites to hatred or performs other behaviour fit to arouse hatred against*

a) the Hungarian nation,

b) some national, ethnic, racial, religious group or certain groups of the population,

is punishable for a felony with up to three years's imprisonment."

147 See discussion of *Affronting a Community, supra* Chapter B.

148 See *supra* Chapter II.

been re-created by the new legislation. However, it has to be said that future conceptual judicial interpretation of the Article in question may remedy the situation.

VI. 'Libel and Slander' and 'Defamation' as Protection Against Hate Speech

The Constitution declares the innate right to human dignity [Article 54 (1)] and the right to the protection of reputation [Article 59 (1)]. These rights are partly ensured in criminal law by the offences *Libel and Slander* (Article 179), *Defamation* (Article 180) and *Profanation of the Deceased.* In connection with hate speech we must examine the first two crimes.[149] The basic difference between these two offences is that whilst in the case of Article 179 the *conduct of perpetration* has to involve a 'fact', when applying it *Defamation* (Article 180) covers any type of expression.[150] 'Fact statements' are expressions which comprise an occurrence, state or phenomenon of the past or present.[151] Additionally, in cases of *Libel and Slander* the act of perpetration has to be committed in front of another, whilst this is not a requirement of *Defamation.* The latter is a subsidiary offence in relation to *Libel,* and therefore it must be first established whether the expression violates Article 179. If this is not so, the test can then be applied to Article 180.[152]

According to Hungarian criminal law a *concurrence* of offences occurs if one or more acts of the perpetrator constitute more offences, and these are judged in one procedure.[153] One example (called *formal heterogeneous concurrence*) could be if

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149 Libel and Slander: "*Article 179. (1) Whoever asserts or spreads facts fit to impair the honour of somebody in the presence of another or uses a term directly referring to such facts commits a misdemeanour and is punishable with deprivation of liberty up to one year, community labour or fine.*

(2) The punishment is deprivation of liberty up to two years if the libel or slander is committed:

(a) for a base motive or purpose,

(b) in wide publicity,

(c) in a way resulting in significant harm."

Defamation: "*Article 180. (1) Whoever apart from the case defined in Article 179*

(a) in connection with the performance of the job, of the public mandate, or the public interest activity of the victim,

(b) in wide publicity

uses a term fit to impair the honour of the person or commits other such conducts must be punished for a misdemeanour with deprivation of liberty up to one year, community service, or fine.

(2) Whoever commits defamation by assault is punishable as provided in paragraph (1)."

Proving the Truth: "*Article 182. (1) The perpetrator cannot be punished for the crimes defined in Article 179–181 if the fact fit to impair the honour proves to be true.*

(2) Proving the truth is admissible where the assertion, spreading of facts or the usage of a term directly referring to such was motivated by public interest or by anybody's legitimate interest."

150 Commentary, *op. cit.*, 527, 536–537.

151 *Ibid,* at 528.

152 *Ibid,* at 535.

153 PC Article 12 (1).

somebody shoots at another with the intent to kill, but misses and seriously wounds somebody else. In this case the perpetrator would be tried for two crimes: *Attempted Murder* and *Serious Bodily Harm*, resulting in an aggravated sentence. However, there are cases of *apparent concurrence*, in which one or two acts of the offender seem to qualify as several offences but actually only satisfy the requirements of one. Different principles help to establish the proper offence in such cases. Therefore—coming back to the issue of hate speech—the question in some cases is whether the act committed is invoking the crime *Sedition Against a Community*, or one of these offences.

In practice it has been important to distinguish between the different forms of sedition—depending on the form which was in effect at the time—and *Libel and Slander* (Article 179), *Defamation* (Article 180). It was relatively easy to differentiate between *Sedition* (Article 148) [the first form of *Affronting a Community*, the old Article 269 (1)], and *Libel and Slander*, *Defamation*, since if the aim of arousing hatred was established the crime could only be *Sedition*; similarly, if the act was suitable to arouse hatred, it qualified as Article 269 (1). However, if such a purpose was lacking, and if the offensive or defamatory expressions or other similar acts were directed against individuals belonging to the protected groups, these acts could also have qualified as *Defamation* (Article 180) or *Libel and Slander* (Article 179). Usually under the principle of *lex specialis derogat legi generali*,[154] if the acts were committed because of nationality, religion, race or socialist conviction, *Affronting a Community* had to be established.[155]

Judicial practice also views offending and defamatory speech involving the person's nationality, religion or race as *Defamation* if it has no more serious reason than a person-to-person controversy. In these cases the legal object, being the public peace in the case of *Sedition Against a Community* (Article 269) (the same was true of *Affronting a Community*), is missing, and therefore *Defamation* is committed by the offender.[156]

In connection with *Sedition Against a Community* (Article 269), there are two main cases in which the application of *Libel and Slander* or *Defamation* instead of *Sedition* has to be considered. In these cases the act qualifies, or under previous law qualified, as hate speech but still cannot be punished as that under the current regulations. The act plainly does not qualify as *Sedition:*

A) if the speech which incited to hatred against the protected *legal objects* was not committed in wide publicity;

B) if the speech was committed in wide publicity but it is 'only' *reviling* (since Article 269 (2) was abolished by the Constitutional Court).

The third case, which might cause problems of differentiation, would be when the speech is inciting to hatred in wide publicity and fits thus Article 269 (1), but is at the same time a fact statement suitable to impair honour, also satisfying Article 179. A

154 "The special rule derogates the general rule". See BÉKÉS–FÖLDVÁRI–GÁSPÁR–TOKAJI: *op. cit.*, 302.
155 Commentary, *op. cit.*, 774.
156 *Ibid.* at 537.

statement, for example, in front of thirty people, that 'all rapes are committed by gypsies, and their population rises five times as fast as that of Hungarians, and, therefore, they should be deported' would satisfy both crimes; two false fact statements have been made and there is incitement to violence. Nevertheless, since *Sedition Against a Community* is the more serious crime (one indication of this is its grading as a felony and the imposed punishment of up to three years' imprisonment), the concurrence of *Libel and Slander* can only result in the sole application of *Sedition*. Even if no 'facts' are involved, and the act would invoke *Defamation* (Article 180) [as the other offence instead of *Libel and Slander* (Article 179)], the situation would be the same.

If the speech involved 'facts' in the cases of A) and B) above, the mere fact that the speech was at least *reviling* invokes the qualifying circumstance of *base reason*, thus making such acts a crime under Article 179 (2) a), and if it was committed in wide publicity, also b).[157] In the absence of references to 'facts', such an act will only qualify as *Defamation* if it is committed *in wide publicity*, or if the expression involves "*the employment, of public mandate, or the public interest activity of the victim*" under Article 180 (1) a). If neither of these two conditions, nor conditions set out before, are met, the hate speech will only involve a contravention punishable with a fine.[158]

The ultimate problem with using *Libel and Slander*, or *Defamation* as a substitute for reviling hate speech is that these crimes do not give general protection to the members of the target groups. The *passive subject* (the victim) of these crimes must be recognisable as an individual, his person must be identifiable from the situation.[159] Thus general hate speech directed against the target groups—which is exactly the usual form of such behaviour—does not fall under these or any other crimes.

The other important limitation is (or was[160]) that the present criminal law regulation is based on the assumption of the untruth of the facts stated by the perpetrator, and a defence of "proving the truth is [only] admissible where the assertion, spreading of facts or the usage of a term directly referring to such was motivated by public interest or by anybody's legitimate interest." [Article 182 (2)]. However, the Constitutional Court held in a decision in 1994 that "this deters the individuals from criticising the participants of public life even as regards facts which are true or are believed to be that. It depends on the discretion of the court involved in the process whether the defendant can try to prove the truthfulness of his statement. This undoubtedly reverses the basic principle of the presumption of innocence in the criminal

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157 *Ibid.* See how hate crime motivation establishes base reason in case of *Bodily Harm* under BH 1994. 299. sz.

158 Act of 1968, Article 96/B. (1).

159 BJD 1190.

160 This question was addressed by the Constitutional Court in its decision abolishing the offence *Affronting an Authority or Official* (Article 232); however the Court only elaborated its opinion on the unconstitutionality of Article 182 (2) in the *obiter dictum* part of its decision, making their applicability dubious. 36/1994. (VI. 24.) AB határozat (Decision of the Constitutional Court), 2517.

procedure."[161] In consequence, the impossibility of proving the stated facts burdens the defendant; therefore, the Constitutional Court declared that the regulations of *Proving of the Truth* are unconstitutional, but seemed not to attach any consequence to this statement.

VII. Conclusion

The ultimate protection against hate speech is provided by Article 269, *Sedition Against a Community*, in cases where the speech creates a situation in which the danger of harm to public order is imminent. Not every inciting expression may be punishable, only those—and this is a quite vague distinction—which incite to violence, but only if incitement seems to succeed in causing an imminent danger of violent result.[162] The speech also must have an audience of approximately 30 persons.

Cases in which speech does not reach this level—mostly *reviling* speech—may be dealt with under *Libel and Slander* or *Defamation* with several conditions attached, of which the main limitation is that such an insult must be directed against an identifiable individual or legal entity, that is, an association of people.

Finally, Article 155, the *Crime Against Ethnic, National, Racial or Religious Group* might be applied if the speech causes serious mental injury to the victim and was committed with a view to destroying the group in whole or in part. Similarly the new Article 174/B, *Violence Against Members of National, Ethnic, Racial or Religious Groups*, provides a effective protection against racist attacks, but is not suitable for the penalising of hate speech.

In conclusion, one has to agree with the Constitutional Court that "freedom of expression protects the opinion regardless of its value and truth. This freedom only has external limits; unless it collides against such a constitutionally drawn external limit the possibility of expressing an opinion, and the fact that someone has done so, remains protected irrespective of its content."[163]

Whilst it may seem that the Hungarian legal system does not provide sufficient protection to groups which could be possible targets of hate speech, I believe that it does protect the exact *values* such speeches try to undermine. The majority of hate speeches thus receives the protection of the state instead of condemnation. Yet quite contrary to their purpose, they do not harm democracy, but instead strengthen the fundamental freedoms inherent to such a political system and the rule of law.

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161 *Ibid.* The presumption of innocence is declared in the Constitution: "*Article 57 (2) In the Hungarian Republic no one can be regarded as guilty until his criminal culpability has been established by the final decision of the court.*"; as well as in the Criminal Procedure Code: "*Article 3 (1) No one can be regarded as guilty until his criminal culpability has been established by the final decision of the court. (2) Proving the culpability burdens the authorities acting in the criminal matters. The defendant cannot be compelled to prove his innocence.*"

162 HALMAI: *op. cit.*, 248.

163 36/1994. (VI. 24.) AB határozat (Decision of the Constitutional Court), 2513.

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The Protection of the Environment by Criminal Law

As we approach the turn of the century, a great many environmental problems threaten us: the greenhouse effect, acid rain, extinction of animal species, etc. This new situation has created an increasing challenge for the legal profession. Since the United Nations Conference on the Human Environment in Stockholm in 1972, many countries have been active in this field. The legal protection of the environment is a concern of different fields of legal science all over the world. The situation is the same in Hungary, where administrative law, civil law, criminal law, and even international law, ensure protection because environmental pollution does not recognise the state borders. Administrative and civil law must be the most important tools in the protection of the environment, but they are not enough. Criminal law also has a role to play, as the ultimate tool. We often refer to the subsidiary role of criminal law. The last International Congress of Penal Law outlined in its *Recommendation on Crimes against the Environment*, that "Consistent with the principle of restraint, criminal sanctions should be utilised only when civil and administrative sanctions and remedies are inappropriate or ineffective to deal with particular offences against the environment".[1]

However, it was not only this last congress of the International Association of Penal Law (A.I.D.P.) in 1994, but previously the Preparatory Colloquium of A.I.D.P.

1 Resolution of Section I on Crimes against the Environment. Application of the general part, in XVth International Congress of Penal Law, Rio de Janeiro 4–10 September 1994, *International Review of Penal Law*, 1995, Nos. 1–2, 50.

in 1992,[2] that dealt with questions of environmental protection. The 12th International Congress on Penal Law in Hamburg in 1979[3] also discussed the problem. As for relevant activities of the Council of Europe, a Resolution[4] and a Recommendation[5] have been worked out, and the Committee of Experts on the protection of the environment through criminal law has recently worked on a draft of the convention.

The importance of the problem was illustrated by the United Nations Conference on the Environment and Development held in Rio de Janeiro in 1992, the Resolution of the 8th UN Congress on Crime Prevention and Treatment of Offenders,[6] and the fact that this topic was also on the agenda of the 9th UN Congress in 1995.

A European Seminar on *Criminal Law and the Environment* was organised by the Helsinki Institute for Crime Prevention and Control (HEUNI) with the Max Planck Institute for Foreign and International Criminal Law in Germany in 1992. The Model for Domestic Law for crimes against the environment proposed by the International Meeting of Experts on the Environment, which took place in Portland in 1994, should also be mentioned here.

I. Environmental Protection at a Constitutional Level

It is among the principles on environmental policy of the European Union that "[t]he right to a healthy environment which is worthy of the people is a fundamental human right."[7] This is in accordance with the Article 18 of the Hungarian Constitution, which says that the Republic of Hungary recognises and validates the rights of everyone to a healthy environment. In addition to this, Act LIII of 1995 on the general regulations of environmental protection (Environmental Code) also mentions constitutional rights to a healthy environment. According to Article 70/D of the Constitution, (1) all citizens living on the territory of the Republic of Hungary have the right to the highest possible physical and mental health; (2) the right to the best physical and mental health is realised through labour safety, public welfare organisations, health services, body care and through an artificial as well as a natural environment of quality, in the Republic of Hungary."

Regarding this regulation, paragraph (2) can be criticised on the grounds that it talks about the artificial environment first, and only after this about the natural

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2 Crimes against the environment. General Part. Preparatory Colloquium, Section I, Ottawa, November 2–6, 1992, *International Review of Penal Law*, 1994, No. 3–4.

3 XIIth International Congress on Penal Law, Hamburg, 16–22 September 1979. Congress Proceedings, in JESCHEK, H.–H. (ed.): *German National Group of the AIDP*, 1980.

4 *Resolution 77 (28) on the Contribution of Criminal Law to the Protection of the Environment.*

5 *Recommendation 88 (18) on Liability of Enterprises for Offences.*

6 *Resolution on the Role of Criminal Law in the Protection of Nature and Environment* adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990.

7 BAKÁCS, T.: "Glosszák az Alkotmány, a környezetjog és a jogalkotás köréből" (Commentaries on the Constitution, Environmental Law and Law-making), *Magyar Jog*, 1995, No. 5, 273.

environment. This is not in harmony with Act LIII of 1995 on the general regulations of environmental protection [Article 4 (a)], which paraphrases the Constitution, and with the amended Penal Code [Article 286/A, paragraph 1 (a)] which regulates concepts of environmental elements. In these two cases the elements are listed as follows: earth, air, water, living nature and the artificial environment created by man.

When referring to its earlier decision, the Constitutional Court has stated that, based on the regulations set out above, the state is obliged to establish and operate those specific institutions which would ensure the right to a healthy environment. It pointed out that the right to the environment is different from all other fundamental rights. The right to the environment cannot be classed amongst the classic, protection type of fundamental rights, but is a so-called third-generation constitutional right, the features of which are still debated. Therefore, it is not a subjective primary right in this present form, but neither is it simply a task or state interest determined by the Constitution. On the other hand, the right to the environment cannot be compared to social rights either, particularly because those entitled to social rights which refer to all citizens can be defined. The specific feature of the right to the environment lies in the fact that mankind and nature is its object.

The right to the environment bears the closest relationship to the right to human life. The Constitution talks about the obligations of the state to support the natural bases of human life as a separate constitutional right. However, if the right to the environment were not ensured by the Constitution—in a way that its meaning can be expanded—then the obligations of the state in connection with environmental protection could also be deduced from the right to human life. The right to the environment ensures the physical conditions necessary to the fulfilment of the right to human life.[8]

II. The Historical Development of Environmental Criminal Law

As far as environmental crimes are concerned, different countries have chosen different solutions: they either appear in the Penal Code, in general statutes on environmental protection, or they are included amongst different statutes on the environment, depending on whether the criminal protection of each element is to be regulated by that statute.

With the first environmental Act in Hungary (Act II of 1976), one environmental offence was included in the Penal Code, replacing the previous offence of well pollution. At the time of the codification of our present Penal Code (Act IV of 1978), two types of criminal offences—environmental damage (Article 280) and natural damage (Article 281)—were introduced instead of just one, among the offences against public health in the section on criminal offences against public order. This criminal regulation took place in order to enforce the right on the protection of the human environment.

8 28/1994. (V. 20.) AB határozat (Decision of the Hungarian Constitutional Court).

Here we should refer to two groups of questions, in connection with the codification mentioned above:

a) Environmental protection is closely related to economic development, and environmental offences occur most often in the economic sphere, in connection with the activity of legal entity. Therefore, we can put the question of why environmental offences are regulated amongst the criminal offences against public health in the chapter on public order, and are not amongst the economic criminal offences or offences against the environment, which are dealt with separately in the Penal Code.

According to the ministerial motivation of the bill which became the Penal Code, economic development has its disadvantages in addition to its undeniable advantages. Specifically, environmental damage is amongst the disadvantages which endanger the whole population and might have a negative effect on it.

The validity of this arrangement regarding the legal object of the environmental offences has been debated by some experts, and no unanimous position has emerged.[9]

b) The second question is whether it is necessary to separate the protection of nature and the environment. According to the ministerial motivation of the Penal Code, nature is an extremely important part of the human environment, and nature and its elements (for example, some species of plants and animals) have to be protected above and beyond the human environment. As a consequence of such an attitude, a regulation was established in which—in addition to the more comprehensive environmental damage clause—environmental damage directed against the different elements of nature are dealt with separately.

The offence of natural damage was modified by the new Penal Code (Act III of 1987) which came into force on 1st January 1988, and was in harmony with the obligations which were consequent upon the ratification of the relevant international treaty.

Preceding the amendment of the Penal Code in 1996, environmental damage was considered to be solely a material offence. This was because—on the one hand—of its internal contradictions, the difficulty in obtaining evidence, and other negative tendencies, and—on the other hand—because Act LIII of 1995 on the general regulation of environmental protection came into force, and Act LII of 1996 then modified the offence of environmental damage. In addition to the offence penalising a result, the danger of environmental damage was also made punishable.

Article 280 of the Penal Code states that:

"(1) Whoever damages the environment or any elements of the environment, or acts in breach of his obligations as defined in a statute, or in a decision of the authorities, in a way which is fit to damage the environment or any elements of the environment, commits a felony and is punishable by imprisonment of up to three years.

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9 TAMÁS, A.: "A környezetvédelem büntetőjogi szabályozásának egyes kérdései" (Some questions on the Penal Law Regulation of Environment Protection), *Jogtudományi Közlöny*, 1978, No. 6, 336; MÁRKUS, F.: *Az emberi környezet büntetőjogi védelme, környezetvédelem és jog* (The Penal Law *Protection* of the Human Environment), Budapest, 1981, 185; ZOLTÁN, Ö.: "Környezetvédelem és büntetőjog a nemzetközi összehasonlítás tükrében" (Environmental Protection and Criminal Law in the Light of International Comparison), *Magyar Jog*, 1983, No. 4, 319–320.

(2) Whoever pollutes the environment or any elements of the environment, or acts in breach of his obligations defined in a statute, or in a decision of the authorities, in a way which is fit to pollute the environment or any elements of the environment significantly, is punishable according to paragraph (1).

(3) The punishment is up to five years' imprisonment, if the offence mentioned in paragraph (1) has caused severe damage, or it is fit to damage the environment or any elements of the environment significantly.

(4) The punishment is two to eight years' imprisonment if the offence has damaged the environment or any elements of the environment to such an extent that the environment or the element of the environment cannot be restored to its original state.

(5) Whoever commits the offence of environmental damage through recklessness, in the cases mentioned under paragraphs (1)–(3), is punishable by up to two years' imprisonment, whilst in the case of paragraph (4), by up to three years' imprisonment."

Certain elements of the environment are separately protected by criminal law through a criminal offence called 'Damage to Nature'. Under the modification of Act LII of 1996, the criminal definition of 'Damage to Nature' was slightly changed, and it became more rigorous both in basic and in qualified cases.

Article 281 of the Penal Code goes as follows:

"(1) Whoever

a) illegally acquires, takes abroad, converts into money, or destroys any plant or animal, or any offspring of them at any stage of their development which is under increased protection, or comes within the remit of an international treaty;

b) illegally changes the area of a protected natural environment to a significant degree

commits a felony and is punishable by up to three years' imprisonment.

(2) The punishment is up to five years' imprisonment if the damage of the environment has caused the destruction of plants and animals described in paragraph (1) point a) in great quantities, or in the case of point b), it has caused irremediable damage or total destruction of the area.

(3) Whoever commits environmental damage mentioned here under paragraph (2) through recklessness, is punishable for a misdemeanour by up to two years' imprisonment."

In addition to these two criminal offences above, Act LII of 1996 introduced a further environmental criminal offence called 'Illegal Disposal of Waste Endangering the Environment'. Article 281/A of the Penal Code says that:

"(1) Whoever, without permission defined in statute, or in breach of the obligations described in statute, or of the decision of the executive authority, collects, stores, deals with, disposes or transports waste containing material which is fit

a) to endanger the life or physical well-being of the people;

b) to pollute water, air, or soil, or to cause lasting changes in them;

c) to endanger animals or plants

commits a felony, and is punishable by up to five years' imprisonment.

(2) Whoever disposes of explosive, inflammable, or radioactive waste, endangering health and the environment, without permission described in the statute, is likewise punishable in accordance with paragraph (1).

(3) Whoever commits the offences defined in paragraphs (1)–(2) through recklessness is punishable by up to two years' imprisonment."

Until 1996 this criminal offence had the form of an administrative offence (contravention).

In cases of criminal offences against public order, it is not only the three criminal offences against public health mentioned above (Penal Code, Chapter XVI, Title IV) which ensure the criminal protection of the environment, but also other criminal offences against public order (Penal Code, Chapter XVI, Title I), such as:

a) Preceding the amendment of 1996: misuse of radioactive (Article 264) or poisonous material (Article 265).[10]

b) After the amendment of 1996: misuse of radioactive material (Article 264), the operation of nuclear power stations (Article 264/A), and atomic energy (Article 264/B).

Operation without permission given in the law, or different from that defined in the law, and the illegal use of the materials listed above, can also cause damage to the environment. However, according to the legislator, public security is the legal object of such misuse types of criminal offences. Therefore, the new criminal offences introduced by the modification were also placed among the criminal offences against public security.

It appears, according to the Convention of the Council of Europe on the Protection of the Environment Through Criminal Law,[11] that the acts which refer to these three new types of criminal offences belong to the group of criminal offences directed against the environment. Therefore, it would be expedient—in order to emphasise the ecological aspect—to separate the criminal offences of the Penal Code dealing with environmental protection and to regulate them all in one place.

In our legal system contravention law exists separately from the Penal Code. Contraventions are regulated in Act I of 1968 and in the Ordinance of Government No. 17 of 1968 on Special Contraventions.[12] These include several environmental contraventions.

III. Basic Problems of Environmental Criminal Law

Environmental criminal offences endanger the necessary conditions for human life, the prerequisites of the existence of mankind.

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10 PUSZTAI, L.: "Gazdasági büntetőjog a változó társadalomban" (Crimes Against the Economy in the Changing Society), in PUSZTAI, L. (ed.): *Második német-magyar kollokvium* (The Second German–Hungarian Colloquium), KJK–OKKrI, Budapest, 1994, 139.

11 *Convention for the Protection of the Environment Through Criminal Law (Draft)*, Explanatory Report. European Committee on Crime Problems, PC-EN(95) 4 (Strasbourg, 3 August 1994), 5.

12 See for more details: BITTÓ, M.–FÜLÖP, S.: "Crimes Against the Environment", *Crimes Against the Environment. General Part. Preparatory Colloquium, Section I Ottawa, Nov. 2–6, 1992, International Review of Penal Law*, 1994, Nos. 3–4, 974–976.

1. The Method of Regulating Criminal Environmental Offences

a) Immaterial offences

For these offences to occur, it is enough if the perpetrator violates, with culpability, the obligations described in any other law or decision of the authorities. Culpable behaviour means disobedience to the regulations of the law or a decision of the authorities. The disobedience of these citizens is considered by the legislator to be of such a degree that they are punished without respect to the harmful effect of their actions. In these cases, there are no problems which emerge in connection with the definition of damaging or endangering effects. I intend to deal with this question in more detail below, that is, that immaterial offences only superficially create a simpler situation.

b) Material offences

In some cases the simple violation of a regulation does not constitute an offence, because for the total fulfilment of the criminal offence a result is also required (damage to the environment, pollution of the environment, state of emergency). The Penal Code regards environmental damage as a material offence.[13] It is very difficult to answer the question of when the "significant degree of pollution" can be defined as a result, which has been an element of the offence of environmental damage both before and after the amendment of 1996.

Based on the Penal Code, that person commits the offence of environmental damage by pollution who pollutes the environment, or any elements of the environment, to a significant degree. For example, the pollution of the air as an environmental element, which exceeds the emission limit value, does not constitute this form of the criminal offence. The exceeding of the emission limit value is not a significant degree of pollution.

The Supreme Court did not find a significant degree of pollution, and therefore, no environmental damage, in a case involving an offender, who poured insecticide into a well with the intention of killing his relatives. According to the Court, this act did not influence the purity of the water in neighbouring wells. Therefore, the pollution of the water in the well was not so significant as that which would have fulfilled the criteria of a criminal offence of environmental damage [Penal Code Article 280, paragraph (1)].[14]

There are, however, uncertainties regarding the judgement and application of the criminal offences of environmental damage, and some difficulties arise regarding the description of harmful effects. Even when Act IV of 1978 came into force, the question was being asked of whether, for the more effective criminal protection of

13 A Büntető Törvénykönyv miniszteri indoklása a Btk 280. §-hoz (The Ministerial Motivation of the Criminal Code Concerning Article 280 of the PC), *A Büntető Törvénykönyv magyarázata (The Ministerial Motivation of the Criminla Code)*, Budapest, 1986, 795.

14 BH 1986. 87. (Decision of the Hungarian Supreme Court).

the environment, the immaterial and endangering offences should also have been applied.[15]

People's productive, economic, or other activities are generally not guided by a direct intention (*dolus directus*) to damage the environment. What is defined as pollution, in the case of environmental damage, is usually not directly intended by the perpetrator to pollute, but rather is intended to decrease the costs of production, and the intention appears, at the most, in the form of eventual intention (*dolus eventualis*). It is also important, in cases of *dolus eventualis*, to foresee the possible consequences of environmentally damaging behaviour. However, for environmental damage to have occurred, both time and place requirements must be concurrently met; that is, the fulfilment of only one of these constituents will not be sufficient for the offence of environmental damage to have been committed. The occurrence of this offence is also dependent upon continuing pollution of the given element of the environment, and its ability of self-purification. In certain cases, environmental damage occurs as an overall consequence of several acts or omissions because, independently of the perpetrator, or as a result of similar activities by others, the effect is cumulative. Such a cumulative criminal offence is, for example, the pollution of water. Because of the complex connections (synergetic effects, etc.) it is often difficult to compile evidence. "It is not unusual either that the environmentally damaging effect can only be proved by scientific analysis."[16] Consequently, one of the problems is that the direct intention to commit environmental damage is missing, whilst the other problem lies in the fact that the consequences of environmental damage cannot be entirely encompassed by human cognitive processes.

Both in theory, and according to the Hungarian Penal Code, the offence of environmental damage caused by negligence can be punished. As far as criminal responsibility is concerned, the examination of the question of the connection between criminal law and administrative law has acquired greater importance; that is, the decision on which area should be prioritised: activism for the independence of environmental criminal law, or the punishment of the perpetrator.

To make criminal reaction and punishment possible to a wider extent, we have to reach a compromise. With regard to legal administrative regulations and demands, we can say that, if the prescribed obligations have been intentionally or recklessly broken, then the activity has to be punished (immaterial criminal offence).

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15 MÁRKUS, F.: "Az élet, a testi épség és az egészség védelméhez való állampolgári jog megvalósulása és a környezetkárosítás bűncselekménnyé nyilvánítása" (The Manifestation of the Fundamental Right to Life, Bodily Integrity and Health and the Criminalisation of Environmental Damage), *Jogtudományi Közlöny*, 1979, No. 6., 326.

16 TAMÁS: *op. cit.*, 335.

2. The Relationship Between Environmental Criminal Law and Administrative Law

In the area of environmental protection, criminal law and administrative law are generally linked.[17] Günter Heine, in examining the relationship between environmental criminal law and administrative law, makes a distinction firstly, between criminal offences which are absolutely independent of administrative law, and secondly, criminal offences which are absolutely dependent on administrative law or, finally, criminal offences which are relatively dependent on administrative law.[18]

Using Hungarian criminal law on a basic case of environmental damage, we can describe the following possibilities, when the perpetrator:

a(1) damages the environment or any elements of the environment (Article 280 paragraph (1) point 1);

a(2) pollutes the environment or any elements of the environment to a significant degree (Article 281 paragraph (1) point 1).

In fact, we are talking of material offences in these cases, which best proves their independence of administrative law. The immaterial danger of environmental damage was introduced by the amendment of the Penal Code in 1996 regarding both damaging and pollution, that is, when the perpetrator:

b(1) by violating his obligations defined in law or by a decision of the authorities, acts in a way which is fit to damage the environment or any elements of the environment;

b(2) by violating his obligations defined in law or by a decision of the authorities, acts in a way which is fit to pollute the environment or any elements of the environment to a significant degree.

In these latter cases criminal offences take the form of an immaterial crime, that is, when the Penal Code expresses the danger indirectly in such a way as to refer to the likelihood of damage. Therefore, the criminal offence requires not only penalisation of disobedience, because the further feature of this behaviour—that is, the likelihood of damage—is also characteristic.

In the Hungarian criminal law system we can find similar solutions in connection with other criminal offences, for example, that the hostile, aggressive behaviour of the hooligan is fit to cause general uproar and public commotion [Penal Code Article 217 paragraph (1)].

In cases of criminal offences against environmental protection introduced by the amendment of the Penal Code [b(1) and b(2)], criminal law omits a requirement of actual environmental damage, and by constraining administrative law and administrative authorities provides a wider protection for ecological elements by criminal legal means.

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17 *Convention for the Protection of the Environment Through Criminal Law (Draft), op. cit.*, 3.

18 GÜNTER, H.: "Environmental Protection and Criminal Law", in LOMAS, O. (ed): *Frontiers of Environmental Law*, 78–79.

The immaterial environmental offence only appears to be an easy solution; in fact, it is one of the most debated areas of criminal law. Whilst the acknowledgement that environmental criminal law is dependent upon administrative law is made for the more effective protection of the environment, it still gives the impression that environmental criminal law has only a symbolic function beside administrative law for overcoming environmental problems.

Administrative law determines the extent of permissible pollution and acceptable risks in most environmental areas, frequently leaving to the administrative authorities the task of establishing the permissible level of pollution in individual cases. Therefore, a close relationship exists between administrative law and criminal law. Regarding administrative permission, several questions and variations emerge, such as:

a) when administrative authority permission exists, and environmental pollution exceeds the limit defined in it, or it is correct formally but it was obtained by bribery or otherwise illegally, or

b) there is no administrative authority permission, because the action of the applicant would be permissible, but the permission was not obtained, or because it would not be permissible.

Focusing on the aims of environmental criminal law, we have to accept the fact that the absolute protection of the environment and ecological elements cannot be the object of criminal law, because certain forms of environmental risks (pollution) are permissible. However, the permission does not exclude the possibility that certain environmental acts could be punished by criminal law. Therefore, the principle to be followed is that "the compliance with environmental administrative law cannot always exclude criminal liability. A permission may legalise certain acts, but does not grant absolute rights to the polluter. Administrative consent must not be available or if granted, irrelevant in those cases where environmental use causes death or serious injury to any person or which creates a significant risk thereof".[19]

The inevitable and indispensable connection between environmental criminal law and the administrative law raises the problem that environmental offences will not be sufficiently definite, because they are also defined by the administrative law and by the actions of the administrative authority. On the other hand, it is a widespread notion that the establishment of environmental criminal law independent of administrative law is not likely to happen within a reasonable period of time.

The description of a blanket offence is a generally accepted technique in the codification of criminal law. For example, in the case of immaterial offences, the commission is defined entirely or partly by an other law referred to in the definition of

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19 *Convention for the Protection of the Environment Through Criminal Law (Draft)*, *op. cit.*, 4. Compare FÜLÖP, S.: "A jogi személyek büntető jogalanyisága" (Legal Persons as Criminal Offenders), *Jogtudományi Közlöny*, 1993, No. 6, 350; TIEDEMANN, K.: "Theory and reform of the environmental criminal law", *Revue de Science Criminelle et de Droit Comparé*, 1986, No. 2, translated into Hungarian by CSONKA, P.: "A környezetvédelem büntetőjogának elmélete és reformja" (The Theory and Reform of Criminal Law Concerning Environmental Protection), *Jogpolitika*, 1988, No. 1, 16.

the crime. The latter example of environmental damage given above [points b(1), b(2)] applies this solution: the commission not only features disobedience, but also a violation of the regulations of administrative law.

When the Hungarian Penal Code talks about disobedience described in the law, it does not refer to obligations described in the stronger legal rules in the first case. The obligations are generally defined even at a lower level by ministerial ordinance, and the Environmental Code also functions as a blanket-type of law.

As far as possible, criminal offences should be defined by a criminal statute, and as far as possible the criminal law should function independently of administrative law. In the case of blanket offences—as Professor Imre Wiener writes—guarantees embedded in criminal law require that the administrative law referred to be defined—as far as these guarantees are concerned—in the same way as a criminal law, notwithstanding the fact that the effectiveness of penal principles should be upheld.[20]

During the construction of environmental criminal law further problems may emerge: in addition to the increased demand for criminal protection of the environment, there is also the rather difficult practical application of individual criminal responsibility, juxtaposed with the theoretical difficulties of introducing corporate criminal responsibility. In conclusion, it is interesting to note that even in 1922 Ervin Hacker, a scholar of Hungarian criminal law, could write thus: "The regulation of the criminal responsibility of legal entity will be one of the principal questions of criminal law in the future".[21]

20 WIENER, I. A.: "Kerettényállások és büntetőjogi garanciák" (Frame Offences and Guarantees in Criminal Law), *Cséka Ervin emlékkönyv*, Szeged, 1992, 618, 628.

21 HACKER, E.: "Az egyesületek büntetőjogi cselekvőképessége és felelőssége" (Criminal Responsibility of Associations), in LÉVAI, M. (ed.): *In Memory of Ervin Hacker* (Kriminológiai Közlemények, No. 28, Budapest, 1989), 119.

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Henrik HÄGGLUND

The Municipal School System in Finland—Some Legal and Administrative Aspects

1. Introduction

The municipal school system in Finland comprises a large variety of educational institutions ranging from the comprehensive school to vocational and voluntary education in different areas. In this presentation I will concentrate mainly on the compulsory education, i.e. the comprehensive school. I will start by giving a short historical review, moving to the present situation and finally paying some attention to a recent reform proposal of the legislation within the Finnish school system. My presentation focuses on the legal and administrative aspects of the municipal school system, whereas aspects of the curriculum and educational methods are not included. The financing of the municipal school system will only be mentioned briefly.

2. A Short Historical Review: From the Primary School Decree 1866 to the Comprehensive School Act 1968

The first actual legislation about municipal schools was the Primary School Decree of 1866 (1866:12). There had been some earlier regulations, e.g. the Church Act of 1686, when Finland still was part of Sweden, which assigned elementary education as a task for the Church, together with the families. The elementary education given by the parishes was very narrow; it mainly contained only basic training in the skills of reading and writing. Before the Primary School Decree of 1866 several types of schools had of course existed in Finland, ranging from small, private elementary schools to secondary schools leading to university education. But a uniform system of primary education had

not existed, and creating such a school system was consequently the main goal of the first Primary School Decree.

The Decree of 1866 contains several interesting features, some of which can still be seen as features of the present school system. First of all, the decree assigned the responsibility of primary schools to the municipalities. This was not a self-evident procedure at that time. In Sweden, for instance, the Primary School Act of 1842 had assigned elementary (primary) education as a task for the church parishes. This was of course in accordance with the principles of the Church Act of 1686. But in Finland, there was a fairly strong resistance against giving the central responsibility of elementary education to the Church. According to the opinions among leading educational politicians at that time, the Church was not interested in a broader general education of the people; basic skills in reading and writing were enough for the church. Since the first Municipal Decree had just recently been given (1865), it was only natural to entrust the municipalities with the task of primary education.[1] This feature of the municipalities being responsible for elementary education in Finland still remains. According to the latest reform proposals, the municipalities shall have the main responsibility of elementary education.

Entrusting the primary schools to the municipalities had some implications for the administration of the local school system. A municipal school committee, with powers to decide about the curriculum for the schools, recruitment of teachers and other important matters concerning the primary schools, was to be established. The decision to establish schools was made by a general meeting of the local taxpayers. Later on this decision was made by the municipal council. These general administrative features of the municipal school system have remained until today: A local committee responsible for school administration is still mandatory in every municipality whereas the municipal council is responsible for the most important decisions (especially in economical matters) concerning the schools. A central governmental body, The National Board of Education, was also created to supervise the municipal schools. This board had large decision-making and controlling powers in relation to the municipalities, and came to play an important role in building up the school system of Finland. The National Board of Education remained a strong supervising central authority until the beginning of the 1990s. Today it functions mainly in the field of developing education in Finland and has no decision-making authority.

The next important step following the Decree of 1866 was the School District Decree of 1898 (1898:20). This decree made it mandatory for the municipalities to establish a primary school when a certain number of pupils (30) within a school district registered for school. The decree obliged each municipality to divide its area into school

1 A more detailed description of the introduction of the Primary School Decree 1866 is given in HÄGGLUND, H.: "Folkskolans organisation i Finland 1866 jämfört med läget i Sverige 1862", in BRAMSTÅNG, G. (ed.): *Kommunalrätt i utveckling*. Skrifter utgivna av Juridiska föreningen i Lund Nr 103, s. 41-53. Lund, 1988.

districts, in general limiting the distance to each school to less than five kilometers for any pupil. Exceptions to this rule were naturally allowed, but it was a general, and for the future development, very important rule. The School District Decree of 1898 also created an obligation for the municipality to establish schools (and subsequently school districts) for both language groups, i.e. the Finnish-speaking and the Swedish-speaking inhabitants of the municipality. All these rules have remained important cornerstones for the municipal school system up to this day; the provision of five kilometers as a maximum distance to each lower-stage comprehensive school was repealed as late as in 1993. Just recently (in April 1996), it has been proposed that the provision of school districts in its traditional form shall be repealed when the new school legislation comes into force.

Even though the School District Decree had made it a mandatory task for the municipalities to establish schools, a system of compulsory education was not introduced in Finland until 1921. During the first decades of the 20th century the school system of Finland grew rapidly as a consquence of the population growth, of the system of compulsory education and of the general need for better educated people. The municipal primary schools had the main responsibility of elementary education, whereas secondary education was divided into two parallel systems. Some of the pupils completed their compulsory education within the primary school system, which eventually was extended to eight years of education. These pupils were not eligible for upper secondary school and thus not for university education. A large part of the pupils attended the municipal primary schools for a period only of four years, after which they attended lower secondary and upper secondary schools and were eventually eligible for academic or higher vocational studies. These secondary schools, based on four years of primary schools, were often private schools, to some extent also state schools, but rarely municipal schools.

During the 1950s and 1960s this division into two parallel school systems was considered to be regionally, socially and educationally unsatisfactory and unequal. A Comprehensive School Act was therefore planned during several years and given in 1968 (1968:467). A unified comprehensive school system was gradually introduced starting in 1970 and completed in 1977.[2] This new comprehensive school system replaced the old primary schools and the secondary schools. The Comprehensive School Act required the municipalities to provide nine years of basic school instruction to all children from the age of 7 to the age of 16. It is important to note that through the Comprehensive School Act of 1968 (and the Comprehensive School Decree of 1970) the main part of the compulsory, comprehensive school system was made a responsibility of the municipalities. Most of the private schools in Finland became municipal during the period 1970-77, when the comprehensive school system was introduced. Since a great part of the upper secondary schools (i.e. the level before academic studies) also joined

2 The comprehensive school system was introduced starting in Northern Finland in 1970 and completed in the Helsinki area in 1977.

the municipal school system, the municipalities in fact almost received a monopoly of basic, general education in Finland.

The main goal of the comprehensive school reform in the 1970s was to create an equal educational system in Finland; equal without regards to social or regional background. In order to reach this goal a strong system of regulation was introduced. The freedom of the municipalities, in regards to the contents of education, was very little: The Ministry of Education and the National Board of Education strongly controlled and governed the school system in every municipality. A uniform administrative system was created; every municipality was to have a school committee and each school its own board. On the regional level, a new educational authority in connection with the County administration was created. The Comprehensive School Act and Decree, together with regulations issued by the National Board of Education and the state funding system, strongly ruled the municipal education system.

3. *The Comprehensive School Act of 1983 and its Amendments in the 1990s*

The Comprehensive School Act of 1968 was originally given only for a transfer period. Since the introduction of the new comprehensive school system was completed by the end of the 1970s, a new, complete Act was being planned. The new Comprehensive School Act was given in 1983 (1983:476) and to begin with it brought only small changes into the municipal school system. At the time when the Act was given, the comprehensive school reform was completed, and the need of strong governance had therefore decreased. But larger reforms, giving more freedoms to the municipalities were not introduced until almost ten years later, in the beginning of the 1990s. I will now describe some legal aspects of the municipal school system according to the Comprehensive School Act of 1983, as it was amended in 1991 and 1993.

The Finnish school system is described in figure 1 (see appendix).[3] The domination of the municipal schools can be seen in numbers, too: In 1995 almost 700,000 (more than 96 %) students attended municipal comprehensive schools or upper secondary schools, whereas the same figure for private schools was about 17,000 and for state schools about 10,000.[4]

A basic rule for the Finnish School system is found in the Constitution Act of Finland, section 13. "*Everyone shall have the right to primary education free of charge. Provisions on compulsory education shall be given by an Act of Parliament*". This, of course, is a most important principle for primary education in Finland. The education is free of charge, which encompasses not only the education itself, but also all kinds of educational material such as literature and writing materials. According to the Comprehensive School Act, every student has a right to one free meal per day. Health

3 Figure 1 is drawn from the outlines given in Committee Report 1996:4., 18.

4 See Committe Report 1996:4., 20.

care and social service within the schools is free, too. If the distance to school is more than five kilometers, or less than that but the way to school is difficult or dangerous, the student has a right to free transportation.

A main right for the student is expressed in the Comprehensive School Act (Sections 37 and 38): Every student belongs to a school district according to his domestic residence and his mother-tongue (Finnish or Swedish), and he has a right to attend the comprehensive school within this district. The municipality cannot deny the student the right to attend his own school. On the other hand, the municipality generally has no obligation to allow the student to attend another school. Since only education, not a certain school, is compulsory in Finland, the student cannot be forced to attend a certain municipal school, but he or actually his parents may in some cases be obliged to pay for the costs themselves if they choose other than the municipal school for their child. A few private schools, mainly in the city of Helsinki, function on the basis of a contract with the municipality and thus "sell" their services to the municipality. Attendance in these schools is, naturally, free of charge. There are also some other private schools supported by the municipalities, and some special schools (often language-based) owned by the State. But to a great extent, the municipal school is the only existing alternative. In larger municipalities, students may choose between the school of their own district or some other municipal school, granted there is room in the other school.

The curriculum of the comprehensive school is no longer drafted on a centralized, state level but in the municipalities and, as a matter of fact, separately in each school. A framework curriculum is approved by the National Board of Education and a general, minimum distribution of lesson hours in different subjects is approved by the Council of State. But in other respects the curriculum is approved by the municipalities and can be approved separately for each school of the municipality. This means that today there is a possibility of great variation between schools; the uniform, equal municipal school system is rapidly getting more and more diversified.

A detail of certain legal interest is the regulation of the disciplinary punishment of students. The Comprehensive School Act (Section 42) and the Comprehensive School Decree (Section 58) contain detailed regulations of the disciplinary punishment of students. The most severe punishment is expulsion for a period of a minimum of one month and a maximum of three months. Even though the student is expelled, the municipality has an obligation to give him educational instruction. The student himself and his parents must be heard before the punishment decision is made. The power to make a decision of expulsion can only be held by a municipal school board or committee, not an individual teacher, principal or civil servant. An appeal can be made against the decision; this appeal is made to the county (regional) administrative court. The Comprehensive School Act was amended just last year (1995) in regards to the appeal; appeal must now be made to a court, whereas it used to be made to the regional educational authority. The amendment was made with reference to the European Convention on Human Rights and its provision (in Article 6) of a fair and public hearing.

In the Comprehensive School Act of 1968 (and Decree of 1970), the administration of and the decision-making within the municipal school system was strictly regulated. At first, the Comprehensive School Act of 1983 did not affect any real change on this. But the experiment with so-called "free municipalities" in the late 1980s brought in the autonomy of the municipalities as a strong feature for administrative matters. The Comprehensive School Act and the Act of Municipal School Administration were amended in 1991 and 1992 in a way which introduced great freedom to the municipalities concerning the administration of the school system. It is mandatory for every municipality to appoint a committee or a board responsible for matters concerning schools. But this committee does not explicitly have to be a school board; it may be concerned with other areas of municipal administration, such as culture, libraries or voluntary education as well. In bilingual (Finnish and Swedish) municipalities, it is mandatory to have separate committees for each language group or separate language-based sections of one committee.[5] The Comprehensive School Act does not entrust obligations or powers of decision to certain authorities within the municipalities; it is up to the municipality itself to decide upon the distribution of powers between different authorities. Thus school administration in different municipalities may vary to a large extent. In some municipalities powers of decision may be concentrated to one committee; in other municipalities powers may be decentralized to the schools themselves, in which case local school boards may be appointed.

The freedom of administration, since 1993, has been joined with a freedom of economical decision-making. The comprehensive schools and the upper secondary schools in the municipalities receive State subsidies. The percentage of State subsidies varies somewhat between the municipalities (45%–65%). Nowadays State subsidies are granted on a calculated basis, in which the number of students, transportation of students and the school network form the basis. The subsidies are granted without connection to the real costs and expenditures of the municipal schools. The municipalites are free to use the State subsidies as they wish; there is only a basic legal obligation to maintain comprehensive education in the municipality.

A right to appeal is connected with most administrative decision-making in Finland; this is the case with the school administration, too. There are two types of appeal in the area of municipal school administration: administrative appeal and municipal appeal. The division between these two is quite clear today: Administrative appeal is mainly to be used in connection with individual decisions concerning students. These are decisions concerning admission of a student to a certain school, moving a student to specialized education and deciding on a student's participation in a certain subject. Appeals in these cases are made to the regional (county) educational authority. In the case of expulsion, appeals are made to the regional (county) administrative court. Typical for administrative appeal is that only the person—in this case the student or his parents—affected

5 This provision is stated in the Municipality Act of 1995, Section 16, as well as in the (present) Act of Municipal School Administration.

by the decision can challenge it. Other decisions than those concerning an individual student can be subject to municipal appeal. Such decisions may concern economic support to a student, the curriculum of a school and general principles of admission of students. According to the Municipality Act, every member of the municipality may appeal against a decision—this is a typical feature for municipality appeal.[6]

4. Reform Proposal in 1996

In April 1996, a Committee within the Ministry of Education proposed some rather large reforms of the educational legislation in Finland.[7] The main goal of the committee is to create a more unified and less detailed legislation in the area of education. The committee report contains proposals concerning education on all levels; from pre-school to university. As far as the comprehensive school is concerned, the Comprehensive School Act and several acts on specialized schools (language-based such as the French School in Helsinki and the Russian School in Helsinki) will be replaced by one Comprehensive Education Act. I will now briefly refer to some of the main proposals in the Committee Report (1996:4).

Comprehensive Education will remain a resposibility for the municipalities. As already stated in the beginning of this presentation, this has been a feature of Finnish Primary and Comprehensive School legislation since 1866. One new feature, though, is an enlarged possibility for the municipalities to purchase educational services from other than municipal schools. This may be done not only on a contractual basis with a private school concerning the whole education within a school, but also as a purchase of one or several subjects to replace these subjects as produced within the municipal school. The right of parents (families) to choose a school for their child will also be enlarged: The municipality has an obligation to indicate a certain school (Finnish or Swedish and in certain areas of Lapland also in the Sami language) for every child, but the parents may also choose any other school for their child. The municipality will be obliged to pay the costs of education to the school of the parents' choice. There will no longer be mandatory division into school districts; a "home school" must be appointed for every child by the municipality. This new system will probably increase competition between schools and, at the same time, once again increase the number of private schools in Finland.

The committee does not propose any changes in the duration of comprehensive education — nine years of comprehensive school will be given in the future, too. The division between the lower stage (i.e. the first six years of comprehensive school) and

6 A detailed description of appeal within the municipal school system is (in Swedish) given in HÄGGLUND, H.: Rättssäkerhet inom kommunal skolförvaltning. En undersökning om rättsmedlens betydelse inom den allmänbildande skolan. SSKH Meddelanden 31. Helsingfors, 1994. especially Chapters 2 and 4. (In Swedish, SABBATAI: *loc. cit.*).

7 Committee Report 1996:4.

the upper stage (i.e. the last three years of comprehensive school) will be abolished. One year of pre-school education, free of charge, is proposed to be offered to all children at the age of six years. Today, pre-school is free of charge if offered within the school system, but a monthly fee is paid by the parents if pre-school is arranged — as mostly is the case — within the day-care system.

The administration of municipal schools and the municipal school system will no longer be regulated in educational law. The administrative structure will thus be based on the Municipal Act, which in Section 16 contains a provision to appoint separate school committees/boards (or other such authorities) for the Finnish- and the Swedish-language group in bilingual municipalities. The Municipality Act also makes it possible to appoint school boards for each school, with representatives for parents and staff. It may be considered somewhat surprising that the proposal does not include any provision to appoint a principal (headmaster) for each school; only a sufficient number of directors within the school system will be demanded.

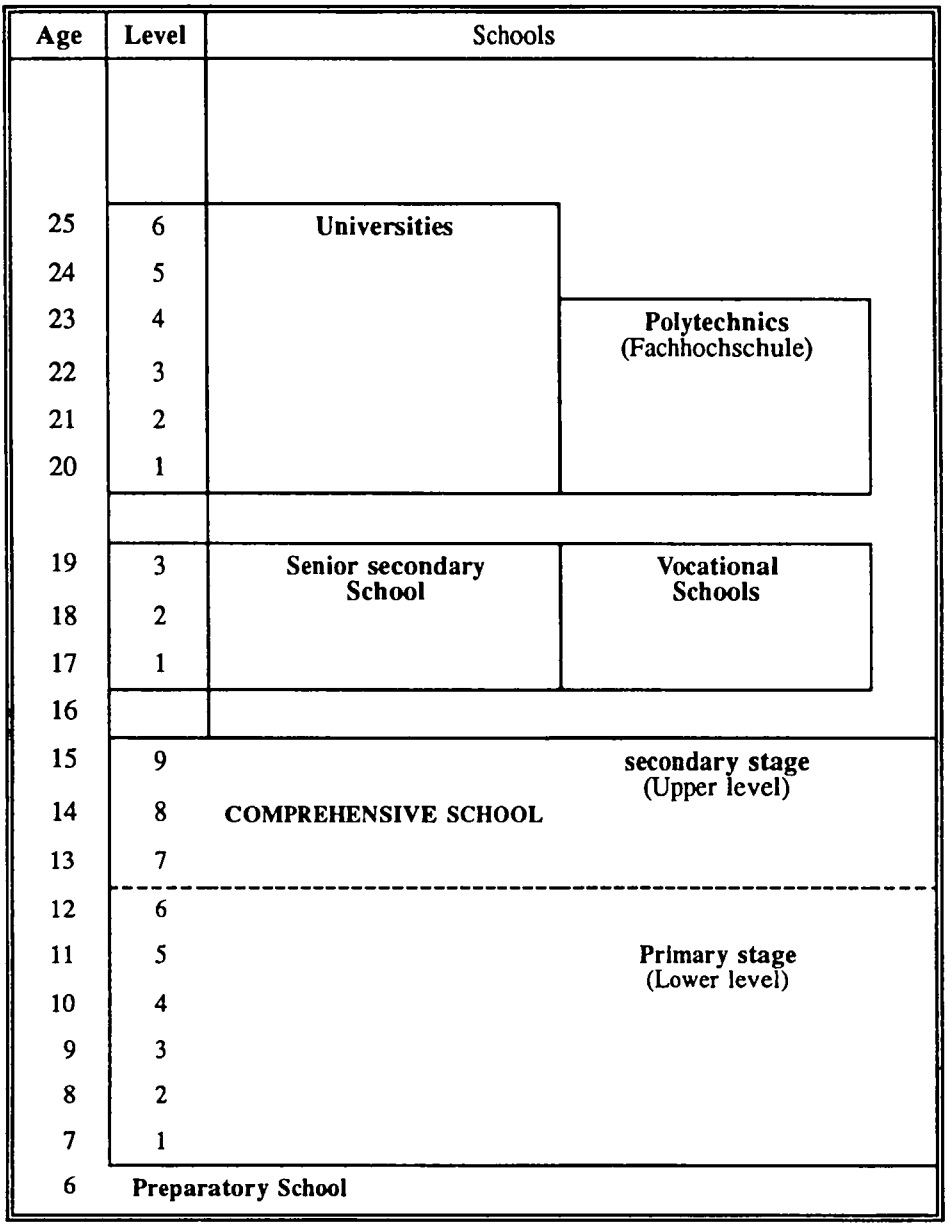
5. *Conclusions*

Although some major legislative changes can be expected in the near future,[8] the fact still remains: Within the Finnish school system the municipalities are the main authorities responsible for comprehensive and secondary education. Over a long period of time, the autonomy of the municipalities did not play a strong part within the school administration; the municipalities only carried out the will of the State in the area of education. Today the situation is different: Both concerning administration and concerning the curriculum, the municipalities have quite a large independence and autonomy in deciding about the education within each municipality. There is, of course, a basic common structure to be carried out; but apart from this, municipal autonomy is an important element within the school administration.

8 The new school legislation will probably come into force in 1998.

APPENDIX

Figure 1: The Finnish School System (1996)



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Sanna HEIKINHEIMO

Money-Laundering— a Controversial Issue

1. Introduction

The subject of my presentation today is a phenomenon which has prompted a great deal of discussion in recent years, namely money-laundering. I will begin by explaining the major reasons behind the growing international concern with money-laundering. I will then proceed by briefly examining the main international initiatives in this field. These initiatives can also be seen to have had an impact in Finland with the recent introduction of new laws on money-laundering. After describing the new obligations placed on financial institutions by the Finnish banking law, I will end by briefly focusing on banking secrecy.

2. What is Money-laundering?

In the money-laundering process illegally obtained money is transformed into "clean" assets; in other words, the existence, amount, source or ownership of assets is concealed. The schemes used to launder money are diverse, but the purpose of money-laundering is always "to dissociate that capital received as a direct consequence of criminality from its illicit origin, so as to ensure that detection by reason of possession of such capital is avoided, whilst simultaneously providing the offender with reason for "being in possession of that capital".[1]

1 MITCHELL, A.—HINTON, M.—TAYLOR, S.: *Confiscation*, London, 1992, 218.

3. Reasons Behind the Growing Concern on Money-laundering

Although the term "money-laundering" was already being used in the 1920's and 1930's to describe the Mafia laundromats in the United States,[2] international measures against money-laundering were not adopted until the end of the 1980's. There are several reasons for the growing concern with money-laundering.

3.1. The Escalating Nature of Drug Trafficking and Money-laundering

In the recent past the growth in amounts of laundered money has been due to drug trafficking.[3] Thus one of the major reasons for international interest in combatting money-laundering is due to the fact that enormous amounts of drug money are laundered worldwide.[4] There are some rough estimates of the amount of money laundered, but just as it is impossible to determine the correct amount of criminality in a society, so it is also impossible to give a correct estimate of the amount of money being laundered. The Financial Action Task Force on Money-laundering (FATF) tried to estimate the amount of laundered drug proceeds in 1990. They came to the conclusion that in Europe and the United States about $85 billion of drug money could be used for money-laundering and investment purposes.[5] The estimation was made using three indirect methods, namely estimated world drug production, consumption needs of drug abusers, and seizures of illicit drugs.

In their 1995 report, the FATF suggested that the amount of money-laundered is hundreds of billions of US dollars each year.[6] The correctness of this estimation is hard to evaluate, for it is based on a "general consensus".

3.2. Increasing Emphasis on Money Trails

In recent years, the law enforcement agencies of many countries have paid increased attention to the financial aspects of criminality. It is hoped that this will help in the fight against criminality in two separate ways: a) it has been pointed out elsewhere that "the best way to deter and punish drug traffickers is to hit them in their pocket".[7] This means that money is seen as the motivation for much criminal activity. There are no reasons for drug barons to sell drugs other than to make money for themselves. Therefore, if law enforcement is able to deprive criminals of these illegal earnings, this main

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2 *Ibid.*, at 218.

3 *Ibid.*, at 80.

4 GILMORE, W., in GILMORE, W. (ed.): *International Efforts to Combat Money-laundering*, Cambridge, 1992, ix.

5 *Financial Action Task Force on Money-laundering*, Report of 6 February, 1990, 3–5.

6 *Financial Action Task Force on Money-laundering*, Annual Report 1994–1995, 8 June 1995, 15.

7 NADELMANN, E.: "Negotiations in Criminal Law Assistance Treaties", *The American Journal of Comparative Law*, 1985, 492.

incentive can be eliminated. b) The leaders of big criminal organisations do not take part in the physical acts of crime, and thus it is often very difficult for law enforcement agencies to convict them of any kind of criminal activity. A money trail is often the only way in which to connect the big bosses with the crimes committed. D. Chaikin has stated that money-laundering is "the lifeblood of organised crime", that is, organised crime cannot survive without laundering money,[8] and thus the attention being focused on money-laundering operations can provide a line of attack for law enforcement agencies to apprehend the people most responsible for these crimes.

3.3. The Necessary Protection of Financial Institutions

At one point or another, money-laundering schemes almost always of necessity involve the use of banks or other financial institutions. The financial sector is now being exploited more and more by money-launderers who can pose serious threats to the functioning of this sector.[9] The internationalisation of financial markets and the diminishing of barriers to the free movement of capital have made the task of the money-launderer easier. As moving money from one jurisdiction to another can be accomplished in a matter of seconds, and jurisdictional limitations make the task of law enforcement more complicated, banks must be protected against money-laundering. Furthermore, the financial sector can also be an effective deterrent against money-laundering by making it harder for launderers to use their services.[10]

These are the main reasons for the growing concern with money-laundering. A so-called "twin-track solution"[11] has been adopted at international and national levels to fight this problem. It has been realised that traditional criminal justice measures, that is, criminalising money-laundering, must play a major role in this effort. Furthermore, it has been admitted that the financial sector must and can contribute to the fight against money-laundering.[12] Finally, with the realisation that money-launderers operate not only nationally, but increasingly also internationally, it has become clear that national

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8 See CHAIKIN, D.: "Money-laundering as a Supranational Crime: An Investigatory Perspective", in ESER, A.–LAGODNY, O. (eds.): *Principles and Procedures for a New Transnational Criminal Law. Documentation of an International Workshop, 1991* (Max-Planck-Institut für Ausländisches und Internationales Strafrecht, Freiburg in Breisgau), 1992, 420

9 GILMORE: *op. cit.*, x. See the Basle Committee on Banking Regulations and Supervisory Practices. December 1988 Statement on *Prevention of Criminal Use of the Banking System for the Purpose of Money-laundering.*

10 See the Preamble of the *Measures Against the Transfer and Safekeeping of Funds of Criminal Origin: Recommendation No. R(80)10* adopted by the Committee of Ministers of the Council of Europe on 27 June 1980 and Explanatory Memorandum, where it was stated that "the banking system can play a highly effective preventive role, while co-operation of banks also assists in the repression of such criminal acts by the judicial authorities and the police".

11 GILMORE: *op. cit.*, x.

12 See GILMORE, W.: "International Initiatives", in PARLOUR, R. (ed.): *International Guide to Money-laundering Law and Practice*, London, 1995, 21.

efforts in themselves are insufficient, and that effective international co-operation has become a necessity.

4. International Measures Against Money-laundering

As I commented above, in recent years we have witnessed a rapid growth in the number of international anti-money-laundering initiatives. The first major measure against money-laundering was the adoption of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[13] Since the adoption of this convention, a number of initiatives have been undertaken to combat money-laundering both at European and international levels. These are also the initiatives that had an impact in Finland when the new laws against money-laundering were adopted.

4.1. The Vienna Convention

The Vienna Convention was adopted by an *ad hoc* conference on December 19, 1988 in Vienna, Austria. The Convention entered into force in November 1990. Finland signed the Convention in 1989, and ratified it five years later, on February 15 1994. As of now, over 100 countries are party to the Vienna Convention. As the Preamble of the Vienna Convention states, the aim of this initiative is "to conclude a comprehensive, effective and operative international convention that is directed specifically against illicit traffic and that considers the various aspects of the problem as a whole". Member States are *inter alia* obliged to criminalise the laundering of proceeds from drug-related offences. Furthermore, the Vienna Convention sets strict obligations on the parties to promote and facilitate international co-operation in the identification, tracing, seizure, and confiscation of the proceeds of drug trafficking. The Vienna Convention is the only global instrument in the field of money-laundering, and has greatly influenced subsequent initiatives.

4.2. The Financial Action Task Force on Money-laundering

The G7 nations and the European Community set up the FATF in July 1989, with a view "to assess the results of co-operation already undertaken in order to prevent the utilisation of the banking system and financial institutions for the purpose of money-laundering, and to consider additional preventive efforts in this field, including the adaptation of the legal and regulatory systems so as to enhance multilateral judicial assistance".[14]

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13 *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, signed in Vienna, Austria on 19 December 1988, U.N. Docs. E/Conf. 82/15, the so-called Vienna Convention.

14 Group of 7 Economic Declaration of July 16 1989, point 53.

The membership of the FATF today comprises of twenty-eight jurisdictions and organisations, including Finland. The first of the series of FATF reports in 1990 issued 40 recommendations, aimed at improving national legal systems, enhancing the role of the financial system, and strengthening international co-operation against money-laundering.[15] The work of the FATF is on-going: each year the group issues an annual report focusing on three priorities. The first is an evaluation of the progress of FATF members in implementing the Recommendations of the FATF. For example, the 1994 FATF report includes an evaluation of the situation in the money-laundering field in Finland.[16] Secondly, it monitors developments in money-laundering trends and techniques and considers the necessary refinements to counter-measures. Thirdly, it undertakes an external relations programme to promote the widest possible international action against money-laundering.

4.3. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime[17]

The Council of Europe adopted the so-called European Convention on September 10 1990, which entered into force on September 1, 1993. Finland signed the Convention in 1991, and it entered into force in Finland on July 1 1994. The purposes of the European Convention are very wide-ranging. By providing a complete set of rules as regards investigative assistance, search, seizure, and the confiscation of the proceeds of all kinds of criminality, the Convention aims to deprive criminals of the proceeds of crime.[18]

4.4. The Directive on the Prevention of the Use of a Financial System for the Purposes of Money-laundering[19]

On June 10 1991 the Council of the European Community adopted the EJ Directive on money-laundering, which is specifically aimed at preventing the use of financial institutions for the purposes of money-laundering. The Directive obliges Member States *inter alia* to prohibit money-laundering.[20] Furthermore, the EJ Directive sets out several obligations for the banking sector: for example, the identification of customers, record keeping, and the reporting of suspicious transactions to the authorities.[21] Under

15 See *Financial Action Task Force on Money-laundering*, Report of February 6, 1990.

16 See *Financial Action Task Force on Money-laundering*, Annual Report 1993–1994, June 16 1994.

17 *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*. Eur. Consult. Ass., Doc. No. 141.

18 See the Explanatory Report on the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*. Convention opened for Signature on November 8 1990. Strasbourg, 1991, 6.

19 *Council Directive of June 10 1991 on Prevention of the Use of the Financial System for the Purpose of Money-laundering*. Council Directive 91/308/EEC, OJ L166/77 of 28 June 1991.

20 Article 2 of the EJ Directive.

21 See Articles 3 to 11 of the EJ Directive.

the terms of the Treaty on the European Economic Area, Finland was under an obligation to implement the money-laundering directive in its internal legislation.

5. The Situation of Money-laundering Laws in Finland

In Finland, in addition to drug proceeds, it is believed that traditional crime, such as bankruptcy offences, frauds, and embezzlements, also accounts for a substantial part of money-laundering. However, the biggest potential problem is the flow of funds from the former Soviet Union for deposit in Finnish financial institutions, or for the purchase of real estate or enterprises in Finland. It is suspected that these funds may include the illegal profits of the shadow economy which are being laundered and invested. In recent years Finland has equipped itself with virtually a complete set of new laws and regulations concerning money-laundering. These laws came into force at the beginning of 1994. The relevant international instruments, which I have briefly introduced above, were implemented in the Finnish legislation by being added to the relevant parts of the general banking and insurance legislation. Certain parts of the criminal law were also amended in order to criminalise money-laundering. Additionally, detailed guidelines were issued by the banking authorities.

5.1. The Money-laundering Offence in Finland

When criminal law was amended in order to criminalise money-laundering, the Vienna Convention, the European Convention, and the EJ Directive served as models for this criminalisation. Thus the criminalisation of money-laundering is clearly reminiscent of the definitions used in these instruments. The money-laundering offence is very widely drawn, covering all proceeds obtained through crime, and not only transactions related to drugs. The following acts constitute a money-laundering offence in Finland:

1. The acquisition, conversion or transfer of assets or other property, knowing that such property is derived from a criminal offence or surrogate of such property, for the purpose of concealing or disguising the illicit origin of the property or of assisting the perpetrator to evade the legal consequences of his actions, or

2. The concealment or disguise of the true nature, source, location, disposition or rights with respect to the property set forth in paragraph 1, or the concealment of information on such matters which he is obliged to report under the law.[22]

5.2. The New Obligations of Financial Institutions

New obligations on banks and other financial institutions were introduced when the new money-laundering laws entered into force in Finland. These obligations include a stricter

22 As an official translation was unavailable, this is my own free translation (S. H.).

duty of customer identification, due diligence, and the reporting of suspicious transactions. The provisions regulating money-laundering transactions cover the activities of credit and financial institutions, including insurance companies. In August of 1996 the provision was extended to activities carried out by exchange counters. Furthermore, a committee has been set up within the Ministry of Finance to determine the need to also extend the coverage of anti-money-laundering laws to real estate agencies, casinos, and dealers in precious metals.

5.2.1. Customer Identification

According to the Finnish banking law, financial institutions are under a duty to identify their customers. Since the amendments in the Finnish banking law came into force in 1994, customers now have to be identified in the following circumstances: a) when an institution enters into business relations with a customer; b) if there is doubt that the customer is not acting on his own behalf, the institution in question is required to take reasonable measures to identify the beneficial owner; c) when an institution is asked to perform a large casual transaction; d) if there is a reason to suspect the origin of the assets. It has been argued that customer identification is the "most effective weapon against being used unwittingly to launder money".[23] Efficient customer identification has the potential to reduce the risks of an institution being used for money-laundering purposes. On the other hand, its deterrent effects can be disputed: false identification is easily obtainable, and thus the identification requirements will not deter "serious fraudsters".[24] The requirement of customer identification may also force institutions to question their clients in order to identify them and/or the possible beneficial owners. If customers resent these potentially prejudiced questions, they may turn to another institution to conduct business.

5.2.2. Due Diligence and the Reporting of Transactions

The requirement of due diligence means that financial institutions must pay special attention to dubious transactions. Under the Finnish law, if there is reason to suspect the origin of the assets to be unlawful, the transaction must then be either terminated or denied. During the preparatory work for the act, it was stated that suspicions should arise when, based on earlier banking experiences, it is clear that the transaction is out of the ordinary. In these circumstances, the institution is under an obligation to inform the Finnish banking authority about its suspicions and, moreover, to give all relevant information which may help to confirm the suspicion. Institutions are required to keep

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23 HARTE, B: "The Role of Banks", in PARLOUR, R. (ed.): *International Guide to Money-laundering Law and Practice*, London, 1995, 249.

24 LEVI, M.: "Money-laundering, Legislation and Fraud", in NORTON, J. (ed.): *Banks: Fraud and Crime*, London, 1994, 39.

the matter confidential, and thus they are not allowed to inform the customer that information relating to him has been passed to the authorities. The use of the information forwarded to the banking authorities is restricted. The authorities are only allowed to register, use, and forward the information in order to fight money-laundering. Other use of the information is prohibited.

5.3. Bank Secrecy and Protection Against Liability to Customers

According to the Finnish banking law, banks have an affirmative duty not to disclose information concerning the affairs of their customers without the consent of the said customer. This duty is also emphasised in the criminal law: charges can be brought against a person who has breached customer confidentiality. Naturally there are exceptions to this rule. An institution, for example, is obliged to provide the public prosecutor and the police with information in order to solve crimes. Furthermore, the Finnish banking authority, as stated above, has been given the right to ask for information relating to money-laundering. Thus the banking institutions cannot refuse to pass information to the Finnish banking authority, and because it is possible to bring charges against a person who has breached the duty of confidentiality, money-laundering charges can be brought against a person who has failed to provide the authorities with information on suspected money-laundering. In order to protect institutions and their employees from liability to customers, the law provides that an institution, or its employee acting in good faith, is not liable to cover any harm which may be caused by the reporting of suspicious transactions. Institutions and their employees are thus immune from liability, even if the disclosure later proves unfounded. According to the preparatory work for the act, such a paragraph is necessary in order to avoid a situation where fulfilling the requirements of the law, that is, the reporting of suspicious transactions, could render the person financially responsible. Thus the objective of this paragraph is to encourage co-operation.

6. A Few Words on Bank Secrecy

Bank secrecy is being lifted as a result of their providing the authorities with information on customers and their transactions. It has been argued that, in particular, the institutions' duty to provide authorities with information on their own initiative is "directly contrary to the principle of customer privacy that has been a hallmark of the banking practice in the US and Europe".[25] It is especially the growing concern with organised crime in general, and with money-laundering in particular, that has caused governments to re-examine the scope of banking confidentiality. The recent legislation in many countries reflects law enforcement concerns rather than a perceived need to regulate the affairs of banking organisations. There is no pretence that the laws requiring customer disclosures

25 HUBER: *op. cit.*, 218.

promote such goals as the safety and soundness of banking. It cannot further be denied that secrecy has been an element of greater or lesser importance in many money-laundering operations in the recent past. The focus on banks and other financial institutions is due to their central role in facilitating the movement of money.

The importance of the issue of bank secrecy can be seen when the international instruments in this field are examined: the Vienna Convention, the European Convention, the recommendations of the FATF, and the EJ Directive on money-laundering all address this question by stating that bank secrecy must be lifted where money-laundering is concerned. However, one should bear in mind that the desire for bank secrecy does not necessarily mean that a criminal activity is involved. Other reasons might be the political, business, or personal motives of the customer.[26] Financial privacy can also be regarded as a fundamental right. Thus, financial privacy should be an individual liberty essential in, and protected by, democratic systems.

How could a reasonable balance among the competing policy objectives of an efficient banking system, promotion of privacy, and effective law enforcement be achieved? The current situation in Finland as regards bank secrecy is that the main rule expressed in banking law is a strict obligation of customer confidentiality. As regards suspected money-laundering, an enormous exception is made to this main rule; it can be stated that, by criminalising a failure to report suspicious transactions, and by providing immunity from liability, the Finnish banking law reduces bank secrecy to nothing when there is a reason to suspect money-laundering. The potentially wide disclosure of information creates a danger that the confidential information of legitimate account holders might be released. It can be questioned whether the exception provided by the Finnish law is too large, for it does not seem possible to identify and report suspicious transactions in a way that would not also greatly affect the affairs of honest account holders. Furthermore, if applied with full force, this approach could result in banks constantly spying on their customers. So, are the banks eventually to be transformed from being the servants of their customers to being spies for the government?

26 HARTE: *op. cit.*, 245.

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Ari HIRVONEN

The Rule of Justice and the Ethical Limits of Criminal Law

I. The Rule of Justice

In contemporary Western legal dogmatism the rule of law is, almost always, taken as a first principle, as a basis or foundation of a legitimate state and legal order. It guarantees not only the legal order's legitimacy but also, and even more importantly, individual freedom according to the law.

Without denying its validity and importance, I will, however, question its fundamental nature: is it really the ultimate rule or the ultimate principle of legal order? And if not, as I would argue, what precedes the rule of law? What comes before it? Then again, why is this question being asked? Why ask questions about something that does not belong to the issues concerning the rule of law; that is beyond, or outside, or exterior to it? Why look after something that, perhaps, always precedes all legal systems, all legitimate states and communities? Why, in general, ask non-legal questions, almost illegal ones? And why try to push things over the limits or borders of modern legal thinking by seeking after something that is beyond the principle, the idea and/or ideal of the just, democratic, legal, law-based society?

Perhaps all these questions will turn out to be unanswerable. This will be the case if that which precedes (or is beyond, outside, etc.) the rule of law is—knowable; that is, something that cannot be defined and imprisoned in a concept, an essence, an idea, a principle, a rule. Perhaps, again just perhaps, what comes before the rule of law is the preceding presence itself; perhaps it is nothing else (or more) than both the progressing ethical demand and the progressing as (*N.B.*) an ethical demand, as a demand for responsibility.

There seems to be no sense, no legal sense, in all these questions and 'perhapses'. Moreover, it appears to be useless to turn to God for a solution; He/She will not come, not anymore. He will not precede the rule of law neither as a sovereign law-giver, as a constitution, legal principles and basic norms, fundamental rights—as a legal positivist would argue—nor as universal moral principles or human rights, reason and rationality—as a natural law theorist would argue.

Consequently again and again, this haunting question returns: What comes before ...? To answer that—and I will answer it whilst not answering it—I must start by making a distinction between two opposing terms: law (or *nomos*, *lex*, *Gesetz*, *jog*, *laki*) and justice (*dike*, *ius*, *Recht*, *igazság*, *oikeus*). And perhaps this other term (the 'other of law', rule of law, all legal orders) is something that demands to be remembered, something that leads us beyond law and, consequently, beyond the rule of law.

Thus instead of concentrating on the rule of law, I will write—and also answer, respond to—about what comes before justice, before the rule of justice. But how to respond, how to be responsible towards the rule of justice? What does it demand from us? What does it demand from the rule of law, and especially, from the criminal justice system?

Before answering this, I must, very briefly, 'define' the rule of justice. As I have already argued, the rule of justice is something that is beyond law, something that precedes or comes before the law and, consequently, it is—must be—the ultimate foundation of all legal systems, all states under rule of law or *Rechtstaats*.

What I have just said does not differ from natural law theories: justice (universal principles/reason) precedes positive rules and norms. But there is a major difference between those theories and my 'rule': the rule of justice cannot be universalised, systematised, thematicised or conceptualised. One cannot reduce it to general and universal principles of natural law (justice). Therefore, it cannot be understood as any kind of system of coherent and stable norms, laws or principles. What comes before the rule of law, any organisation, institutionalisation, legalisation, is fundamental ethics. It is, and here I will follow Emmanuel Levinas (1981),[1] an authentic relationship with the 'other', a response or responsibility before the 'other'. Ethics, in this sense, signifies the fact of encounter, of the relation of myself with the 'other', a scission of 'Being' in encounter without coincidence. I must respond to all singular 'others' and take responsibility for all 'others'. I, as a singular person, am responsible before and for you, as a singular other. And this responsibility I have before any legal arrangements and institutions, before any 'rule of law' or legal system. Here I am for the other.

Such responsibility is the primary and essential structure of human subjectivity, of human relationships, of community, and, of course, of the rule of law. It is not the rule of justice but instead rules of justices that are synonymous with ethics in the sense of fundamental ethics. Justice, as responsibility in concrete situations and in singular human, legal, political, social acts is the fundamental part of the law. It is the ultimate ground for all just legal institutions, principles and rules. No just law without fundamental ethics!

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1 LEVINAS, E.: *Otherwise than Being or Beyond Essence*. Hague, 1981.

This demand requires nothing else than an answer, a response before a particular other, before a foreigner, stranger, different, deviant, criminal, the one who is imprisoned or condemned to death. The ultimate question of a condemned man, is why are you going to kill—or punish—me? Because the law says so, is no answer, not a response which has anything to do with responsibility, ethics and justice.

II. Abolitionism

Perhaps abolitionism—thinking and acting labelled as abolitionistic—by challenging the justification of the criminal justice system, thinks or remembers what comes before the law, that is, ethical responsibility in concrete situations. But how does the rule of justice work through or in abolitionism? How does it demand ethical response and responsibility?

A radical abolitionist would argue that the criminal law has nothing to do with the rule of justice and everything to do with the rule of force, violence, power and might. Instead of this kind of 'illegal' abolitionism, a legal (and here legal refers either to accepted thinking, as opposed to exiled, illegal thinking or to critical legal studies movement that works inside, or on the limits of law) abolitionist would argue that the rule of justice is a fundamental part of the rule of law, and all legal principles, rules and institutions and thus is also a fundamental part of the criminal justice system. Consequently, the criminal justice system is based not only on the rule of law but also, and more fundamentally, on the rule of justice, which limits all legal arrangements, criminalisations, punishments, etc.

To answer this question more precisely, I will next try to clarify what abolitionism as a critical-ethical thinking means and how it challenges the criminal justice system and its justification. Firstly, I will give a general definition of abolitionism. Secondly, I will speak about what to abolish. And finally, I must say something about alternatives to the criminal justice system.

The English verb 'to abolish' comes from Latin *abolere*, to grow out of use. It signifies that something (an institution, custom or practice) is demolished, destroyed or annihilated. Initially the concept of abolitionism was used by anti-slavery movements in USA and England. At the beginning of the period of Enlightenment it was also used by those who fought against capital punishment and torture. From the 1960s onwards it has mainly signified the fight against prisons and imprisonment. More generally, abolitionism means, on the one hand, the radical critique of the criminal justice system and, on the other hand, the opposition to the state's right to punish, *ius puniendi*.

The term abolitionism refers to many different perspectives, goals and strategies. There at least four different interpretation what abolitionism is. Firstly, and most importantly, it can be an ethical perspective. This kind of abolitionism shows that there is no ethical justification for the criminal justice system in general and for punishments in particular. It is wrong to intentionally and systematically inflict pain upon other people even if they are labelled and classified as offenders or criminals. But the

criminal justice system is not only morally wrong; it is also a failure since it cannot even achieve its own goals. It is an ineffective or dysfunctional system: it is not able to solve problems, it does not offer protection for people, general and special prevention cannot be supported with empirical data. In other words, it either does not work or, if it works, it has only negative and destructive effects (produces unjustified suffering divided unevenly between different social groups, labels and marginalises offenders, prevents real solutions, etc.). Consequently, the criminal justice system should be abolished.

Secondly, abolitionism can refer to a social and humanitarian movement. In the USA, convicts and ex-convicts, their families and different church groups are engaged in a fight for prison reforms. These religiously-oriented grassroots groups also work as support groups for those imprisoned.

European abolitionism has always been more politically oriented. Thus, thirdly, we can see abolitionism as a political strategy to abolish prisons or, more generally, all punitive and repressive modes of social control. The Norwegian penal pressure group KROM, founded in 1968 by left-wing intellectuals, convicts and ex-convicts, not only collectivised the struggle for prisoners' rights but also fought against the whole penal system as an instrument of state control. The same kind of politically oriented prison movements were also founded in Sweden, Denmark and Finland at the end of the 1960's. In France GIP (*Group d'Information sur les Prisons*) produced counter-information concerning the official criminal policy and conditions in French prisons. It also created for prisoners the right and possibility to present their points of view and organised protests against prisons.

The main theorist of the KROM, Thomas Mathiesen (1974), has written about the strategy of negation: one must say a loud and clear no to the prison system by using negative reforms that will not give a new legitimisation to the penal system.[2] These negative reforms must be of the abolitionist kind: in the long run the whole prison system will be abolished; in the short run all walls inside prisons, which are not strictly necessary, must be abolished. Mathiesen also warns us about positive reforms and alternatives to imprisonment since alternatives are quite often defined so that they become a functional part of the criminal justice system. And after reforms have lost their abolitionist (or destructive) effect they will do nothing else other than strengthen the existing penal order ('net-widening' and 'net-tightening' effects).

From the 1980s onwards, abolitionists have been faced with prison expansion, and consequently, many of them have formulated abolitionism in more modest terms: the goal is now to prevent the expansion of the prison system and bring it to a full stop. This kind of defensive abolitionism fights for a permanent ban on prison building and not for the abolition of all prisons like offensive abolitionism did. It is also open for positive reforms.[3]

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2 MATHIESEN, T.: *The Politics of Abolition*. Oslo, 1974.

3 MATHIESEN, T.: *Prison on Trial*. London, 1990.

Fourtly, abolitionism can be a critical legal strategy that, by using legal theory and dogmatics, fights against the criminal justice system and punishments. This kind of abolitionism limits the scope of criminal law by using human and fundamental rights and legal principles. As an example, legal abolitionism would take the *ultima-ratio* principle seriously: firstly, it should be the principle of all criminalisations (are there less repressive and punitive ways to protect and ensure fundamental rights of other people—and protection of these is the only reason why we should have criminal law at all); secondly, it should also be a legal rule when norms are applied (even if the deed is criminalised), that someone (the judge) should consider if there are in a particular and concrete case, less repressive and punitive ways in which to solve the conflict; whether criminalisation and punishment is absolutely necessary?.

As has been seen, there exists not just one abolitionism, but many different abolitionisms. The main object of abolitionism has been prisons and imprisonment. But it is not enough to concentrate only on this one form of punishment, for at least two reasons. Firstly, there are other more inhuman and more cruel punishments—for example capital punishment, torture, corporeal punishments—than imprisonment. Secondly, a risk always exists that alternatives to imprisonment will lead to a more repressive and effective control system: the medical treatment and hospitalisation of offenders, gene-technology, technical prevention and control can all have 'net-widening' and 'net-tightening' effects. Consequently, abolitionism must question the justification and meaning not only of punishment, but also of all other kinds of control and disciplinary systems, institutions and technologies, by whatever name they are known.

Abolitionism may also concentrate on abolishing certain kinds of criminalisations. In that case, it refers either to decriminalisation or de-penalisation. Decriminalisation means that certain offences (like victimless crimes) are abolished. More radically understood, decriminalisation means the total abolition of the whole criminal law. This total decriminalisation should be the long term goal for abolitionism even if it speaks for partial decriminalisation (and this is the main difference between abolitionism and a minimalist criminal policy).

De-penalisation means that certain acts will formally remain illegal, but will not be prosecuted, or the offender will not be punished. (One may also speak about *de facto* decriminalisation when referring to this kind of de-penalisation). More generally, de-penalisation does not reject the concept of crime as moral condemnation. It is more against the repressive and punitively-oriented way in which these crimes are dealt with in the penal system. A radical de-penalisation would mean that we would still have criminal law, but not penal law. But perhaps this is nothing else than taking the symbolic function of criminal law seriously. This kind of de-penalisation also recalls the true meaning of punishment: the English term comes from Latin *punitio* which originally meant that which we would today call 'sanction'; that is, the ratification or hallowing of rules. A sanction guides us to find a regulation when a conflict arises. And norms of criminal law and their ratification in 'civil' procedure could help, guide, instruct us to reflect upon the right and just direction in society: instead punishment (pain, suffering, harm) we need sanctions.

More theoretically-oriented abolitionism aims to abolish the concept of crime. This dangerous concept must be deconstructed by showing that no such thing as an ontological or natural crime exists. Crime is nothing else but a socially constructed product. And when this is understood any simplified reaction to it in the form of punishment becomes very problematic.

III. Alternatives to the criminal justice system

According to abolitionism, the criminal justice system is beyond repair. It cannot be reformed or made more efficient, just and humane. Therefore abolitionism must seek other possibilities to deal with unjust and morally wrong behaviour, with problematic situations and conflicts. Instead of offering a finished program for the future or an alternative utopia, abolitionism opens our thinking to possibilities that lie beyond punishment-oriented criminal law.

Increasing tolerance and the accepting of different ways of lives and morals is one relevant alternative. In these cases social control becomes unnecessary. Abolitionism does not always want to do away with all forms of social control since tolerance is not always an alternative. There are acts and cases that are morally wrong and harmful for other persons and when social control is necessary: anything does not go! More generally, one can argue that social co-existence would be impossible without some kind of control. In one sense, language already is a form of social control—and perhaps the most fundamental form of it. René van Swaaningen has argued that the problem is not social control in itself, but the repressive, punitive, and inflexible character of formal social control systems.[4] And for this reason, abolitionism must adopt an informal, reflexive and participatory model of justice, and if in some cases penal intervention is indispensable, then civil liberties and human rights must be guaranteed.

According to Herman Bianchi, the criminal law is still based on the ideas of inquisition and it lacks a moral foundation.[5] He proposes a *tsedeka-model*. This ancient Hebrew notion of justice and righteousness is based on conflict resolution rather than punishment. In the reparative model of justice the conflicting parties themselves play the central role, and this enables people to experience law as being supportive of their lives and social interactions. It offers a chance to resolve conflicts and reach a non-punitive solution. If the present system of criminal law is anomic and alienating, because it frustrates the main participants in a crime conflict; the new model of justice is eunomic and integrative, offering participants a way out.

Bianchi also argues that the present system of punitive justice has forgotten ideas of forgiveness and mercy. But mercy and justice are completely interwoven, the one

4 VAN SWAANINGEN, R.: *European Critical Criminologies. A Future for a Social Justice.* Rotterdam, 1995, 130.

5 BIANCHI, H.: *Justice as Sanctuary. Toward a New System of Crime Control.* Bloomington, 1994.

non-existent without the other: "Mercy is just, and justice is merciful".[6] Thus, mercy in the criminal justice system would mean a willingness for human interaction and help given both to victims and offenders in overcoming their conflict and restoring human relations and a right order.

Louk Hulsman puts his trust in self-regulating mechanisms at the 'life-world level'.[7] He discards the criminal law's absolute definitions of reality and crime since they block the search for other and more productive solutions. The criminal procedure itself is non-communicative, since it categorises concrete situations and experiences. Without this reductionistic way of thinking we are able to understand better the real, concrete and unique situations. Instead of the 'guilt-principle', punishment and anonymous penal reactions, Hulsman seeks the 'risk-principle' and non-institutionalised forms of correction.

Nils Christie also argues for decentralised and autonomous methods of dispute settlement.[8] The penal law steals conflicts from those directly concerned, and instead of solving conflicts it only labels an offender. An alternative is a dialogue which enables understanding of conflicts and produces solidarity between the parties involved.

This already shows that the criminal law could, according to abolitionism, be replaced either by informal dispute settlement procedures or by civil law, and punishments could be replaced by tolerance or by other forms of less institutionalised and less anonymous forms of social control, caring and restitution.

I will now leave these alternatives unfinished, leave the problems attached to them un-answered (re-justification of social control, more efficient and repressive social control mechanisms without legal guarantees, the alternatives' inefficiency in cases of organisational, economical, environmental, etc. kinds of crimes) and open them for your own consideration by ending this part with a question: what would happen if the criminal law would be abolished tomorrow?

IV. Ethical limits of criminal law

Abolitionism challenges the criminal justice system. It questions criminal law's justification and efficiency. From this we can now proceed to the rule of justice, and discuss how it, from an abolitionist perspective, could be—on the one hand—an alternative model of justice and—on the other hand—used to limit the scope of criminal law.

The rule of justice demands ethical justification of the criminal justice system. One cannot avoid this fundamental demand by referring to the rule of law; in other words,

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6 *Ibid.*, 48.

7 HULSMAN, L.: "Critical Criminology and the Concept of Crime", in BIANCHI, H.—van SWAANINGEN, R. (eds.): *Abolitionism. Towards a Non-repressive Approach to Crime.* Amsterdam, 1986, 25–41.

8 CHRISTIE, N.: *Limits to Pain.* Oxford, 1981.

one cannot hide behind the positive norms: "because the law says so" is not an ethical response.

This demand differs from traditional jurisprudence which works and thinks in the area of the rule of law by forgetting, or excluding, the rule of justice and its ethical demands. That being so, there is no real responsible response or pure ethical thinking. Instead of real justificatory discourse, an end (i.e. the criminal law and its existence) is taken for granted, and its justification is only a means to this end. The justificatory discourse is only used to justify what exists as a fact and what must exist. In other words, the justificatory discourse does not establish what it justifies, nor de-justifies what it does not establish. In that sense, it is just a technical justification.

This utilitarian and teleological rationality means that all the general penal theories—be they absolute or relative, retribution-, deterrence-, moral- or utilitarian-oriented—serve to justify penal intervention. At the same time, it is taken for granted, that criminal and penal law are indispensable and ethically just and correct from a utilitarian point of view. Legal knowledge is thus nothing else but dogmatics that provides final justifications. Consequently, jurisprudence has become a method of forgetting ethics and the genuine experience of civil life.

The demand of the rule of justice means that one has to remember, and re-remember, the forgotten and repressed. In order for there to be any justice in a democracy governed by the rule of law, one has to recognise the essential link between law and ethics. Abolitionism insists that they are, and must be, completely interwoven.

This means that one has to justify penal intervention again and again. These justifications have to be based, to be founded, and to be the ultimate ground for criminal law. One has to justify not only criminal law and the penal system in general but also special punishments (especially capital punishment and imprisonment), special criminalisations and penal interventions in individual cases.

Every single time one—be it a judge, a prosecutor, an advocate, a legislator, a criminal law professor, a criminologist—has anything to do with the criminal justice system, one has to remember the call of ethics and respond in a responsible way to the demand of justice, before the 'other'. The rule of justice asks not only the general question—"Is it ethically right and just to criminalise and punish?"—but also the particular question in every particular and concrete situation—"Is it ethically right and just to condemn another in this particular situation?". And if one cannot properly justify the penal intervention in the particular case (or on the general level), it should not take place.

Thus the question of justification is not only an abstract and universal question, but one which is also particular and concrete. Abolitionist responsibility consists of the constant and unremitting questioning of ideologies, theories, principles and foundations of criminal law and its application in concrete cases. And this perpetual questioning has its horizon in responsibility for an 'other'. The thinking of the rule of justice means re-thinking of the 'other' of legal knowledge, not only other laws or forms of legal knowledge or models or theories of justification. It demands re-thinking and remembering the particular, concrete, existential responsibility before the singular 'other' in his/her singularity and 'alterity' in the singular situation.

The rule of justice functions and operates both on the level of the legal system and concrete legal decisions. Not as a moral principle or as an abstract and formal rule but as an ethical particularity it always precedes procedures of legislation and 'universalisation'; it always precedes laws and legal interventions; it always demands an ethical justification; it always returns to demand responsible responses. Henceforth, the 'rule' is something other than a rule: it signifies the moment of obligation, my irreducible responsibility when I am obliged to respond to a particular 'other', and when I have to make a decision that touches him/her (like criminalising or tolerating his/her acts or punishing or forgiving him/her). Thus, the question that interrupts the continuity of legal positivism is "how to be just to a particular 'other'?"

The rule of justice is in its concreteness an alternative model of justice. And in its demand to justify it limits criminal law and penal interventions. All criminalisations (both in general and concrete cases) which are not in accordance with the demands of justice, or which do not promote justice, are unjust laws or decisions. Thus, abolitionism does not represent utopian thinking. Instead it means inventing the fundamental ethics of the rule of justice again and again and extending it to all areas of criminal law and its practices and institutions. Even if a criminal-law-free society will never be present, will never come, abolitionism is still always, already working at the heart, at the core of criminal law; working there as an ethical demand, as the rule of justice. Abolitionism as the rule of justice practices an on-going interruption of the criminal law by ethics: legal knowledge must be at the service of fundamental ethics. A just 'criminal' law is an ethically-grounded form of law, which is continually being called into question by asking for its justification and justification of its practices and institutions.

All in all, abolitionism is just an effort or an unfinished task of an infinite responsibility.

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Tibor HORVÁTH

The Problems of Constitutional Regulation of the Right to Life

In the words of the Hungarian Constitution, "[the] right to life is an inherent right of all human beings"; that is, to anyone without distinction as to nationality, ethnicity, religion, political conviction, etc. This principle also appears in several international documents, such as the Universal Declaration of Human Rights issued by the United Nations (Article 3); the United Nations' International Covenant on Civil and Political Rights (Article 6); and the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 [European Convention on Human Rights (Article 2)]. However, these international documents do not talk about the content and the extent of this right.

Yet the content of this right to human life can be defined. Its basis is in the ethical command "Thou shalt not kill", thousands of years old, which obliges both individuals and the state to have respect for life. Therefore it is an inherent right of a human being to have his right to life respected by everyone; the state is also obliged to ensure this right with the power of the law.

The importance of human life is a primary value which cannot be denied by any philosophical, ethical, or sociological system. It is also clear that the right to life is only possessed by a human being. But it is unclear from what time the law should begin to protect human life, and for how long this protection should continue. When does human life begin: at insemination or at birth? Does it cease at the moment of death, or can it even end before this as the result of some kind of state action, or as a consequence of the right of the individual to renounce life?

The constitutional regulation of the right to human life depends on the answers given to these questions. As far as the beginning of life is concerned, the regulation of

abortion poses a problem, whilst in the case of the cessation of life, questions concerning capital punishment and euthanasia may arise, and require a constitutional solution. Also at issue is whether the right to human life should be an absolute value, or whether any other legal interest could limit it. Connected with this are then questions raised by justified defence and difficulties of the constitutional justification of the legal use of firearms by state organs.

I. Abortion

There has recently been a widespread ethical, political, and legal debate in Hungary on the topic of abortion. After the Constitutional Court had expressed its opinion[1], Parliament passed a law on the protection of embryonic life (Act LXXXIX of 1992).[2] However, the law does not answer the question of whether the right to human life also includes the life of the embryo. During the debate in Parliament, there were several opinions expressed for and against the embryonic right to life. The law which entered the statute books did not change the attitude accepted in the Hungarian legal system, namely that an important element of the legal interpretation of the human state is the legal entity, which begins at birth. To put it simply, the right to life starts at the time of birth. I find it impossible at present to give a wider constitutional definition of the interpretation of being human—using the terminology of the Constitutional Court—whilst taking the vague nature of this interpretation and its legal consequences into consideration. It is essential to note, in connection with this issue, that neither the international documents nor the recognised European constitutions include any regulations regarding abortion. At present European legal systems, and what is more, even the European Court of Human Rights in Strasbourg, still refuse to include the question of abortion in the genus of the right to life.

II. Capital Punishment

The Hungarian legal system today does not recognise capital punishment. Replying to a motion by the League Against Capital Punishment, the Constitutional Court of the Hungarian Republic, in its decision published on the 24th of October, 1990, declared that capital punishment is unconstitutional and repealed all the statutory provisions concerning the infliction and execution of capital punishment. Soon after making this decision the Hungarian Republic became a signatory to the European Convention on Human Rights. The Convention, together with its 8 additional Protocols, was ratified in

1 64/1991. (IX. 17.) AB határozat (Decision of the Constitutional Court).
2 1992. évi LXXXIX. törvény (Act LXXXIX of 1992).

Act XXXI of 1993.[3] As is well-known, Article 1 of Protocol No. 6 states that "[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed."

The question is whether it is still necessary to deal with capital punishment after this ratification, and whether there is anything yet to be done in the constitutional process in connection with this apparently already solved legal problem. To answer this question it is necessary to make a brief survey of the procedure by which capital punishment was abolished, the decision of the Constitutional Court, and the legal situation which followed.

This method of abolishing capital punishment is unprecedented in international legal practice, and all the resolution of the Constitutional Court appeared to be an unexpected and surprising step to the Hungarian public. Questions often asked at the time, and still today, are what made this step possible, what were the reasons behind it, and why was the medium of the Constitutional Court used?

In 1989, in the course of the change in political regime, and of the building up of a democratic and constitutional state, it was clearly seen that the preservation or abolition of capital punishment was a social, political, ethical, and legal dilemma which, sooner or later, society would have to face. In the 1980's it was mainly professional legal circles who were aware of, and influenced by, the European development of law based on social rationality and the recognition of human rights, which had already resulted in the banning of capital punishment from the arsenal of criminal law on the major part of the continent.

The government which was developing the political strategies of the transition was undoubtedly sympathetic to the idea of abolition, although it never committed itself to it publicly. Neither of the political parties supported the unpopular idea of abolishing capital punishment. At the same time, as more and more of society learned about the misuses of political and legal rights in past decades, and particularly about the size and scope of the retribution after the uprising of 1956, the public came face to face with the ethical and political dilemma of the problem, and turned away from capital punishment. It was due to this fact that Parliament carried the motion of the Minister of Justice not to impose capital punishment for political offences—in particular, offences against the state.

In early 1989 lawyers and intellectuals established the League Against Capital Punishment, which planned to launch an extensive campaign for the complete abolition of capital punishment. However, at the same time as the idea of abolition was spreading among the members of Parliament, and there were adherents of abolition in every

3 The Convention was transformed into the Hungarian legal system by XXXI Act of 1993; it became, however, effective with respect to the Hungarian Republic on 5 November 1992. See e.g. MAVI, V.: *Az Európa Tanács és az emberi jogok (The Council of Europe and Human Rights)*, Budapest, 1993, 19.; BÁRD, K.—BÁN, T.: "Az Emberi Jogok Európai Egyezménye és a magyar jog" (The European Convention on Human Rights and Hungarian Law), *Acta Humana*, 1992, Nos. 6–7; GELLÉR, B.: "A 'büntetés' fogalma az emberi jogok és alapvető szabadságok védelméről szóló Egyezmény 7. Cikkének 1. bekezdésében" (The Concept of "Punishment" in Article 7(1) of the European convention of Human Rights), *Magyar Jog*, 1997. No. 2, 105–107.

political party, the party leadership did not dare to address the issue of abolition, presumably for tactical reasons. Yet the amendments to the Constitution stated that "[I]n the Hungarian Republic all persons have an inherent right to life and human dignity which no-one can be deprived of arbitrarily" (Act XX of 1949 modified by Act XXXI of 1989, Article 54).

Considering all these factors, the League decided to take the case before the Constitutional Court, since they believed that capital punishment was irreconcilable with the principle of law expressed in Article 54 of the amended Constitution. In January 1990 the League submitted its petition to the Constitutional Court, and moved that the Constitutional Court should declare capital punishment to be unconstitutional.

The reasons for this petition were presented in a study which set forth in detail the European traditions of the movement against capital punishment, offered a survey of the present state of capital punishment in Hungary, and discussed the reasons for and against its abolition.

The League developed its position against capital punishment by relying on the experiences of both Hungarian and international criminal research. According to the standpoint of the League, the problem has an ethical issue at its centre: capital punishment cannot be ethically justified; it is irreconcilable with the constitutional appreciation of the right to life; and the state cannot justify its right to deprive its citizens of life by any legal title. All the other arguments and counter-arguments judged the efficiency, expediency, or inexperience of this particular punishment from a utilitarian point of view.

On the 16th of October 1990, the Constitutional Court discussed the petition of the League in a full public meeting. Subsequently the Constitutional Court decided to abolish capital punishment by a vote of 8 to 1.

It is important to emphasise that the Constitutional Court based its decision not on political, historical criminal law, or on criminological arguments, but exclusively on the natural legal conception of human life which can be deduced from the statements of the Constitution. The Constitutional Court, in justifying its decision, reasoned as follows.

Comparing Articles 8 and 54 of the Constitution, we can say that the right to life and human dignity—irrespective of citizenship—is an inherent, inviolable, and inalienable fundamental right of every human being in Hungary. Human life and human dignity constitute an inseparable unity and are the highest value, preceding everything else. The right to human life and human dignity is a fundamental right, constituting a unity which is the source and precondition of several other fundamental rights. The right to human life and human dignity as absolute values represent a limitation on the punishing power of the state.

Pursuant to the decision of the Constitutional Court, the prohibition of Capital Punishment is absolute: it covers military and civil justice, as well as in time of war or any other state of emergency.

After the abolition of capital punishment, opinions were voiced frequently and regularly claiming that the increase in criminal cases, especially serious murder cases, could be attributed to the lack of capital punishment. Following certain particularly cruel

cases which caused public indignation, the demand to restore capital punishment gathered force among the public. In the present constitutional dispute some political groups are pressing for the restoration of capital punishment.

However, it is important to emphasise that it is not possible to find a direct relationship between the abolition of capital punishment and the increase in crime. The reasons for the considerable increase in crime after the change in political regime should be attributed to other factors. It can be demonstrated, even without a comprehensive criminological analysis, that the change in political regime and its social and economic side-effects are among the main factors. The change in regime destroyed several old values, along with the respect for norms developed under the old regime, and the new regime has managed only very slowly and with contradictions to build up new forms of value and norms. Additionally, the difficult economic situation, the decline in living standards, together with the opening of the country's borders and the appearance of international crime, have resulted in an increase in criminal cases. The same phenomenon can be experienced in all the former socialist countries, independently of whether or not capital punishment has been abolished. During the process of political changes, capital punishment was abolished by presidential order in Romania and Czechoslovakia; it remained as a legal sanction in the former Soviet Union and the states of the former Yugoslavia, Bulgaria, and Poland.

Taking all these factors into consideration, I cannot find any reasons which would make it necessary to review the decision of the Constitutional Court due to public pressure, or any other emotional or political opinions. I believe that

— abolition of capital punishment in Hungary was a both ethically and legally justified move;

— the abolition of capital punishment proved, and continues to prove, the democratic and constitutional commitments of the Hungarian Republic;

— the dilemmas caused by the abolition of capital punishment can be handled legally, for example by introducing life imprisonment to replace capital punishment; however, these dilemmas—because of their extremely complex social, economic, and socio-psychological character—can be solved only in the long run.

Turning back to the efforts to restore capital punishment, the following must be noted. Act XXXI of 1993, mentioned above, which ratified the European Convention on Human Rights and the wording of its Protocol No. 6, compels the Hungarian Republic to abolish capital punishment. In international law it is not impossible to withdraw from obligations already accepted, but it may have further political and international legal consequences.

It has been proposed that capital punishment should be restored by means of a referendum. However, I have to say that this is a rather naïve and legally impossible idea. Without going into details I will refer very briefly to Act XVII of 1989, Article 6, paragraph 1, point c, which sets out the legal regulations of a referendum, and which excludes the possibility of a referendum "in the case of internationally accepted obligations". Since this obviously applies to Act XXXI of 1993, the legal conclusion is quite clear: the question of capital punishment cannot be decided at a referendum.

Having dealt with these introductory questions, it should now be examined whether it would be necessary, or indeed possible to include any regulation on the abolition of capital punishment into the new Constitution.

For my own part, I cannot see any reasons why the new Constitution should not regulate the right to human life. We have to suppose that the present 8th and 54th Articles of the Constitution will also be included in the new law. It is not impossible that the paraphrasing of the new Articles may be modified, with respect to certain structural and stylistic aspects, but this does not imply substantial changes. The starting point is that the new paraphrasing should lay down that the Hungarian Republic accepts the inviolable and inalienable fundamental rights of the human being without restriction, and it statutorily regulates the right to human life.

As a consequence of including these regulations in the future Constitution, there seem to be two legislative possibilities as far as capital punishment is concerned.

The first possibility appears to be the more satisfactory. As the content of the 8th and 54th Articles will presumably not change, it is possible to adopt a position which says that, due to the previous decisions of the Constitutional Court regarding capital punishment as unconstitutional, it is unnecessary to have separate regulations in the Constitution. This position can be supported by the fact that the Constitutions of several European countries do not mention the prohibition of capital punishment, although these countries are signatories to the European Convention on Human Rights and have accepted the recommendation of Protocol No. 6. The advantage of this solution is that it may spare Parliament from actual debate—which would probably strongly divide the political parties—and from taking a public position on either side. However, this advantage is at the same time a disadvantage. The public would have difficulty in understanding why Parliament had tried to hide behind the Constitutional Court, and why it does not take ethical and political responsibility for the decision. Additionally, the danger would still remain that later any political force could take advantage of the "hidden" prohibition of capital punishment for the purposes of a political attack, thus mobilising the public, for example, into collecting signatures in favour of a referendum, against the constitutional institutions.

No matter which side this solution is seen from, its possible advantages and disadvantages, my firm opinion is that this way should not be attempted.

There is still a second possibility: the Constitution should state that, in accordance with the European Convention on Human Rights and other international documents, the infliction and adoption of capital punishment is prohibited both in time of peace and of war. This solution was chosen by European countries which recognised the inhuman, brutal, and cruel nature of capital punishment, and its inconsistency with human rights after breaking the traditions of a dictatorial system. That was the way that was followed by the Federal Republic of Germany in 1949 (Fundamental Law, Article 102), as well as by Austria in 1955 (Constitution, Article 85), by Spain in 1978 (Constitution, Article 15), and by Portugal in 1976 (Constitution, Article 24). It is natural in this situation to debate in Parliament, and to openly confront the public and other political forces. This is the only solution which would create an unambiguous situation, and would

additionally demonstrate without any doubt the ambitions of the Hungarian Republic to integrate fully into Europe in the field of human rights.

As far as the structure is concerned, the constitutional prohibition of capital punishment should be included in the paragraph containing the rights to life, in the catalogue of fundamental laws.

III. Euthanasia

The problem of euthanasia was first addressed in Hungarian legal literature in the inter-war period, under the influence of European—mainly German—literature. After the Second World War, as the actions of German fascists in carrying out "merciful death" became well-known, the question of euthanasia was quietly dropped, and it did not appear even in legal literature. This changed in the 1970's, partly because of the sudden developments in medical science, and partly because of the increase in activities in favour of legalising euthanasia, especially in the Anglo-Saxon countries.

Since the beginning of the 1980's, the movement to legalise euthanasia has appeared in newspapers and magazine articles, in deontological literature, and a legal doctoral thesis was even written on this problem. This author argued that "easy death" should be controlled as a human right, and that the statute on the right to human life should be extended by the "right to death". However, Hungarian criminal and civil legal literature had traditionally opposed legislation on euthanasia. There is a mutual understanding in the literature that euthanasia goes beyond criminal law, its appearance is the result of medical science, and its approval or disapproval is a deontological, medical, and legal dilemma.

What sort of answers can be given to the questions which emerge in connection with euthanasia from a criminal and constitutional point of view? A brief historical review is necessary.

According to the evidence of Mommsen, the principle of *volenti non fit iniuria* did not prove effective in Rome in the Imperial period. At that time murder was considered to be a crime not against the individual, but rather against the community. In the early Middle Ages, with the influence of Christian religious ethics, a new principle was established according to which the right to life is inalienable and does not belong to the area of free will of the individual. However, in the 17th and 18th centuries views were already appearing which considered euthanasia and the potential generosity with which it could be employed—for the purposes of compassion, sympathy, and the relief of unbearable pain. Euthanasia was regarded as being distinct from any other kinds of murder, and it was proposed that it should merit a lighter sentence. That is how a new criminal act was born in the 19th century, namely "mercy killing", which was a form of murder liable to a lighter sentence. This phenomenon can be found in the Criminal Code of the German Empire in 1871, and then later, in the first half of the 20th century, in several European penal codes, such as the Italian, Swiss, Danish, Norwegian, and Polish.

In Hungary the first mention of "mercy killing" can be found in the Criminal Code of 1843, and then later in the Criminal Code of 1878. Article 282 of the *Csemege Codex*

states that "Anyone who is caused by the firm wish of someone else to kill him" commits the act of "mercy killing". This provision was valid until 1961, although whilst the law was in force, hardly any such cases were taken to court. The Criminal Code of 1961 rejected the idea of "mercy killing", and ever since then the judgement of euthanasia comes under the general regulations referring to premeditated murder.

When dealing with the present debate on euthanasia, I have to emphasise that different forms of euthanasia should be treated in different ways. There is not, and should not be, any dispute about the fact that non-voluntary or forced euthanasia should be excluded from this area. To be more precise, the only possible response to this type of euthanasia should be to punish it as an act of murder.

Criminal judgement of voluntary euthanasia should be differentiated from that of involuntary euthanasia. Unfortunately, there is no common reaction among doctors and legal professionals, as regards the judgement of actions of this kind; this is proved by the confusion in the terminology, and the inconsistency in the legal literature on this problem.

There is talk of "euthanasia in practice" even in cases where a doctor tries to ease the suffering of a terminally ill patient with narcotics, without the intention of hastening the patient's death by this action. I firmly believe that such actions cannot be either legally or ethically censured. Easing the suffering in a state of agony without hastening death—that is, making possible a more humane and easy death—is not unacceptable. Rather, it is one of the responsibilities of doctors. No problem emerges from a legal point of view, because death has occurred in natural circumstances, and there is no connection between the use of narcotics and the occurrence of death. Therefore, I personally do not regard this case as one of euthanasia, and it is irrelevant from a legal point of view.

However, this case described above should be strongly distinguished from cases where an overdose of narcotics is given to the patient, and as a consequence it leads to death. Here the dilemma is the following. The normal dose of painkiller does not ease the pain of a patient suffering from a painful and terminal illness, and the doctor increases the dose of the drug. Although the doctor is aware that this will ease the pain, he is also aware that it can hasten death. If the patient subsequently dies, as a consequence of the increased dose of the drug, then the doctor has actually shortened his life and hastened his death. Western ethical literature exonerates the doctor from this responsibility by the principle of "secondary effect", and considers that the aim of the doctor was not to shorten life, but rather to ease pain.

However, from a legal point of view this case is not so simple, since the increased dose of painkiller has actually shortened the life of the patient. In other words, it has a causal connection with the patient's death. The question is whether the doctor's act was legal from a criminal point of view. My opinion is the following: the illegality of the doctor's action is precluded, on one hand, by the principle of risk-taking, and on the other, by the principle of professional responsibility. That is, the doctor has to take responsibility for hastening death by giving painkiller immediately. And, as in the case of dangerous operations, the actions of a doctor in taking a risk are not considered to

be illegal, because this same principle of permissible risk-taking exonerates the doctor of responsibility and blame.

However, it is also legally accepted that it is the doctor's professional responsibility to ease pain as well as to protect life. In certain cases, where the two rightful individual interests contradict each others the law should show the way out of the dilemma. In the case of such a collision of responsibilities, this would be if the doctor can freely choose between responsibilities based on his scientific and ethical convictions, and he cannot be censured for his choice.

In any other cases when active euthanasia is carried out at the request of either the patient or any of his relatives, it is considered to be illegal from the point of view of criminal law; it can be partially explained by the humane motivation of the doctor, but cannot be excused.

The question is whether this rather inflexible position is right, or whether a change in the regulations on the criminal evaluation of active euthanasia would be justified.

All those who argue for the legalisation of euthanasia in fact commence from the utilitarian idea of the value of life. They attribute a smaller value to life when its usefulness is declining or approaching its end. That creates the idea that the preservation of life in the case of a terminal and painful illness, or in the final period of agony, is not in the interests of the patient, his family, or society. This conclusion is encapsulated in the concept that the individual has the right to life and to death. Those demanding a more active participation by medical science also deduce from this conception that in addition to preserving life (by curing the patient), provision of an easy death, or in certain cases the shortening of agony, is also among the responsibilities of medical science.

In my opinion, this reasoning is not acceptable to consistent ethical or legal thinking. Not acceptable firstly because the law regulates the protection of life by a general norm. "Thou shalt not kill" was made into law because this ethical regulation was turned into a general legal term. A criminal prohibition's guaranteeing function results partly from its successful application as a general demand. And the generality of the principle is, at the same time, the most important guarantee of its success. It is the guarantee that the lives of all citizens, without distinction as to nationality, sex, condition of health, and age, should be protected by the power of the law. Article 54 of the Constitution talks of the right to life in the same sense.

We are not speaking of the fact that the respect of life by any means and in any circumstances, and the autonomy of the individual, the fundamental acceptance of free choice as a basic value, contradict each other. However, the main obligation of a constitutional state is to ensure the right to life against any attack, abuse, or unnecessary risk.

Most doctors share the same opinion without distinction as to ideology or religion. The official position of the Ethical Board of the Hungarian Chamber of Doctors, dated 12th July 1993, expresses the same idea:

"The doctor who carries out euthanasia brings death closer than it would naturally be. Doctors take an oath to cure patients and not to take their lives. Any actions which

may lead to the taking of life are in contradiction to both the medical profession and to deontology. The Hungarian Chamber of Doctors rejects either form of euthanasia."

To summarise, my opinion is that, even today, active euthanasia contradicts the principle of the fundamental protection of life, and is not consistent with the ideas of medical profession. It is not acceptable to include it in the Constitution, that is, to acknowledge it as the "right to death". It is not accidental that European constitutions do not accept the "right to death", a position shared by the international human rights institutions in Strasbourg.

The case of passive euthanasia is quite different. Since the 1960's, the development of medical science and technology has shaped new medical practices and attitudes. With the increase in transplantation and improved artificial feeding, the uncertainty regarding passive euthanasia has grown both among doctors and in the legal literature.

Firstly, it must be pointed out that in the case of passive euthanasia we are talking of a particular deontological problem, about an inner conflict of conscience. The question is how far and with what kind of equipment should a doctor keep a patient alive whose life is naturally approaching its end. Is he obliged to utilise anything, that is, any medical equipment currently available, to maintain the patient's life? Or, based on his professional knowledge, is he permitted to cease using any artificial equipment, and thus by this action permit nature to take its course?

According to generally held opinion, doctors should employ increasingly sophisticated technical and scientific techniques, but they must not take advantage of them. The doctor does not have the right to take a humane and easy death away from the patient on account of a false, one-sided interpretation of a doctor's responsibility. The artificial, almost aggressive sustaining of human functions does not mean that life is lengthened, but rather that the agony of death is extended. Delaying or hastening inevitable death are both considered to be a criminal offence—an opinion which is increasingly widespread in the medical community.

In vindication of my previously expressed opinion, I would contend that in the case of dissociated brain-death the re-animator should have the right to be assured not to be kept alive with the help of medical equipment. That is, if restoring self-supporting life without medical equipment is not possible. When this point is reached can only be decided by taking all the conditions of the case into consideration. If this point has arrived, and the doctor decides to dispense with any further employment of medical equipment, the doctor cannot be censured for his "negligence". The principle of *lege artis* defines the legality of "negligence", which means that the doctor has acted in a way which both observes the regulations of the medical profession and at the same time is in the patient's favour.

This opinion corresponds to the position of the Ethical Board of the Hungarian Chamber of Doctors, as quoted above.

Taking all these factors into consideration, my opinion is as follows: passive euthanasia is justified in the group of cases discussed above, and it should be acknowledged as a moral and legal action, for which the doctor cannot be censured, and for which he does not bear a moral and legal responsibility. Carrying out passive

euthanasia will always be a dilemma of medical knowledge and the individual's conscience, and all bureaucratic solutions have to be excluded from this question.

IV. An Exception to the Statute of the Right to Life

According to the Constitution, the right to life ensures absolute protection for human life—in the sense of the legal interpretation of "human"—from birth to death. This fundamental right cannot be limited by the state, and its effectiveness has to be ensured by law with regard to both individual and state actions. However, those provisions have existed in European legal systems, as well as in Hungary, for centuries, which makes it possible for any individual as well as for organs of the state to prejudice the right to life of any citizen in favour of certain rights and legal interests. There are two groups of cases relevant here. One is the legally justified defence and state of necessity known in criminal justice; the other is the legally justified use of firearms by organs of the state. In the former case, the law allows for the elimination of a person who is illegally and aggressively attacking another or, in cases of necessity, the disregard of others' rights by a person in an emergency situation (Penal Code, Article 29, Article 30). In certain cases, where the state is carrying out actions in order to maintain public security, law, and order, the law empowers the executive forces of the state to use firearms to kill individuals. These cases are, for example, those where serious crime is being countered, where a person who has committed a serious criminal offence is being apprehended, or to prevent an attempt at escape (c.f. 1994 Act on the Police Force, Articles 52–57). Almost the same legal regulations can be found in the legal systems of all European states.

It is important to point out that there is a serious contradiction between the fundamental Constitutional law on the right to life, and the above mentioned statutes. This because although these statutes establish exceptions to the law in force regarding the right to life, these exceptions are not acknowledged by the Constitution.

This contradiction is not a characteristic only of the Hungarian Constitution. I have no knowledge of any other European Constitution which contains regulations overruling this contradiction. This legal problem is well-known in the international legal literature which deals with human rights, and several solutions have been suggested. The only international document—which also concerns Hungary—which gives guidelines for the solving of this problem is the European Convention on Human Rights. Article 2(2) states that "Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of no more force than is absolutely necessary:

a) in defence of any person from unlawful violence;

b) in order to effect a lawful arrest, or to prevent the escape of a person lawfully detained;

c) in action lawfully taken for the purposes of quelling a riot or insurrection."

There is no doubt that point a) of the Convention refers to the situation of justified defence, whilst points b) and c) refer to actions carried out by organs of the state which observe legal regulations. All these cases eventually imply exceptions to the general

prohibition on violating the right to human life. When the Hungarian statute mentioned above is compared to these regulations set out in European Convention on Human Rights, the Hungarian situation essentially measures up to the expectations of European norms. However, it is still questionable whether the exceptions to the law on the right to life should be included in the Constitution.

Opinions which refer to the practice of other European Constitutions are also possible. This would allow the question to be regulated by statutes outside the framework of the Constitution, and the possible contradictions would then be overruled by the Constitutional Court. Therefore, the present uncertain and contradictory situation would remain unchanged. However, if we accept that the Constitution regulates the right to human life as well as prohibits capital punishment, then we can hardly be averse to stating that the Constitution should define or should refer to exceptions to the existing law on the right to life. The legal solution would be the following: the last paragraph of the regulation referring to the right to life would encompass the directions of Article 2(2) of the European Convention on Human Rights. If this paraphrasing is found to be too lengthy, then the last paragraph of this regulation could refer in general terms to the exceptions: "the exceptions to the law on the right to life are regulated by a separate statute." For my part, I would recommend this solution, which is in accordance with the method employed by the Constitution when referring to exceptions.

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Heikki KULLA

The Municipal Staff: the Manager and Officials

I. Introduction

1. The structure of municipal administration

Local autonomy in the Finnish system is a concept referring basically to municipal self-government and to administration through the municipalities. At present, there are about 455 municipalities. In addition, there are some two hundred municipal joint authorities that constitute the basic form of cooperation between the autonomous municipalities. The part of the local administration for which autonomous municipalities are responsible for forms quantitatively today the largest section of in the whole public administration.[1]

At the end of the 80's, the Government made the reform of public management major focus of concern. The ensuing reform aimed at strengthening the democratic system and municipal self-government, and increasing public service and opportunities for participation among citizens.

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1 MODEEN, T.: *L'Administration communale de la Finlande.* Åbo, 1971; MODEEN, T.: *Die Entwicklung der Kommunalverwaltung und des Kommunalrechts in den skandinavischen Staaten.* Universität des Saarlandes. Europainstitut 113. 1988; OULASVIRTA, L. (ed.): *Finnish Local Government in Transition.* Finnish Local Government Studies 4/1995; MÄENPÄÄ, O.: "Administrative Law", in PÖYHÖNEN, J.: *An Introduction to Finnish Law,* Helsinki, 1993, 295–344.; MÄENPÄÄ, O.: "Constitutional Aspects of Local Autonomy in Finland", in SAKSLIN, M. (ed.): *The Finnish Constitution in Transition.* Helsinki, 1991, 121–131.; THORS, A.: "Local Government in Finland", in MODEEN, T. (ed.): *Public Administration in Finland,* Helsinki, 1994, 37–47.; RYTKÖLÄ: *Finnisches Gemeindeverwaltungsrecht.* Helsinki, 1961; STÅHLBERG, K.: *Finnish Local Government in the Postwar Period.* Åbo, 1990.

The committee pondering the status of local authorities submitted its report on a new Local Government Act in 1993 (Committee report 1993:33). In 1994 the government submitted a proposal (192/1994) for a new Municipal Act, which was then passed, taking effect on 1.7.1995 (365/95). The scope, competence and structure of the municipal administration are determined by this Act. According to the Act, administration is organised more flexibly than in the preceding Act of 1976.[2]

The Local Government Act presupposes a somewhat modified division of powers within the municipal organisation. The decision making powers are exercised by the council whose members are directly elected in municipal elections. The executive functions are carried out by the municipal board and the administrative organs controlled by it. The judicial control of the decision-making is the task of independent courts, that is, the Provincial Administrative Courts and Supreme Administrative Court.[3]

Municipal administration is based on representative democracy. The representative organ of the municipality is the council. The members of the council are elected every four years. The council's main duties include the making of all politically important decisions, adopting a budget, general steering and controlling of the other municipal organs, and passing local by-laws.

Responsible for the administration in general, as well as for the implementation of municipal decisions, are the municipal board, the committees, and the administrative staff. The municipal board is composed of persons elected proportionally by the council. Its main duties include supervising and steering the activity of the committees and municipal staff, drafting the council's decisions, and implementing them.

Under the new legislation, municipalities have been given quite extensive powers to organize their own structure. Within the framework of the law, each municipality may decide on the details of its administrative machinery. The administrative and executive staff are subordinate to the council, the board, and the committees.

Committees are responsible for the administration of one of the main areas of municipal activity. Even the committees are elected by the council by proportional vote. All the committees are formally subordinate to the board but especially the statutory committees enjoy considerable freedom in their decision-making within the municipal organisation.[4]

2. The administrative staff

Personnel working for local authorities are employed either in an employment relationship under public law or in an employment contract relationship under private

2 RYYNÄNEN, R.: "Trends in Municipal Legislation Reform", in *Finnish Local Government in Transition*, 291–295.

3 MODEEN, T.: "The Principle of Administrative Legality. The Control System", in *Public Administration in Finland*, 87–96.

4 NIEMI-IILAHTI, A.: "The Structure and Finances of Finnish local Government", in *Finnish Local Government in Transition*, 272–285.

law. According to Section 44 of the Local Government Act, public offices are established for administrative duties, i.e. those that involve the exercise of public authority, including the preparation and implementation of decisions, or that involve particular financial responsibility. In practice, however, offices have also been established commonly to handle work other than administrative duties.[5]

The standardizing of the position of officeholders and other employees has been under consideration for a long time. When the 1976 Local Government Act (953/1976) was being dealt with in Parliament, the Second Law Committee took the view in its report that a study should be made of the ways of eliminating the discrepancies between the employment relationship under public law and the employment contract relationship.

The matter was also dealt with by the working group set up in 1989. This working group pointed out in its memorandum (1990) that municipal administration was subject to strong pressure for change. The shift to a more service-oriented administration demanded a reassessment. Local government needed to be more flexibly organized and it was felt that personnel should be used more freely for a wider variety of tasks. The working group and later the Local Government Committee (Committee Report 1993:33) preparing the new Local Government Act of 1994 proposed that personnel in municipal administration should be employed under contract.

In contrast, the starting point of the government proposal to Parliament in 1994 (192/94) was for the traditional division. Personnel working for local authorities were to be employed either in a civil service relationship under public law or in an employment contract relationship under private law. Parliament passed the bill as such but emphasized that a reform to standardize the position of officeholders and other employees was still necessary. However, the important reform of employment security will be put into effect by the Act on the Employment Security of an Municipal Official (484/1996, effective date 1.7.1996).

Salaried employees in both the state and municipal sector are governed by labour law. The most important laws on general labour markets are the Employment Contracts Act and the Collective Agreement Act.[6]

The number of the public sector personnel in Finland is on average at the European level. The Finnish public sector grew fast during the 1980's but the serious recession in the national economy and the budget deficits have forced Finland to cut down personnel in the public sector. The greatest personnel cuts has been made in the municipalities, especially in health care, social services and education.[7]

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5 MODEEN, T.: "Politicians—Professional—The Power", in *Finnish Local Government in Transition*, 286–90; KULLA, H.: "La fonction publique territoriale", *Annuaire des collectivités locales*, Paris, 1993. 401–404.

6 BRUUN, N.: "Labour Law and Non-discrimination Law", in *An Introduction to Finnish Law*, Helsinki, 1993, 119–159.

7 METSÄPELTO: "Public Sector Personnel", in *Public Administration in Finland*, 65–71.

	Municipal		State	
	Officials	Employees	Civil servants	Employees
1987	250,000	200,000	132,000	82,000
Total		450,000		214,000
1994	410,000	190,000	110,000	48,000
Total		400,000		158,000

The total of wage and salary earners was 1,800,000—total labour force was 248,000 —unemployment rate was 18.4 % (456,000).

II. The Standing of the Officials

1. Main principles

The basis of their standing is in the Local Government Act, Section 44. According to this section a service relationship is an employment relationship under public law in which the municipality is the employer and the official the employee.

Consistent with the principle of self-administration, every municipality is enpowered to give service regulations, which are by-laws. The most important regulation is the office regulation, as it is called, and it is compulsory in law. These regulations contain the main rules with respect to the general duties of officials. The differences between municipalities are not significant, because the Municipal Employers' Office has drawn up a model regulation for municipalities.

The important reform of employment security will be put into effect by the Act on the Employment Security of the Municipal Official (government proposal 44/1996, Statute Book 484/1996). Up to the present, employment security has been regulated by the municipal service regulations. The main reason for this reform derives from the low hierarchical level of the service regulations. The International Labour Organisation Convention (1982) concerning Termination of Employment at the Initiative of the Employer requires that the basis of employment security is in general law enacted by Parliament.

The concrete background factors of the reform are connected with the new constitutional rules on the fundamental rights (the Constitution Act, chapter II).[8] According to section 15 of the Constitution Act no one can be dismissed from the service unless on

8 SCHEININ, M.: "Minorities, Human Rights and the Welfare State—the 1995 Fundamental Rights Reform in Finland", in POHJOLAINEN, T. (ed.): *Constitutionalism in Finland—Reality and perspectives*, 30–47.

grounds of law. Therefore, the special Act on the Employment Security of an Municipal Official passed by Parliament was necessary.

The general grounds for the official responsibility of officials are the provisions of Sections 92 and 93 of the Constitution Act. Official responsibility is heightened through a special system of consequences. The forms of liability are penal liability and liability to pay damages. The disciplinary responsibility of the officials is no longer in force, because it was abolished by the new Local Government Act.

The general duties of the officials are prescribed principally in the municipal service regulation. The most important is the obligation to perform official duties. There are also provisions on, for instance, not taking bribes, the obligation to maintain secrecy, taking an ancillary job, health checks and the obligation to live in an official residence.[9]

The retirement age for officials varies from 63 to 65 according to the retirement legislation.

2. Economic terms of employment

Salaries and other terms of employment of officials were decided unilaterally up to 1970. Since then, salaries and other conditions of employment have been determined by collective agreements (the Collective Agreements for Municipal Officials Act 1970/669).

Collective bargaining is to a large extent the same as in the private sector. The agreements are made at both the central and local level. The municipalities as the employer are represented at the central level by the Municipal Employers' Office. The officials are represented by the central trade union organizations.[10]

Municipal officials have the right to strike, and municipal employers are authorized to impose lock-outs. Strikes and lock-outs are not allowed while collective agreements are in force.

3. Employment security

An official's employment relationship can be terminated by notice given on either side, by cancellation, by dismissal from office by criminal law, or when he reaches retirement age.

According to the Act on Employment Security (6 §), notice can be given by an official or by a municipality so that an employment relationship will end following a given period of notice. However, a municipality may not give notice of termination of an employment relationship for a reason deriving from the official unless this reason is

9 MÄENPÄÄ: *op. cit.* 315–321.
10 BRUUN: *op. cit.* 142–151.

especially weighty. The model for this regulation is used the Employment Contracts Act, Section 43, and the State Civil Servant's Act, Section 25.[11]

In any case, none of the following reasons may apply: 1) sickness, incapacity or injury on the part of the official, unless the consequence thereof is a substantial and permanent deterioration in working capacity, 2) participation of the official in a strike or other industrial action decided on and implemented by an association of officials, 3) the official's political, religious or other opinions or his participation in social or associational activities.

A municipality may not give an official notice on grounds of pregnancy. If a municipality gives a pregnant official notice, this shall be viewed as due to pregnancy unless other grounds are shown.The municipality may not give an official notice during special maternity, maternity, paternity or parental leave or other leave of care.

The grounds for giving an official notice on financial and production-related grounds (Section 7) are much the same as in the Employment Contracts Act and in the State Civil Servant's Act. A municipality is entitled to give an official notice if the officials duties substantially decrease other than temporarily. However, a municipality is not entitled to give an official notice if he can be reasonably relocated in view of his professional skills and capabilities, or can be trained for new duties.

When an official gives notice, the period of notice is from 14 days to two months, and when a municipality gives an official notice, the period of notice is from one month to six months, depending on the duration of the employment.

The employment relationship of an official appointed for a fixed term ends without notice when the said fixed term comes to an end unless it is terminated before then because notice has been given.

An official's employment relationship can be cancelled immediately without the period of notice if he grossly violates or neglects his official obligations. An official can cancel the empoyment relationship, for instance, when the salary agreed upon is not paid.

A lay-off is a situation in which the service relationship otherwise remains in force, but the work and payment of salary are discontinued indefinitely or for a fixed term. Formerly, the collective agreement contained provisions on unilateral lay-off by the employer. At present the lay-off is ruled by the new Act on Employment Security. The maximum time for a lay-off is 90 days.

An official can be suspended from office for the period of a criminal prosecution or of a trial (Local Government Act, 47 §) and for the period when an official cannot perform his duties properly for personal reason.

Rectification of a decision on a matter concerning employment security can be requested from the municipal authority which has made this decision. A decision in the light of such request can be appealed to the Provincial Administrative Court and after that to the Supreme Administrative Court.

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11 BRUUN: *op. cit.* 138–140; *State Civil Servant's Act (with legislative drafts).* Ministry of Finance, Helsinki, 1995, 13–31.

4. Relations to politicians

The new Local Government Act emphasizes flexibility of municipal organization. There are only a few statutory committees. In practice, decision-making has been delegated to the officials more widely than previously. In this respect, a considerable part of the political power has been devolved on the officials.

As a counterbalance to this, the new Act limits more than previously the opportunities of officials to take part in political life at the municipal level. This is a question of eligibility for membership of the municipal council, the municipal board and committees. The leading officials are not eligible for membership of those organs, and the officials subordinated to the board are not eligible for membership of the board and an official subordinated to a committee are not eligible for membership of this committee.

Political favouritism in appointments is hardly an unknown phenomenon in municipal life.[12] On the one hand, the municipal council can choose the new officials fairly freely according to the principle of self-government. On the other hand, the rules for qualifications and procedural rules decrease the arbitrary elements in decision-making. The provincial administrative courts and, as the highest instance, the supreme administrative court control as appellate courts the legality of appointments.

In the Finnish legal order, there also are many new rules against discrimination consequent on international treaties. The most effective rules are in the Act Concerning the Equality between Women and Men (309/1986). The new Act on Employment Security contains a general rule against discrimination. A municipality may not unjustifiably place a person in a different position to other persons, for instance, because of his race, religion, age, political or union activities, or other comparable basis.[13]

III. The Special Status of the Municipal Manager

Reform of the municipal management system has been the focus of attention in drafting and passing the new Local Government Act. The key issue has been the position of the municipal manager.[14]

According to the new Act, the manager is still the chief professional administrator of a municipality. The manager is an official and often also a political appointee chosen from persons enjoying the confidence of the leading political parties.

The main task of the manager is to lead the administration, the management of the finances, and other activities of the municipality.

Under the Local Government Act, the status of the manager as an official is in certain respects a special one. The manager is always elected by the municipal council. The

12 MERIKOSKI, V.: "The Politicization of Public Administration", *Annales Academiae Scientiarum Fennicae.* B 162. Helsinki, 1969.

13 BRUUN: *op. cit.* 152–59.

14 MODEEN: "Politicians–Professionals–The Power", *op. cit.* 287–289.

manager is elected for an indefinite period or for a limited period (during which he cannot be dismissed). A manager taken for a limited period can be elected by the municipal council to be chairman of the municipal board.

Nowadays, the manager is the official presenting proposals to the municipal board. Until 1977 the manager was the voting chairman of the executive board.

The manager's employment security and the protection against summary dismissal are rather weak. The council may by a resolution carried by 2/3 majority of all members give notice to the manager or transfer him another tasks if the manager has lossed the confidence of the council.

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Raimo LAHTI

The Rule of Law and Finnish Criminal Law Reform

I. The Concept of the Rule of Law

The relationship between the rule of law and criminal law has been discussed in the Hungarian-Finnish Criminal Law Seminars on several occasions since 1979. For example, Professor Eero Backman (from the University of Turku) presented a paper on the *Rechtsstaat* and criminal law in Hungary in 1990.[1] His main arguments can serve as a starting point for this article.

Professor Backman referred to the doctoral thesis of Dan Frände[2] (who is now the Swedish-speaking professor at the University of Helsinki) and, in particular, to the division of the legality principle in criminal law into the following four sub-clauses: the rule that only the law can define a crime and prescribe a penalty (*nullum crimen sine lege scripta*); the rule that criminal law must not be applied by analogy to the accused's detriment; the prohibition of the retrospective application of the criminal law to the accused's disadvantage (*nullum crimen sine lege praevia*); and the rule that a criminal offence must be clearly defined in the law (*nullum crimen sine lege certa*). This kind of classification of the main contents of the legality principle is generally accepted *inter alia* in the case-law of the European Court of Human Rights.[3]

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1 BACKMAN, E.: "Rechtsstaat und Strafrecht", in LAHTI, R.–NUOTIO, K. (eds.): *Towards a Total Reform of Finnish Criminal Law*, Helsinki, 1990, 7–20.

2 See FRÄNDE, D.: *Den straffrättsliga legalitetsprincipen*, Ekenäs, 1989.

3 See, for example, the recent case of the Eur. Court H. R., C. R. v. United Kingdom Judgment of 22 November 1995, Series A. no. 355–C.

For Professor Backman these rules were only formal aspects of the legality principle. The requirements of *Rechtsstaatlichkeit* (the constitutionally governed state) included several additional criteria. Accordingly he listed firstly, anticipatory guarantees such as the general limiting preconditions for criminal liability and the principles concerning the organisation of the judiciary. Secondly, the procedural rules regarding the different phases of criminal proceedings; and, thirdly, the methods of appeal in criminal proceedings and the supervision of the administration of justice.

Another Finnish scholar, Professor Kaarlo Tuori, has distinguished four models of the *Rechtsstaat* in his theoretical analysis: the so-called liberal *Rechtsstaat*; the model of the substantive *Rechtsstaat*; the formal concept of the *Rechtsstaat*; and the model of the democratic *Rechtsstaat*.[4] According to Tuori, this last model presupposes a constitution based on democracy and fundamental rights but, in addition to this constitutional demand, requires an active and independent civil society.

The democratic model is constructed with the presumption that democracy and fundamental rights must be regarded as complementary principles rather than opposing or rival ones. The Finnish legal system seems to correspond to this model with respect to, among other things, the means of reviewing the constitutionality of laws: there is neither judicial review nor a constitutional court, but rather a preventive and an abstract control of norms; that is, the conformity of a bill to the constitution is reviewed only during the legislative process.[5]

Any examination of the concepts of the rule of law and *Rechtsstaatlichkeit* reveals how vague or open to various interpretations they are, although their doctrines are very central to the Western liberal democracies. Backman's analysis indicates that the idea of the rule of law includes requirements for both the substantive rules of the system and the procedural rules which govern adjudication and enforcement in individual cases.

II. Finland and the Ratification of the European Convention on Human Rights

Remarkable changes in Finnish legal ideology have taken place since 1990, as far as the concepts of the rule of law and *Rechtsstaatlichkeit* are concerned.

In May 1990 Finland ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR), accepted the jurisdiction of the European Court of Human Rights, and recognised the right of individual petition. Before that an in-depth study on the compliance of Finnish legislation with the ECHR and Strasbourg case-law

4 TUORI, K.: "Four models of the *Rechtsstaat*", in: SAKSLIN, M. (ed.): *The Finnish Constitution in Transition*, Helsinki, 1991, 31–41.

5 JYRÄNKI, A.: "Taking Democracy Seriously. The problem of the control of the constitutionality of legislation. The case of Finland", in *The Finnish Constitution in Transition*, 6–30.

was conducted. Several Acts of Parliament were amended, for example with respect to pre-trial investigation and aliens' rights.[6]

The ECHR and other important human rights conventions have been incorporated through an Act of Parliament *in blanco*. Because of the predominance of the incorporation method, Finland can be said to represent dualism in form but monism in practice when implementing international law in the domestic legal order. This method of implementation affects the application of human rights treaties. The Parliamentary Constitutional Law Committee has confirmed the following principles: the hierarchical status of the domestic incorporation act of a treaty determines the formal rank of the treaty provisions in domestic law (that is, their rank is normally that of an Act of Parliament); incorporated treaty provisions are in force in domestic law in a form corresponding to their representation in international law; and the courts and authorities should resort to "human-rights-friendly" interpretations of cases which have domestic status, in order to avoid conflicts between domestic law and human rights law.[7]

Before the Finnish ratification of the ECHR there were no references to international human rights conventions in the case-law of the Finnish Supreme Court, although the Parliamentary Ombudsman had systematically applied international human rights law in his decision-making in the years leading up to ratification. The first cases where the Supreme Court expressed its willingness to apply international human rights norms were decided in 1990, and dealt with the extradition of persons accused of hijacking an aeroplane in the former Soviet Union. In all of these four cases, the Supreme Court informed the Ministry of Justice that, in its opinion, there were no legal obstacles to extradition, stating meanwhile that a rule of *non-refoulement*, directly binding on Finnish authorities, could be drawn from, *inter alia*, Article 3 of the ECHR and Article 7 of the International Covenant on Civil and Political Rights (CCPR).[8]

Since these extradition cases the Supreme Court has mostly applied human rights norms in issues concerning criminal procedure, that is, using Article 6 of the ECHR and Article 14 of the CCPR. These treaty provisions have been applied directly in order to fill certain gaps in the Finnish legislation on criminal procedure. Such an approach is in line with the "human-rights-friendly" interpretation.[9]

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6 See PELLONPÄÄ, M.: "The Implementation of the European Convention on Human Rights in Finland", in ROSAS, A. (ed.): *International Human Rights Norms in Domestic Law*, Helsinki, 1990, 44–67.

7 See in more detail SCHEININ, M.: "Incorporation and Implementation of Human Rights in Finland", in SCHEININ, M. (ed.): *International Human Rights Norms in the Nordic and Baltic Countries*, The Hague, 1996, 257-294.

8 See HANNIKAINEN, L.: "How to Interpret, and What to Do to, the Treaty on Aircraft Seizures with the Soviet Union", *Finnish Yearbook of International Law*, Vol. II, 1991, 538–558.

9 It should be mentioned here that a government bill concerning criminal procedural matters in the first instance courts is currently under Parliamentary scrutiny; this law will comply with the provisions and case-law of the ECHR and CCPR.

III. Constitutional Reform in Finland

New provisions on basic rights were incorporated into the Finnish Constitution in 1995[10] which, compared to previous legislation, are much more detailed. For example, these provisions not only discuss fundamental rights in the traditional sense—that is, concerning personal security and liberty—but also discuss social rights, having been inspired by international human rights. From the point of view of criminal law, there are important new provisions, such as one regarding the legality principle in criminal law (corresponding to Article 7 of the ECHR and Article 15 of the CCPR), and the provision according to which a punishment entailing deprivation of liberty can only be imposed by a court.

Several of the enacted constitutional rules make reference both to constitutional and to human rights, thus giving semi-constitutional status to human rights treaties.[11] The *travaux préparatoires* of this reform emphasise the point that constitutional provisions are also directly applicable in the administration of law by judges and authorities, and so their binding effect is not restricted only to law-making. In addition to the "human-rights-friendly" interpretation of the law, a similar "basic-rights-friendly" interpretation is recommended, although the prohibition on courts examining the constitutionality of Acts of Parliament has been maintained.

As a result of these comprehensive legislative reforms the significance of fundamental rights has been strengthened, and a certain change in the relationship between democracy and fundamental rights, as well as between different state powers, has taken place. For example, some critics of this development have been concerned about the weakening of the position of Parliament at the cost of an emerging "*Richterstaat*". On the other hand, a proposal has been made for a constitutional amendment which would explicitly authorise the domestic courts to review, at least in certain respects, the conformity of laws to the Human Rights Treaty provisions and the Constitution.[12]

IV. Towards European Criminal Law

Another major trend is towards internationalisation and European integration and, accordingly, towards universal or at least increasingly harmonised laws.[13] Dr. Károly Bárd already sees certain possibilities for the birth of a European criminal law. Bárd's analysis perceives a process of unification in the field of European criminal law. It is,

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10 For a compilation of the provisions on the basic rights, see The Parliament of Finland *et al.*: *Constitutional Laws of Finland*, Helsinki, 1996.

11 So SCHEININ: *op. cit.*, 276.

12 See e.g. JYRÄNKI: *op. cit.*, 15.

13 See generally DELMAS-MARTY, M. (ed.): *What Kind of Criminal Policy for Europe?* The Hague, 1996, *passim*.

however, continuing in two opposite directions: on the one hand, there is a tendency towards the extension of the threat posed by criminal law (for example, through the broadening of the scope of the European instruments); on the other hand, the organs of the ECHR will continue to fix the minimum standards of a fair administration of justice.[14]

Becoming a member of the European Union (EU)—a supranational regional organisation—was for Finland a dramatic event, not only politically, but also from a constitutional point of view. For example, the directly applicable parts of EC law must operate within each member state as a legal system in its own right, that is, according to a monistic (and, to Finland, strange) model.

As to the future, there is increasing pressure for more harmonised (administrative) criminal law in the EU and "European judicial space".[15] The regulation and convention to be used in the fight against European Community fraud (1995) are the first clear examples of this development.[16]

V. Finnish Criminal Law Reform and the Rule of Law

I have presented a long introduction to the theme of "*The Rule of Law and Finnish Criminal Law Reform*". Information on these general legal developments is important for an understanding of the on-going shift in legal ideology, and possibly also for an understanding of some of the other Finnish contributions to these proceedings. This ideological change, with its greater emphasis on human and basic rights will, to my mind, increasingly influence both Finnish criminal law theory and criminal policy.

As to the recodification of the Finnish Penal Code of 1889, preparation had already started in the 1970's, before the emergence of human and basic rights thinking. Nevertheless, two basic principles have governed Finnish criminal law reform: the legality principle, and the principle of culpability (*Schuldprinzip*). These principles are justified primarily on the basis of their compatibility with the values of legal certainty and predictability. At the same time, those principles are defended with reference to the utilitarian argument of general prevention. A necessary prerequisite for the persuasiveness of such a parallel or complementary justification is that general prevention means so-called integration prevention, in other words, the effect that criminal law has in maintaining and strengthening moral and social norms. It must be kept in mind that those basic principles are significant, not only when reforming criminal law, but also in its actual application.

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14 See BÁRD, K.: "European Criminal Law?" in LAHTI, R. (ed.): *Towards a Rational and Humane Criminal Policy. Dedicated to Inkeri Anttila, 29 November 1996*, Helsinki, 1996, 241–253.

15 See the recent proposal by DELMAS-MARTY, M.: "Vers un espace judiciaire européen", *Corpus Juris* 1996.

16 As for these instruments on the protection of the EC's financial interests, see the Act of the Council of the EU of 26 July 1995 (convention) and the Council Regulation No. 2988/95 of 18 December 1995.

The legality principle includes the requirement that criminal law must be certain. The aim of limiting judicial discretion is predominant in the reform. Whilst, for example, the Swedish Criminal Code of 1965 was criticised for using overly vague definitions of criminal offences, those responsible for drafting Finnish law have striven to describe the offences as clearly as possible: by reducing, for example, the use of value-laden or otherwise ambiguous terms in the definition of crimes. On the other hand, the objective of more precise crime definitions collides with another aim of the Finnish reform work, namely the effort to synthesise these; in other words, to write them in a more abstract form and, amongst other aims, to facilitate a progressive development of the criminal law through judicial law-making. A reasonable balance between these conflicting aims must be sought.

An accommodation may also be required between the principles of comprehensibility and certainty. Although clarity is a function of both comprehensibility and certainty of language, the maximisation of one may be detrimental to the other.[17]

Other means to curb judicial discretion have also been used. Thus in many cases the existing offences have been split into sub-categories (for example, basic assault, aggravated assault and petty assault), and the definition of an aggravated offence has also been based on an exhaustive list of criteria (always allowing, however, for a less severe evaluation). Additionally, the amount and range of penal scales (punishment latitudes) have been generally reduced.

In accordance with the legality principle and the values underlying it, the basic concepts and principles governing the general preconditions of criminal liability will be defined in the general part of the Criminal Code to a greater extent than is the case now. It is obvious that, *inter alia*, the concepts of intention and negligence as well as the preconditions for liability for omissions will be defined in the new Code, which is not currently the case.

One way to strengthen the legality principle will be the effort to reduce and specify the use of the so-called *blanket provision* technique. The new provision on the legality principle in the revised Constitution should oblige the legislature and courts to take a strict course of action in this respect, because the acts must be punishable under an Act of Parliament in force at the time when they were committed.

This new constitutional provision on the legality principle, according to its *travaux préparatoires*, and the tradition of transforming international treaties requiring the penalisation of certain acts, appears to lead to the conclusion that the Finnish courts are not allowed to sentence for an act which only constitutes a criminal offence under international law (cf. Decision 53/1993 (X.13) of the Hungarian Constitutional Court, where individual responsibility for war crimes and crimes against humanity was

17 See COLVIN, E.: "Criminal Law and The Rule of Law", in FITZGERALD, P. (ed.): *Crime, Justice & Codification*, Toronto, 1986, 125–152 (135).

established irrespective of their punishability under domestic law, but was based on the general cogency of the relevant international law).[18]

VI. European Dimensions of the Rule of Law

The demands for accessibility and foreseeability, which are essential criteria of the rule of law, are particularly challenging in the more unified Europe, where the increasing interdependence of nations compels them to harmonise their criminal justice systems in order to combat effectively transnational and international crime. One example of this is the requirement of *double criminality*, which induces harmonisation in international co-operation concerning penal. Regionalisation and sub-regionalisation of crime prevention and control is an increasing tendency, especially in the member-states of the European Union.

When the concept of the rule of law is understood in a wider sense as "a design which maximises the capacity of legal rules to function as guides for behaviour and hence to shape social order on the basis of voluntary compliance with the standards of conduct which they express",[19] then the challenge to a more unified Europe is even greater, because then it is difficult or even impossible to keep to the democratic legitimacy of the legal order.

VII. The Impact of Human and Basic Rights on the Theory of Criminal Law

As stated above, the increasing emphasis on human and basic rights will obviously be reflected in Finnish criminal law theory and criminal policy.[20] In the work on a new Finnish Criminal Code the theoretical discussion so far has primarily concentrated on the arguments of moral and political discourse. This is also true in relation to my own theoretical pieces in this field: for example, when I have argued for a more efficient, just and humane criminal law.[21]

The arguments based on human rights or constitutional theory will certainly be put forward more insistently in the coming years. For example, the moral and political arguments of justice and humanity can now be firmly fastened to human rights and constitutional law; accordingly, they have strong institutional support as legal principles. Nevertheless, the tension between, on the one hand, utilitarian arguments

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18 See MOHÁCSI, P.–POLT, P.: "Estimation of War Crimes and Crimes against Humanity according to the Decision of the Constitutional Court of Hungary", *Revue Internationale de Droit Pénal*, 1996, 333–339.

19 See COLVINÉ: *op. cit.*, 128.

20 See, in particular, the contribution of NUUTILA, A.-M.: "The Reform of Fundamental Rights and the Criminal Justice System in Finland", to these proceedings.

21 See LAHTI, R.: "Recodifying the Finnish Criminal Code of 1889: Towards a More Efficient, Just and Humane Criminal Law", *Israel Law Review*, 1993, 100–117.

of social defence and, on the other, arguments of justice and humanity (a tension that can be found throughout the history of criminal law) cannot be resolved. As Stole Eskeland has put it, international human rights permit an offensive and not only a defensive criminal policy.[22] In a similar way, a tendency towards a functional criminal law cannot be rejected with arguments based solely on the legality principle. In the future the forum should also be open to balancing different types of legal, political and moral arguments.

22 See ESKELAND, S.: "Criminal Law and the International Human Rights", *Scandinavian Studies in Criminology*, 1995, 204–221 (220). Cf.; JAREBORG, N.: "What Kind of Criminal Law Do We Want?", in SNARE, A. (ed.): *Scandinavian Studies in Criminology*, 1995, 17–36.

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The Rule of Law and Criminalisation—Theoretical Considerations and Hungarian Criminal Law*

1. Introductory Notes

The topic of my paper is the issue of criminalisation: that is, for what purpose, and according to what values, is a conduct declared punishable, and what kind of limits and consequences does this social labelling process have. Before going into the issue in detail, we should consider some preliminary thoughts.

According to an old Hungarian proverb, "... where there are many laws crime will grow".[1] Apparently those who thought up this proverb did not display a deep knowledge of criminology; all the same, contemporary events justify their judgement and their wisdom.

A marked cultural characteristic of the end of our century, however, is that in a majority of countries the scope of criminal justice is expanding more and more due to the increase in criminal laws; parallel with this, crime is also increasing.

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1 TÁRKÁNY SZŰCS, E.: *Magyar jogi népszokások (Hungarian Legal Folk Customs)*, Budapest, 1981, 781.

Those in authority today seem to consider criminalisation an adequate answer to any social problem. Today criminal law and its threat is a significant instrument of social control. The tendencies observed in the field of other elements of criminal political intervention, such as sentencing policy, law enforcement, and criminal procedure also demonstrate in a wider sense the expansion of the scope of criminal law.

If we compare contemporary subjects of criminalisation with the relations protected by criminal law previously, we can see that the paradigm based on the *ultima ratio* role of criminal law is being reinforced. In other words, it should be re-emphasised that these laws should be used as a reaction to a phenomenon only when the application of other elements of social control do not seem to be effective.

Let me illustrate this with the following, as put by Adler, Mueller and Laufer in their textbook:

> "Among the pre-Columbian Incas of Peru, one of the most serious wrongs was the destruction of a bridge ... Among the ancient Germanic tribes, theft of a beehive was one of the most serious public wrongs. Beehives provided honey, which then was the only source of sugar for food and drink ... Neither the Roman Law of the Twelve Tables (451–450 BC) nor the Babylonian Code of Hamurabbi (about 1700 BC) lists homicide or ordinary theft among crimes. Nor can we find these crimes among the listings of other very early legal systems. On the contrary, homicides appear to have been in a category of wrongs that could be righted by compensation, or by the surrender of the perpetrator to the injured clan as a substitute worker for the slain victim."[2]

We can therefore say that in previous times the prevailing practice was to use punishment and criminal law only with regard to acts which fundamentally endangered the life and operation of the society.

Today, however, the crime which receives the most serious punishment, excepting murder, is drug-trafficking. Governments try to apply the instruments of the criminal justice system against either petty property crimes, or drug abuse, or different problems of child-rearing, or certain marital anomalies, as well as non-violent sexual abuse at the workplace, or a slight violation of civil responsibilities. Scientific and technological development has also increased the authority of criminal law, mainly by ways of enacting "endangering offences" in criminal codes.

In parallel with the above process, the structures of criminal acts have changed, as well as the basis and scope of responsibility of criminal law. Whereas in the late 19th century, the period of legal codification in Europe, the typical criminal offence was 'a crime of culpable causing of harm', this is now only one group of crimes.

In addition to the responsibility based on guilt, in certain fields (for example, in environmental protection) there now seems to be an effort to introduce 'strict liability',

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2 ADLER, F.–MUELLER, G. O. W.–LAUFER, W. S.: *Criminology*. New York, 1991, 7–8.

and connected with this, to expand criminal responsibility by including not only natural persons (human beings), but also corporate bodies.

Thus the scope of criminal law has grown significantly in the recent past due to the increase in conducts declared to be criminal, and the change in the conditions and subjects of criminal responsibility. "Today", as Matti Joutsen puts it in his paper on this much debated topic,

> "some Western European countries appear to be following the approach pioneered in the United States in declaring war on crime. All of these [are] pluralist countries, where there are serious conflicts over many of the values underlying the criminal justice system ... As a result, the danger is constantly present that such countries will expand the scope of criminalised behaviour, expand enforcement and increase the degree of intervention without stopping to total up the financial, human and social costs."[3]

On the basis of the above, we can assert that even the civilisational development of Elias seems to be dominant; that is, whilst the sanctions of the criminal justice system are becoming more humane, contemporary trends in criminalisation prove, however, that the role of criminal justice and criminal law is not decreasing, but is rather increasing in the field of social control. That is why it is justified to regularly discuss issues of criminalisation; this is additionally in the interest of maintaining the delicate equilibrium between the civil right to security and the right to liberty and personal freedom.

In this paper I will deal with the main problems of the issues mentioned above; that is, criminalisation or rather the inflation of criminalisation, from the point of view of criminology, criminal law policy, and the criminal law and the constitutional law. Within this framework, after mentioning some criminological aspects of the problem, I will mainly discuss the standards, objectives, reasons and limiting principles of criminology discernible in some criminal political models, that is, questions related to the legitimacy of penal law. Following this, I will discuss current issues of the topic in Hungary, primarily on the basis of the related resolution of the Constitutional Court of Hungary.

2. *Some Criminological Issues of Criminalisation*

In criminology it was due mainly to the work of Edwin Sutherland that the topic of criminalisation was given attention. Today this subject has grown so large that there is an author who calls criminology "the discipline of criminal sanctions".[4]

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3 JOUTSEN, M.: Legitimation and the limits of the criminal justice system, *European Journal on Criminal Policy*, No. 1, 1993, 23.

4 SHERMANN, L. W.: "Kriminológia és kriminalizálás: dac és a büntető szankcionálás tudománya" (Criminology and Criminalization: Defiance and the Science of Penal Sanctioning), in GÖNCZÖL, K. (ed.): *Válogatás a 11. Nemzetközi Kriminológiai Kongresszus előadásiból (Selected papers of the 11th International*

Criminological research related to our topic is primarily directed towards the examination of the following two aspects of criminalisation:

— the analysis of social factors which exert an influence on criminalisation;

— the evaluation of the efficiency of penal sanctions.

Analyses of social factors have pointed out that "the socio-economic circumstances of a society determine which forms of behaviour that society considers to be wrongs serious enough to be controlled by criminal law".[5]

With regard to the components of socio-economic circumstances, Matti Joutsen, in his study quoted above, based on McGarrel's and Castellano's work, states that the factors influencing criminalisation can be examined at the following levels:

— the structural foundations (such as the heterogeneity of the society; social, economic and political inequality; economic crisis; cultural factors);

— the actual and perceived experience of crime in a social system;

— the immediate triggering events of crime and justice legislation (such as "the role played by political and moral entrepreneurs, campaign politics, media campaigns, interest group activities, the criminal justice bureaucracy, reform groups and sensational crimes reported by the media in demanding reform of law and policy").[6]

As a result of the research quoted above, the conclusion has been drawn that the reason for criminalisation is not necessarily the seriousness of the punishable act, and furthermore, that value-based criminalisation is often displaced by objective-oriented criminalisation, which is mainly interest-based.

Another approach to the current topic must be mentioned here, that is, the analysis of norms, and especially that of the criminal norms from the point of view of interests. The two dominant views with regard to this are the consensus model and the conflict model. According to the representatives of the former approach, "certain acts are deemed so threatening to the society's survival that they are designated as crimes. If the vast majority of the group shares this view, we can say the group has acted by consensus." The model assumes—as Adler, Mueller, and Laufer state—that "members of society by and large agree on what is right and wrong, and that law is, in essence, the codification of social values..."[7]

This view reflects Durkheim's definition of the punishability of an act. According to him, "We can ... say that an act is criminal when it offends strong and defined states of collective conscience."[8]

However, the supporters of the conflict approach say that "criminal law expresses the values of the ruling class in a society, and the criminal justice system is a means of controlling the lower classes."[9]

Congress on Criminology), Budapest, 1993, 26.

5 ADLER–MUELLER–LAUFER: *op. cit.*, 7.

6 JOUTSEN: *op. cit.*, 10–11.

7 ADLER–MUELLER–LAUFER: *op. cit.*, 11.

8 DURKHEIM, E.: *Rules of Sociological Method*, Glencoe, Illinois, 1958. 64.

9 ADLER–MUELLER–LAUFER: *op. cit.*, 11.

In view of today's pluralist and, in many respects, heterogeneous societies, we can say that criminalisation according to the consensus approach is an ideal to be aspired to.

However, the critical analyses of the representatives of the conflict model help us on the one hand to understand why the lower classes are over-represented amongst apprehended criminals, and on the other hand they highlight the necessity of the enforcement of the point of view of social justice during criminalisation.[10] This last means that the acts of those with authority which are seriously harmful to the society must also be criminalised. The research results analysing the formation of criminal norms on the basis of the conflict model and similar approaches (for example, the labelling theory) are essential from the point of view of the issue under discussion, because they remind us to be careful when we automatically want to consider legitimate a criminal law which is fully in compliance with the principle of legality, or to use the Hungarian terminology, with the principles of *'nullum crimen sine lege'* and *'nulla poena sine lege'*.

The other main research field of criminology related to criminalisation is the evaluation of the efficiency of penal sanctions. The subject of research as it is defined by Lawrence W. Shermann is as follows: "... to discover the actual impact of penal sanction on the criminalised behaviour from the point of view of both the individual person punished and the society. This means not only determining when criminal sanctions prove to be effective or ineffective but also when they have a reversed effect and create more crimes."[11]

Amongst the results of research on the topic, the new theoretical approach to the relationship between the intensity of informal control and the efficiency of criminalisation is worth mentioning. Essentially this approach states that "the efficiency of the penal sanctions depends on the foundations created by informal social control. If this foundation is undermined normal sanctions can ... fail, moreover they can backfire ... Thus the more the informal social control decreases the more careful and cautious we have to be when applying criminal sanctions and we must not overuse them."[12]

We can consider the criminological analysis of the above-mentioned aspects of criminalisation essential because the research results can supply us with arguments for the reasonable criminalisation of an act or behaviour. From among the relevant statements in the special literature let me once again quote Shermann, with whom I fully agree: "The question whether the criminalisation of a behaviour is reasonable or not depends on two criteria: is there a wide social consensus in condemnation of the act and

10 See, for example, QUINNEY, R.: *Crime and Justice in Society*, Boston, 1969.
11 SHERMANN: *op. cit.*, 26.
12 *Ibid*, 31.

does empirical research show that the penal sanction is efficient in an increased application of the rule in question."[13]

We can therefore say that the legitimational criteria of criminalisation from a criminological aspect are social consensus and rationality.

In the process of declaring something a crime we have to respect some values and principles of criminal law, constitutional limits, and the final result embodied in the criminal policy. In the following part of this paper I will deal with these questions.

3. Questions of Criminalisation from the Point of View of Criminal Law, Criminal Law Policy and Constitutionality

The range and contents of problems of criminal law, criminal law policy and constitutionality with respect to criminalisation are basically determined by the political system and the form of government in the given state. Questions related to criminalisation in a dictatorship are different to those in a state governed by the 'rule of law'. At the same time, the approach to and practice of criminalisation might be different in states of the same political system with regard to the difference in criminal law policy. I will now turn to the questions and dilemmas of criminalisation and the basic models of reactions and solutions in a state governed by the rule of law.

Before discussing all this, however, I would like to state that the notion of "the rule of law" will be used below with a wider meaning, in compliance with its use in recent English and American constitutional literature.

The term "rule of law" is used by the scholars writing in this area not only as a legal category denoting a country governed through laws, but also as a political doctrine. Bradley, Ewing and Bates write the following about this:

> "It is not possible to formulate a simple and clear-cut statement of the rule of law as a broad political doctrine ... If the law is not to be merely a means of achieving whatever ends a particular government may favour, the rule of law must go beyond the principle of legality ... As society develops, and as the tasks of government change, lawyers, politicians and administrators must be prepared to adapt the received values of law to meet changing needs. ... it deserves to be remembered [as the authors assert with regard to the contents of the rule of law as a political doctrine] that law, like the democratic process, may be used to protect the weak and unprivileged sections of society against those who can exercise physical, economic or industrial force."[14]

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13 *Ibid*, 38.

14 WADE, E. C. S.–BRADLEY, A. W.: *Constitutional and Administrative Law*, New York, 1993. 107, 109, 110.

This approach quoted above is otherwise very similar as regards its contents to the case of a 'social jural state' in continental constitutional scholarship.

From a constitutional point of view, criminalisation means the conflict of personal rights to liberty and freedom, because the state must guarantee the rights of its citizens to personal security in a way that it limits the prevalence of other human rights to a certain extent. The generally accepted constitutional criterion corresponding to the "rule of law", with regard to the extent of, and reason for the limitation, is "that government should inhibit freedom only as much as it has to in order to serve important needs."[15] As McCloskey remarks, "various attempts have been made to formulate a rule or a test that would implement this premise. The 'clear and present danger' concept (that speech can be restricted only when it threatens an immediate and serious evil) represents one such attempt, the 'balancing test' (that speech can be restricted when the state interest in suppression outweighs the private interest in freedom) represents another. But [the author adds] insofar as 'rules' are not merely tautological, they are shorthand phrases for a large number of alternatives that must be considered before a reasonable conclusion is reached..."[16]

As for the role of criminal law from a constitutional point of view, with regard to the above we can say that it is nothing else but the indication of the limits of the criminal justice system. The most significant principle related to the limits of substantive criminal law in compliance with the "rule of law" is the legality principle which unites the following principles: the principle of non-retroactivity, the principle of maximum certainty, and the principle of strict construction of penal statues.[17] The content of the principle is well-known, so I will not discuss it here.

The function of criminal law, however, does not end with the marking out of the limits of intervention. The role of criminal law, in addition to this, is to protect communal and individual rights and to realise social values.

Criminalisation is in compliance with the requirements of the "rule of law", as far as the legislator takes into consideration this double function.

In the countries regarded as states governed by the rule of law we can find a number of differences in the extent of criminal justice and criminalisation, even though there are several similarities as regards the group of punishable conducts. The disparities basically stem from social and cultural differences, but the differences in the objectives of criminal policy and the criminal law theories related to criminalisation play a significant role in what is declared to be a crime in a certain country.

I will now discuss the basic approach to theory and types of ideals of criminal policy existing in the latter of the fields mentioned above.

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15 McCLOSKEY, R. G.: "Civil Liberties", in SILLS, D. L. (ed.): *International Encyclopaedia of the Social Sciences*, Vol. III, The Macmillan Company and the Free Press, 1968. 310.

16 *Ibid.*, 310.

17 ASHWORTH, A.: *Principles of Criminal Law*, Oxford, 1995, 67; in the Hungarian literature on this see NAGY, F.: "A nullum crimen/nulla poena sine lege alapelvről" (On the Principle of nullum crimen/nulla poena), *Magyar Jog*, No. 5. 1995. 257–270.

Joel Feinberg[18] defines the following four legitimational principles of criminalisation:

– 'The Harm Principle': this means that "It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor ... and there is no other means equally effective at no greater cost to other values."

– 'The Offence Principle': according to this principle, "It is always a good reason in support of a proposed criminal prohibition that it is necessary to prevent serious offence to persons other than the actor and would be an effective means to that end if enacted."

– 'Legal Paternalism': under the terms of this principle, "It is a good reason in support of a prohibition that it is necessary to prevent physical, psychological, economic, or moral harm to the actor him/herself."

– 'Legal Moralism': this means that "It can be morally legitimate to prohibit conduct on the ground that it is inherently immoral even though it causes neither harm nor offence to the actor or to others."[19]

Following the views of John Stuart Mill—that is, "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others"[20]—Feinberg is of the opinion that criminalisation can primarily be based on the principle of "harm" and its supplement, the principle of "offence". The supporters of the so-called minimalist approach of criminal law, and of the tendency of criminal policy called 'defensive criminal law policy' by Nils Jareborg, are essentially of the same opinion.[21]

The representatives of the minimalist approach, as described by Ashworth, accept "the need for criminal law in order to safeguard the interests of individuals, the state and collectivities, but it emphasises the protection of individuals from the abuse of power—whether by state officials or by groups or other individuals ... the minimalist approach emphasises respect for the rights of individuals as suspects and defendants ... and it insists that the criminal law should be used only as a last resort or for the most reprehensible types of wrongdoing. Thus minimalism has no difficulty in accepting the criminalisation of direct, victimising wrongs that harm individuals, but as one moves away from those clear cases, it demands stronger justification for criminalising rather than dealing with the problem in another way."[22]

As for effectiveness, the followers of minimalist criminal law emphasise that "the criminal law should not be used if it cannot be effective in controlling conduct, and/or causes consequences at least as bad as non-criminalisation, and ... that the criminal law

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18 FEINBERG, J.: *The Moral Limits of Criminal Law*, Vols. 1–4, Oxford, 1984, 1985, 1986, 1988.

19 FEINBERG, J.: *The Moral Limits of Criminal Law*, Vol. 4, Oxford, 1988. xix–xx.

20 MILL, J. S.: *A szabadságról (On Liberty)*, Budapest, 1994. 18.

21 JAREBORG, N.: "What Kind of Criminal Law Do We Want", in SNARE, A. (ed.): *Scandinavian Studies in Criminology*, 1995. 17–36.

22 ASHWORTH: *op. cit.*, 31.

should be used if it is the most efficient and cost-effective means of controlling conduct."[23]

In contrast to the minimalists, scholars who emphasise the so-called welfare principle and communal interests consider the other two principles of Feinberg, that is, 'legal paternalism' and 'legal moralism' to be the legitimational principle of criminalisation. Their representatives do not refute the significance of individual autonomy, but they consider solidarity and the importance of communal aims and values to be of equal rank, alongside the active participation of the state in the solution of social problems.

As Nicola Lacey, one of the theoreticians of this approach, writes, "the principle of welfare as including the fulfilment of certain basic interests such as maintaining one's personal safety, health and capacity to pursue one's chosen life plan."[24]

Based on this principle, the scholars of this approach can accept criminalisation of any conduct that has, respectively, harmful consequences for community interests, and endangers the autonomy of an individual (such as drug abuse). In the words of Ashworth, "The principle of welfare recognises the social context of the law", and criminalisation on the basis of this principle "is likely to favour the use of criminal law to reinforce collective interests rather than private interests and private property ..."[25]

With regard to the legitimational principles of criminalisation, we can also speak of a third tendency. In practice the tenets of both approaches are acceptable to the minimalists, as well as to the moderate supporters of the 'principle of welfare'. So this means that there may be an approach to criminalisation from the aspect of theoretical penal law which "would recognise the position of individuals in their social context and thus the need in some circumstances to use the criminal law to prevent incursions on some collective goods as well as on individual rights".[26]

The ideas of another ideal type of criminal law policy, called the "offensive approach" in Jareborg's terms, represent a markedly different standpoint to those of the previous approaches, as far as the principles of legitimation are concerned. According to Jareborg, the "offensive approach" of criminal law policy "regards the criminal justice system as an at least repertoire method for solution of social or societal problems ... The central feature of the offensive approach is fast action in 'social problem' situations".[27] In consequence, "a threat against or a violation of a legitimate interest or value"—as Jareborg puts it—"is a sufficient reason for criminalisation ..."; furthermore, "to an increasing extent, the criminalisation concerns potentially dangerous deeds or deeds that are otherwise peripheral in relation to caused harm, which means that a violation of or a manifest threat to a legitimate interest or value is not required ... The

23 *Ibid.*, 33–34.
24 LACEY, N.: *State Punishment: Political Principles and Community Values*, Routledge, 1988. 104.
25 ASHWORTH: *op. cit.*, 28, 32.
26 *Ibid.*, 32.
27 JAREBORG: *op. cit.*, 25–26.

threat of penal sanctions is used, not as a last resort or for the most reprehensible deeds, but often in the first place for minor transgressions of peripheral regulations. The criminal law"—in the sense of the 'offensive approach'—"is used for didactic, socio-pedagogical and paternalistic purposes".[28]

At first sight it may seem that Jareborg regards the criminal law policy behind the criminal law of totalitarian systems to be the offensive approach: "the possibility of power abuse is not completely forgotten: a *Rechsstaat* ideology is still the background. But the important thing is to show results".[29] An effective means of achieving these results in the area of finding solutions to social problems is the criminal justice system and criminalisation contained therein.

From this review it is clear that criminalisation can be centred around several principles of legitimation and criminal policy approach, which may sometimes greatly differ in content from each other. The existing differences give a good explanation of the differences discernible amongst countries as regards the extent of criminalisation. At the same time, it would be difficult to claim that it is only this or that principle, or criminal law policy, which complies with the 'rule of law'. However, we can say that it is mainly the views on criminalisation of the defensive model of criminal law policy, and of the minimalists, as well as of the moderates of the 'principle of welfare', that comply best with the contents of the 'rule of law' discussed above, and with the social purpose of criminal law as developed over the course of history.

Instead of an evaluation of the approaches and principles, I feel it is more important to emphasise that one of the key issues of criminal law is that criminalisation be based on principles and values and be properly justified. That is to say, only with justified criminalisation based on principles can arbitrary criminal legislation which merely reflects the current parliamentary majority, and which does not comply with the rule of law, be avoided.

Now I will turn to the characteristics of criminalisation since the fall of communism in Hungary—what we refer to as the 'change of system'. Which of the previously mentioned approaches can be discerned behind our present criminal law policy?

4. Criminalisation and the Rule of Law in Hungary after 1989

The total transformation of the political system between 1988 and 1990 has wholly changed the character and contents of the Hungarian legal system, and within this our criminal law. This change basically stems from the fact that the amended Constitution states that "The Republic of Hungary asserts itself to be an independent democratic jural state".[30]

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28 *Ibid.*, 26, 27.
29 *Ibid.*, 25.
30 Article 2.1.

We have become a country governed by the rule of law and, what is more, a country with a fully functioning constitution. Consequently, only those statutes may remain in force which comply with the Constitution. It is the Constitutional Court, a body set up in 1989, which safeguards the rule of law.

What is the consequence of this as regards criminalisation?

Between 1989–1996, 16 laws modified the Special Part of the Hungarian Criminal Code.[31] Former criminal offences that did not meet the requirement of "jural state" (rule of law) and the characteristics of the new state order were re-regulated (for example, political crimes) and decriminalised (for example, work-shyness as a public danger).

However, most of these modifications have created new criminal offences; 41 of these have been included in the Criminal Code.

If we look for the limits and basis of legitimation of criminalisation in the Hungarian legal system, we find 'the legality principle' and the formula of 'social endangerment". As far as 'the legality principle' is concerned, Article 57 paragraph 4 of the Hungarian Constitution states that "No-one shall be declared guilty and sentenced for an act which is not a criminal offence under Hungarian law at the time of its perpetration."

The content of 'social endangerment' is defined in the Criminal Code[32] in the following way:

> (1) "An act of crime is an act perpetrated intentionally or—if the law also punishes negligent perpetration—by negligence, which is dangerous for society and for which the law orders the infliction of punishment."
> (2) "That activity or omission shall be an act dangerous for society, which violates or endangers the state, social or economic order of the Republic of Hungary, the person or rights of the citizens."

Based on the articles of the Criminal Code referred to above, we can conclude that the underlying principle of criminalisation in our criminal law is one of 'welfare'.

However, if we take into consideration the Constitutional Court's practice, in relation to the reasons for criminalisation, we can find another approach.

Point IV.4 of the reasoning of the 30/1992 (V.26) AB Resolution of the Constitutional Court states that:

> "Criminal law is the *ultima ratio* in the system of legal responsibility. Its social function is to serve as the sanctioning foundation of the overall legal system. The

31 KERTÉSZ, I.–STAUBER, J.: "Magyarország Európa bűnügyi térképén" (Hungary on Europe's Map of criminality), *Magyar Jog*, No. 9. 1996, 523.

32 Section 10.

penal sanction, the role and function of punishment, is the preservation of legal and moral norms when no other legal sanction can be of help.

A substantive requirement springing from constitutional penal law is that the legislature may not act in an arbitrary fashion in defining the scope of behaviour subject to punishment by law. The necessity of making of any behaviour an offence punishable by law must be scrutinised strictly: in protecting certain relationships, legal and moral norms, the system of instruments of penal justice—which perforce restrict human rights and freedoms—may only be applied when absolutely necessary and only as justified by proportionality, if the constitutional or constitutionally derived state, social or economic values and goals may not be protected through any other means."

On the basis of this resolution of the Constitutional Court, which has been reinforced in later resolutions, we can say that the body regards the defensive approach of criminal law policy to be constitutional. In compliance with this, it is the concept of minimalist criminal law that can be found in the decisions in the field of criminalisation: the Constitutional Court emphasises respect for individual autonomy, and the role of criminal law as the 'last resort'.

As we can see, there is a difference between the approaches to criminalisation found in the legislation and the decisions of the Constitutional Court. I would suggest that these two approaches should be harmonised on the basis of the notion of the rule of law discussed above; that is, in the process of criminalisation we should take into consideration the community's values, interests, and social justice. However, we should at the same time test the 'necessity', 'proportionality' and 'rationality' of the creation of new criminal offences.

5. In Conclusion

In this paper I have dealt with a few theoretical questions and the Hungarian practice related to criminalisation. In lieu of a summary and a moral I would like to raise some more questions and dilemmas with regard to this subject which have not been covered here but are related to the topic and may be worthy of our consideration.

I hope that it has been made clear that I do not regard the increase in criminalisation as a positive development. It must, however, be mentioned that there are favourable reasons amongst those which have led to the expansion in the numbers of criminalised acts. The first of these is the changing and ever-widening content of the concept of human dignity. This explains the ever-increasing criminalisation of stalking and child abuse. A similarly positive process occurs when the means of criminal law are used as some kind of protection against the side-effects of scientific and technological development. Naturally, the question remains as to the proper extent of this legal intervention.

This leads to another problem, the role of criminal law as 'last resort'. In the case of eliminating those acts from the criminal code which cause lesser harm to society—in the interest of the reinforcement and rehabilitation of this principle—without actually decriminalising them, they would still remain transgressions. The difficulty with this is that it would entail serious problems from the point of view of guarantee in countries where the authorities dealing with transgressions are not under judicial control. Hungary, for example, is one such country.

Finally, there is another problem: can we reach a consensus as regards principles legitimising criminalisation in a pluralist world where opposing values and tendencies exist side by side? For example, the effort to achieve integrity whilst at the same time enforcing national interests. With regard to this, the words of Professor Terttu Utriainen are worth recalling: "... where a conflict arises between values, it becomes necessary to either establish a compromise or choose in favour of prevailing values. In this sense, society no longer has a single system of values, rather there are several truths. In a democratic society, discussion and legislation determine the procedures followed, the prevailing social values and their priority".[33]

I believe that our field of study can assist legislation, in finding appropriate values and priorities by stating proper principles with regard to the bases of criminalisation, and the expected consequences of declaring certain behaviours punishable. If legislation takes this into consideration then criminal law may not simply become legal, but also legitimate. This may become a significant element in law-abiding behaviour, or keeping within the laws, especially in countries in transition, where informal control cannot really be relied upon.

33 UTRIAINEN, T.: "Social Changes, Crime and Police—the Police in Society", in VÍGH, J.—KATONA, G. (eds.): *Social Changes, Crime and Police*, 1993, 151.

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Tore MODEEN

The Institution of Self-government in Finland

The term: "self-government" in the Constitution

The term: "self-government" (in Finnish: "itsehallinto", in Swedish: "självstyrelse") is used in the Finnish Constitution Act 1919:94 in two connections. In Art. 51. 2. it is stated that the administration of municipalities shall be based on self-government of the citizens according to specific acts of parliament on this matter. The manner and extent of the application of self-government of the citizens to administrative districts larger than the municipalities shall likewise be prescribed by law.

In this context, self-government means that territorial units are administered by persons elected by and from their inhabitants. A certain amount of autonomy is thus demanded when the term "self-government" is used. If a body is to be characterized as self-governing, it cannot be subject to complete guardianship by the State. A self-governing unit must have the right to command a certain field of jurisdiction where it acts on its own responsibility and uses its own resources. In Finland the self-governed units, the municipalities, have been given quite substantial powers by law.

The Constitution uses the term "self-government" in another context, concerning the managment of the state University of Helsinki–Helsingfors. In Art. 77. 1. it is stated that the right of self-government of the University shall be maintained.

In 1919, when this article was written, there was only one state university in Finland, the University of Helsinki–Helsingfors. The reason for giving it a certain amount of independence was to ensure the freedom of study and of learning in the institution.

The University used to be administered by its professors under the supervision of its Chancellor, appointed by the State from among candidates put forward by the professors.

Today the Finnish universities are administered by bodies composed of other "members" of the university: as well younger teachers, other personnel and students.

Because of its different structure and activities, it is obvious that the self-government enjoyed by a university is very different from that of a municipality.[1]

Self-governing institutions

As has already been mentioned, the Finnish municipalities (in Finnish "kunta", in Swedish "kommun") enjoy very broad autonomous powers. Most of the local government functions have been entrusted to the municipalities. The State itself takes care of only a limited amount of local tasks such as the administration of justice, presidential and parliamentary elections, taxation (even municipal taxation), and the construction and maintenance of the more important roads.

In this connection, the National Insurance Institute ("Kansaneläkelaitos, Folkpensionsanstalten") should also be mentioned. This institution functions with a certain amount of autonomy in the fields of compulsory social and health insurance and assistance to the unemployed. The National Insurance Institute is mentioned in the Parliament Act (a constitutional statute complementing the Constitution Act) not as a self-governing institution but as an independent body under parliamentary control. In reality, however, it is often regarded together with the National Bank of Finland ("Suomen Pankki, Finlands Bank, also mentioned in constitutional law) as a self-governing institution.[2]

The following survey will mainly concern the local government of the municipalities.

Self-government of the municipalities

According to Art. 51. 2. of the Constitution Act, the jurisdiction of the municipalities shall be prescribed by law. This means that the functioning of the municipalities is regulated by statutes adopted by Parliament.

The President of the Republic and the Council of Ministers thus cannot decide on the rights and duties of the municipalities without the approval of Parliament. Only the implementation of the municipal statutes may be regulated by decree.

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1 About the notion of "self-government", see MODEEN, T.: *Om de självständiga offentligrättsliga anstalterna i Finlands förvaltningsorganisation.* Åbo Akademi. Åbo, 1965; MÄENPÄÄ O.: "Constitutional aspects of local autonomy in Finland", in SAKSLIN, M. (ed.): *The Finnish Constitution in Transition*, Helsinki, 1991.

2 See MODEEN, T.: *L'administration communale de la Finlande.* Åbo Akademi, Åbo, 1971; MODEEN, T.: "Les compétences du pouvoir local en Finlande", *Annuaire européen d'administration publique* 3. Paris, CNRS, 1980; MODEEN, T.: "Local Government in Finland: scope and functions", *Finnish Local Government Studies* 9. 1981; MODEEN, T.: "Le médecin et le droit: aspects de droit administratif finlandais", *Journées de la Société de droit comparé.* Paris, 1987; MODEEN, T.: "Historische Einführung in das nordische Kommunalrecht", *Stadt und Gemeinde*, 1993, 2.

Of the statutes regulating municipal actions the most important one is the Municipal Act 1995:365. According to Art. 2. of this statute, the jurisdiction of the municipality consists of two parts. The first part concerns activities in which the municipality engages entirely on its own initiative. The second part (the main scope of action of the municipality) consists of its statutory tasks. There are several special statutes charging the municipalities to carry on certain activities.

Examples of such special statutes are the Comprehensive School and the High School Act, the Social and Health Care Acts, and the Planning and Building Act.

The special statutes vary greatly as to their construction and content. Often they do not go into detail concerning the management of the task in question. The municipality usually enjoys a large amount of freedom in deciding on the organization and the running of these activities.

In this case the term "frame statute" is used.

In the case of statutory provisions concerning municipal services to the citizens, the statutes normally regulate the conditions for rendering such services to the clients and the judicial and administrative control of the municipal action.

The result of this legislative policy is that the municipality functions with a great deal of autonomy even in most areas of its statutory competence.

There are even cases where a special statute has been given not to oblige the municipality to carry on a duty but to provide for guidelines in the case the municipality wants to engage in such an activity. If these guidelines are complied with, the State will participate in the financing of the activity.

Examples which may mentioned are statutes concerning the management of certain cultural activities such as adult education or public libraries.

As a general rule, a municipality can count on State grants for services offered to the citizens under special legislation.

The situations where the municipality's action is regulated by special statutes should not be considered "delegated State activities", as in some foreign local government systems. Even if these activities fall under the Municipal Act, they belong to the responsibility of the municipalities, as the management is entrusted to bodies chosen by it. The costs are paid by the municipality, even if partly subsidized by the State. All these activities must thus be observed in the municipal budgetary planning.

The special statutory activities are supervised by municipal committees. The committees normally appoint the officials who are responsible for the day-to-day management of the service. The management of these activities is always submitted to the (mainly financial) control of the central municipal bodies: the council and the board.[3]

3 See MODEEN, T.—KALIMA, K.: *The general competence of the municipality.* University of Helsinki 1982; MODEEN: "Historische Einführung...", *op. cit.*

The limits of the general competence of the municipality

The municipality decides with a great amount of autonomy on the management of the affairs not regulated by special statutes. It may thus engage itself in various activities of interest to its members or give financial help to private bodies engaged in such activities.

A municipality may thus financially subsidize privately run cultural and social activities in the municipality which benefit its citizens.

An obvious restriction, however, is that the municipal activity is confined to the territory of the municipality except for a situation where there exists a bi- or multilateral agreement on municipal cooperation.

Another limitation concerns the municipality's role as a body under public law which disposes over tax money. It must on all occasions observe the principle of objectivity and impartiality in its dealings with the citizens. A municipality should concern itself with government and not engage into private commercial or industrial activities.

The limits of the municipal jurisdiction based on its general competency will, however, be subject to control only in the case of an appeal made against a decision taken by a municipal body (usually the municipal council). In order to have a municipal decision annulled, the appellant must show that it is contrary to law, i. e. , is in conflict with the general principles a public body has to follow.

Any member of the municipality has the right to appeal a decision taken by the municipal council or another municipal body on the grounds of exceeding the limits of the general competence of the municipality. Not only a physical person domiciliated in the municipality but also a legal person and, furthermore, every person engaged in business or owning real estate in the municipality, is regarded to be a member.

In most cases of appeals, the case concerns the use of public money for activities the appellant considers as unacceptable for a municipality to engage in.

It often happens that municipalities decide to encourage private firms to start doing business, hoping to increase the commercial and industrial activities in the district and thereby to improve the financial situation of the municipality by receiving more tax income.

The municipalities also interfere with financial and other aid to private business in situations of unemployment and to prevent a bankruptcy situation.

When appealed against, such decisions may be approved by the Supreme Administrative Court only if good social reasons can be shown for the investment of the taxpayers' money in private firms.

There have thus been many cases of municipal securities given for loans taken by private firms which have resulted in considerable financial losses for the municipalities.

The Government tried to introduce into the new Municipal Act a provision restricting municipal guarantees to private firms. But Parliament did not approve of this "restriction of the municipal freedom".[4]

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4 See also MODEEN, T.: "The industrial policy of the communes", in LINDMAN, S. (ed.): *Problems in Finnish Local Government*, Åbo, 1964.

The Court also takes a restrictive attitude towards municipal grants to political parties or to activities concerning foreign countries.

But, as has already been stated, if a municipal decision is not appealed against, the decision will remain valid. The State authorities do not interfere in municipal actions on their own initiative.

The special (statutory) competence

The legislative policy in recent years has been to increase the autonomy of the municipalities in the field of statutory competence as well. Earlier a considerable number of municipal decisions had to be submitted to State authorities before they could become valid. Today this occurs only in exceptional cases (for instance, certain physical planning measures).[5]

In most situations where the State grants financial aid to the municipalities for activities regulated in special statutes, the subsidies consists of so-called "state shares". A "state share" means a lump sum, calculated according to the size and other criteria (such as the financial strenght) of the municipality. The municipality disposes the grant quite autonomously.

The only condition is that the municipality is able to maintain an acceptable level of services. In the case of investments, however, the municipality has to ask for the money and commit itself to more detailed control of the use of the money.

The "state share" system is applied in such important areas as health and social care and schools.

The national policy aims at creating equal social, health and schooling conditions for the citizens irrespective of the municipality in which they reside. Therefore, more generous State grants are given to poor districts than to municipalities enjoying better financial conditions.

The uneven standards in providing public services among the municipalities have, consequently considerably diminished in recent years, thanks to this "state share" policy. The Finnish system, based on large municipal autonomy, does not, however, allow too great uniformity.

The legal security of the citizen

A question often raised in connection to providing public services in the welfare state is to what extent the citizen enjoys legally secured social rights. Does the present system allow for efficient control of the local authorities in this respect?

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5 See MODEEN, T.: "Submission and appeal: two means of State supervisions of the communes in Finland", *International Review of administrative Sciences*, 1970; MODEEN, T.: "Town and country planning law in Finland", in J. F. GARNER—N. P. GRAVELLE (eds.): *Planning law in Western Europe*, Amsterdam, 1986.

As has already been mentioned, the standards of social services depend on the available resources. The same is true concerning health services.

Appeals of municipal decisions concerning social care are thus very rare, since the clients understand that "the legal way" seldom brings results. Instead, they prefer less formal methods of calling the attention of the authorities to their needs.

The municipalities also usually act with efficiency when it comes to giving help in difficult situations. Even in recent years, when many municipalities have encountered financial difficulties, the schools function fairly satisfactorily. The municipalities have in many cases even taken loans in order to fulfil their duties in these respects.

According to a certain opinion, the legal rights of the citizens are not satisfactorily protected under the present system, however. Today there exists a prohibition to appeal against the Provincial Administrative Courts' decisions in matters concerning social care. This restrictive policy does not comply with the principle of legally protected social rights. If the Supreme Administrative Court were given the power to control the municipalities' social care practice, the possibility to arrive at a more equal system in the country should be created. Today there are thus no court decisions on the national level to be referred to.

Only in the field of assistance to severely handicapped people (Act 1987:380) is the Supreme Administrative Court authorized to deal with appeals. The Court has in some cases taken a favourable position to patients' claims for assistance and has obliged municipalities to give more substantial assistance than they had agreed to.

It is unavoidable, under the present system based on municipal autonomy, that the citizen's social rights depend, to some extent, on the financial situation of the municipality.

In the field of health services, it is obvious that an appeal system does not work. The medical authorities decide which cases demand treatment. There exists, on the other hand, a well-developed control system.

In 1995, the whole municipal health system was subject to a four-week-long nurses' strike. Many of the hospitals had to close. The municipalities were quite helpless, as the wages are decided on a national level. The State authorities did not interfere in this situation.

The autonomy of the individual municipality is thus restricted by the system of central collective wage agreements. The municipality has got only limited possibilities to decide on the wages in certain cases.

The right of a patient to receive health care from the municipality is guaranteed by law (Act 1992:785), but was not secured in this case. This is a serious grievance, especially since there are so few private hospitals in Finland.

The financial autonomy of the municipality

The Finnish municipalities have the power to tax their members (the most important municipal taxes are the income tax and the real property tax). The level of the income

tax is decided individually by each municipality, and, within certain limits, also the real property tax.

The municipality enjoys a lot of freedom as to the use of State grants.

The State has the power to interfere only when a municipality has proved itself unable to handle its finances. The municipality will then be put under a kind of State guardianship (Act 1994:658). This very rarely happens.

Municipal co-operation

Finland does not know of any bigger autonomous territories than the municipality. An important exception, the Aaland Islands, enjoy internationally and constitutionally recognized home rule.[6]

There are, on the other hand, a great number of local federations ("kuntayhtymä", "samkommun"). Some of them are entrusted with important powers, in the field of health care, for instance.

The local federations are administered by bodies appointed by the member municipalities and financed by the members. They enjoy a distinct legal personality.

There exist small voluntary local federations with two or three members (running an institution of social care, for example). But there are also some quite big federations concerning a great number of municipalities.

The municipalities also cooperate by means of agreements.

Not all local federations depend on the free decision of their members. For instance, in the fields of specialized hospitals and physical panning, the municipalities are obliged to cooperate within districts set up by the State. There are thus 21 specialized hospital federations and 18 regional panning federations decided by the State.

The local federations function with the same kind of authority as the municipalities and thus belong to the municipal administration area.

The self-government of the parishes

There are two national religious communities in Finland enjoying special rights: the Evangelic–Lutheran and the Orthodox Church. The communities are organized as corporations under public law enjoying a legal personality, as are all local parishes belonging to these communities. About 90% of the Finns belong to the Lutheran Church and only 1% to the Orthodox Church. The special rights are consequence of Finland's earlier attachment to Russia.

The Lutheran and Orthodox parishes have the power to raise taxes. Their constitutions are based on statutory law and their bishops are appointed by the President of the Republic.

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6 MODEEN, T.: "The International protection of the national identity of the Åland Islands", *Skandinavian Studies of Law*, Uppsala, 1973.

Originally the local parishes were entrusted with most of local government tasks in the rural districts. In the 19th century, however, the municipality was separated from the church parish. Since then, the parish administers only church matters concerning the church personnel and the administration of the church property (also the graveyards). Some social work is, however, also executed by social workers hired by the church.

The limits of the church parish always follow that of the municipality, although several perishes can exist in the same municipality. Most parishes, for instance, are monolingual even in bilingual districts, but they still cooperate in financial matters.

There are also many "free churches" and other religious communities in Finland. They do not enjoy the privileges of the above mentioned communities and must be regarded as associations under private law.

Other self-governing bodies

A number of other self-governing corporations exist under public law. Their importance is much more limited than the one enjoyed the above-mentioned bodies.

The owners of real property thus must belong to associations for the maintenance of roads and must pay fees for this purpose. Fishermen and hunters are also organized by law, as are attorneys-at-law, who belong to a corporation under State control.

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Péter MOHÁCSI

International Co-operation in Criminal Matters, with Special Reference to Extradition

I. Introduction

International co-operation on criminal matters in Hungary used to be regulated by the Penal Code,[1] in the general part as "Validity of a Foreign Sentence", "Taking Over and Surrendering the Execution of Punishment", "The Offer to Institute Criminal Proceedings", and "Extradition and the Right to Asylum". The procedural part of the forms mentioned above, in addition to mutual assistance, were governed by the Criminal Procedure Code.[2]

Another source of law on co-operation in criminal matters are bilateral treaties; reciprocity may also be regarded as a source of law. According to the Acts mentioned above, these regulations were based on, and were to be applied to, international treaties. Extradition could similarly be granted on the grounds of reciprocity. In this sense these rules provided a framework. They covered the general principles of the forms of co-operation—undeservedly, very briefly. Furthermore, there are unwritten principles in this field, which exist as customary law.

The Act on International Co-operation in Criminal Matters was adopted by the Hungarian Parliament on 22nd May 1996.[3] In spite of its defects, it satisfies a long-

1 Act IV of 1978.
2 Act I of 1973.
3 Act XXXVIII of 1996.

felt need. When it entered into force, the Act annulled the Articles of the Penal Code and the Criminal Procedural Code which have been described above.

In the chapter of the General Provisions of the Act, there is a very important and, in my opinion, insufficient paragraph that states that the Act can be applied unless an international treaty indicates otherwise. I would prefer a solution without this paragraph, one that regulates the forms of co-operations in general, according to the relevant Conventions ratified by Hungary. In this case the Act could be based on higher and accepted values, and it would be easier to circumvent the contradictions that can be found between the treaties and the Act.

The hierarchy of the sources in this field is undoubtedly an interesting, but contradictory, and controversial issue, because it is an open area in Hungarian law. I would suggest the following solution:

1. International law

According to Article 7 of the Constitution, "The legal system of the Hungarian Republic accepts the universally recognised rules and regulations of international law, and harmonises the internal laws and statutes of the country with the obligations assumed under international law". Is it the task of the judicial practice to define what the universally recognised rules are? Is there any *ius cogens* norm related to human rights? It seems to me that there must be: for example, the prohibition of torture, the right to a fair trial, etc. In this sense, I believe, these *ius cogens* norms of human rights are undoubtedly part of the sources of Hungarian law. The Constitutional Court stated in its Decision of 53/1993 (X. 13)[4] that rules relating to war crimes and crimes against humanity are *ius cogens* norms of international law. Such *ius cogens* norms are by their nature to be applied independently of domestic law or of any convention.

2. National law

The Constitution is at the top of the hierarchy of domestic laws. According to the rules of the Constitution mentioned above, the universally recognised rules and regulations of international law are superior to the Constitution. The Constitution and other regulations related to co-operation in criminal matters must be harmonised with these rules. Regulations on criminal matters must be passed by Parliament. Reciprocity and judicial practice are also part of the sources.

I would suggest the following hierarchy of relevant sources is acceptable:

1. general principles of the international community;
2. European Conventions based on those principles;
3. domestic Acts based on the Conventions and on the Constitution;
4. international treaties based on the Act XXXVIII of 1996.

4 53/1993 (X.13.) AB határozat (Decision of the Constitutional Court).

For example, in the European Convention on Extradition, Article 28 provides that the Convention shall supersede the provisions of any bilateral treaties, convention, or agreements governing extradition between any two Contracting Parties.

Article 2 of the 1996 Act encompasses a public order clause, according to which a request cannot be granted nor submitted if it jeopardises the safety, or infringes upon the public order of the Republic of Hungary. Article 5 (a) contains the principle of double criminality, as the request can be granted or submitted if the conduct is a criminal offence and the perpetrators are punishable according to the law of both the Hungarian and the foreign state. Article 5 (b) gives another condition which applies to the granting or submitting of a request: if the legal assistance between states does not concern a political or a military offence. The offence is not regarded as political if, considering all the circumstances of the perpetration, the character of the offence is predominantly ordinary, as opposed to political. Murder, or crimes involving murder, always qualify as ordinary crimes according to the Act.

Article 7 of the Act finds a strange solution to the procedural requirements. According to this, the Minister of Justice and the Attorney General *may* ask for sufficient guarantees to grant the request, or *may* deny the granting of the request if those guarantees are refused, if it is to be presumed that the procedure abroad, or the probable punishment, or its execution, is not in harmony with the relevant regulations and/or the principles of the Constitution, of international law, and of human rights. This is a very wide definition without any exactitude in its details. It would be preferable to give details of the requirements with special reference to *ad hoc* tribunals, fair trials, or other bars to extradition based on due criminal procedure, and so forth.

II. The Substantive Law on Extradition

As mentioned above, the Penal Code gives brief regulations on extradition. These are the following:

a) citizens of the Hungarian Republic cannot be extradited to another state;

b) non-Hungarian citizens should be extradited under the provisions of international treaties, and when such is lacking, they should be extradited on the grounds of reciprocity;

c) a request for extradition cannot be granted if the conduct for which the extradition was requested does not constitute a criminal offence, or the perpetrator was not punishable either under Hungarian law or under the law of the requesting state;

d) the extradition of a person granted asylum should be denied.

The Second Part of the 1996 Act regulates extradition. A foreign citizen can be extradited to the requesting state for criminal procedure, for the carrying out of a sentence of imprisonment, or under a detention order. The provisions of extraditable offences are the same as with the Council of Europe Convention of Extradition (No. 24), but with the difference that the period of the punishment awarded must be at least six months, not four.

According to the Act, the request should be refused if

a) the punishment, or the conduct for which the extradition is requested, becomes obsolete because of the lapse of the statutory limitation period whether in the requesting state, or in Hungary;

b) the person whose extradition is requested, is granted a pardon for that offence or punishment;

c) the private complaint or similar statement necessary to institute criminal proceedings in the requesting state was not submitted;

d) in a case of *res iudicta* (*non bis idem*), by a Hungarian court.

A Hungarian citizen cannot be extradited unless the Paris Peace Treaty (Act XVIII of 1947) renders such extradition obligatory, or the person whose extradition is requested is also a citizen of another state and his permanent place of residence is abroad, and if in a similar case the requesting state ensures reciprocity. There is a very short and insufficient provision in the Act on persons granted asylum: they should not be extradited to that state from which they sought refuge. In my opinion, the legal position of a refugee needs to be regulated in a more detailed fashion, specifying for which offences he cannot be extradited, what guarantees are required, etc. The Act does not make any distinction between the person granted asylum and a refugee, although this should have been clarified.

If the offence for which extradition is requested is punishable by death penalty under the law of the requesting state, the Minister of Justice may refuse the extradition unless the requesting state gives such assurance that, in the case of a sentence of capital punishment, the death penalty will not be carried out. The Act contains the rule of speciality and rules of conflicting requests, in accordance with the Convention.

There are no provisions either for fiscal offences, life imprisonment, or extradition of children, juveniles, or elderly persons. According to the Penal Code, a person under 14 years of age is not subject to punishment. There is no obstacle to the extradition of elderly persons or juveniles, but these cases may be judged on the basis of judicial discretion.

III. Extradition Procedure

The Criminal Procedure Code formerly regulated the procedure of extradition. According to that,

- the court issues a warrant against the perpetrator who is abroad, and whose extradition can be granted; the arrest warrant must be submitted to the Minister of Justice;
- in the case of a request for extradition with a foreign arrest warrant, or sentence, if extradition can be granted, then the court will order the arrest of the requested person (extradition custody);
- the police may place the person whose extradition was requested in detention for 72 hours in order to allow access to the court;
- it is the Metropolitan Court's duty to proceed in the case of a request for extradition, to examine the request, to question the person, to ask for the statement

of the prosecutor, and to submit the brief to the Minister of Justice, who will decide on the request; the person requested must be informed of the decision;

- the person in remand custody may only be released by a decision of the Minister of Justice.

According to the Act on International Co-operation in Criminal Matters, the procedure is more detailed. The Metropolitan Court holds a hearing on the questions of extradition, and informs the prosecutor and the defence attorney of the date and time of the hearing. The hearing may proceed even in the absence of the defence attorney. Extradition custody may last for six months, and can be prolonged once for a further six months by the Metropolitan Court.

There is no separate chapter in the 1996 Act concerning human rights. The regulations of the human rights conventions, of the relevant Articles of the Constitution, and of the Penal Code, must be applied in a fashion which will fulfil the requirements of human rights.

In summary, the Act has filled in holes in the legislation, and its regulations give detailed procedural and material guidance on the subject. In my opinion, its main deficiency is the secondary nature of the application of the Act, as any international treaty created on the subject will take precedence over it. Its usefulness in practice, however, remains to be seen.

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The Difficult Task of Drafting Law on Principles

The idea of the rule of law brings to mind a specific conception of law which fulfils a whole set of demanding conditions. The law has, on the one hand, to be abstract and general but, on the other hand, to be well-defined in advance. The preciseness of the law has to allow for the law to be applied in a predictable manner. The law—when it is applied—has to be understood as a set of general rules, not merely as an enormous collection of individual decisions. The law has to be systematic, but not blindly: the rules should be capable of picking out the relevant aspects of individual cases.

The idea of the law being a legal order also entails presuppositions concerning the normative coherence of legal materials. This again shifts the emphasis onto elements in law which can possibly serve this purpose by securing at least a minimal amount of coherence between different elements of the legal system. The methods of legal interpretation are of course here of special importance if we look at the law from the point of view of the court. Another source of coherence has to do with the legal values themselves. This is where legal principles come into the picture.

The topic of this article is the discussion of the problems of general legal principles from the point of view of the legislator. The task of the legislator differs radically from that of the courts. The legislator does not apply and interpret the law as it already exists. His role is much more constitutive in relation to the legal system. Although his own activities are also legally framed by, for example, the constitutional norms of

* I wish to warmly thank researcher Markus Wahlberg for his useful comments, especially on the Hegelian terminology, with which I am less familiar.

competence and binding international law, there is still a wide area left open for the creation of new norms, which for the courts—when passed as valid law—are then "pre-existing law". Legal reforms also have a profoundly constitutive nature with regard to the legal system.

It is typical of modern law that its legitimacy is often understood to be dependent upon the positive influences it has on the life of the community. The norms of criminal law not only restrict and sanction randomly chosen forms of behaviour, but are also thought to protect vital interests of the community by diminishing the damages and social costs brought about by the forms of behaviour in question. In Finnish penal legislation and criminal law doctrine, conceptions of general prevention are quite dominant even if a growing number of expressions of individual preventive thoughts in some of the latest reforms of the system of penal sanctions can be pinpointed (such as wide experimentation with community service as a sanction, treatment programs for drug-addicts and alcoholics as an alternative to unconditional imprisonment, etc.).

The values of the rule of law are closely linked with the belief (or disbelief) in the general preventive effects of penal prohibitions, especially when the actual practice of effective application supports the prohibitions. Jonathan Schonsheck speaks about a certain "assumption of compliance" adopted—often highly problematically—by many jurists and legal philosophers. To prohibit means to attempt to prevent, when people are regarded as being law-abiding in general.[1]

The idea of general prevention carries within itself an interesting contradiction between the general and the individual. Unlike the legislator, the courts only decide on individual cases, but it is usually a very complex matter to speak of any measurable general preventive effects of individual court decisions; only some very exceptional cases can attain such an importance through the accompanying publicity given to them by the mass media. On the other hand, these cases are in themselves highly troublesome, because the publicity makes of an individual case an exceptional one, a feature which should again be adequately taken into account in the decision-making process.

It is clear that the stress laid on general prevention has meant that one should always pay more attention to court practice as a practice which deals with typical cases, instead of the individual decisions themselves. When this penal policy point of view is taken as a starting point, we are in a way moving from the level of individual decision-making one step backwards, in the direction of the law-giver and the values of the rule of law values. Only firm court practice is really interesting and valuable from the point of view of general preventive effects.

From the point of view of general prevention we are interested in crimes as they represent certain types of acts, which is actually also the point of view of the legislator. Individual criminalisations in a way specify types of acts, whilst court practice is seen

1 See SCHONSHECK, T.: *On Criminalisation. An Essay in the Philosophy of the Criminal Law*, Dordrecht/Boston/London, 1994, 8–12.

as best furthering the goal of general prevention by forming generally followed rules which inform the public of the underlying criminalisation each time, when an act is regarded as exemplifying the criminalised act-type. The message in the individual conviction is transformed, so that what is important in the case is its typicality (the general), and not its exceptionality (the particular). In this way general prevention theories emphasise the first half of the general principle of equality: treat the like alike; but they pay less attention to the second half: treat the different differently.[2]

The rule of law concept thus has a very close connection to theories of general prevention. One could even claim that they also historically belong together. The Hobbesian theory of the rule of law state, headed by a sovereign monarch, emphasised that the citizens' guarantees against the abuse of public authority only required predictability in legal decision-making. However, the citizens profited when they complied with the rules set by the sovereign governor. Therefore it was in their own interest that they should accept their being subordinated to the rule-setting authority.[3]

The concept of the rule of law is in itself extremely ambiguous, as is its German counterpart, "*Rechtsstaat*". The rule of law refers to forms of organisation which use state authority, as well as to the sphere of legitimate activities of public powers. The rule of law actually means a form of organisation which employs social relationships as legal ones, thus connecting legal rights and duties with social positions and forms of action.

The state under the rule of law has often been understood as a state governed by a system of rather mechanically applicable rules. Rule of law ideals of predictability and legal certainty require or stress the importance of formal values in the legal system. The legal system's main task is to avoid surprises and randomness in legal application.

After Hobbes, the rationalistic natural law theories adopted another version of the rule of law, in which the democratic element in legislative activity became an important part of the rule of law. Here the citizens not only have an interest in the forms of public authority that may be exercised over them—promulgated rules in particular—but in addition to this they want to participate in the enacting of statutes. The Kantian version of the rule of law contains the idea of legislation as self-legislation of the people. The people's private autonomy is morally and legally defined, but the required legitimation for positive law's ability to create obligations can be found in the following explanation: public authority gets its democratic legitimacy because political will-formation in a democratic state connects public authority with the public autonomy of the individual. Kant's theory of a state under the rule of law clearly belongs to the genus of social contract theories. The possibility of a positive law separated from natural law is created by the democratic element, allowing for the creation of new binding law.

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2 See e.g. LUHMANN, N.: *Das Recht der Gesellschaft*, Frankfurt am Main, 1993, 110–114.

3 See HOBBES, T.: *Leviathan* (ed. in German, 1984), 237–244. See also the discussion in NORRIE, A.: *Law, Ideology and Punishment*, Dordrecht/Boston/London, 1991, 15–38.

Even Hegel could be characterised as one of the founding fathers of the rule of law ideology. Hegel wants to restrict the use of contract metaphor in the legitimation of state authority. He discusses questions of law at two different levels. Firstly, abstract right or law contains three philosophically based categories: property (in a limited sense), contract, and wrong. Law is presentness of free will, and in a deeper sense the actualisation of freedom. Crime already gets its abstract legal definition at the level of an abstract right: crime is a specific will which contradicts the rational will of the actor.[4]

The right as law has also to be dealt with at the other, more concrete, and tradition-bound level of the so-called "*Sittlichkeit*". The abstract right alone is not the whole story of law. Law as positive law is part of *Sittlichkeit*, which comprises of three entities: family, civil society, and the state. In Hegel's legal philosophy positive law has a connection with human needs, but it is less relative than the human needs themselves. In *Hegel-Sprache* the objective actuality of the law consists, on one hand, of its being present to the consciousness, that is, "becoming" in some way "known". On the other hand, it is a real and powerful force and validity, and therefore is also "becoming known" as universally valid.[5]

There is a certain reason for my having chosen this particular line of historical argument in order to be able to put the question of principles in modern legislation in a meaningful context. It is crucially important to grasp that the principles' value in a legal system is very much connected to the position of the principles at the borders of the legal system. The principles mediate between the level of abstract right or law and the system of positive law. According to Hegel, the positive law's advantage over abstract right or tradition lies in its conceptual concreteness, but its disadvantage is the emergence of the possibility of a conflict between the demands of the positive law, and the demands of the abstract right.

In general Hegel—as well as presumably most of us—sees the positivity of law as a very useful quality. The legislature and the whole political apparatus of a state work in order to ensure the high qualitative standard of the law. The positive law is not just posited in the sense that it could be totally arbitrary as far as values and principles are concerned. Quite the opposite, in fact: legal principles grow in weight in a system of positive law, because the laws enacted are general. Thus they are also more consciously set as the often unreflected norms of tradition and custom which, according to the historical school of Savigny, represent the law in its ultimate authenticity.

It is not only the position of the legislator which is affected by the double character of law. In a system of positive law the difficulties of legal application become apparent: the authority of positive law has to be recognised in legal interpretation as an authentic if not exclusive source of legal knowledge, but the law still cannot be reduced to the enacted law. As is well known, the general law of a modern state does

4 See HEGEL, L. G.: *Grundlinien der Philosophie des Rechts*, Frankfurt am Main, 1989, Sections 82–104.
5 *Ibid.*, Section 210 *et seq.*

not fully determine questions of legal interpretation; the application must in a way bridge the gap between the general demands of law and the particularities of the individual case.

One way to do this is to develop scholarly theories which will help this application by giving support to certain practices of legal application, just as we saw at the beginning of this article: general prevention theories could shift the problem of efficiency, and that of what is an acceptable use of criminal law, from the level of an individual case to the level of standardised legal practices.

From the point of view of the courts, general legal principles are a somewhat ambiguous phenomenon: the principles seem to belong to the level of legislation, but they are not very explicitly handled there. We could perhaps say that the principles are located—at least in some respects—on a meta-level above the penal code. The principles have a connection to the level of abstract right or natural law that Hegel spoke of. They also have to do with the law's pragmatic functions. And as a third location the doctrines of legal application and interpretation could be mentioned, where general legal principles take on the role of fundamental legal values of the legal system.

I will now turn to the problems directly relevant to the modern legislator. The Finnish Penal Code of 1894 adopted a very restricted and cautious manner in dealing with questions of principles. According to the then prevailing classical school ideology, it was better not to tie the hands of legal practitioners in issues concerning the general doctrines of penal liability with questions which were not supported by widespread opinion in the scholarly community. From my point of view the most interesting provisions are the ones in Chapter 3 of the Finnish Penal Code, which bears the title "On grounds which abolish the punishability of an act or mitigate it". This Chapter contains 12 sections which cover a wide variety of situations and factors worth taking into account when questions concerning the culpability of an act or an omission are to be decided upon.

In a state which respects human rights and the principles of the rule of law, the border between punishable and non-punishable acts should be defined as clearly as possible; this of course stresses the importance of including provisions guiding the public (including the so-called "bad man"), as well as the courts in their legal adjudication. The rules and principles setting these limits have a different function with regard to different actors in the legal society. The "bad man" (or the "good" one), interested in the limits of lawfulness of his former or future actions, and of the sanctions connected to various types of actions, uses the information he can get about the law in the discretionary process of deciding how to act. The rational planning of one's own activities presupposes this to be possible. The court, on the other hand, uses the legal norms as a measuring stick, as a source of legal values.

Before going into details on the Finnish Penal Code and its proposed reform, I would like to point out that the general doctrines in a field of law are a web of interlinked legal principles and legal concepts, which makes the task of the legislator a great deal more difficult here than in questions which deal purely with the definitions of the special part.

The system of norms defining penal liability is constructed in scholarly discussion in a highly conceptual form. The conditions of penal liability, conditions of punishability, are described by compact concepts—such as intent (*Vorsatz*), negligence (*Fahrlässigkeit*)—and those concepts again define the normative substance inherent in basic penal categories: the correspondence to the elements of a crime's definition (*Tatbestandsmässigkeit*), the unlawfulness of an act (*Rechtswidrigkeit*), and culpability (*Schuld*). However, this conceptual system is closely tied to the values and goals of the legal system in general, and so issues of principle therefore become involved. And issues of principle are again not easily reduced to issues of mechanically applicable rules without the loss of some important dimensions.

Even though the doctrines at first sight look like a very fine and well-defined set of instruments for *ex post* evaluation of various acts, a closer inspection reveals the need to go behind the general conceptual logic of these doctrines and to connect them to the values and policies which have to be used in shedding light on the different legal institutions in question. But if this is necessary in the scholarly work on general doctrines, it must also be of concern to the legislator.

How deeply is it possible to explain basic legal institutions in the general part of the Penal Code; indeed, how deep do such explanations need to go? How should the rule of law values of predictability, etc., with their emphasis on the exactitude of the norms, and their guaranteeing of the exercise of rights by individual members of society, be balanced with the demands of justice, which requires a very fine-grained way of expressing societal values through deciding of individual cases, which are understood "in their uniqueness"? Again, how should prevention theories be taken into account? If we are to refer to them in applying the norms of the general doctrines, should we not let this show in the formulation of the provisions?

It is easier to start with the latter complex of questions. Chapter 3 of the current Finnish Penal Code does not explicitly refer to criminological or penal policy theories of prevention, except in Section 5 where two sub-sections give the court discretionary powers to mitigate the otherwise prescribed punishment, or to refrain from imposing punishment at all. Preventive interests and some value elements are in these cases "hidden" in the general clause "unless the general interest demands otherwise".[6]

This is typical of the other parts of the Finnish Penal Code as well as of the special laws dealing with the system of sanctions. General clauses expressing the needs of society to obtain protection, which in some cases restrict the discretionary powers of the judge, have only been expressly written down in law when sentencing problematics is

6 Despite the fact that Matti Joutsen translates the term "public interest", I will here use the term "general interest", because this, in my opinion, expresses more precisely the content of the original term. Public interest seems to me to be closer to the interest of the state than the term "general" in itself presupposes. The term "general interest" again is more neutral, and could be interpreted to mean also the interest of the civil society. As can be seen, we constantly fall back on problems having to do with the deeper understanding of the demands of the state under the rule of law.

on the agenda.[7] General prevention arguments as well as arguments of justice can be seen as generally speaking in favour of effectiveness and punishing, whereas individual concerns usually speak in favour of the accused.

We have already seen that the general doctrines, at least on the level of the current Penal Code, are practically free of this type of limiting discretion. This can be seen as a positive feature. We could easily imagine provisions regulating the preconditions of penal liability following the same logic: "An act of an insane person or an act by someone mentally deficient due to senility or some other such reason shall remain unpunished, unless the general interest demands otherwise." Fortunately, we do not have such provisions. They would open legal decision-making to pressures which could ruin the legal system's task of guaranteeing individual citizens their use of legal rights. There must not be any general preventive reasons heavy enough to legitimate punishing insane persons or those innocent.

We may here leave open whether we have really proved that general prevention cannot be the only justification for letting innocent or insane persons go unpunished. It could turn out to be true that people's law-abidingness is somehow connected to the law's ability to make this type of differentiation.

So far, we have concluded that preconditions of penal liability should not be constructed in such a way that general interests could allow for the overriding of the structural limits of liability in order to serve public demands. But this is still not to claim that issues of general prevention have no role whatsoever in the system of preconditions of penal liability.

To my mind, the really difficult question is, to what extent are prevention theories needed in the legitimation and making concrete of the components of penal liability? As we all know, this topic is far from being a new one. In Germany the goal-rational school, spear-headed by the work of Claus Roxin, was distinguished by its emphasis on the necessity of determining the normative structures on penal liability, using prevention theories as a foundation. The basic categories which made up the concept of 'crime' were connected to the penal policy functions of each category. The legality principle—also regarded as a principle of penal policy—was satisfied mainly through the category correspondence to the elements of a crime's definition (*Tatbestandsmässigkeit*), unlawfulness (*Rechtswidrigkeit*)—which was understood as having the function of social conflict settling—and culpability (*Schuld*)—which again should serve, among other things, the potential general or special preventive need for neutralising the bad example given by the perpetrator.[8]

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7 It is of course a little problematic to speak here about restricting discretionary powers when the court itself has to interpret whether or not the general interest exists.

8 ROXIN, C.: *Kriminalpolitik und Strafrechtssystem*. Berlin, New York, 1973, 30. See also the addition to sect. 218 in HEGEL (*supra* note 4) which nicely puts forward the argument of the relative nature of the need to meet the bad example exemplified by the crime with a counter-example.

We can clearly see that functionalist legal thinking has during the few last years, been modified in the direction of greater respect for rule of law principles than before. The cores of ideas on restricting punishability inherent in some legal concepts are no longer subsumed under the penal policy functions of the concept. In the case of guilt, this point is easily highlighted. In his impressive text-book Roxin emphasises the reason for putting such a condition of guilt in the first place. According to him, the reason lies in the setting of limits to the exercising of sentencing powers by a state. These limits in particular restrict the influence of interests of the public needs of prevention in this respect.[9]

As I see it, the general doctrinal work in the criminal sciences very often threatens to remain "*begriffsjurisprudential*" for the reason just mentioned. Bernd Schünemann has called that style of dogmatic work "non-consequential dogmatics".[10] It would, however, be quite depressing if this were what the rule of law was all about: an imperative to be formalistic, and in a way only unconsciously to further the ideals of a rule of law state, in order not to be forced to compromise those ideals. Then we should actually have to doubt the Hegelian claim that the value of positive law lies partly in its having been reflected upon.

To my mind, one way out of this dilemma is to see the norms of criminal law in the context of the legal system as a whole, and especially in the context of fundamental rights. Penal prohibitions not only qualify actions or omissions as crimes. They also construct a framework wherein people may act and thus enjoy their rights, without the fear of intervention by the organs of the criminal justice system. The legal system qualifies different modes of action and omission with various legal sanctions. The contemporary legal system differs radically from that of the days of formal rule of law ideology. The best example of this is the growing importance of social roles and positions when the rights and duties of persons are determined. One could also call this a sort of sociological influence in law and jurisprudence. The legislator has in many fields of law broken the formalistic—we could call it bourgeois—concept of abstract legal personhood, and filled it with specific rights and duties differentiated according to various social roles and positions. Contract law could here be given as an example.[11]

This development must of course also have influenced modern criminal law. Questions of legal imputation have to be put in the right context, which to my mind is the socially just manner of distributing rights and duties in a given society. I would not be in favour of reducing the idea of a rule of law to the kind of model of law which

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9 ROXIN, C.: *Strafrecht. Allgemeiner Teil. Band I*, München, 1992, 541.

10 Goltdammer's Archiv, 1995, 30–33. It is actually not totally fair to claim it as a defect in research that it is conceptual. The real reason for this is of course that it does not reach the level of reflection, that is, the level of so-called theoretical jurisprudence.

11 See, amongst others, Thomas Wilhelmsson's critical work on contract law. WILHELMSSON, T.: *Critical Studies in Private Law. A Treatise on Need-Rational Principles in Modern Law*, Dordrecht/Boston/London, 1992, 80–100 and *passim*.

conceives of law as an abstract system of rights and duties only, anchoring them directly to the concept of a legal person, and thus to abstract role-concepts. Quite the opposite. I do not at all think that it would be somehow utopian to claim that this general development of law has to be reflected upon in the doctrine of criminal law. If we look at the normative system of criminal law as a whole, it is in many ways profoundly dependent upon other fields of law, such as when the content of norms of conduct are given their precise meaning. The criminal law of a modern rule of law state cannot be adequately described as a system of rules which would be totally universally applicable. The rule of law state has to be seen not only from the point of view of the safeguarding of pre-existing rights, but the active transformation of the legal system by the legislator has additionally to be understood as being constitutive to the whole idea of the rule of law.

This is precisely what causes the dilemma for the legislator. Modern legislation should take into account this development, but on the other hand there is no easy way of determining the correct amount and direction of "materialisation" of conceptual elements in the general doctrines of criminal law.

It could be useful here to refer to an analysis of different normative elements in criminal law, which has been proposed by Paul H. Robinson.[12] He emphasises the importance of choosing one particular distinction as the crucial one when analysing normative materials of criminal law: the distinction between rules of conduct and principles of adjudication.

He stresses that rules of conduct should seen as being addressed directly to the common people. The rules of conduct "should be stated in simple, brief, and commonly understood language that can be widely disseminated".[13] The rules of conduct have to describe what is prohibited and what is punishable, and they have to be in a form which allows for an easy application in various unexpected situations in life.

The principles of adjudication are again addressed to the legal professionals who are supposed to have more competence and time to study the cases they have to decide. The norms that they should and can use must be much more complex than the rules of conduct. The principles of adjudication have quite another function than the rules of conduct. The rules of conduct are guidelines for the public in their actions, whereas the principles of adjudication are required in order to reach just decisions in legal decision-making.

According to Robinson, legislation should recognise these differing functions, and therefore strive towards different ideals in the respective two parts of criminal legislation. Criminalisations should be as clear as possible, whereas most of the so-called general part can be seen to belong to the other group, having primarily to do with evaluation of actions *ex post facto*.

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12 ROBINSON, P. H.: "Rules of Conduct and Principles of Adjudication", *The University of Chicago Law Review*, 1990, 729–771.

13 *Ibid.*, 765.

It is clear that Robinson actually stresses the need to recognise the importance of rule elements in the criminalisations of criminal law. I do not disagree with that view. I would in any case use the same argument in the opposite direction: the principles of adjudication—which according to Robinson are dealing with questions of culpability—cannot be transformed into rules. The legislator should understand why the principles of adjudication inevitably have to be vague, and at best only to set a framework for a concrete decision. In the words of Robinson, "[t]he principles of adjudication should be made as complex or discretionary as is necessary to properly capture the community's evaluation of blameworthiness, without the constraints that might be imposed on a document designed for unsupervised, lay application."[14]

To my mind, the feature of vagueness is a consequence of the task of the legal system to guarantee certain rights for the people and other legal entities, and of the fact that the system of rights cannot be defined as a system of rules. Robinson's analysis allows for the interpretation that I am proposing, but I do not speak of it only in functional terms. I want to connect this set of problems with the general development of law and the modern legal way of thinking about people's obligations in different kinds of social activities. Role-concepts cannot be abstract, and the division of rights and duties has to reflect the differences in the legal demands we put on various actors with differing qualities and abilities, in concrete situations where they act.

To take one example of this: traffic rules. It should be rather obvious that different actors' breaches of rules must be measured differently. A truck driver's or other professionals' acts cannot be directly evaluated using the standards which apply to average road-users.[15] Professional status affects, for example, the culpability judgement. The role-concept is normatively stricter than the average, and it establishes the normative expectation that a person in that role has the relevant attitudes and abilities needed in the activity to safeguard others' legitimate expectations. Of course specialisation—a kind of progressive division of labour—is also partly connected to the need of society to operate stricter control over certain important and potentially risky activities.

The same kind of development can also be seen in questions having to do with the authorised use of force. The classical liberal state knew basically only the rights of the individual to defend him or herself in the case of an unlawful attack. The relevant justifications and excuses were applied in typical situations where dangers had to be battled. Acting in self-defence was prima facie fulfilling the definitional elements of a crime, and thus only the exceptional ground of self-defence could erase from this act the quality that it in principle violated the demands set by the law. State authorities, private guards, and others were also judged on the basis of these general regulations. Now the situation has changed a great deal. The authorities or guards do not have to legitimate their use of force in this way, as a justified exception to a normally unlawful

14 *Ibid.*, 765–766.

15 *Ibid.*, 763. Robinson speaks about the need "to individualise the reasonable person standard, if it is to accurately reflect the normative expectations by which the community assigns or withholds blame".

action. They have norms of competence of their own today, which directly authorise their use of force under certain circumstances. This has led to the narrowing of the sphere of application of the original sections dealing with defence.

Even if aspects such as the division of labour affect the possibility of abstract and general regulation, there is also a kind of force of resistance to the development towards the differentiation of normative standards in criminal law. This has to do with a criticism often levelled against criminal law: the sin of becoming too modern, especially in those fields of criminal law which deal with economic and environmental crimes. Generally speaking, crimes performed by rationally planned and directed organisations which belong to the economically and technologically powerful sectors in society have grown in importance since the 1970's. This legal development has led to a kind of anachronism with regard to the classical doctrines of penal liability. The impossibility of combining the requirement of the personal guilt of the perpetrator with the possible consequences of the act was a weighty argument which supported the penal liability of legal persons for some crimes, and in Finland the relevant legislation recognising this new type of corporate liability was passed last year.

I think that it is not too difficult to see where the roots of these anachronisms lie. If the general doctrines are constructed upon a conception of human action which stems purely from the heritage of moral philosophy, and as such is almost historical, it could be doubted whether this picture is accurate as a starting point when the planned actions of rationally acting organisations are to be evaluated. To my mind, not even the work of the Criminal Reform Project in Finland has really tackled this question, which becomes even more difficult when basic concepts of penal liability are to be defined in the text of the law.

The preparatory work for the Criminal Reform Project has advanced—slowly but steadily—and the proposals of the project dealing with provisions on the general doctrines should be made accessible to the public in a few months. The solution presented to this problem mentioned above, that is, dealing with the anachronisms, will be one of the points of interest to be evaluated when the new proposals have been published.

I want to give one example of a question which will be difficult: the choice of formulation of the definition of criminal intent. One problem lies in defining the sphere of *dolus eventualis*, and whether the border-line between intent and recklessness is settled by using volitional theories of intent, or probability theories, or by somehow combining the two. The probability version is clearly better suited to cases where the act is based on rational calculation—such as in most so-called modern criminality—whereas the volitional theories perhaps give better tools for the handling of traditional crimes such as violence between two individuals.

This choice comes first. But the second choice can be even more difficult: if a probability conception is chosen, should the required probability estimate be exactly the same in all constellations of imputation, that is, in all crimes and in the case of all perpetrators? Should we not be willing to think that a person functioning in a professional organisation with specific duties to undertake measures to guard against breaches of the law, will understand the nature of the law's demands much earlier than

an average citizen without any special knowledge? Can we really say that we only have one standard?

The same could be said of grounds for justification and excuse. Can we find a way of taking into account both sides of our needs: the norms have to be relatively general so that they cover a sphere wide enough? But, on the other hand, they have to be flexible enough so that the rights and duties of the parties can be evaluated in a socially just manner, that is, so that the party's social role can adequately form one basis of the evaluation?

One of the leading general legal principles in the field of criminal law is the principle of legality. As seen above, the principle of legality is very fundamentally tied to values and ideas of the rule of law. Therefore, I would like once again to discuss the importance of this principle, this time from the point of view of the law-giver.

The principle of legality has the characteristics of a meta-principle in the legal system. On the one hand it binds the legal application of criminal law to the wording of the written legislation, but on the other hand it also restricts the legislator's alternatives in how to pursue criminal political goals. The written law may not be too vague in nature, retroactive criminalisations may not be tolerated, and so on. Viewed from a wider perspective, the principle of legality can be seen amongst other things, to limit the creation of ad hoc courts. It is not only norms of conduct and sanctions, but also the organisational side of the legal system which has to be clear at the moment of the deed.

To my mind, the different norm-contents of the legality principle very strongly emphasise that the principle is not, strictly speaking, "part of" criminal law. It is a constitutional principle which affects the system of criminal law in many ways. Its function is to guarantee that the construction of criminal law will be carried out in a manner which does not threaten the fundamental rights of the citizens. This makes the task of formulating the norm system of penal law a delicate matter. When specific forms of conduct are made punishable by sanctioning the breach of those norms, the sphere of the legitimate enjoyment of fundamental rights is thereby affected. The principle of legality not only demands that this limit has to be clearly defined at the time of the act, but also that breaches of the norm have to be dealt with according to the law. The law not only has to manage to determine what is lawful and what is unlawful, but the law has to have a system of judging and convicting unlawful actions in a lawful manner. The need to protect the rights of the individual is not of lesser importance when the accused is being convicted.

I do not want to go through the whole spectrum of issues which have to do with the principle of legality. The particular issue I wish to discuss here concerns the importance of the principle of legality with regards to the quality of preciseness of the general doctrines of penal liability.[16]

16 See Robinson's remarks on the other rationales supporting application of the legality principle to doctrines of adjudication rather than to the rules of conduct, *ibid.*, 770. According to him, not only notice is important, as it is in the case of rules of conduct. The legality rationales include: "increasing uniformity of application to

It seems to me obvious that the importance of the principle of legality is most crucial when the rules of forbidden conduct—the definitional elements of various types of crimes—in the special part of criminal law are set. There is much reason to worry about the present situation in this respect, but this is not my foremost concern here. The point I wish to make is that if we regard the principle of legality as being a constitutional principle, then its importance is much more easily recognisable, when compared with the alternative that it is just seen as one particular rule, or element, within the general doctrines.

Only if the principle of legality is seen in the context of fundamental rights can the intimate relationship between that principle and the principle of guilt be fully demonstrated. We could say that the principle of guilt is the specifically material element guaranteeing the maximum protection of the rights and interests of the accused and convicted person when criminal cases are to be decided. It is therefore of crucial importance that law-drafting practice respects the differences in the culpability of the act, in order not to one-sidedly over-emphasise the value of dangerousness and harmfulness of a certain act referring to utilitarian goals.[17]

The position of the legality principle was strengthened in the reform of the Finnish Form of Government, when the Sections concerning the fundamental rights of the citizens (often generally applied also to cover foreigners) were renewed.[18] Section 6a concerns some aspects of the principle of legality. According to the Government Bill (309/93), the section contains "the most important elements of the legality demands in criminal law".[19]

I still think, however, that the principle of legality is also understood in this reform of the Form of Government and in the Finnish doctrine[20] in an overly formalistic manner. If we were to see it as the legislator's duty to build the whole totality of criminal law in a way which safeguards individuals' full enjoyment of their rights, it would always be important to stress the culpability principle as a supplement to the perhaps more formal principle of legality. Therefore, it would have been better if the legality principle had also been understood to cover criminal responsibility's limits of culpability.

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similar cases, limiting the potential for abuse of discretion, and minimising the improper delegation of criminalisation authority from the legislature to the courts".

17 See also Robinson's remarks on the primacy of utilitarian concerns at the level of the rules of conduct, whereas the justice reasons dominate the level of principles of adjudication. *Ibid.*, 770.

18 Act 969/95; in force since August 1, 1995. See also the article LAHTI, R.: "Perusoikeusuudistus ja rikosoikeus" ("The Reform of Constitutional Rights and Criminal Law"; with a summary in English), in *Lakimies* 5–6, 1996, 930–939. In the summary Lahti asserts that the increasing emphasis "on human and constitutional rights will obviously affect the Finnish criminal law theory and criminal policy. For instance, the moral and political arguments of justice and humanity, which play an important role in criminal law theory, have now a strong institutional support as legal principles, too, when being firmly attached to human rights and constitutional law."

19 Government Bill, 50.

20 E.g. FRÄNDE, D.: *Den straffrättsliga legalitetsprincipen*, (Criminal Law Diss., with a Summary in German, Ekenäs, 1989), *passim*.

From my point of view—and from the point of view of the protection of fundamental rights and human rights—the general part of the Penal Code should also contain provisions defining the more specific degrees of culpability, which the individual definitions of the special part could then refer to. I would like to defend the view that the norms of criminal law not only have as their addresses the courts authorised to enforce the law, but also that citizens should be able to know at least the outlines of the system created in the general doctrines. This is important not only with regard to the general doctrines of criminal liability, but also with regard to the general formation of the system of sanctions.[21] As we all know, questions concerning sentencing mainly just elaborate further the same principles already present in the doctrines of penal liability.

I would now like to turn back to the issue of whether we really can have the general doctrines' generality demand satisfied under modern conditions, when the special part covers a variety of totally different types of prohibited acts. This is now where the dilemma arises. The legality principle encourages us to be as pedantic as possible in the definition of the general doctrines, but the variety in the regulations in the special part does not allow for it without our neglecting important aspects concerning the object-adequacy of the field in question.

This discrepancy can only be handled if we properly understand the nature of the problematic. Here one important aspect is to take into account the differentiation that has occurred on the level of the activities which form the object field of legal regulation. I feel that this requires that the point of an individual person's rights and duties is seen in the context of the social activity in question. Therefore the principle of legality, properly understood, cannot be seen to demand the generality and specificity only of the formulations of the general doctrines in the general part of the Penal Code. The principle of legality in itself demands the adequacy of the content of the norms defining the culpability of the act, in relation to the legitimate and normatively supported expectations connected with activities in legal roles and positions. This will, in my view, demand a certain flexibility in the definitions of the general doctrines of liability, and the possibility in the legal application of the norms of securing the object-adequacy of the interpretative result in this respect.

I have tried to prove my thesis that the legal theoretical framework is of crucial importance when the true meaning and validity of general legal principles in the legislative work of the law-giver is being discussed. The traditional conception of the rule of law state leads to an unnecessary formalism in the presentation of the contents of the principle of legality, which again somehow isolates matters concerning the legitimate construction of norms defining the area of criminal law from the context of fundamental and human rights. This also leads to a kind of polarisation of penal law thinking with respect to the discussion concerning the role of the state. I refer of course

21 See the valuable article by ROBINSON, P. H.: "Legality and Discretion in the Distribution of Criminal Sanctions", *Harvard Journal on Legislation*, 1988, 393–460.

to the two faces of the state: it is conceived of either as a rule of law state or as a social welfare state, but it should be conceived of as fulfilling both expectations.[22]

In my opinion, this goal is best served by stressing the importance of material legitimation of the constructive elements of penal liability, with regard to the different legal positions of the actors, and in the light of constitutional law. I even see here one possibility of emphasising one point where the system of penal law has an advantage, when compared with most other branches of legal studies. Criminal law, unlike most of civil law or public law, deals in a very direct way with social activities, which gives penal law a dynamic context. It is the change in social activities, and the concomitant development of the system of rights and duties, that brings about the need to review the constructive elements of penal liability.

To my mind, much of this development happens without our being conscious of it. The courts' decisions already reflect this dynamism, which for the courts is something quite natural. Traditional dogmatic apparatus has not prevented developments in this respect, just as the development of constitutional law is very seldom "led" only by constitutional law. Legal dogmatical research should be able to "mediate" between the different levels and poles of law and legal actors, and to take the necessary distance to the norms and practices which are to be evaluated by referring to materials which belong to another pole or level.

However, constitutional rights and values should not be forgotten in the work of developing new constructive models for prerequisites of criminal liability. I would wish in fact to see criminal law doctrines profiting from this very connection to dynamic aspects of life. We could see that the general principles of criminal law are very much at the roots of constitutional rights—also historically. They are an expression of the individual's need for protection limiting the powers of the public authority. The level of legal application is where the individual's interests are most concretely at stake. This level is also the place of birth of legal principles. The general doctrines in the criminal law should therefore be seen as having gained their specificity mainly because the needs for protection are of a particular kind when the state pursues its goals by threatening to enforce penal sanctions.

Of course, constitutional law not only deals with the state's obligations and rights to punish. That is only one tiny facet of the tasks of the state as defined at the level of the constitution. But that does not make the connection between the rules and principles of criminal law and constitutional norms less interesting. We actually need only the correct perspective on law that will allow us to conceive of this connection. I hope I have been able, at least in a sketchy fashion, to draw a picture demonstrating this to be possible.

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22 One eminent author who has tried to re-organise the struggle between these two types of legal paradigms is of course Habermas. He has sought the way out of the dilemma by constructing a third way of thinking about the foundation of the individual's rights. His solution is the so-called procedural paradigm of law. See HABERMAS, J.: *Faktizität und Geltung*, Frankfurt am Main, 1992, 468-537, esp. 493.

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The Reform of Fundamental Rights and the Criminal Justice System in Finland

1. The Revision of Fundamental Rights in Finland

The reformed Chapter II of the Constitution Act of Finland came into force last year.[1] This Chapter on fundamental rights can be seen as the first comprehensive "Bill of Fundamental Rights" in the Finnish Constitution. The previous catalogue of fundamental rights had little influence on the criminal justice system for several reasons.[2]

1. Fundamental rights only had the function of limiting the powers of the State. The idea was that the State could not violate the fundamental rights of the individual through an ordinary law. Fundamental rights were not rights which could also have had relevance in legal relationships between citizens. This effect—which is covered in Germany by the concept of *Drittwirkung*—included only legislation in the fields of, for example, criminal law and the law of damages.[3] In practice, this meant that criminal legislation was hardly ever considered to be related to fundamental rights. The limitations on the freedoms of individuals which criminal legislation entails could be formulated as ordinary law. Questions such as those regarding the extent to which the

1 Act no. 969/1995.

2 For the broad outlines of the reform see, e.g., SCHEININ, M.: "Minorities, Human Rights and the Welfare State—the 1995 Fundamental Rights Reform in Finland", in POHJOLAINEN, T.: (ed.): *Constitutionalism in Finland—Reality and Perspectives*, Helsinki, 1995, 30, 31 *et seq.*

3 Even in Germany, where there has been a far-reaching system of fundamental rights since the 1950's, the discussion of *Drittwirkung* is normally limited to private law relationships between individuals. Only in the 1990's has the interest shifted to cover the criminal justice system as well.

State is allowed to restrict the freedoms of individuals by criminal legislation, or the general requirements criminal legislation must fulfil in order to be constitutional, were hardly ever raised. In any case, if these questions were raised, the answers were not based on the fundamental rights and the Constitution, but rather on the so-called principles governing criminal provisions. I will return to these principles in section 2.

2. The courts had not normally seen themselves as being permitted to examine the constitutionality of the Acts of Parliament. In fact, fundamental rights have not had much relevance for the courts at all. In some cases, the Finnish Supreme Court has referred, for example, to the principle of equality,[4] but normally laws have been interpreted without taking into account fundamental rights of individuals, and without reference to the Constitution. Fundamental rights have been relevant solely for Parliament, not for the courts; on the other hand, international human rights conventions have been applied in the courts.

The reasons for this special feature are obvious in Finland. There is no Constitutional Court, and the general courts may have found it difficult to apply provisions of the Constitution. In addition to this, the general opinion has been that if the courts had the right to apply the fundamental rights and rule on whether ordinary laws are in conflict with fundamental rights, then this would mean that an important part of the powers of Parliament would have been transferred to the courts.

3. The domestic catalogue of fundamental rights was rather old-fashioned and limited to the so-called "negative liberty rights", that is, human rights of the so-called first generation. The Constitution did not take into account the European Convention on Human Rights or other international human rights instruments. For example, the right to a fair trial or social rights were not present in the written Constitution of Finland. Most economic, social, cultural and environmental rights were not included in the Constitution Act. Furthermore, there were not even explicit constitutional provisions concerning all the traditional basic rights. For example, provisions relating to the right to personal integrity were lacking in the Finnish Constitution.

After the total reform of Chapter II of the Constitution Act the situation in Finland is wholly different. The domestic discussion began as early as 1974 when the Constitution Act Committee suggested a total reform of fundamental rights provisions. The Working Group on Fundamental Rights, appointed by the Ministry of Justice, made the same proposal in a more elaborate way in 1982. In the domestic discussion, the role and function of fundamental rights has been one of the core issues in the scientific discussion of constitutional law in the last ten years. Additionally, the international discussion, especially Robert Alexy's theory of fundamental rights,[5] has had an impact.

The reform of Chapter II of the Constitution Act in 1995 had two main goals.

1. The function of fundamental rights is no longer only to limit the powers of the State. On the one hand, the State must respect the fundamental rights of individuals,

4 See decision KKO 1973 II 73.

5 See ALEXY, R.: *Theorie der Grundrechte*, Frankfurt am Main, 1986, 224 *et seq.*

and, therefore, Parliament is not allowed to enact criminal legislation which is not in accordance with the provisions of the Constitution. For example, the principle of legality may under no circumstances be breached.[6] But on the other hand, the State is also obliged to protect and ensure fundamental rights in the relationships between individuals. This concept entered the Finnish discussion particularly after Finland had become a party to the European Convention on Human Rights. The international discussion of these three functions of fundamental rights also had an impact on this new emphasis. In practice these changes are analogous to the doctrine applied in the European Court of Human Rights and at the domestic level imply the following.

Firstly, there are some so-called absolute prohibitions in the reformed Chapter II of the Constitution Act of Finland; the most obvious of these is Section 6(2), according to which "(n)o one shall be sentenced to death, tortured or treated in a degrading manner". Additionally, the principle of *nullum crimen sine lege, nulla poena sine lege*—which is stipulated in Section 6a—may not be violated under any circumstances. These provisions obviously caused no major changes in the existing Finnish criminal justice system.

Secondly, in other cases the principle of proportionality should be given a central position in the argumentation concerning new criminal justice legislation. The State must, for example, protect the life and health, personal integrity and liberty, property and privacy of individuals from the violations of other individuals to some degree.[7] This requirement is already traditionally fulfilled by the provisions in the criminal law.[8]

But at the same time the State must also take into account the fact that punishment in itself means the deprivation of personal liberty and property. In addition to this, the threat of imprisonment or fines, and the limitations which the criminal provisions indicate, must be in proportion to the value of the fundamental rights protected by these provisions. Restrictions of fundamental rights must meet the criteria of proportionality. The importance of the desired goal, and the extent to which the fundamental right is infringed in pursuit of its protection, must be duly proportional.

Thirdly, restrictions of fundamental rights must also be necessary to protect and ensure the rights of individuals. Limitations on fundamental rights may be allowed only if the protection of individuals is not possible by means that do not violate the rights as much as the threat or actual implementation of the punishment. The State may not restrict a fundamental right except when the protection or implementation of another fundamental right or protection of another constitutional value cannot be secured by other means. This means, for example, that if a proposed criminal provision will not

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6 According to Section 6a of the Constitution Act "(n)o one may be found guilty of a criminal offence or sentenced to a penalty on account of some act for which no penalty had been prescribed by Act of Parliament at the time of its commission. No greater penalty shall be imposed for a crime than that which was prescribed by Act of Parliament at the time of its commission." The Constitution of Finland is published in English in *The Parliament of Finland & Ministry For Foreign Affairs & Ministry of Justice, Constitutional Laws of Finland, Procedure of Parliament*, Helsinki, 1996.

7 Sections 6(1), 8(1), and 12(1) of the Constitution Act.

8 Chapters 21, 20, 25, 28, 27, and 24 of Finnish Criminal Law deal with these relevant fundamental rights.

have enough preventive impact, it should not be used. In practice, however, evaluations of proposed criminal provisions are made far too seldom in the Finnish Parliament.

2. The reform also meant opening up the possibility for the courts to apply fundamental rights. This is only natural, since the courts have already applied provisions such as those of the European Convention on Human Rights in their individual decisions. It seems probable that in the future there will be no special Constitutional Court in Finland, although the final decision on this has yet to be made.

However, the courts in fact very seldom find themselves in a situation in which they have to declare an ordinary law to be invalid because it contradicts the Constitution. They will probably not have this right even after the reform. Questions as to whether it is possible to restrict the rights of the individual with criminal legislation, and under which conditions, will very seldom arise in courts.

Of greater importance for criminal justice is the new emphasis on the interpretative weight of fundamental rights. It is more common that the fundamental rights of both the accused and the victim may be used in courts as arguments in different kinds of interpretative questions left open in the legislation. In this interpretative influence of fundamental rights, the rights of individuals function in the same way as traditional legal principles. They have a "dimension of weight" which, although it may differ according to context, ought to be taken into account in legal reasoning. When a provision in an ordinary law gives rise to several interpretative possibilities, the court should choose the interpretation which fulfils the requirements of fundamental rights in the best possible way. The courts are, according to the prevailing doctrinal understanding, under an obligation to resort to a "constitutional-rights-oriented" or a "human-rights-friendly" interpretation.[9]

2. The Principles Governing Criminal Provisions

2.1. The Inviolability of Human Dignity

Instead of discussing the relationship between fundamental rights and criminal justice, in Finland there has traditionally been much discussion on the so-called principles of governing criminal provisions and their impact in criminal legislation.

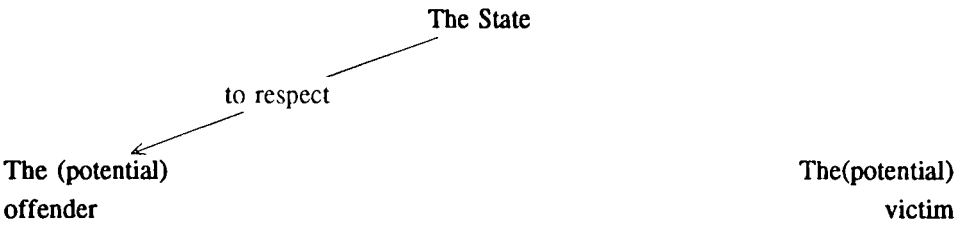
I consider the principle of the inviolability of human dignity to be the first principle of governing criminal provisions. In the Finnish discussion, the principle has not been considered to be of this kind, but after the reform of fundamental rights it has been codified in Section 1(1) of the Finnish Constitution Act[10], and I see no reason why it should not be the most central normative principle of the criminal justice system. The

9 See SCHEININ: *op. cit.*, 32.

10 According to the Constitution Act, "Finland is a sovereign Republic, the constitution of which shall guarantee the inviolability of human dignity and the freedom and rights of the individual as well as promoting justice in society".

role and function of this principle of governing criminal provisions can be illustrated in Figure 1.

Figure 1



The principle of the inviolability of human dignity refers to the rights of the offender that the State must respect. The principle has at least the following aspects.

Firstly, the principle can be understood in a way that categorically prohibits strict liability in criminal law. This is the interpretation that the principle has, for example, in Germany where the inviolability of human dignity is also a part of the Constitution.[11]

Secondly, the degrees of guilt must be in proportion to the interests protected. The principles governing criminal provisions not only apply to the questions of what we may protect by the criminal law, but also to the question of the way in which we may protect fundamental rights. The legislator should use negligence as the minimum requirement to establish culpability only when important interests are at stake. This can be seen, for example, by the fact that life and health are protected against negligent acts[12], but theft and other crimes against property require intentionality.[13]

Thirdly, one can also argue that because of the principle, the forms of criminal guilt—intentionality, gross negligence and negligence—may not be based solely on general deterrence but must, in addition, meet the requirements of the individual's ability and opportunity to conform to the law.[14] This question has relevance especially in the formulation of negligence. In contemporary criminal justice textbooks it is not uncommon to define negligence in a way that does not necessarily take into account the individual's abilities and opportunities to act carefully.

More precisely, if we define the subjective requirements of negligence solely on the basis of what the so-called "normally careful person" or *bonus paterfamilias* would have

11 See, e.g., WOLTER, J.: "Menschenrechte und Rechtsgüterschutz in einem europäischen Strafrechtssystem", in SCHÜNEMANN and DIAS (eds.): *Bausteine des europäischen Strafrechts. Coimbra-Symposium für Claus Roxin*, Cologne, Berlin, Bonn, Munich, 1995, 3, 4, 5–6. See also TIEDEMANN, K.: *Verfassungsrecht und Strafrecht*, Heidelberg, 1991, 4–5, 9–10.

12 See Finnish Criminal Law, Chapter 21, Sections 8–11.

13 See Finnish Criminal Law, Chapter 28.

14 See WOLTER: *op. cit.*, 11. See also—slightly more cautiously—LAGODNY, O.: "Grundrechtliche Vorgaben für einen Straftatbegriff", in ARNOLD—BURKHARDT—GROPP—KOCH (eds.): *Grenzüberschreitungen. Beiträge zum 60. Geburtstag von Albin Eser*, Freiburg im Breisgau, 1995, 27, 31.

done in the corresponding situation, and do not take into account, for example, the youth, the lack of knowledge or lack of intellectual or physical capabilities of the offender, then this may cause problems with respect to the traditional principle of guilt and the constitutional principle of the inviolability of human dignity. It is another matter, of course, if the objective standard of due care is formulated on the basis of how a normally careful person would have acted in the situation. My point is that violation of this objective standard should never alone be sufficient as a requirement for criminal responsibility.

2.2. The Interests that May be Protected by the Criminal Law

Another classic principle to be taken into account is that criminal provisions may be used only to protect those interests which are vital to the community.[15] In the German discussion, the concept of *Rechtsgut* defines the interests to be protected by the criminal law in the same way. The principle has at least the following five consequences.

(a) The sources of interests to be protected. Previously the problem central to this principle was that the scope of interests to be protected by the criminal law was very vague. In its classic form, the concept of *Rechtsgut* was formulated on the basis of morals. The source for the catalogue of *Rechtsgüter* was legal literature. In modern, goal-rational criminal justice, however, the catalogue of *Rechtsgüter* can be derived either directly or indirectly from the constitution and human rights.[16] The interests that may be protected by the criminal law would not only be defined in the minds and theories of criminal law scientists, but also in the political discussions in Parliament and the international human rights conventions.[17]

(b) The principle as a limitation on criminal law. The second problem has been that the principle has been used as a positive principle, that is, it provides permission for the use of criminal law every time an acceptable interest is to be protected. The traditional meaning of the principle was the opposite. Parliament may use the criminal law only when the State is obliged to protect certain interests because of fundamental or human rights.[18] The criminal law is not a list of actions which are "bad in nature" (*mala in se*);

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15 For an overview of the principles governing criminal provisions, see LAHTI, R.: "Die Gesamtreform des finnischen Strafgesetzes: Zielsetzung und Stand der Reformarbeit bis 1991: insbesondere im Blick auf die erste Phase der Gesamtreform", in LAHTI, R.–NUOTIO, K. (eds.): *Criminal Law Theory in Transition*, Helsinki, 1992, 27, 38 *et seq.*

16 See, e.g., ROXIN, C.: *Strafrecht. Allgemeiner Teil. Band I. Grundlagen, Der Aufbau der Verbrechenslehre.*, Munich, 1994, 14–17; SCHÖCH, H.: "Entkriminalisierung, Entpönalisierung, Reduktionismus. Quantitative Prinzipien in der Kriminalpolitik", in ALBRECHT–EHLERS–LAMOTT–PFEIFFER–SCHWIND–WALTER (eds.): *Festschrift für Horst Schüler-Springorum zum 65. Geburtstag*, Cologne, Berlin, Bonn and Munich, 1993, 245, 253.

17 See also in the Swedish discussion JAREBORG, N.: *Straffrättsideologiska fragment*, Uppsala, 1992, 101.

18 See especially TAPIO, L.–S.: "Om straffrättssystemets (externa) berättigande", in BERGLUND–FRÄNDE–HÄGGBLOM–SEVÓN (eds.): *Skuldfrihet och ansvarslöshet. En hälsning till Alvar Nelson på 75-årsdagen av Ane den gamles barnbarn*, Helsinki, 1994, 71, 79 *et seq.*

it seeks rather to protect individuals from violations of fundamental rights committed by other individuals. Only in cases where the protected *Rechtsgut* involves such matters as State security, public order, and so on, does the criminal law not need a direct background in constitutional fundamental rights.

In practice the Finnish Parliament has not taken this principle at all seriously. A typical example of the principle is the area of sexual offences.[19] The legitimate interests to be protected are those involving personal integrity[20] and the special protection of children and young people. Public morals, for example, do not form an interest which could be protected by the criminal law with reference to fundamental rights in the Constitution.

In Finland the Criminal Law Project proposed a reform of the provisions relating to sexual offences in 1993. According to this proposal, public encouragement of homosexuality would no longer be a crime. It was additionally proposed that voluntary incest between adults over 18 years of age should not be a crime. This would be a logical result of the interests to be protected according to the Constitution, but in practice, however, it is not clear whether these reforms will be implemented. Many voices have been raised—not only from the churches and other religious groups—insisting that the criminal law also be used in the future to protect public morals.

Another example taken from the field of sexual offences is the question of pornography. Criminal provisions ought to be limited to situations in which the interests of personal integrity, the protection of children and the young people or other constitutional values require the use of the threat of punishment. In practice this aim is not easily achieved. On the contrary, there are currently many political pressures in favour of toughening the legislation on pornography.

(c) The principle and the protection of new fundamental rights. If we trace the interests that may be protected by the criminal law to national fundamental rights and international human rights, a possibility such as the protection of the environment by criminal law becomes evident. The fact that the Constitution strongly emphasises environmental protection is one argument for using the threat of punishment in this area.

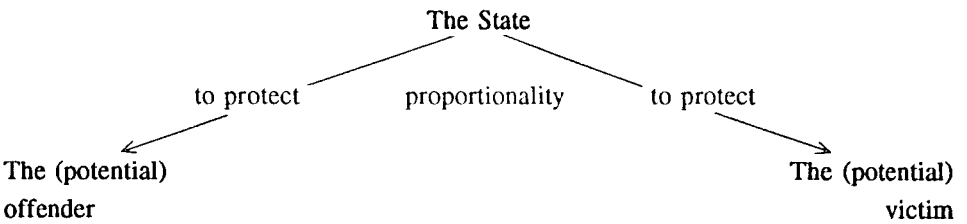
Legislation concerning crimes against the environment was reformed last year[21] as part of the second phase of the total reform of the criminal law.[22] Many scholars in Finland have seen major problems in the use of the criminal law in such relatively new areas as the environment. The critics are right in saying that only such criminal provisions as can have enough preventive influence on behaviour should be used, and that purely symbolic criminal provisions cause more problems than they solve. The role of the criminal law in these new areas must also be restricted to a subsidiary one.[23] On

19 Chapter 20 of Criminal Law.
20 Section 6 of the Constitution Act.
21 See the new Chapter 48 of Finnish Criminal Law.
22 Act no. 578/1995.
23 See Section 2.4 below.

the other hand, why should protection of the environment with the help of the criminal law be any more problematic than that of the traditional fundamental rights, especially when fundamental rights and international treaties require States to implement legislative measures to protect the environment?[24]

(d) The balancing of interests in the legislative process. Taking into account the reform of fundamental rights, the principle could also be understood in a way that presupposes proportionality between the protected interest, the deterrent effects of the criminal provision, and the limitations that these provision impose on the freedoms of individuals. In Figure 2, this relation is not solely the protection offered to the victim by the State; it also represents the protection of both the offender's and the victim's rights. When the State protects, for example, life, personal liberty, and the property of individuals by means of criminal law, it must at the same time take into account that the threat of punishment in itself constitutes a limitation on the freedoms of individuals. The threat of imprisonment or fines must be in proportion to the value of the fundamental rights protected by the criminal provisions.

Figure 2



This argument may be relevant to, for example, the question of how much we should use endangerment instead of concrete effects as the basis for criminal provisions. The intensity of society's response must be proportional to the danger represented by the offender. The total reform of Finnish criminal law in the 1970's had as one of its emphases dangerous conduct as such, and not the effect caused. In the last two decades, however, many critics, both in Finland and abroad, have questioned the rationality of punishing dangerous behaviour without requiring concrete effects, such as on life or health. For example, Felix Herzog[25] points out that the offences based on endangerment "endanger the whole criminal justice system".

(e) The balancing of interests in the general principles of criminal justice. The same kind of balancing of interests has obvious applications in many interpretative questions of the general principles of the criminal law. This line of thought is especially evident

24 See also STRATENWERTH, G.: "Zukunftssicherung mit den Mitteln des Strafrechts", *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1993, 679, 692.

25 See HERZOG, F.: *Gesellschaftliche Unsicherheit und strafrechtliche Daseinsvorsorge. Studien zur Vorverlegung des Strafrechtsschutzes in den Gefährdungsbereich*, Heidelberg, 1991, 70.

in the German goal-rational or functionalist schools. For example, such recent questions as the scope of allowable risk-taking, or the relevance of the consent of the endangered person, can be dealt with in a more consistent manner than previously, if we ask whether the protection of the interests of the victim really require the punishing of the offender.

In effect we are speaking of the same thing as the principle of proportionality in constitutional law.[26] The protection of *Rechtsgüter* must be proportional to the importance of the desired goal. I could mention dozens of examples of this approach; here one will suffice. In Finland one typical problem has been the definitional elements of the crime of "negligent receiving of stolen property".[27] If, for example, a salesman has "reasons to suspect" that the property he or she is buying is stolen, he or she shall normally be sentenced to pay a small fine. If we understand the question as also being of relevance to fundamental rights, we are obliged to ask how far must individuals investigate the origins of the goods they are buying? How wide may the limitations on normal economic transactions be in order to provide sufficient protection of property, without, at the same time, placing too great a limitation on the freedoms of individuals?

In addition to this, in many questions of the general principles of criminal law, one may ask whether the victim is in need of protection. This question can be also understood as one aspect of the constitutional principle of proportionality. For example, today in Finland the relevance of the consent of the endangered person is very unclear. Again, one example will here suffice. Let us suppose that two persons are travelling in a car. The passenger urges the driver to drive faster in order to catch a plane. In the ensuing accident the passenger is injured. Traditionally the situation has been seen as falling within the area involving the problems raised by the "consent of the victim". This justification does not apply if the victim has not consented to the effect, but only to the endangerment. But is the victim's health really in need of legal protection, if he or she has personally urged the offender to drive faster?[28]

2.3. The Comparison Between the Advantages and the Disadvantages of Criminal Provisions

The traditional interpretation of this principle has been that, although the criminal provision would have passed the two previous tests, it still must bring about more advantages than disadvantages to society as a whole. In this respect, the reform of fundamental rights and the principle of proportionality may mean an improvement, although this question had already in Finland in the 1970's been seen as a central one.

I cannot here go into the details of this principle. The advantages of a certain criminal provision are, of course, the preventive effects from the point of view of the

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26 See section 1 above.

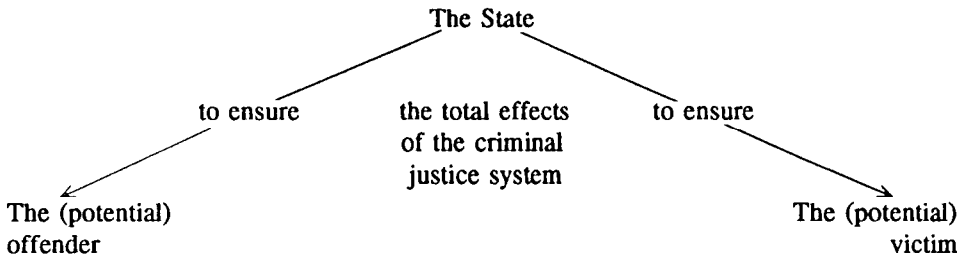
27 Chapter 32, Section 4 of Criminal Law (my translation).

28 For more details on the different situations, see NUUTILA, A-M.: *Rikosoikeudellinen huolimattomuus (Fahrlässigkeit als Verhaltensform und als Schuldform)*, Helsinki, 1996, 639–43, (*Zusammenfassung*).

protected interests. We should at least have some well-reasoned conception of what the preventive effects of the criminal provision will be before defining behaviour as criminal. A criminal provision which we know will be inefficient ought not to be enacted.

The disadvantages of criminal provision are also obvious. Punishments mean that the convicted suffer. The disadvantages to the State are financial. The costs of a control policy, the courts and the prison system should not be taken for granted. There is yet a third disadvantage in the use of the criminal law: it restricts the liberties of individuals. This, as such, can be seen as a disadvantage which ought also to be taken into consideration.

Figure 3



Raimo Lahti[29] and all other Finnish criminal law scholars and criminologists have emphasised the evaluation of the overall effects of criminal provisions in an important way. In the first place, they say, we should seek to decrease the relative role of the criminal justice system in comparison with other societal means of regulating human behaviour. Imprisonment rates in particular have been decreasing significantly in Finland: in 1994 there were 64 prisoners per 100 000 inhabitants, which is one of the lowest rates in the Western world.

2.4. Ultima Ratio

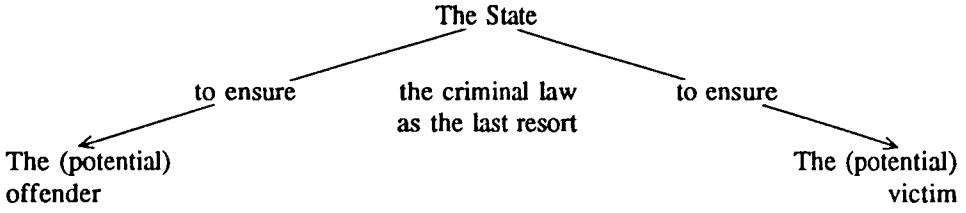
Even if we respect the inviolability of human dignity, argue carefully about the interests that may be protected by the criminal law, and objectively compare the advantages of criminal provisions with their disadvantages, we must still meet the requirements of the *ultima ratio* principle. We must ask whether a criminal provision is the only solution that will ensure the protection of fundamental rights. If there is another way of responding to the problem which has approximately the same deterrent effect, and which it is possible to implement without incurring high financial costs, we should choose this

29 See, e.g., LAHTI, R.: "Scandinavian Criminal Policy: Trends and Interactions", *Kansainoikeus–Ius Gentium*, 1987, 128 *et seq.*

way instead of the criminal law. *Ultima ratio* means, as we all know, that the criminal law must be the last resort.

In Figure 4 *ultima ratio* requires that the State ensure the fundamental rights of both the potential offenders and the potential victims. In addition to this, the principle can be seen as an application of the so-called necessity test.[30] The State should not use the criminal law except when the protection or implementation of fundamental rights or values cannot be secured by other means.

Figure 4



This is not the place in which to enter into a detailed discussion of the *ultima ratio* principle; it is sufficient to point out that the principle very often clearly contradicts what the Finnish Parliament does. For example, when Parliament responds to the problem of drunken driving, it does not consider whether improvements in the health care and the treatment of alcoholism would produce better road safety than a more dynamic control policy or more severe punishments for drunken driving. The criminal law ought to be left to play a subsidiary role in social politics.

On the other hand, if we look at the *ultima ratio* principle in the light of fundamental rights, the criminal justice system is not automatically the worst option simply because it is criminal justice. In many countries, certain minor offences have been decriminalised and transferred to the area of administrative law. In effect these reforms may have produced problematic, repressive systems compared with the criminal justice system. This may be seen in the replacement of fines by administrative payments which may result in weaker legal protection, fewer possibilities to complain about sanctions, and so on.

3. The Common European Basis of Criminal Justice?

The emphasis of this article has been on pointing out how fundamental rights and human rights can function as a background to criminal legislation and as a background to the interpretations made in courts. In the last few years, scholars such as Jürgen

30 See section 1 above.

Wolter[31] and Bernd Schünemann[32] in Germany have seen in this development new hope for a common basis for a European criminal justice ideology. To summarise, four points are of interest.

Firstly, the ultimate limits of European criminal justice can be read in the absolute prohibitions of national fundamental rights and international human rights in the way described in section 1 above. The principle of inviolability of human dignity has also meant an absolute prohibition on strict liability, at least in most parts of continental Europe and in the Nordic countries.

Secondly, within these limits, criminal provision and interpretations should be in line with the emphasis on fundamental rights or other constitutional values. This concept has both a national and an international basis in fundamental rights and human rights doctrines. Criminal provision must stand in proportion to the interests protected and sacrificed.

What we need here is a balancing operation in which we can compare the preventive advantages with the disadvantages from the point of view of the offender and the society as a whole. This kind of balancing model takes into account both traditional liberal criminal law ideology, and the functions of the modern welfare State.

Thirdly, the balancing model is not restricted to the policies of parliament. It can also be used to some extent in many questions concerning the interpretation of the general principles of the criminal law in the courts. Interpreting the definitional elements of crime in this way takes the traditional doctrine of *Rechtsgüterschutz* seriously, is teleological, and open to new interpretations in new societal circumstances. It also sees criminal law in a clearly functional manner. According to this way of thinking, a crime is not seen as a form of disobedience against the legislator, and the criminal justice system is not a mythical system for punishing those we blame. Rather, a crime is seen primarily as a conflict between individuals and an offence against their constitutionally protected interests. This development is, however, only in its initial stages.

Fourthly, this kind of interpretative connection between fundamental rights, human rights, and criminal justice could also form a uniform basis for international discussion of European criminal justice systems. Georg Küpper[33] has previously argued that goal-rational or functional criminal justice systems cannot form the basis for international discussion, since national legal systems and ways of thinking about criminal liability differ so markedly from each other. But, after all, Europeans are to some extent thinking about fundamental rights and the use of the criminal law in a similar way. Nevertheless, in an international discussion of criminal liability which is based on conceptions of fundamental rights and human rights and their relation to criminal justice, we are talking the same, international language.

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31 See WOLTER: *op. cit.*, 3 *et seq.*

32 See SCHÜNEMANN, B.: "Einführung in das strafrechtliche Systemdenken", in SCHÜNEMANN, B. (ed.): *Grundfragen des modernen Strafrechtssystems*, Berlin, 1984, 1, 8, 64.

33 See KÜPPER, G.: *Grenzen der normativierenden Strafrechtsdogmatik*, Berlin, 1990, 196.

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Zoltán PÉTERI

Problems of Regionalism in Hungary

I. Some general remarks concerning regionalism in Europe

The problem of regionalism may be held as a special aspect of a more general phenomenon, i. e. the interdependence between social and other groups, itself a product of the technical progress and development in contemporary societies.

The need to preserve the identity of separate groups has been felt with increasing intensity throughout the world. The "Europa of Regions" has become by now from a dream of the believers in the ideas of self-government and federalism an integral part of the ideology and practice of a new Europe. The creation of a European Committee of the Regions in the Maastricht Treaty may be held as a further step on the way towards new institutional forms for dealing with an old but evergreen problem.

However, on the way towards these goals several obstacles have to be surmounted.

One of the main difficulties in this field seems to be that most of the European countries have no identical federative or regional structures. It is rather difficult to see, therefore, what kind of territorial organization could be imposed on a unified Europe.

As far as the terminology itself is concerned, it is a well-known fact that there exist various meanings of the words "region" and "regionalism". The word "region" has been in use with various meanings, e.g. as denoting a merely geographic unit with identical or similar natural conditions extending beyond national frontiers, or, on the contrary, identified with the dwelling-place of a cultural or ethnic group inside the territory of a State; its meaning can be connected with the economic demands of production or traffic, sometimes it can be a remnant from past centuries, moreover a symbol of historical traditions, etc. In this paper the word "region" will be used in its political-legal meaning,

i. e. denoting the level between, on the one hand, communities, and the central authorities of the State, on the other; or, more precisely, according to the official wording, the level existing immediately below that of the Central State.

The "Committee of the Regions" created by the Maastricht Treaty to ensure the representation of "regional and local bodies" will, by all probability, not settle all these difficulties and even it can be also a source of further ones. Namely the combination of local and regional bodies adds much to the confusion besides each state will be represented in the Committee by the same members of delegates that it has in the Economic and Social Committee, irrespective of whether or not has a real regional structure; moreover, the members of the Committee will appointed by the Council of Ministers on the proposal of the member states which makes it possible for national governments to appoint that the regions would not regard as their own representatives, etc.

Another source of difficulties seems to be connected with the demands of the modern "post-welfare State". By now, the principle of subsidiarity, declared by the Assembly of the European Regions as the basis for European Union, has become a "commonsense rule" for most democratic societies. Borrowed from the social teaching of the Roman Catholic Church, where it is used to denote the leading principles governing primarily the relationships between State and society, it has become characteristic demand for the theory and practice of any democratic exercise of power. In dividing powers between the various levels in State and society, the realisation of this principle results in precedence being given to action at the level closest to citizens, with the upper levels only being called on to intervene if their action is made necessary by the nature of the problem to be resolved.

Subsidiarity therefore presupposes an allocation of decision-making powers within a State or within a larger Community according to certain criteria designed to ensure that decisions are taken at the appropriate political level. The allocation of the decision-making power to a higher level than the lower or lowest one might be made primarily on such grounds as subject matter, efficiency or necessity or some combination of these elements.

This demand for the realization of the principle of subsidiarity as one of the key objectives of the Assembly of European Regions put forward in the resolution of the General Assembly of the Assembly of European Regions on 5 and 6 December 1990 recognized was in Art. B and Art. 3b of the Treaty of Maastricht on European Union: "The Community shall only exert the authority vested in it by this Treaty, if and insofar as the action of the Community is necessary to effectively achieve the aims stated in this Treaty and for which actions taken by the individual member States and, in particular, by the Länder, Regions and Autonomous Communities as territorial authorities existing immediately below the level of the central States are insufficient". So the principle of subsidiarity may be held as that of protecting and guaranteeing the autonomy of the Länder, Regions and other autonomous communities.

However, though the principle itself may be held as a subject of a broad consent everywhere, it seems to be a rather difficult task to specify the rules for its implementation. The principle of subsidiarity is based on the hypothesis that one can identify, in

the light of the functions assumed by modern states, the tasks which have to remain on community (i. e. the lowest) level as closest to the population, while some others have to be dealt with on the regional and the State level where they can be solved with greater effectiveness by higher authorities. Unfortunately, the fact itself that in some discussions concerning the application of this principle and Art. 3b of the Treaty on European Union, mention is not always made of the regional level, gives rise to the idea that the principle of subsidiarity will apply exclusively to the relations between the European Community and national level. It seems therefore to be a well-established claim that the principle of subsidiarity has to be defined in a more precise manner.

II. Historical and legal problems of regionalism in Hungary

1. Historical aspect of constitutionalism in general

In present-day Hungary the problems connected with a future membership in the European Union present themselves in a period of substantial changes after the decades of Communist regime. As a consequence of these changes the previous structure of the State and public administration have to be replaced by a new system meeting the requirements of a pluralistic parliamentary democracy. However, due to the peaceful character of the transformation, the new institutions could not be established and confirmed right away; on the contrary, the transformation may be characterized as a development going along step by step, and the results of which have yet be improved in almost every field of social life. In this process also a return to the old traditions of pre-war Hungary has repeatedly been claimed so for the understanding of the present situation both the demands of modernization and those of traditionalism have to be taken into consideration.

In pre-war Hungary there existed, similarly to England, no written constitution. The so-called "historical constitution" of the country consisting of some basic or "cardinal" laws (e.g. the Golden Bull of King Andreas II. issued in 1222 and seembling the Magna Carta of England) could survive until the middle of the 20th century as the symbol of the freedom and independence of the Hungarian Kingdom.

The first written constitution in Hungarian history, if we leave aside the constitution of the short-lived Hungarian Councils' Republic issued in 1919, was enacted in 1949 based on the model of the Soviet constitution issued in 1936. This Constitution of the Hungarian People's Republic (Act of Parliament No. XX. of 1949) was modified several times, the most important changes having been made in the years 1972, 1989 and 1990. Due to the amendments added recently to the original text, the Hungarian constitution lost its former character as the basic document of a "socialist" State, inasmuch as both its basic principles (e.g. those concerning the monopoly of State power, democratic centralism and dual subordination, the leading role of the Communist Party, etc.) and the institutional framework established by it have undergone to substantial changes. As a result, the Hungarian Republic could be characterized in the amended text of the constitution as an independent and democratic State of Law (Rechtstaat).

Plans to establish a new constitution were suggested repeatedly also in the Communist period and especially in its last years when a draft constitution was completed but because of the starting of negotiations between the Hungarian Socialist Workers' Party and its opposition, could not have been tabled. In the recent period, however, the realization of these endeavours seems to be postponed to future Parliamentary terms.

2. Traditions of regionalism

The idea of local self-government rooted deeply in Hungarian history throughout the thousand-year existence of the Hungarian State. The territorial division of the country was established by the first King of Hungary, St. Stephen (1000–1038) in the form of the county (megye)–system which could survive, with modifications required by the changing political conditions, until our days.

Without going into details, one can set the historical role of the Hungarian counties in its proper light by pointing out its two characteristic features. On the one hand, more than once in Hungarian history, the counties proved to be real centers of the nation's resistance against foreign influence and could be held reasonably as the depositaries and symbols of national independence and identity. On the other hand, however, their struggle against the centralizing tendencies in the years of Habsburg enlightened absolutism resulted also in some harmful consequences in the form of a conservative attitude towards any efforts for modernization in general and of sheltering obsolete feudal traditions. Hereby the nation's interests connected with modernization and progress came, more than once, into a tragical conflict with the legitimate feelings of patriotism on the part of big masses of the population.

This conflict, rooted in the historical circumstances, had a lasting influence not only upon the development of the Hungarian system of local self-government but also upon its contemporary and subsequent appraisal until now.

In post-war Hungary the counties as biggest territorial units of State power and public administration formed an integral part on a strictly centralized and hierarchical structure. This system based on the Soviet model and characterized by the principles of "democratic centralism" and "dual subordination" offered a large scope for centralization and practically excluded the lower levels from the decision-making process.

After the downfall of the Communist regime a new law on local self-government (Act of Parliament No. LXV. of 1990) was enacted by a freely elected Parliament and the new representative local organs established throughout the country as a result of local elections set about their activities. However, the law as a result of many compromises between parties with different goals and interests, has been appraised and criticized several times both by scholars and practicians and on the basis of these experiences initiatives were taken for drafting a new law on local self-government. Unfortunately, the realization of these plans had to be postponed to coming parliamentary terms.

3. The present system of local self-government

The law in force on local self-government, following the progressive traditions of Hungarian history and taking into account the requirements of the European Charter of Local Self-Government, has acknowledged and protected the rights of local communities to self-government. As a consequence of this, the local government is allowed, within the limits of the law, to regulate and administer freely the local affairs within its range of tasks and scope of authority.

The autonomous bodies elected in Hungary on the basis of the law can be ranged into two categories: on the one hand, the local self-governments of communities i. e., villages and towns, the capital and its districts elected directly by the citizens, and those of the counties (megye) elected indirectly i. e. by the deputies of the towns and villages, on the other. There exists no hierarchical subordination between the various kinds of local self-government, however, their tasks and competencies may be stipulated differently by law. Accordingly, distinction is made between obligatory and facultative tasks and competencies with the principle of subsidiarity as a general rule, prevailing. As stipulated in the law, the municipal self-government shall ensure healthy drinking water supply, primary education, basic health care and social service, public lighting, the maintenance of local public roads and public cemeteries, it shall ensure the enforcement of rights of national and ethnic minorities. Other tasks of local self-governments (e.g. local development, protection of the built and natural environment, local mass transport, public security etc.) specified in the law, can be taken voluntarily by them. The self-government of the county has to fulfil the tasks not belonging to the obligatory scope of activity of the municipalities. Local self-government are entitled to co-operate and to make an alliance with each other, to establish nation-wide or regional associations, to co-operate also with foreign autonomous bodies and to be members in international associations of local self-government.

Furthermore, the law may lay down mandatory (obligatory) tasks and functions for the local self-government, and the Parliament is obliged to ensure the financial conditions for their implementation. Also the local self-government may undertake other local affairs not referred to by law to act freely in that scope provided that the law is not violated.

The autonomy of local self-governments concerning the allocation of their budgets and finances is recognized and protected by law. They are assigned proprietary rights and in order to cover their expenses, they are allowed, with the except of the counties, to impose local taxes. On the other hand, their expenses are covered mostly by State budget.

The powers allocated to local self-governments are concentrated with their elected representative bodies (general assemblies) led and represented by the mayor (towns and villages) or the president (counties). The representative body (general assembly) may establish standing committees for furthering the decision-making process and for controlling the fulfilment of tasks and decisions. Administration is carried out by the office of the local self-government with a clerk (greffier) as its head appointed by the representative body for an indefinite period.

The decisions taken by the representative bodies of self-governments may be overruled only by the courts or by the Constitutional Court only in case of violation of positive law. The control over their activity is performed, in the name of the Government, by the Minister of Interior. Besides, in order to control the legality of the activities of local self-government, new administrative officers called Republic's delegates were appointed in the capital of the country, in its districts and in eight, newly established territorial units of State administration, with the name "region". The Delegates appointed, upon the proposal of the Prime Minister, by the President of the Republic, for the duration of his own term (i. e. 5 years) were generally held as a set-off to local autonomy both in legal and in administrative matters. As a guardian of legality, the Republic's Delegate could attack any act of the local self-governments before the Constitutional Court or the ordinary courts and in administrative matters he could act as public authority of second instance in dealing with appeals against the decisions of local self-governments.

As a new tendency in Hungarian political life, steps were repeatedly taken by the central government in order to broaden the sphere of competence of the Republic's Delegates. Taking advantage of the not entirely clear stipulations of the law, they were authorized to control and influence the activities of State organs in their regions on the pretext of "co-ordination", reducing substantially the competencies of the local autonomous bodies.

These new tendencies had been criticized sharply by some local self-governments (pre-eminently on the level of the counties) as a violation of their autonomy and a proof of the concealed ambitions of the government aiming at further centralization. As a result of these critical attitudes, the post of the Republic's Delegates was abolished.

III. Perspectives for the future

Taking into consideration Hungary's desire to be full partner to the newly established European Union her problems connected with federalism and regionalism have to be dealt with in this sense. As it was declared several times, the doors to participation in the European house on equal terms must also be opened for the young democracies of Central and Eastern Europe. Consequently, their endeavours in the field of modernization in general and in the re-establishment of their State structure must be in conformity with the European model.

As far as this model is concerned, the new European cooperation presupposes, as first of all, the attachment to some basic values having their origin in democratic traditions of development. (e.g. the rule of law, protection of fundamental rights, etc.) Therefore, institutions and procedures structured on this foundation will present, with slight differences, basic similarities among countries with various historical traditions, too.

The future European regionalism is a question of setting up the European construction at three levels, i. e. the European Union, the member States and the regions. In this connection, points of reference are the division of authority amongst the various bodies

but also models for delineating powers between the central State and the member States at regional level. Consequently, the principle of subsidiarity should not only be limited to relations between the European Union and member States, but should also be applied in connection with their regions and municipalities. In this spirit also the reforms concerning the administrative structure of member States have to be realized. As a logical consequence of these insights, also in Hungary it has been repeatedly declared as one of the most important tasks of the new freely elected Parliament to enact a new law on local self-government fulfilling the demands of European development.

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Raimo RYYNÄNEN

The New Finnish Municipality Act—The Changes in Comparison with the Old Act

The new Act on Local Government (No. 365/1995),[1] which came into force on 1. 7. 1995, gives to the local governments more room for operation and decision-making competence than the previous Act of 1976. The unity of the administration and the elimination of differences were typical of the period of the previous Act.[2] The new Act enables local governments to organise their administration and their operation in better accordance with local conditions than previously.

I will limit my discussion to the fields of the municipal local self-governments of Finland, which are also extremely relevant today within the European modernisation process. These are the relationships between state and community, and the relationship between citizen and community. The relationship state—community and the relationship community—citizen has developed to a great extent during the past years. The new Act on Local Government also contributed to the increased recognition of these themes in administrative praxis.

Background—New Paths In Public Administration

An inter-cultural comparison shows that principles, which can be described by a meta-concept of "New Public Management", developed especially in the states of Australia,

1 For an overview, see *Main Content of the Local Government Act*, Ministry of the Interior, Helsinki, 1995.
2 See for more detail VATAJA, P.: "Self-government of Local Communities in Finland", *Kunnallistieteellinen aikakauskirja*, 3/1982, 259–283.

Austria, Canada, Denmark, Finland, France, Great Britain, New Zealand, the Netherlands, Norway, Sweden, Switzerland, and the USA. Important considerations here are the orientation towards a professional and responsibility-conscious management; the development of standards and methods of measuring the efficiency of administrations; the emphasis on output-controls; desegregation; the establishment of independence between and decentralisation of administrative units; the strengthening of the idea of competition; the deployment of private sector management-instruments and management-practices; and greater discipline and thrift in the use of resources.[3]

Finnish local governments have to function under difficult conditions, which are also regarded as challenges in other European countries:

- the construction of an efficient and citizen-friendly administration;
- the thrifty handling of dwindling financial means;
- the systematic promotion of the economy;
- an innovative employment policy.

The Scandinavian states have carried out a considerable reform process in the public sector during the past few years in order to, amongst other things, put the welfare state back on a level which can be financed. With reference to this matter, issues of the reform of tax concepts, organisational and personnel reforms, and deployment programmes are in the foreground.[4]

What should be changed in order that more can be handled and taken care of? Firstly, the obstacles to handling must be disassembled. It is precisely this development that has for a few years been under way in several countries, especially in Scandinavia, where the subject of the so-called "Free Commune Experiments" has been the abolition of centrally-imposed guidelines and standards for the organisation of decisions, or the use of means for the benefit of the individual creative freedom of specific local administrations. These "Free Commune Experiments" are especially instructive for the Federal German and European debate: in the last few years, in all four states, on demand, certain statutes and regulations for the municipalities have been repealed, in order to enable these municipalities to carry out structural and performance reforms. This room for manoeuvre, and the opportunities for experimentation, has considerably increased the drive to innovate of the municipalities; indeed, there have been amazing reforms in the last decade. Moreover, the relatively "soft" implementation style, with which the management reforms have been carried out in public administration in Scandinavia, should be emphasised.[5]

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3 HILL, H.–KLAGES, H.: *Quality- and Success-oriented Administration Management*, Berlin, 1993, 25.

4 For more detail, see *The World's Best Public Sector?, International Public Management Comparison Project*, Ministry of Finance, Finland, Helsinki, 1993.; NASCHOLD, F.: *The Modernisation of the Public Sector in Europe. A Comparative Perspective on the Scandinavian Experience*, Ministry of Labour, Helsinki, 1995.; MODEEN, T. (ed.): *Public Administration in Finland*, Finnish Branch of the International Institute of Administrative Sciences, Helsinki, 1994.; OULASVIRTA, L. (ed.): *Finnish Local Government in Transition*, Finnish Local Government Studies, Special Number 4/1995.

5 REICHARD, C.: *Re-thinking in the Town Hall*, 1994, 27–28.

The financing of the local governments has been carried out since 1993 on the basis of a globalised subsidy system. This reform, with several modifications of the Act, was a very important step in the direction of the strengthening of municipal self-government. The reform of the system of state balance payments for the municipalities is continuing, with the aim of making the bases for calculation more transparent, and to promote the more economical organisation of service-production. The municipalities recently organised themselves according to the model of the "*Gewahrleistungsverwaltung*" (guarantee administration).[6]

The new task which Finland faces today requires significant re-thinking, which is being undertaken only in a preliminary fashion by the political élite of the country, and for which the population seems to be only scantily prepared. The end of the economic boom in the 1980's—at that time, in the face of great economic growth, Finland was prematurely described as the "Japan of the North"—and the current economic crisis, makes it difficult to perform the necessary internal policy reforms.[7]

The so-called "lean administration" is also not in Finland a miracle cure-all pill. However, if it means modern organisational principles which have found their way into private industry, and provide for more profitability, reliability, and customer service, then local governments additionally do not need to be fearful of taking it over.[8] It provides the opportunity to set new priorities: for example, when building kindergarten places (in Finland there has been a kindergarten place guarantee in effect since 1990).

It is certainly important when reading foreign municipal constitutions to get acquainted with the historical background. Finland has been, since ancient times, a unified state. This fact also leaves its mark on legislation. Modern municipal self-government can be traced back to the Municipality Order of 1865. At that time the tasks of the church and secular municipalities were divided.

Although the role of local governments in society later changed significantly, the historical heritage still lives on in the legislation, if fundamental principles are at issue.[9] Finland has from the beginning belonged to the centralised state tradition of European history. The concept of German and Swedish municipal self-government provided models. Our first rural local government Act in 1865 was, for example, prepared by following the Swedish model.

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6 See also RYYNÄNEN, A.: "Trends in Municipal Legislation Reform", in *Finnish Local Government in Transition*, Finnish Local Government Studies, 4/1995, 291–295.

7 For an overview, see HUBEL, H.: "Finland After the East-West Conflict. From the Peripheral State to Stability Factor", *Europa-Archiv*, Folge 15/1993, 443–450.

8 RÜTTGERS, J.: "The Role of the Municipalities in a Changed World", *City and Local Community*, 1/1996, 10.

9 Finland and Sweden have the same historical background, compare The Development in Municipal Legislation After 1977 in Sweden... See also MODEEN, T.: "Historical Introduction to Nordic Municipality Law", *City and Local Community*, 2/1993, 69–77.; and MODEEN, T.: "National Report of the Nordic States", in KNEMEYER, F.-L. (ed.): *The European Charter on Local Self-government*, Baden-Baden, 1989.; compare BRENNER, J.: "New Municipality Constitution in Hungary", *Archiv für Kommunalwissenschaften*, II/1991, 296–301.

Today, Anglo-Saxon "New Public Management"—and managerialistic ideas—are especially strong in the Scandinavian countries, and also in Finland. An important model for the new regulations on direct democracy of our Municipality Act was the local government ordinance of Schleswig-Holstein, which dates from 1990.

Citizen-friendly Administration Through the Strengthening of Municipal Self-government

The relationship between the citizen and the state has changed at all its levels. The performance expectations of the citizens towards the administration have increased further. At the same time, administrative decisions are not accepted at face value. Appropriate explanations and, moreover, participation in decision-making is expected.

What has been described since the 1980's by the concept of "*Wertewandel*" (value change) also touches the relationship between a state and her citizens. "Service-orientation", "user-friendliness" of the administration, "participation of the citizens in the administration", and so on, are demands uttered with increased frequency lately. This is for the betterment of the image of public administration, which wishes to change from the old subject-master relationship to an individual "administered" set-up.[10]

Particularly in Finland, with her long tradition of the rule of law, several information and help services have established themselves in addition to the codified procedural rights of the participants in the administrative process; these aim to make the "jungle" of the administration transparent to those affected by it. The Finnish legislator has also reacted to this need.

Citizen petitions, citizen demands, and citizen decisions have found their way into the new Municipality Constitution (Chapter 4). Substantially, it is concerned with reasonably small steps. For example, a referendum has, in the end, merely a consultative character. At least 5% of the eligible citizens can, through a so-called "Citizen Demand", petition for a referendum (Paragraph 31). The majority of the local government representation decides, however, whether or not a referendum should be initiated. A referendum is always only advisory (Paragraph 30).

These new regulations of the Municipality Act are important steps; however, I do not think that they are already sufficient. The opportunities for participation in the formation of community life must develop further. That means especially that people must not experience municipal policy decisions as decisions of their masters.[11]

Therefore, it would be very important that citizens' assemblies in particular should be regarded and utilised as democratic opportunities. Citizens' and residents' assemblies, as institutions, could serve very different aims. In part they facilitate mutual exchanges of information between the administration and the citizens, and

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10 See also MODEEN, T. (ed.): *The Status of the Citizen In the Face of State Power*, Societas Scientarium Fennica, Helsinki, 1995.

11 RÜTTGERS: *op. cit.*, 1/1996, 9.

between the citizens and the administration. In other respects they promote a direct democratic effect, in the form of immediate advice and votes which form such advice. For example, in Bavaria[12] it is the mayor who prepares the citizens' assembly, defines the agenda, and calls it together, as well as chairing and safeguarding the carrying out of its resolutions, by placing final decisions of the citizens' assembly on the agenda of the council within the following three months.

The citizens' assembly leaves the council's responsibility for the decisions (in a legal sense) untouched. Its political and factual binding force is, however, not to be underestimated. In Finland the citizens' assembly has not yet attained its deserved importance and is not yet rooted in local government life; therefore it has not yet made possible a close empathy between the citizens and the local government administration. Our Municipality Act does not, unfortunately, regulate the institution of the citizens' assembly.

It is also certainly interesting to observe that the new Municipality Act additionally affords to the citizens a general municipal right to make a complaint (*actio popularis*) (Paragraph 92). All members of the local community have had the right, since the first Municipality Act of 1865, to file an appeal against a decision of the municipal authorities. It is important that only the legality of the decision can be questioned (Paragraph 90). The consideration of a complaint is an adjudication separate from the administrative process; that is, administrative adjudication. The basic units of this are the Provincial Administrative Courts (12); the Highest Administrative Court exercises the final adjudicatory authority in matters of administrative complaints. The Highest Administrative Court decides whether or not a debated decision is legal.

The Local Community Complaint (*Gemeindebeschwerde*) provides not only an effective method for the realisation of state supervision, but it is also an important form of control, which the members of the local community's self-government bodies may exercise from below for the safeguarding of the general welfare.[13]

Citizen-friendly administration in Finland means especially the strengthening of municipal self-government.

The Meaning of the New Act

Analysis of the new Act shows that it builds on tradition as well as on renewal. Completely new are, for example, the regulations concerning the municipal budget (Chapter 8), which came into force only on 1st January 1997. One of the reforms which is important from the point of view of principle is primarily that the use of columned commercial accounting replaces centralised state (*kameralistisch*) accounting in local communities.

12 See KNEMEYER, F.-L.: *Citizen Participation and Municipal Policy*, München—Landsberg, 1995, 122–127.

13 RYTKÖLÄ, O.: *Finnish Local Community Administration Law*, Helsinki, 1961, 104.

As regards our local communities, just as, for example, in Sweden and in Germany, they have in principle been endowed with a general local competence, the limits of which will be decided in judicial practice. The tasks of the local communities are of a general character. They are defined through the "universality principle" (*Universalitäts-prinzip*).[14] The local communities have a general range of competence, which is based exclusively on their self-governance (this has been maintained by the new Municipality Act, paragraph 2.1). The local communities provide basic services for their citizens.[15] Even though local communities were long ago put under supervision through state legislation regarding the range of issues of their self-government, the realisation of these tasks being regulated in detail in a variety of ways, a remarkable principle of de-centralisation of public tasks can be observed, which, with a view to the fundamental radicality of the general presumption of competence, finds its parallel only in other Scandinavian countries and in Germany.[16]

Of greater importance also are its special tasks, which are defined in greater detail in special Acts. Until the beginning of the 1990's these special Acts presented a great problem for the municipal self-governments. From the viewpoint of the unity of living conditions, one can always recognise centralising tendencies in the relationship between state and local community. In the interest of greater mobility of the citizens, every place should, if possible, provide an, in many ways identical offer of similar performances. Corresponding to these unificatory tendencies, the legislator forms increasing numbers of tasks as task orders, with the consequence that when performing these tasks the municipal bodies are subordinated not only to legal but also to extensive professional supervision, and by that are limited in their freedom to act and to make decisions.

The net of the regulations tightened the room for manoeuvre of the municipal self-governments too greatly in the 1970's and 1980's. The development, as a rule, was that the local communities first took over a task voluntarily, within the framework of their self-government. Then later the legislator turned these tasks into duties within the framework of the special competence.[17]

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14 RYTKÖLÄ: *op. cit.*, 4.

15 The local communities are responsible for general education and vocational schools, and offer services in the fields of adult education, libraries, culture and leisure. Part of the local communities' tasks is kindergarten care, geriatric care, and care of the disabled, the lowest priority being help for income support and social housing support. The local communities are also responsible for health centres which provide preventive health-care, the treatment of simpler illnesses, and dental treatment. Local communities have competence in planning and building supervision, water supply, refuse and sewage disposal, the energy supply and environmental protection. For more detail, see, for example, HAKAMÄKI, S.—HARISALO, R.—HOIKKA, P.: "An Introduction to local government activities, administration and finance in Finland", *Institut für Kommunalwissenschaften der Universität Tampere*, 1/1988.

16 REICHARD, C.—WOLLMANN, H.: *Municipal Administration in the Push for Modernisation*, Basel, 1996, 4.

17 In my thesis (*Kunnan tehtävien lakisääteistäminen*, with a summary, Legislative Regulation of Municipal Tasks, Tampere, 1986), I have discussed the development of this flood of statutes.

Thanks especially to the "Free Commune Experiments" (from 1989 to 1996), the reform of the Act began.[18] Its idea is to dismantle through decentralisation the over-organisation of the welfare state. The full potential of the experiments has unfortunately not yet been realised. Maybe, however, the experiments reached furthest quantitatively and qualitatively in Finland.[19] This experiment was extremely important in connection with the reform of the Municipality Act.

It is interesting to remark that such experiments are now used through the "experiment clauses" of the new Municipality Acts of the German states.[20] Following the decisions of the Parliament and the Government, it is believed that the new local community Act will serve as a "model" for the further reform of these special Acts.[21]

A Freer Hand in Matters of Organisation

The fundamental starting-point in the drafting of the new Act was that local communities should have a free hand in organisational matters. The internal organisational freedom of local communities was enlarged as a result of the new Act.[22] Nevertheless, the legislator regarded it as necessary that, for example, the council's size should be precisely regulated (Paragraph 10): Finnish local community representations have more members than in several other states (in local communities under 2000 inhabitants, 17 members; in local communities with 2001–4000 inhabitants, 21 members; and, for example, in local communities with 8001–15 000 inhabitants, 35 members). The administrative committee (*Verwaltungsausschuss*) of the Finnish Parliament has in this regard particularly emphasised that the large number of mandate-holders is important for municipal self-government.

The free organisation of committees is an extremely important principle in the new Municipality Act. The large number of committees (20–30) was previously an important

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18 See for more detail RYYNÄNEN, A.: "The Strengthening of Municipal Self-Government—Current Reforms", *Archiv für Kommunalwissenschaften*, I/1994, 114–124; RYYNÄNEN, A.: "Municipalities as Pacemaker for Comprehensive Modernisation of the Public Sector in Finland?" in WOLLMANN, R.: *Municipal Administration in the Push for Modernisation*, 1996, 308–319; and RENNER, A.: "Competence Transferred to Below. The Free Community Experiment in Finland", *AKP Fachzeitschrift für Alternative Kommunalpolitik*, 6/1995, 44–45.

19 As Renner writes, *cf.* AKP *op. cit.*, 6/1995, 44.

20 For example, Paragraph 133, the Hessan Local Government Regulation of 21. 12. 94 (Experiment of New Tax-models, Experiment Clause).

21 See, for example, *Government Decision-in-principle on Reforms in Central and Regional Government* 17. 6. 1993 (in English: Ministry of Finance, Helsinki 1993):

"The way in which local authorities arrange and organize their operations will be founded more distinctly on municipal self-government. The relevant rules will be repealed at the beginning of 1994 at the latest, unless legal safeguards or some other justifiable cause requires otherwise. The ministries will prepare the necessary Government bills so that they can be placed before Parliament during 1993. The Ministry of the Interior will coordinate preparations."

22 See also MODEEN, T.: "Politicians—Professionals—the Power Structure of Finnish Local Government", in *Finnish Local Government in Transition*, Finnish Local Government Studies 4/1995, 286–290.

problem. Its special feature was its strong, in several cases, statutory competence. Several committees functioned as if they were state authorities, whilst being under state supervision. It was also not necessary that the committee members should be members of the council. This was one of the reasons that the standing of the council was weakened during the 1970's and 1980's.

The new Municipality Act gives further possibilities to elect as members of the committees people other than council members. The Act (Paragraph 18) also now provides the possibility that the council may decide that members of the council should be the members of the municipality's board or of the committees.

The theme of the appropriate chief municipal organisation is again being discussed. The current question in several European countries is the standing of the executive and chief organisation of the local community.[23] The important purpose of the Finnish Municipality Act is to improve the decision-making possibilities of the municipal representation (the Council). Nevertheless, one can say that we still have a "strained" relationship between politics and administration.

From the above it is clear that, as far as local community administration is concerned, the separation of the decision-making and the executive powers has been aimed at, by the application of a principle of duality. The local community board is the administrative organisation which is primarily entrusted with the executive power in the local community (Paragraph 23).

The Finnish Municipality Act does not yet know the institution of the mayor (as for example it is known in Germany and in Hungary). During municipal political "weekdays", the chairperson of the council, as well as the chairperson of the local community board (with the Vice-Chairperson), holds an important position. One of the reasons for this is the Finnish multi-party system: the most important parties in the local community require leading positions. The Finnish local communities therefore have a "many-headed" political leadership. A step in the direction of an organisation with a "single-headed" political leadership is now the possibility of electing the same person as council chairperson and chairperson of the local community board (the new Municipality Act no longer prevents this alternative). For party political reasons this possibility is certain to remain only on paper.

The local community director leads the local community under the collegial municipal board (*Kommunalvorstand*) (Paragraph 24). The status of the Municipal Director has in the last few years been *de iure*[24] considerably weakened; *de facto*, however, it has not been. The local community director previously functioned (until the beginning of 1977) also as chairperson of the local community board. The new Municipality Act again makes it possible that the local community director should be able to work as the chairperson of the local community board, if he is elected only for

23 See, for example, SCHIMANKE, D. (ed.): *City Director or Mayor*, Basel, 1989.

24 Since 1993 a two-thirds majority of the Council can relieve him of his duties (Paragraph 25).

four years (Paragraph 24.2). It is quite possible that this opportunity will only rarely be utilised.

Most certainly the question of the mayoral system with direct elections will also be become an issue in Finland in the next few years.

The Enterprise City

Today Finnish local communities and cities are like a politically-governed service-providing enterprise. Of the output created by the local communities, 90% is not agency-typical (*behördentypischen*), but instead is services. These performances are provided in different organisational forms: through the core administration, with their offices and departments, through participating enterprises in the form of self-owned firms and companies, or through communal, and often local community subsidised, private entities. The new Municipality Act, in this respect, gives a free hand and more room for movement than previously (Paragraph 2.3).

The agencies of the state and those of the local community, in a similar fashion to other public agencies, can transfer their tasks to the common public offices (Act No. 802/1993).

In view of this development, to speak of an erosion of municipal self-government is not an overstatement.[25] In order to realise the public aims, the performances of local government have to be guided. The required guiding instruments are already in place (in the new Municipality Act) and have only to be applied.

The local communities have to develop a policy of participation which, deriving from the enterprise character of the city, understands the core administration and its "daughter" as a political and economic unity for the fulfilment of municipal tasks.

A Freer Hand for Municipal Co-operation

Since in Finland there are no self-government associations at government district level,[26] the legislator perceived it as necessary to oblige local communities to provide for certain activities which are seen as being extremely important through compulsory municipality associations.[27] There are cases in which the individual municipalities either are not in charge of necessary resources, or are too small as a region to deal with the matter alone, but the state does not want to take over the activity herself either, because it is regarded as belonging to the self-government of the local communities.

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25 HILL—KLAGES: *op. cit.*, 59.

26 Local self-government in Finland is not fundamentally separated into two instances, contrary to such regulations of the Basic Law of 1919 (Paragraph 51). Circuits (as in Germany) or departments (as in Hungary) do not exist, and the state provinces have been, since 1993, endowed only with little competence.

27 There are 272 Municipality Associations (1994).

The fundamental regulations of the municipality associations are to be found in Chapter 10 of the Municipality Act. A municipality association can now be formed by a basic contract voluntarily entered into between the local communities concerned. The goverment district office (county) has only to be notified of the basic contract in order to bring it into effect.[28] The principle of voluntariness in the co-operation is also an important step. The new regulations on municipal co-operation in the new Municipality Act give the local communities a stronger possibility of steering the municipality associations.

A municipality association is a legal entity. Since, however, a municipality association has no tax-raising power, its members are financially responsible for the actions of the association.

The Endangerment of Municipal Self-government

State supervision over municipal agencies is more limited in Finland than in most other countries. The endangerment of self-government lies especially within the legislation concerning the area of obligatory tasks.

The principle of municipal self-government is naturally also recognised in Finland. This recognition means in fact that local communities enjoy a certain protection of their independence. The range of this protection is, however, in no way unambiguous.[29] According to the Finnish Basic Law (*Regierungsform*) of 17th July 1919, municipal administration has to build on the self-government of citizens, as prescribed by the relevant statutes (Paragraph 51 Section 2). There are different opinions on the content of this concept of self-government. Generally recognised is the opinion that self-government encompasses at least the right to organs elected by the people, the right to raise taxes, and general competence on tasks of self-government.

It is now to be aspired to that certain fundamental principles which are incorporated in the European Charter on Local Self-government of 1988[30] should be incorporated into the Basic Law; for example, the Finance Principle. This reform has not yet been accomplished despite several proposals. The reform of the complete Finnish Constitution (Basic Law 2000) started in January 1996, and it can be assumed that the modernisation of the provision concerning municipal self-government (Paragraph 51) is going to be decided on only in this context.

The legal protection of the municipal regional bodies as regards the free exercise of their competence and the observance of the municipal self-government's basic laws is in Finland (as in other Nordic states) hardly elaborate. For this reason it is difficult

28 MODEEN, T.: "The Administration of Regional Development in Finland", *Hallinnon tutkimus* (Administrative Studies), 3/1995, 216–220.

29 MODEEN: "National Report...", *op. cit.*, 175.

30 Finland ratified the Charter in 1991.

to gauge where the limits of self-government lie.[31] For the protection of rights, local communities in Finland cannot turn to the Constitutional Court (as, for example, in Hungary[32] or in Germany).

Therefore, it is not sufficient to give new regulations only in the new Municipality Act concerning the relationship between state and local community, even though these are also modern. One has to concede that the principles of the European Charter on Local Self-government have been observed in Finland. A few years ago, there were still contradictions on three points: organisational superiority, state supervision only concerning legal issues, unassigned state subsidies, and legal recourse in cases of breaches of municipal self-government law.

In the words of Professor Curt Riberdahl:[33]

"It seems to me, as a Swedish observer, as if they had attained more in Finland with respect to this question. I am thinking of the suggestions in Paragraph 8 of the new Finnish Municipality Act, in which the Interior Ministry receives a role in which it should generally monitor and supervise municipal activities and economy, and in cases of the drafting of statutes which concern municipalities, it should safeguard the principles of municipal self-government. The discussion between state and municipality has also been normatised."

The customary reform strategy, of reforming from the top downwards by means of instructions and orders, has been reversed in Finland in recent years. Strategies should be developed *in situ* in order to find suitable initial solutions to the existing problems under differing conditions.

There is no "best way", no ideal organisational form. An important pre-requisite in this new administration culture is, however, good co-operation, deep trust, and new working methods ("partnership") between state and local community.[34] Whether this

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31 MODEEN: "National Report...", *op. cit.*, 182.

32 The Hungarian Municipality Constitution is certainly a good model for further Finnish reforms, because the Hungarian reform has by all means put forward a model which is capable of functioning in the sense of a municipal self-government. As SZABÓ, G. has written in *Public Administration in Hungary* (1992, 57.): "The Hungarian MP's tried to establish a system of local government that is rather non-hierarchical and rather decentralized similar to the British or Scandinavian experiences (but not so decentralized and independent as it is in the United States), than a more centralized, a more hierarchical and less independent as it is the case of France or Germany or the former Hungarian solutions."

33 RIBERDAHL, C.: "The Development of Municipal Legislation After 1977 in Sweden", *Die Gemeinde* 5/1995.

34 This possibility is being discussed in Finland: see HAUTAMAKI, A.: "Towards the Joint Responsibility of Local and Central Government", *New Directions for Local and Central Government Relations*, Ministry of the Interior 3/1995:

"Central government creates within its economic responsibility administrative and economic conditions for local governments for them to be able to bear the responsibility for services and to develop competitive regional infrastructure. Organisation of production and development of infrastructure in municipalities are governed by Local Government Act which defines democratic procedures and institutions. Municipalities are not bound by the legislature except regarding few earlier mentioned (minorities, etc.) exceptions. Along with representative democracy, channels of direct interaction will be developed and citizens activeness as residents and users of

will be achieved cannot yet be seen. All things considered, the new Municipality Act provides a good tool for this development.

Modernisation of the Administration as a Permanent Process

Decisive for every reform process is stamina and a deep breath. It has to be made clear from the start that the reform of municipal administration is no short-term campaign, no phenomenon which will be got through in a couple of months. Results and successes need time. A desirable and effective strategy in order to torpedo undesirable changes is, as is generally known, that "noticeable" changes and results should be demanded as early and as often as possible, and in the case that these cannot be convincingly demonstrated, that the sense and purpose of the entire enterprise should be questioned.[35]

This article is based on the premise that a local community regulation able to perform has to sufficiently consider the interests of the citizens of the local community, the local community itself, and of the state. Whoever compares the performance of different municipal constitutions has to be open about his or her standards. He or she by that makes a value judgement which will have to face criticism. The chosen standard should be called self-government performance. It is derived from the idea of civic self-government transformed into norms in the Constitution, and local community constitutions and regulations, the aim of which is the welfare of the municipality and its citizens, and not the interest of functionaries or parties. Its two main elements are correctness of the decisions, and citizen-orientation.[36]

The new Finnish Municipality Act takes several important steps in this respect, even though the Finnish model differs in several details from the German and Hungarian local community regulations. It is too early to say whether the new Act is timely in the face of the requirements of a modern municipal policy.

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services will be leaned on. The base standard of services is to produce the services in a satisfactory way with respect to the national level. For this we need to develop extensive information steering, i.e. neutral data on services, their impact, quality and costs. Obtained comparative information would be used by citizens, municipal representatives and managers as well as producers. Information steering will be the central mean of steering according to the joint responsibility model."

35 HILL–KLAGES: *op. cit.*, 80.

36 Thus BANNER, G. in SCHIMANKE, D. (ed.): *City Director or Mayor*, Basel, 1989, 41.

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The Necessity Test Relevant to the Codification of Criminal Law

With respect to all fundamental constitutional rights, the question arises of whether it is possible to restrict those rights, under what conditions this should occur, and what criteria should be used for establishing a priority of rights in case of their collision.

In one of its decisions, the Hungarian Constitutional Court has made the following points: the Constitutional Court should continue its work of interpretation in order to predicate the conceptual bases of the Constitution and of the rights embodied in it, and to create a coherent framework of its judgements, which is intended to serve as a reliable measure of constitutionality. This would provide an "invisible constitution" standing above the Constitution, which is still often amended out of daily political interests. This "invisible constitution" will, therefore, not be expected to come into conflict with the new Constitution, or any other constitutions which may be adopted in future. In this procedure the Court will have freedom of action as long as it remains within the bounds of the notion of constitutionality.

Bearing in mind this guiding concept, the decision of the Constitutional Court is deliberately subjective and is historically determined. Even if the Court declares certain values to be absolute, it thereby lays bare the meanings they convey for its own era, and, therefore, its judgements on the questions of, for example, capital punishment or abortion, have no claim to eternal value even in principle.[1]

In the course of preparing the new Constitution the decisions of the Constitutional Court must inevitably be taken into account, because they bring strong influence to bear

1 23/1990. (X. 31.) AB határozat (Decision of the Constitutional Court), 2180.

on the exercise of the State's criminal jurisdiction. This is despite the fact that the questions considered by the Court are not covered, or are treated inconsistently, by the text of Hungary's Constitution. However, it is a requirement that questions of criminal law should be governed by express provisions of the new Constitution, and should not only be addressed by the "invisible constitution". I believe that this desideratum is not in conflict with the rule of law.

Article 8 of the Constitution states that "the Republic of Hungary shall recognise man's fundamental rights inviolable and inalienable, and it shall be a prime duty of the State to respect and protect those rights. The rules establishing fundamental rights and duties shall be laid down by Act of Parliament", but the essential content of fundamental rights must not be subject to restrictions.

The State may not resort to restricting a fundamental right except when protection or implementation of another fundamental right or freedom, or protection of another constitutional value cannot be secured by other means. So, for the restriction of a fundamental right to be constitutional, it is not sufficient for restriction to be required by the protection of another fundamental right or freedom, or in the interest of another constitutional goal. Instead, restriction should also meet the criteria of proportionality, namely that the importance of the desired goal and the extent of prejudice caused to a fundamental right in pursuit of that goal should be duly proportional. In imposing a restriction the legislator must use the least intrusive means to attain the given goal. Restricting the content of a right is unconstitutional if done without an imperative cause or in an arbitrary manner, or if the extent of restriction is disproportionate to the desired goal.[2]

The Hungarian Constitution uses the expression "fundamental rights" as a generic term covering the rights referred to in the European Convention as human rights and freedoms.[3] Member States thus have a certain margin of appreciation concerning the necessity of restricting these rights and freedoms in a democratic state. The European Court of Human Rights controls the need for restriction by using the so-called necessity test.[4] Application of a criminal sanction necessarily means restriction of a fundamental right. The framework for protection by criminal law is therefore created as a result of deliberation. In using the necessity test it should be established whether there is a need for restriction, that is, for regulation by criminal law, and whether restriction is proportional to and appropriate to attaining the purposes of punishment. In this context, judgement is influenced by the existence or absence of social consensus in declaring an act to be a criminal offence, and by the group of people affected by and opposed to criminal responsibility. On the international level, it should be established whether there is a generally held view in this matter, and whether the related community interests are

2 31/1992. (V. 26.) AB határozat (Decision of the Constitutional Court), 1910.

3 BÁRD, K.–BÁN, T.: "Az Emberi Jogok Európai Egyezménye és a magyar jog", *Acta Humana*, 1992, No. 6–7, 9.

4 BÁRD–BÁN: *ibid.*, 125–126.

at least similarly protected in a similar cultural environment. It is necessary to examine the moral content of an act, which may differ from the average with respect to, for example, professional negligence. It is necessary to consider the extent to which a restriction is capable of achieving the purpose of punishment under criminal law (for example, abortion, alcoholism, drug addiction). Finally, it is necessary to consider the *ultima ratio* nature of criminal law, that is, whether other means are sufficient.[5]

While the Constitution in force does not expressly state an obligation to prosecute crimes, several of its provisions refer to the obligation to protect values, even by exercising criminal jurisdiction:

a) under Article 35 (1) the Government must protect the constitutional order, and protect and ensure the rights of citizens;

b) under Article 50 (1) the courts must protect and ensure the constitutional order, as well as the rights and legitimate interests of citizens, and must punish the perpetrators of criminal offences;

c) under Article 51 (1) the Chief Public Prosecutor and the Prosecutor's Office must be concerned with the protection of the rights of citizens, and must consistently prosecute any acts violating or endangering the constitutional order, national security, and independence.

These brief provisions of the current Constitution are counterbalanced by the "invisible constitution's" explanations of the sanction of criminal law. Accordingly, the role and function of criminal law sanctions consists of the upholding of the integrity of legal and moral norms when the sanctions of other branches of law are insufficient;

a) The punishment intended to protect the integrity of law has a symbolic function. Most notably, the commands of criminal law must not be violated even if one has a cause to do so or if the punishment fails to achieve, or is unfit to achieve, any particular purpose. The purpose of punishment is in itself, namely in the public declaration of the integrity of law, in retaliation regardless of purpose.

b) The principle of proportional punishment is the only possible one in a constitutional state for the added reason that it alone is consistent with the idea of equality before the law. Any other consideration would mean the declaration of inequality, for the individual would regard his personal status, rather than the act, as the yardstick for punishment.[6]

In another concurring opinion, Justice János Zlinszky, observes that the criminal jurisdiction of the State undoubtedly restricts man's freedom of decision, thus operating to a certain extent as a limitation upon human dignity, whilst it allows scope for making a new positive moral decision—inasmuch as legal norm may be freely accepted and observed—such a decision has a moral value. It is nevertheless a fact that, just as human freedom is both a limit to, and a precondition for, social existence, a State-protected norm is a limitation to a moral value and is therefore in place only where necessary, and

5 KREMNITZER, M.: "Constitutional Principles and Criminal Law", *Israel Law Review*, No. 1–2, 87 *et seq.*

6 23/1990. (X. 31.) AB határozat (Decision of the Constitutional Court), 2186.

to the extent required, for the protection of the life and freedom of individuals (life being understood here as comprising all pre-conditions for social existence). It follows—and Zlinszky's opinion points this out—that punishment is acceptable only in this goal-directed sense, and loses its justification as soon as it becomes unsuitable for achieving its purpose.

Since the criminal jurisdiction of the State is not uniformly interpreted even by the members of the Constitutional Court, this in itself, or the limitations of jurisdiction do not lend themselves to deducing the admissibility or inadmissibility of capital punishment. For centuries it has been an implicitly accepted principle of criminal law that punishment has a preventive purpose which serves to suppress attacks on protected social values. Punishment can only be effective where, and to the extent that, it is suited to its purpose; it loses its legal basis when it is unable to serve that purpose, or when it is only able to serve it at the cost of a greater injury than the one it is meant to prevent.[7]

What has been stated in connection with the purpose of punishment, regardless of whether there is a consensus among the members of the Constitutional Court on this issue, it can at most be considered as a scholarly opinion which seeks to assist the transition to a constitutional state. However, I do not believe in the existence of a principle of punishment which serves as the basis for "the only possible punishment in a constitutional state". There is a voluminous literature on the purposes of punishment, and the proportional or educational trends change according to place and time.[8] Indeed, Article 3 of the European Convention on Human Rights is concerned with the quality of punishment applied, rather than with the purpose of punishment pursued, and it gives no positive wording on punishment, but merely prohibits acts of inhuman and degrading punishment. Therefore, I am of the view that formulation of the purposes of punishment is not a question for the Constitution to cover.

In one of its decisions[9] the Constitutional Court uses the term "constitutional criminal law", and the use of this term probably accounts for the failure to duly separate questions of constitutional and criminal law in analysing the problems that have emerged. Yet it is necessary for both constitutional and criminal law to resolve problems of codification and interpretation of law by using the terms specific to their respective systems. During the period of transition it may be acceptable that, in the course of its work, the Constitutional Court takes a broader view when interpreting the Constitution, and such an interpretation may be of help in elaborating the concept of a new Constitution. Once the new Constitution has been adopted, it will be necessary to interpret that Constitution instead of the "invisible" one. Delimitation of problems affecting constitutional and criminal law assumes particular importance for the added

7 *Ibid.*, 2187.

8 Interesting studies on this subject are contained in a volume edited by LAHTI, R.–NUOTIO, K. (eds.): *Criminal Law Theory in Transition. Finnish and Comparative Perspectives*, Helsinki, 1992.

9 42/1993. (VI.30.) AB határozat (Decision of the Constitutional Court).

reason that the Constitutional Court has recently handed down decisions addressing questions of criminal law not only from the standpoint of constitutional law.

In examining restriction of the freedom of expression by means of criminal law, the Constitutional Court has maintained that constitutionality should be considered in conjunction with observance of the constitutional precepts relating to the entire system of criminal law. The source of those precepts lies in the concept of constitutional criminal law, and in the set of requirements which derive from the principle of the rule of law as a fundamental value for the exercise of criminal jurisdiction by the State, which includes the limitations on substance and the formal requisites of criminal legislation. In this context the decision referred to the International Covenant on Civil and Political Rights—adopted by the 21st Session of the United Nations General Assembly on 16 December 1966 and promulgated by Law-Decree No. 8 of 1976 in Hungary—which embodies freedom of thought [Article 18 (1)] and the right to freedom of expression [Article 19 (2)]. Furthermore, the court pointed out that exercise of the rights contained in the freedom of expression carries with it special duties and responsibilities. Hence it may be subject to certain limitations, but these must only be such as are provided by law and are necessary for

a) the respect of the rights or reputations of others or

b) the protection of national security or of public order, or of public health or morals.

The decision additionally quoted Paragraph 2 of Article 20, under which "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Then it referred to the International Convention on the Elimination of All Forms of Racial Discrimination, which carries a legal obligation for the Hungarian State and was promulgated by Law-Decree No. 1 of 1969. Under Article 4 of the Convention, State Parties must declare propagation of ideas based on racial superiority or hatred to be an offence punishable by law.

To sum up the position of the Constitutional Court, limitations on the freedom of expression and the freedom of the press are required and justified both by the historically proven harmful effect of hatred against specific group of people, and by protection of constitutional fundamental values and fulfilment of the international obligations of the Republic of Hungary.[10] In consequence, the conduct penalised by Article 269 (1) of the Criminal Code[11] also threatens individual rights, and the Court's

10 30/1992. (V. 26.) AB határozat (Decision of the Constitutional Court), 1912.

11 "*§ 269. (1) Whoever in wide publicity incites to hatred against*

a) the Hungarian nation or some nationality,

b) some nation, religion or race, furthermore certain groups of the population, commits a felony and is punishable with deprivation of liberty up to three years.

[(2) Whoever in wide publicity uses an expression offensive or degrading to the Hungarian nation or some nationality, nation, religion or race, or commits other such conducts, is punishable for a misdemeanour with deprivation of liberty up to one year, community service or fine.]" (Paragraph 2 was abolished by the decision of the Constitutional Court [30/1992. (V. 26) AB határozat)].

decision thus gives such weight to the direct object of the public peace, that restriction of the freedom of expression can be viewed as necessary and proportional.

The Constitutional Court held that, in codifying Article 269 (2) the Criminal Code had built on the fact that use of derogatory expressions with respect to national or religious communities was generally contrary to the desirable tranquillity of society. This definition of the immaterial facts of the offence protects, therefore, public order, the public peace, social peace in themselves, in an abstract fashion. The crime is also deemed to be committed when the derogatory expression does not, under the circumstances, carry the danger of prejudice to individual rights. Such an abstract threat to the public peace is an insufficient argument in favour of constitutionally restricting the freedom of expression by punishment under criminal law.

The decision further states that the right to the freedom of opinion protects opinion without regard to its value-content and truth, yet Article 269 (2) places no external limitation on expressions, but qualifies on the basis of the value-content of opinion, to which disturbance of the public peace is only linked by assumption and statistical probability.

Maintenance of the public peace does not inevitably require the law to threaten with punishment under criminal law the use, in the presence of others, of insulting or derogatory expressions with respect to the Hungarian nation, a nationality, a people, a religious or a racial group (or the commission of other similar acts). This statutory definition of the pertinent facts unnecessarily, and in a manner disproportionate to the desired goal, restricts the right to freedom of expression. An abstract, eventual threat to the public peace gives insufficient cause for the Criminal Code to place limitations, as determined by Article 269 (2), on the fundamental freedom of expression, which is indispensable to the functioning of a democratic, constitutional state.[12]

The decision of the Constitutional Court furthermore stated that "racial" incitement is prohibited by criminal law in all democratic countries of Europe with a continental system of law and, in the territories of Anglo-Saxon law, in England and Wales, Canada, and New Zealand. However, drawing the appropriate boundaries between incitement, hatred and the freedom of expression is also a source of considerable debate in the international arena.[13] For this reason it is also not certain that Article 269 (2) will stand the necessity test. The Constitutional Court proceeds from the assumption that the right to freedom of expression protects opinion without regard to its content of value and truth.

This statement—in my opinion—not only runs counter to the provisions of Covenant Article 20 (2), but para. (1) thereof spells out that any propaganda for war must be prohibited by law. In that case, freedom of expression cannot be independent of any value-content. Moreover, freedom without a content of truth is open to doubt on the basis of the arguments advanced in the Constitutional Court decision discussed below.

12 *Supra* note 10, 1913–1915.

13 *Ibid.*, 1909.

Manifestation of opinion expressing a value-judgement apt to injure the honour of an authority or an official, or a politician acting in the public view in its/his capacity, is not constitutionally punishable. Allegation or spreading of facts fit to impair honour or use of a term directly referring to such facts is punishable only if the person alleging or spreading facts fit to impair honour, or directly referring to such facts was aware that his allegation was untrue in content or was unaware of its untruth because, under the rules of his profession or occupation, he failed to show the diligence that could be expected of him with respect to the object, means and target of his allegation.[14]

According to the decision, the constitutional boundaries of the freedom of expression should be established by taking into consideration, along with the subjective right of the person expressing opinion, the interest attached to the formation or free creation of public opinion which is indispensable for democracy. The right to the freedom of expression is not only a fundamental subjective right, but is also a recognition of its objective, institutional aspect, whilst serving as a guarantee for public opinion as a fundamental political institution.

Although the special role of the right to freedom of expression does not imply that this right is unrestrictable, as are the rights to life and to human dignity, it certainly means that this freedom actually has to yield to a very few rights; therefore the laws placing limitations on the freedom of expression should be interpreted restrictively. A restrictive law, when considered against freedom of opinion, carries a greater weight if it directly serves to ensure observance and protection of another fundamental subjective right; it has a smaller weight if it protects such a right only indirectly, through the medium of an "institution"; and its weight is smallest when it serves nothing but an abstract value in itself.

The right to the freedom of expression protects opinion without regard to its value-content and truth. It is subject to external limitations only. Unless it exceeds such constitutionally imposed, external limits, it is the very possibility and fact of expressing opinion that is afforded protection without regard to its content. In other words, what enjoys constitutional protection is expression of individual opinion, public opinion shaped by its own laws and, in interaction with the former, the possibility of forming individual opinion based on as wide a range of information as possible. The Constitution ensures free communication (individual conduct and the social process), and the fundamental right to the freedom of expression is unrelated to the content thereof. In this process there is a place for every opinion, good and harmful, pleasant and offensive alike, especially by reason of the fact that the qualification of opinion is itself a product of this process.

The criminal law means of protecting honour restrict the freedom of expression in defence of the constitutional values of the rights to human dignity and to reputation.

Under Article 54 (1) of the Constitution, every human being has the inherent right to life and dignity. Since Decision No. 8/1990. (IV.23.) of the Court was handed down,

14 36/1994. (VI. 24.) AB határozat (Decision of the Constitutional Court), 2511.

the practice of the Constitutional Court has accepted the right to human dignity as a "general personality right". The general personality right is a "parent right", that is, a subsidiary fundamental right which both the Constitutional Court and the ordinary courts may always invoke in defence of the individual's autonomy if none of the qualified fundamental rights can be applied to the pertinent facts of a particular case.

This statement—in my view—affects questions of detail explicitly of criminal law and is in conflict with the dogmatic system of the relevant part of criminal law. The dogmatic system functions well only if free from contradictions.

In this decision[15] the Constitutional Court touches on specifically criminal law issues with which it cannot concern itself, and not only under the current Constitution, but also under the "invisible" and, hopefully, the new Constitution which is now in the making.

As is stated in this decision, the perpetrator's acts include alleging or spreading, in the presence of others, facts objectively apt to injure honour, or using terms directly referring to such facts (henceforth called "statement of facts"), or using terms, or committing acts, objectively apt to injure honour (henceforth called "value-judgement").

The act can only be committed with intent: commission through negligence is not punishable by law. For wilful commission to be established it is necessary that the perpetrator be mindful that the statement of facts or the value-judgement is made in the presence of others, refers to an official or one representing an authority, and is objectively apt to injure the honour of that official or, through insulting him, that of the authority. Guilt is not conditional on intent to insult, and the motive of the act can be judged, not in the establishment of guilt, but in the meting out of punishment.

In examining the constitutionality of regulation by criminal law, it is of particular relevance that the untruth of facts apt to injure honour is not a pertinent element of the criminal offence, so statement of facts, whether true or untrue, is deemed to be a crime. Establishment of guilt does not require awareness of the untruth of facts, so error concerning the truth of facts is indifferent to criminal law. Likewise indifferent to the commission of the crime is the perpetrator's "good or bad faith", his diligence or negligence in ascertaining the truth of facts. The perpetrator is not relieved of criminal responsibility either by due foresight or by "*bona fide* error".

Protection of the honour of officials is an aspect of the inalienable and unrestrictable right to human dignity. Among the fundamental rights relating to the person's social appreciation Article 59 (1) of the Constitution mentions only the right to reputation, but there is no doubt that honour, which emanates from the parent right to human dignity, similarly enjoys the protection of a fundamental right under Article 54. Although only an official representing an authority can have human dignity, an authority may also lay claim to a favourable value-judgement or appreciation by society.

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15 *Ibid.*, 2511–2513.

Its consideration with a view to their inter-relationships, of the constitutional protection of human dignity, honour and reputation, of the right to the freedom of expression and of the constitutional interest attaching to the freedom to discuss public affairs, has led the Constitutional Court to conclude that freedom of expression may only be subject to a smaller degree of restriction in defence of the exercise of public power. For the protection of the honour of authorities and officials, the means of criminal law that are strictest in the system of sanctions may not be used constitutionally, except in cases outside the sphere of the freedom of expression.

According to the decision, the Constitution makes no express distinction between statements of facts and value-judgements in safeguarding freedom of expression. This freedom is basically aimed at enabling individuals to shape the opinion of others, and to convince others of their own position. Therefore it generally includes the freedom to communicate anything, regardless of the manner and value of communication, its moral quality, and usually its content of truth. Statement of a fact may itself qualify as opinion, for opinion may also be reflected by the circumstances of communication, that is, the constitutional fundamental right to express opinion is not limited to value-judgements. In drawing the boundaries of freedom of expression, however, one is justified in making a distinction between value-judgements and statements of facts.

Freedom of expression always includes value-judgements, that is, the personal opinion of individuals, irrespective of whether they are valuable or worthless, true or false, or are based on emotion or reason. Nevertheless, human dignity, honour, and reputation, which are equally protected by the Constitution, may place external limitations on the freedom of expression as manifested in a value-judgement, and give rise to criminal responsibility in the interests of protecting them. Therefore criminal responsibility cannot, on the whole, be regarded as disproportionate and hence unconstitutional.

Yet the Constitutional Court maintains that the Constitution accords increased protection to value-judgements voiced in conflicting views on public affairs, even if such views may be exaggerated and extravagant. Again, protection of society's peace and democratic development does not need the intervention of criminal law against criticisms of, or negative judgements on, the activities of authorities and officials that are manifested in the form of insulting or defamatory statements or conduct. The view, set out in Constitutional Court Decision No. 30/1992. (V. 26.), that shaping public opinion and the political style by criminal law penalties is a paternalist approach also holds true for this case.

All the above may be viewed and disputed within an analysis of the necessity test, but the points to be made below concern problems of criminal dogmatics which, given the subjective aspects involved, are not matters of constitutional law.

In the view of the Constitutional Court, freedom of expression does not include statements of untrue facts apt to injure honour if the person uttering a libel is positively mindful of the untruth or if, under the rules governing the exercise of his profession or occupation, he could have been expected to ascertain the truth of facts, but he failed to use diligence in his responsible exercise of the freedom of expression.

The Constitutional Court has held that the unconstitutionality of criminal law is not ruled out by the possibility of proving the truth of a particular statement. Regulation by criminal law is based on the presumption of untruth.[16] My comment on this line of reasoning is that regulation by criminal law is based, not on the presumption of untruth, but on the objective, not subjective, criteria of aptness to injure honour.

The Constitutional Court maintains that the admissibility of a defence by proving the truth under the burden of proof not only means prohibition of deliberate utterances of falsehood, but is also apt to discourage persons from criticising the activity of those exercising public power. The possibility of proving the truth does not counterbalance unnecessary and disproportionate limitations on freedom of expression and the press, and is not a substitute for constitutional protection where facts are stated which are either true or reasonably believed to be true, but which are apt to injure the honour of an official.

In cases of this defence, the general rule for evidence, following from the presumption of innocence, a constitutional basic principle of criminal law, is turned around: the burden of proof is borne by the person against whom proceedings are being undertaken. The perpetrator's punishability is excluded by nothing but the proven truth. His guilt must be established if the proceeding authority has not satisfied itself that the fact stated is true in content. The consequences of the impossibility of proving the truth of facts are suffered by the person against whom criminal proceedings have been instituted, and the presumption of innocence does not prevail in this case.

The decision of the Court stated that, with respect to the exercise of public power, or to participants in public life, disclosure of true facts should always be deemed to be in the public interest even if such disclosure is apt to damage the social appreciation of those persons, and appraisal thereof cannot be left to the authority proceeding in criminal cases.[17]

The statement made in the dissenting opinion on the question of constitutionality points out the following: the ordinary courts may, by relying on the present set of conditions for proving the truth, constitutionally decide whether a particular case involves the freedom of expression, or involves an act violating the private sphere and dangerous to society. The content of "public interest" and "anyone's lawful interest"—concepts which serve as conditions to communicate offensive facts even if true—evolved through the practice of ordinary courts. According to them, the closer the sphere of civil relations affected by a statement of facts is to public life, the wider is the protection of the public interest or of lawful private interests, on the basis of which

16 *"Proving the Truth*

§ 182. (1) The perpetrator can not be punished for the crimes defined in Articles. 179–181 (Libel and Slander, Defamation, Profanation of the Memory of the Deceased) if the fact fit to impair the honour proves to be true.

(2) Proving the truth is admissible where the assertion, spreading of facts or the usage of a term directly referring to such was motivated by public interest or by anyone's lawful interest."

17 *Supra* note 14, 2516–2518.

the truth can be said; and the closer it is to private life, the smaller is the possibility of proving the truth.

Moreover, it is up to the system of criminal law to regulate the objective and subjective elements of responsibility, and for criminal procedure to judge individual cases. The unlawfulness of defamation (and insult) may be excluded on an objective basis if social appreciation attaches greater importance to the statement of fact or the expression of opinion than to the protection of the injured person's honour. The provisions of Article 17 of Statute XLI of 1914 provide a statutory example of this.[18] Contemporary judicial practice has excluded the unlawfulness of defamation and insult in connection with numerous circumstances (for example, expert or scientific opinion, the giving evidence of to authorities, the fulfilment of educational duties).[19] In these cases the only limit to statements of facts or expressions of opinion is set by the punishment of the use of defamatory terms, because use of such terms, insulting in themselves, is also punishable in these cases.

If the Constitutional Court had wished to attach similar importance to public or political activities, it would have had to invite the legislator or the ordinary courts to regulate the causes excluding similar cases of unlawfulness, because the causes excluding unlawfulness come into play in the stage preceding the institution of criminal proceedings. Aptness to injure honour as well as the circumstances in which facts are stated or opinion is expressed can be objectively considered before the institution of proceedings, such consideration needing no hearing.

Failure to show diligence, or negligence as indicated in the Constitutional Court's decision, can only be examined within the framework of criminal proceedings. Since proceedings in such cases are usually instituted on a private complaint, effective protection for the critic can only be accorded by a criminal law solution that does not allow criminal proceedings to be taken against the critic. It is commonly known that, in a case liable to prosecution by private complaint, what is important for the private prosecutor is not the punishment, usually minimal, but the fact that the critic can be brought into a defendant's position. Since that position is by itself necessarily an injury to the personality right—which is conditional on the particular conduct being a criminal offence—the rules of criminal law should be formulated in such a way as to prevent such injury as well. It is this objective situation for which a circumstance excluding unlawfulness can be created by applying the necessity test.

In my view, systematising and applying the conditions of criminal responsibility in substantive and procedural law is not a matter of constitutional law. It would therefore

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18 *"(1) Establishment of defamation or insult shall be excluded if the statement of a fact or the use of a term directly referring to a fact occurred orally or in a document during the hearing of the case before the authority in relation to the case and the party thereto.*

(2) This same rule shall apply to other similar declaration made by the party to the case or by his representative orally or in a document during the hearing of such a case, provided that the declaration is related to the case and was necessary in the interest of the party."

19 Cf. *A Büntető Törvénykönyv magyarázata (Commentary to the Penal Code)*, Budapest, 1986, 532–533.

be advisable to separate problems affecting constitutional law and the internal systems of other branches of law. As such separation concerns both legislation and adjudication, it would seem reasonable to empower the Constitutional Court to examine the constitutionality of judicial decisions as well. Such practice might prevent an intermingling of matters pertaining to constitutional and criminal law and ensure reversal of the proportion of majority/minority views in the decisions handed down by the Court. Given its lack of competence, the Constitutional Court may not examine the constitutionality of judicial decisions, but this is no sufficient cause for its annulling a law or regulation that may be applied in harmony with or contrary to the Constitution.

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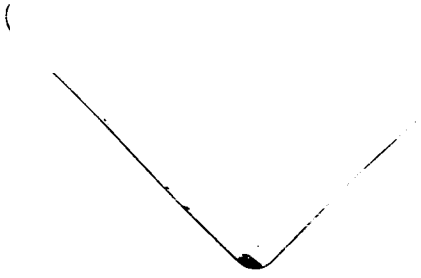

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