Vol. 40. Nos 1–2. 1999

HU ISSN 1216-2574

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Editor in Chief *Vilmos Peschka*

Akadémiai Kiadó
Budapest

Kluwer Academic Publishers
Dordrecht / Boston / London

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Acta Juridica Hungarica presents the achievements of the legal sciences and legal scholars in Hungary and details the Hungarian legislation and legal literature. The journal accepts articles from every field of the legal sciences.

Recently the editors have encouraged contributions from outside Hungary, with the aim of covering the legal sciences in the whole of Central and Eastern Europe.

Manuscripts and editorial correspondence should be addressed to

ACTA JURIDICA HUNGARICA
H–1250 Budapest, P.O. Box 25
Tel.: (36 1) 355 7383 Fax: (36 1) 375 7858

Distributors

for Hungary

AKADÉMIAI KIADÓ
P.O. Box 245, H–1519 Budapest, Hungary
Fax: (36 1) 464 8297
http://www.akkrt.hu

for all other countries

KLUWER ACADEMIC PUBLISHERS
P.O. Box 17, 3300 Dordrecht, The Netherlands
Fax: (31) 78 639 2254
http://www.wkap.nl

Publication programme, 1999: Volume 40 (in 4 issues).
Subscription price: NLG 450.00 (USD 225.00) per annum including postage & handling.

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Vol. 40. Nos 1–2. 1999

CONTENTS

STUDIES

BOOK REVIEW

ACTA JURIDICA HUNGARICA
1999 40 Nos 1–2, pp. 1–17

1216-2574 / 99 / USD 5.00

STUDIES

Vilmos PESCHKA

The Retroactive Validity of Legal Norms

"Time present and time past
Are both perhaps present in time future
And time future contained in time past."

(T. S. Eliot)

Time

Time is a hard taskmaster, permeating as it does our life, the life of the individual quite as much as that of society. It is an element of our existence, of the existence of individuals and society alike, and hence one of personal and social reification. Temporality is a determinant factor of life. It is an interesting phenomenon: while in philosophy time presents a substantial and mysterious problem from Aristotle through Kant and Hegel down to Bergson and Heidegger, in the philosophy of law it is, one might say, a peripheral issue, a rather rare subject of discussion and analysis.[1] What may account for the disinterest of legal philosophy in respect to the link between law and time, indeed, for the marginal importance of the relationship between law and time for the philosophy of law? Law is primarily concerned with practice and, in this sense, forms an organic part of daily life, naturally living as such in the dimensions of the past, the

1 For a noteworthy exception, see HUSSERL, G.: *Recht und Zeit.* Frankfurt am Main, 1950.

present and the future in the context of time, whereas these three dimensions constitute a piece of evidence, a self-understood, unproblematic contention for all: "Obviously, any past is chased by the future and any future ensues from the past, and any past and any future have their genesis in the omnipresent, issue forth from it".[2] Yet time carries in itself a range of unresolved problems, the questions of time and space, objective and subjective time that are always with us. In everyday life, law apparently presents no problem for us in the dimensions of the past, the present and the future. Still, when one looks down in the giddy depth of time, the link between law and time involves as many peculiar and interesting questions, above all that of whether the temporality of law can be elucidated at the level of daily life, in the dimensions of the past, the present and the future, or whether it would perhaps not be amiss to delve deeper and rasp the fact that the past, the present and the future are mere external existence and that what we have is actually no other than "the unity of existence and nothing", notably the transition of existence to nothing and the transition of nothing to existence. "The non-existence of existence replaced by 'now' is the past; the existence of non-existence embodied in the present is the future. In the positive sense of time, therefore, one can say that only the present exists, there being no previous and no posterior, but this concrete present is the result of the past and is pregnant with the future."[3] This Hegelian statement reveals the real substance of time correctly and more profoundly than both earlier and later philosophical conceptions do, for if one looks at either previous or subsequent philosophical disquisitions on the subject, the difference, apart from the more or less identical results, lies only in that, with Hegel, the objective process of time passes to the terrain of subjectivity and is manifested in existence, in the mind, in memory.[4] As we are speaking of the relationship between law and time, let us hasten to add that the relevance of subjective time is by no means negligible in regard to law.

In dwelling on the distinction between objective and subjective time we are concerned with this problem mainly in relation to law. The question is primarily on of how law appears in objective time, since law emerges from the process of objective time, lives, functions and ceases in it. This is objective

---

2 AUGUSTINUS, A.: *Vallomások* (Confessions), Budapest, 1982. 365.

3 HEGEL, G. P.: *A filozófiai tudományok enciklopédiájának alapvonalai.* II. rész. *A természetfilozófia* (Encyclopedia of the Philosophical Sciences in Outline. Part II The Philosophy of Nature), Budapest, 1979. § 259. *Függelék* (Appendix), 57.

4 See AUGUSTINUS: *op. cit.*, 365, BERGSON, H.: *Idő és szabadság* (Time and Free Will), Budapest, 1923. 113–125 et seq.

time, and existence in it is nothing but than the history of law. In brief, the problem concerns law in time.[5] However, in relation to law, time assumes paramount importance in another quality of it, too, which is subjective time. The idea is that objective time becomes subjective in respect not only of an individual, but also of his products, especially of intellectual objectification, just as it does in relation to, *inter alia*, law. Law as a social objectification has a specific time, a subjective one. Briefly, the concern of this problematic is with time in law. The case here is that objective time appears in a social, mental, intellectual objectification, in an intellectual, mental product, in legal objectification, and this in accordance with the specific function and purpose of such legal objectification. Time alters in this special legal sphere, peculiarly becoming subjective in legal objectification. The present analysis is dealing basically with this process, with how objective time appears in the realm of law, how it changes, how it becomes subjective in a certain sense. And, considering that law as a social-mental objectification is of several layers, consequently that time in these segments of law appears in different ways, differently in legislation, in legal relations and in the application of law. At his juncture we shall confine ourselves to examining one aspect of the appearance of time in law, namely the way in which time manifests itself in the validity of laws and regulations or, more specifically, in the retroactive validity of legal norms.

Nevertheless, it will not be out of place to emphatically point out well in advance that the following discussion will inquire into time, not in respect of legislation, but as regards the way in which time appears and its meaning in relation to the product of law-making, the legal norm, as a legal objectification. Nor should it be overlooked that the profound philosophical definition of time at a philosophical depth, according to which "time is such as *exists*, but is concurrently non-existent, and it is non-existent while being existent...",[6] is a social objectification that is a determinant of law as well, just as the fact, which otherwise suggests a subjective temporality of law as a mental objectification, that "a thing in itself cannot be made into one for us except by elevating the past and the future to the present, while the non-existent, in its

5 For an extensive study, see KULCSÁR, K.: *Történetiség a XX. század jogtudományában* (Historicity in the Jurisprundence of the 20th Century), in: *Kritikai tanulmányok a modern polgári jogelméletről* (Critical Studies of the Modern Bourgeois Theory of Law), Budapest, 1963. 89–149; SAJÓ, A.: *Társadalmi-jogi változás* (Social and Legal Change), Budapest, 1988.

6 HEGEL: *op. cit.*, 258. § 52.

absolute postulation, naturally can but rise to be a thing for us alone, rather than to be a thing in itself".[7] All this is a mere philosophical abstraction and generality, which this discussion is called upon to credit with real philosophical meaning and significance. The point is that on the basis of the following amplification on time we shall try to bring light to bear on the relationship between law as a social-intellectual reification and time in a single aspect, in regard to the retroactivity of laws and regulations. It should be stressed that at issue is the link between legal, social and ideological objectifications and time. For, to avoid misunderstandings, we wish to avoid even the appearance of the following exposition looking like, as it were, the antipole of G. Husserl's work "Law and Time".[8] That is out of the question, however, as we are to explore a topic concerning one of the relationships between law and time. The two approaches *quasi* complement rather than oppose each other. While Husserl as a true existentialist starts from the individual, from the person of the law-maker, from his concrete activity and determines the essential temporality of legislation from his point of view, viz., from the question of whether the past or the present or the future is decisive to law-making, on which dimension of time is the focus thereof, of which aspect of temporality is predominant therein, our discussion will not, as noted, bring into focus the person and activity of the law-maker, but will analyze the product of his activity, the law as the objectified result of that activity, in the context of time in which that result exists and appears, and, even so, merely one of its aspects, the retroactivity of legal norms.

Duration of validity

The fact that a legal norm appears as one to be followed and realised in society is called the validity of the legal norm. Validity should be neither abstract nor some sort of a theoretical social substance, but a concrete social substance organized in a legal teleological-normative structure, legal in substance as the norm is. The validity of the legal norm means its specific mode or form of existence, while pointing to its objectively existing specific feature which, once the norm has come into existence, becomes independent of the minds, of the subjects of individuals, is not a psychical or subjective phenomenon in the least.

---

7 LUKÁCS, Gy.: *Az esztétikum sajátosságai* (The Specificity of Aesthetic Quality), vol. II., Budapest, 1965. 329.

8 HUSSERL, G: *op. cit.*

The validity of the legal norm is a specific mode of existence thereof as a special social objectification, which is an aspect of all-social existence. It is a complex phenomenon which comes about as the special result of the combined impact of several social factors and processes. In its complexity, the validity of legal norms results from these formal and substantive aspects as ingredients thereof.

As is evidenced by legal history and practice, the validity of legal norms is not unlimited, but has well-definable personal, territorial and temporal scopes. Our present concern is in particular with the historicity, the temporality of validity, or retroactivity as an aspect thereof, for validity emerges at a specified point of time, exists during a specified period and ceases at a specified date. In other words, validity has a specific temporality, there are temporal limits to it. This is designated in legal literature as the temporal validity of law or its scope of application.

We cannot avoid touching on a clarification of an essentially terminological question implied in distinguishing the validity and the applicability of legal norms. Validity and applicability (scope) are by no means synonymous in traditional doctrinal study of legal norms. By distinguishing them, jurisprudential conceptions seek to express and illustrate frequent cases in which the law-maker enacts and publishes a legal norm but extends its force to a time preceding its adoption or brings it into effect at a later date. Accordingly a legal norm is valid upon the act of the legislator adopting and promulgating it, but it becomes operative or applicable at or from the date either previous or subsequent, as determined, to that of validity. Under these conceptions, a legal norm exists, viz., is valid as of the moment of its creation from or up to the time of its coming into force. Validity is thus a property or quality of the legal norm existing during the period between its creation and entry into force. This jurisprudential concept uses the term "validity" to qualify an undoubtedly special, temporary, intermediate state of the legal norm, a state that, one might say, immediately precedes the existence thereof. Consequently there are legal norms which momentarily are not binding on anyone anywhere, but will be so only at a later date, while being valid as such. In this case, therefore, the term "validity" denotes but the fact that the law-maker has drafted a norm, accepted its content and published its text, yet the norm cannot be regarded as a rule to be followed and observed, as one imposing a legal obligation, except from an earlier or later point of time. Nevertheless, this special pre-state of the legal norm can in no way be considered to mean a valid norm. We can speak of a legal norm only if it really exists, is valid, that is, it is binding on a specified group of persons at a specified time and place. What we have until that state occurs as a result of legislative activity is but a text of a legal norm, of a future

norm, as a legislative product that is to become a legal norm valid as from a specified time.

This has practically brought us to our subject proper, to the temporality of the validity of legal norms, to the fact that validity is of a specified time, with a beginning, duration and end. Depending on the legislator's will, this temporal validity can be either specified or unspecified. "The principle that a norm of a legal system is valid until its validity is terminated by the legal system in a specified manner or is replaced by another norm is the principle of legitimacy".[9] That the temporality of validity emerges at all as a problem of legal theory is due to the ontological fact that the legal norms as a social objectification exists not merely in objective time, but in its special, homogeneous medium, subjectively reflecting time and being applied, which at times shows no small differences from the objectivity and irreversibility of temporal processes. To avoid misunderstandings, it should be emphasized, of course, that the duration of validity beings at a basically objective, specified time and lasts for a specified period. However, this determinacy of validity is far from unambiguous. Suffice it to refer here to the uncertainty experienced in respect to the duration of the validity of legal norms coming into and going out of existence by virtue of customary law in the law enforcement practice of the State. Further complications regarding the duration of validity, particularly the beinning thereof, arise from the legal norm treating time in a special way in its special, homogeneous context, occasionally determining the duration of validity differently from the objective temporal processes, real and irreversible. Like any process going on in time, the validity of a legal norm obviously has its past, present and future. The temporal commencement of validity is generally the date at which the norm comes into beging, and its present is the time of its being as it is at any one time, in relation to which the time extending back to its creation is deemed to be its past, whereas the time subsequent to it is its future. Well, but a legal norm is generally valid as from the date of its coming into being, which means that it is of binding force in regard to cases and behaviours occurring in the future as reckoned from that date. Of course, such futurity of validity is a mere appearance, for a legal norm is always valid in its concrete existence, although its validity is merely anticipated in regard to the real social processes and behaviours occurring at present. The fact that a legal norm is valid at present means its applicability not only to behaviours and cases occurring at present, but also to those that occur during the period extending from its creation to the present day and in the future as viewed in

9 KELSEN, H.: *Reine Rechtslehre.* Wien, 1960. 213.

relation to the present. The validity of legal norms is therefore a special one, for it involves more than simply a norm objectively having a past, which is the period from its creation to the present, and a future, which is the period subsequent to it; it also implies that a legal norm as it is lives not only in the present time, but, by virtue of being valid, it brings influence to bear on its past and future as well. A legal norm is, as a rule, valid from its moment of creation to its date of extinction, practically meaning that during this period the norm applies, in its concrete form of existence at the present time, equally to cases and behaviours that occurred in the past and to ones that are to occur in the future. As can be seen, time is not irreversible in the domain of validity, because a legal norm that is valid today is also valid in regard to cases and behaviours that occurred during the period extending back to its date of creation, so its temporal existence today goes back to the past, too. Whereas in the temporality of objective processes the past is irretrievable, the time gone is irreversible, the duration of validity up to the present can not only be recalled subjectively, in the mind, but validity objectively exists in respect to the present and the past alike. If an act in respect to which a legal norm was valid at the time of its commission becomes known today, that act, which is virtually past when related to the present validity of the norm, is governed by this norm, as if by turning back the validity of the norm which is concretely valid at present, and this configuration stands to reason because the norm involved was already valid at that point of time. This possibility is always there to cause such variations in the validity of legal norms. The specificial feature of the duration of validity lies in a norm's ability to relive its past at all times as long as it is valid. Paradoxically, the ontological basis of this is constituted by the future-oriented nature of the legal norm. The fact that a legal norm is generally valid in respect to all future cases and behaviours from the moment of its coming into existence creates the basis for its application at present to cases and behaviours that occurred in the past, viz., during the period extending from its concrete present to its date of creation. One cannot change his past by his acts, but a legal norm is enabled by the specific duration of its validity to influence, shape or modify events and processes that occurred in its past.

Thus a valid legal norm exists in objective time, but, as has been noted, the temporality of its validity shows specific features which act to shape the present, past and future of validity somewhat differently from the irreversibility of real temporal processes. This is evidently due to the fact that validity is virtually a special legal reflection of objective time, so its duration is deemed to be subjective time in this sense and context. As was seen, the decisive element in the distinction between past, present and future in the duration of

validity is the date at which a legal norm is created. The future of validity can be reckoned from the norm's creation or concrete present, while the past of validity accordingly extends back to that date. However specific the duration of validity may be, it becomes clear from the foregoing that a legal norm is valid only in regard to facts, behaviours, events and relations that occurred after its coming into existence.

The Retroactivite Validity of the Norm

From all this it follows that the reversibility of a legal norm as indicated above can in fact be regarded as a *quasi* or *pseudo* one, which will be quite clear when an inquiry is also made into laws and regulations with retroactive effect or force. In their case the question is that both the application and, we stress, the validity of legal norms follow upon the occurrence of events or behaviours to be adjudged. The retroactivity of a legal norm means that the norm is valid not only in respect to events, relations and behaviours that occur after its enactment, that is in the future, or, in other words, it applies not only to the past extending from its concrete existence to its creation, but also to the past preceding its date of enactment. In this event the validity of the norm is really retroactive, the duration of its validity is really reversible, turning back to the past previous to its coming into existence, because it extends to acts, events and relations that occurred prior to the enactment of the norm. This feature of validity is apt to cause significant changes with respect to the past. In the first place it may extend legal coverage to behaviours and cases not governed by law before; it may remove from legal coverage situations and acts which were governed by valid rules of law in the past; it may render formerly lawful behaviours to be unlawful and prohibited; and it may render formerly unlawful and prohibited acts to be declared lawful and permissible and even desirable. In point of fact this means that a legal norm with retroactive of an earlier norm in regard to the past, to the time preceding the enactment of the norm with retroactive effect. The list of historical cases showing the existence as well as the social, political and legal role, significance and impact of such (*ex post facto*) laws and regulations is rather long, so it will suffice to recall here the great boom period, immediately following World War Two, of laws and regulations with retroactive effect adopted worldwide.[10]

---

10 See PESCHKA, V.: *A modern jogfilozófia alapproblémái* (Fundamental Problems of the Modern Philosophy of Law), Budapest, 1972. 238–239.

Consequently the validity of legal norms with retroactive effect commences, not with enactment, but already in the past preceding it. Such norms will thereby subjectively remove or terminate the irreversibility of objective time in the domain of validity, but not elsewhere. Their existence has the effect of changing the legal qualification and regulation of past behaviours, situations and events. It cannot be emphasized too strongly that a legal norm with retroactive effect cannot terminate the irreversibility of objective time, that is, it cannot change and undo cases, events and behaviours that occurred, took place or were exhibited in the past. "If all time is eternally present / All time is unredeemable." (T. S. Eliot) Nevertheless, it may substantially change and even abolish the legal qualification, value and meaning of these past cases, events and behaviours. "Although what happened cannot be undone, the normative meaning of cases long past is amenable to subsequent change by virtue of norms that have emerged after the events to be interpreted."[11] While it is true that not even a legal norm with retroactive effect is able to terminate the irreversibility of objective time, to undo the past, such a norm tends to produce, by a legal requalification and reinterpretation of past situations and acts, momentous economic, social, political and mainly legal effects at the time of the emergence of its validity and its concrete present. This impact of legal norms with retroactive effect is manifest precisely in respect to consequences, to those of past acts and behaviours, entailing social and legal consequences which were most unlikely or had hardly any chance to ensue from past acts and decisions. The special temporality of legal norms with retroactive effect therefore brings about significant changes in respect not only to legal qualification and regulation, but also to concrete facts, relations and acts of everyday life, yet not in respect to the occurrence of cases, events and acts in the past, but in the period of the consequences thereof, in the present and the future of the validity of legal norms.

The existence of laws and regulations with retroactive effect is a fact. The problem lies in the presented existence thereof, namely the question to what extent the adoption and existence of such laws and regulations are justified and substantiated in theory and practice alike. From an axiological point of view, the question may also be asked whether the existence of laws and regulations with retroactive effect is advisable. This problem is not of recent vintage, although, historically not by change, it comes up for discussion time to time. That is the force of history, particularly of legal history. It is also indicated and borne out, albeit with different explanations offered, by two main traditions,

11 KELSEN: *op. cit.*, 13.

otherwise diametrically opposed, of the theory and philosophy of law. Paradoxically, the natural-law and the positivist philosophy of law hold identical views on the existence of laws and regulations eight retroactive effect, both considering it as theoretically two classical examples. The natural-law theories dismiss this problem with ease by claiming that practically there is no retroactivity, because the governing and valid natural law prevailed earlier, as far back as the time when the question was controlled differently by positive law. This is succinctly expressed by Gustav Radbruch, who, in the critical period of trials in the wake of World War Two, stated that, on the one hand, "there may exist laws with injustice and public harm on a scale to justify the need to deny them validity and even a legal character"[12] and that, on the other hand, "there are, then, legal axioms, stronger than any postulate of law, so any law contrary to them is devoid of validity. These axioms are called the law of nature or reason".[13] Indeed, this law of nature or reason is always valid, and it overrides the validity of positive law. Consequently what we have is not retroactivity, but the permanent validity of natural law, one that is independent of positive law. As can be seen, the natural-law concept seems to deny the retroactivity of positive law rules on the one hand and, on the other, substantiates it by a vague ideology about the permanent validity of natural law. The retroactivity of legal norms is openly and resolutely advocated by Hans Kelsen, an exponent *par excellence* of legal positivism, in arguing that since the scope of validity of legal norms, inclusive of temporal validity, is a substantive element of legal norms, it is determined by the lawmaker and that although legal norms generally apply to future behaviours, that is they are retroactive, because "in this respect the law is similar to king Midas. Just as whatever he touched turned into gold, anything under the control of law assumes a legal character".[14] The theoretical basis for the advocacy by legal positivism of the retroactivity of legal norms is provided by Felix Somló's "incontestable truth that legal power (or, in other terminology, the legislator, the State, the sovereign power) may postulate any discretionary legal substance".[15] The natural-law and legal positivist of legal norms are riddled with inner contradictions: the argumentation of the natural law tradition involves the clash between the validity of natural law and positive law, while legal positivism involves the clash between the validity and the application of laws and regulations.

---

12 RADBRUCH, G.: *Rechtsphilosophie,* Stuttgart, 1950. 336.

13 *Ibid.*

14 KELSEN: *op. cit.*, 282.

15 SOMLÓ, F.: *Juristische Grundlehre,* Leipzig, 1927. 308.

The theories adopting a critical attitude toward the retroactivity of laws and regulations and deeming it theoretically untenable usually invoke the rule of law, the ideals of law, morals and the harmful effect of laws and regulations with retroactive force and essentially declare their opposition to the retroactivity of legal norms. "Laws introducing amendments must not be ascribed *retroactive* force ..., or else any guarantees by a law-governed state for the life of human communities stand to be abolished."[16] Moreover, retroactive law "is, in one context, inconsistent with the very idea of law..."—writes Fuller[17]—, which is succintly expressed in New-Hampshire's Constitution (1784): "Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be mode, either for the decision of civil causes, or the punishment of offenses." However, the problematic nature of the retroactivity of legal norms derives in fact from its inner inconsistency, ontological as well as structural.

The question concerning the ontological inconsistency of the retroactivity of laws and regulation's is that, as was indicated above, legal norms are, as a rule, oriented to the future. Orientation to the future is determined above all by the alternative character of legal norms, for such norms govern situations of alternative nature, the actors of which are free to decide and to choose between behaviours and acts that are possible in a given situation. True, this elbowroom for decision is determined by social existence, but such determinacy "always implies determination 'merely' of some alternative decision, a concrete scope of its possibility".[18] And, what is of decisive importance to legal norms and their validity, "not even this room for manoeuvre existing at any one time, however clearly described, can do away with the fact that the alternative act embodies the decision, the aspect of option, and that the 'place' and organ of such decision is the human mind".[19] Therefore, the validity legal norms generally extends to future situations and cases alternative in nature. The human behaviour defined and prescribed in a legal norm is but one the options with respect to cases defined by law. The duration of validity of a legal norm and in particular its orientation to the future accordingly presuppose that, in the cases defined in the hypothesis of the particular norm, the behaviour prescribed

---

16 BOEHMER, G.: *Grundlagen der bürgerlichen Rechtsordnung.* Zweites Buch, Erste Abteilung. Tübingen, 1951. 181.

17 FULLER, L.: *Anatomy of Law.* New York–Washington–London, 1968. 63.

18 LUKÁCS, Gy.: *A társadalmi lét ontológiájáról* (On the Ontology of Social Being), vol. III., Budapest, 1976. 346.

19 *Ibid.*, vol. II., 48.

by the norm appears as an option to translate a possibility into reality. Clearly and simply put, the subject at law is free to exhibit as lawful the behaviour postulated by the valid rule of law in question. The legal responsibility of persons rests precisely on this alternative nature of legal norms, on the possibility of decision and option within the socially determined scope of action, and on the effect exerted by law on such alternative situation, or on acceptance or disregard of the option required by law.

By illustrating the ontological inconsistency of legal norms with retroactive effect we wish to point precisely to the fact that the retroactivity to the fact that the retroactivity of laws and regulations is contrary to this alternative nature and substation of legal regulation and legal responsibility. For if the validity of a legal norm extends also to past situations and behaviours preceding its enactment, the behaviour prescribed by that norm could not appear in the past as a legally valid alternative, legally postulated and prescribed, but it is even possible that a quite different legal alternative prevailed at that time. Hence the behaviour as postulated in the retroactive norm could not mean an alternative to a lawful action in the past. Although it might have been considered as an alternative to action or decision in a given situation, it is possible that this behaviour was defined as expressly unlawful by a regulation in force at the time, or was outside the domain of legislation altogether, was not the concern of the law *(non iuris)*. Consequently the subjects of a past set of facts could not choose as a legal alternative the behaviour prescribed by a retroactive rule of law. As can be seen, retroactivity terminates the alternative character of legal norms in regard to the past and, with it, the alternative substantiation of legal responsibility.

The ontological inconsistency of legal norms with retroactive effect is particularly evident in the relationship between retroactive laws and regulations and the *ignorantia iuris*. The old rule of Roman law "*ignorantia iuris neminem excusat*" is a *sine qua non* for the operation of legal norms, a factor which is indispensable for the existence and operation of legal norms in two aspects. First, and this is the decisive and determinant element, the alternative character of a legal norm would become doubtful if it were not possible for the subjects at law, the persons finding themselves in the particular situation, to make themselves familiar with the alternative formulated in the given norm. Second, the operation and enforcement of legal norms would become impossible if the subjects at law were free to constantly invoke ignorance of invoke the ignorance of law and the impossibility of getting aquainted with law. As is know, the principle of *ignorantia iuris* has given rise to widely differing interpretations and positions as well as to rather heated debates in literature on

the theory of law.[20] Without elaborating on this problem we deem it necessary to point out that the substance and purpose of the rule of *ignorancia iuris* are, in our view, not the fiction that the provisions of law are known to everyone, but the unrebuttable presumption *(paesumptio iuris et de iure)* that it is possible for the subjects at law to get acquainted with the substance of legal rules. The prerequisite for the operation and application of a legal norm is constituted not by the fiction that although the norm is not known to all subjects at law, yet the norm deliberately considers them to be familiar with it, but by the probability or the chance that the subjects at law may come to know its substance. If we conceive of the *ignorantia iuris* in the first sense, we turn a fiction into an ontological precondition for the validity of legal norms, just as if we call in doubt, on the basis of absolute mechanical determinism, the possibility of legal alternative, of option and decision, for the subjects at law. Thus, we are aware that the subjects at law do not know the given legal norm, but we consider them to know it, or that they are entirely determined, they have no, being as they are entirely determined, have no possibility for alternative decision, yet they are to bear legal responsibility. In reality, however, the validity of legal norms presupposes their alternative character, the possibility for subjects at law to choose, within the given scope of social action, from several alternatives, naturally including the legal alternative, and thereby to be legally responsible, as well as the equally social possibility, which is otherwise an indispensable condition for alternative decision, for the subjects at law to get acquainted with the provisions of law. Since the possibility for familiarity with legal norms exists on a social scale, rather than for each individual separately, and because legal norms regulate situations at the social level, the condition for the application, operation and enforcement thereof lies only in ensuring that general, social possibility for a cquaintance with laws and regulations, and hence the legal presumption of this possibility is not rebuttable. It is in this sense that Hegel argues as follows: "to nail laws as high as possible in the way Dionysius the tyrant did so that not a single citizen was able to read them, or to bury them in the voluminous apparatus of scientific books, collections, decisions, customs embodying different judgements, opinions and the like, and in foreign languages at that so knowledge of

20 See SZABÓ, I.: *Szocialista jogelmélet — népi demokratikus jog* (Socialist Theory of Law—People's Democratic Law), Budapest, 1966. 156–183.

the prevailing law is not accessible except to persons dealing with it professionally—add up to one and the same lawless act".[21]

These two meanings of the principle of *ignorantia iuris* as a *sine qua non* for the validity and operation of legal norms bring influence to bear on the link between the *ignorancia iuris* and retroactive laws and regulations in either of two ways, as is also noted by Kelsen.[22] If the *ignorancia iuris* as a fiction is construed to mean that legal norms are unknown to the subjects at law, the *ignorancia iuris* and retroactivity are reconcilable, for in this case knowledge of the law is a fiction just like the argument that the legal norms was in existence prior to its enactment, viz., it was valid. The case is different if the *ignorantia iuris* is interpreted as an unrebuttable presumption, as the norm's cognizability at the level of social generality. In this event, by spelling out the principle of *ingorantia iuris*, the legal norm presuposes that its substance or provisions are cognizable at the level of social generality for those in respect of whom it is valid. However, a retroactive rule of law declares its validity in respect to behaviours and situations which occurred prior to its date of adoption and the actors of which were thus obviously unable to get acquainted with its substance. Since the provisions of laws and regulations not yet in existence are impossible to know at the social level, the principle of *ignoratia iuris* viewed in this sense and the retroactivity of legal norms are irreconcilable. So Kelsen is mistaken in asserting that "with respect to the possibility or impossibility of knowing the law, there is no essential difference between a retroactive law and many cases in which a non-retroactive law is not, and cannot, be known by the individual to whom this law has to be applied".[23] Consequently, and otherwise in opposition to his analysis in which he indirectly expounds the alternative substantiation of legal norms,[24] Kelsen completely disregards the social generality of cognizability of legal norms, which is inseparable from the alternative character of them. By calling in doubt the cognizability of legal norms at the level of social generality we question their alternative character and substantiation as well. In this case, two socio-ontological conditions for legal norms, namely their application to alternative situations and the possibility of familiarity with them at the level of social generality, turn into a mere fiction. therefore, given the fictitious character of its validity, a

---

21 HEGEL: *A jogfilozófia alapvonalai* (Elements of the Philosophy of Right), Budapest, 1971. 215. § 233.

22 KELSEN: *General Theory of Law and State.* Cambridge (Mass.), 1949. 44.

23 *Ibid.*

24 KELSEN: *Reine Rechtslehre,* 11.

retroactive rule of law is in contradiction with its ontological contitions we have just mentioned, namely its alternative character and its cognizability at the social level.

The retroactivity of legal norms is no less in contradiction with the inner structure, pattern or form thereof. The point is that the categorial structure of legal norms is primarily determined by the teleological nature thereof. A legal norms involves a special teleological postulate. It is not accidentally underlined by Gehlen that once one looks on religion, law and morals as objective phenomena of life, the question immediately arises of a teleological form of thinking and its performance.[25] The decisive, essential aspect of the teleological structure is the active role of the mind, the prospective conceptual anticipation of the result. This is emphasized by Nicolai Hartmann in his analysis of the final link category, pointing out that "something that is to be a reality only in future cannot influence anything present unless it 'pre-exist' somehow in advance of its materialization, but this can only be thought of if its mode of existence in the pre-existent state is different from the real one which it is yet to grow into... This is what is possible in the mind alone".[26] The prospective conceptual anticipation of the objective, the result, is an essential aspect of legal norms. In a norm, the human behaviour which the norm was created to induce, influence and govern *conceptually* exists as a result *prior* to the actual behaviour displayed on the strength of the norm. A norm conceptually designs human behaviour as an end which the postulator intends to induce and achieve. Legal norms prescribe, prohibit or permit specified behaviours or forbearance, namely they describe or specify the behaviours and their distinctive features which they seek to see realized or avoided in the daily life of people. Such human behaviour, postulated by a legal norm as an objective to be attained by the members of society, is as yet conceived of as unreal, one that will turn real after its expression in the norm, perhaps on the strenght of its postulation, in a concrete, actual human activity or behaviour. It is a structural property of the legal norm that it postulates something *vivo*, that "we think something yet unreal to have existence".[27] Thus the teleological structure of legal norms means in essence that, as is stated by Hartmann in his categorial analysis of the

25 GEHLEN, A.: *Az ember természete és helye a világban* (Man, His Nature and Place in the World), Budapest, 1976. 557.

26 HARTMANN, N.: *Teleológiai gondolkodás* (Teleological Thinking), Budapest, 1970. 130.

27 HEGEL: *A szellem fenomenológiája* (The Phenomenology of Mind), Budapest, 1961. 309.

relation of finality,[28] the objective set is anticipated in the mind, by jumping the process of time, as one existing in future.

We see here the manifestation of an important aspect of the teleological relationship and the teleological nature of legal norms, namely the three-dimensional nature of time. The fact that the result of human activity conceptually exists earlier in the teleological postulation than in reality, that in the defined objective man projects the future before himself, while choosing the tools of achieving the postulated objective, the anticipated result, by going backwards in time in the causal interrelationship of the present and the past, that is the objective is based on recognition of causal interrelationships existing and materialized and so is founded on the present and the past, demonstrates the specific manifestation of the three-dimensional nature of time. The orientation of legal norms to the future is undoubtedly the predominant norms to the future is the pre-dominant aspect of their teleological structure and nature.

This is made even more markedly evident by the structural feature of the legal norm that it is not simply teleological, but also normative, for the legal norms as a rule of conduct embodies two conditional relations: on the one hand, it provides that, with certain conditions prevailing, the specified behaviour *must* (shall) be exhibited in the future (the *must* refers in itself to the future, as not the Past Tense is used) and, on the other, this *must* (shall) is expressed in the conditional relation that should the prescribed behaviour be or not be exhibited, one or another legal consequence *must* ensue. The *must* (normative) *character* of the structure of legal norms is manifested in that there *must* occur specified legal consequences contingent on the realization of the behaviour as described in the first context. The teleological manifestation in legal norms of the causal relationship takes a special form: the defined objective is coupled by the norm with further specific results or consequences, precisely with the envisaged function, *inter alia*, to promote and ensure attainment of the objective (behaviour) as formulated in the given norm. In the legal norm itself, the specified human behaviour and its legal consequence are not yet real, but are only "conceived of as having existence" and as such are linked with the *must* (shall). The structural and categorial properties of legal norms lie in that the human behaviours defined in them and the envisaged legal consequences attached to them are not real except *in the future*. Such human behaviour and its legal consequence with a future reality exert an influence in the present by *pre-existing* in some form, viz., in the form of a legal norm.

---

28 HARTMANN: *op. cit.*, 134.

Hartmann's statement on the mode of existence of thought, intent and purpose holds, *mutatis mutandis*, for legal norms as well: "The mind has the amazing freedom to perceive or imagine, well in advance at discreation, a thing is not real as yet. What is anticipated exists, in its mode of existence, *in mente* only, but it nevertheless exists actually before becoming a reality".[29] This special mode of existence of legal norms, their validity—that is they exist as valid—is borne out in life and practice by the fact that what is conceived of in the norms as "having existence", whether in actual human behaviours or social relations, will as a rule be realised in the future.

As can be seen, the inner structure of legal norms is *future-oriented* in its pattern and normative character alike and hence its temporality, the dimension of time as expressed in it (the future), is in contradiction with time as manifested in retroactivity, since—as has been mentioned—legal norms with retroactive effect look to, are oriented to the past.

29 HARTMANN: *op. cit.*, 130.

ACTA JURIDICA HUNGARICA
1999 40 Nos 1–2, pp. 19–41

1216-2574 / 99 / USD 5.00

Csaba VARGA

Paradigms of Legal Thinking

1. The nature of norms

After the turn of the century, parallel to the birth of modern cognitive sciences and inspired by a new-*Kant*ian renewal in the methodology of sciences, new realisations were formulated concerning norms.

Language philosophy was the first to face the challenge of defining its own subject.[1] Following the conceptualisation introduced by *Ferdinand de Saussure* in his lectures,[2] the conclusion gradually took shape—finally breaking with both

---

1 On the problems of linguistic norms, see HANFLING, O.: Does Language Need Rules?. *The Philosophical Quarterly*, July 1980, Vol. 30, No. 120, 193–205, as well as BARTSCH, R.: *Sprachnormen: Theorie und Praxis*, Tübingen, Niemeyer, 1985., especially ch. III, 84–140, which—mainly based on H. L. A. Hart's és Joseph Raz' arguments—attempts to apply the lessons of legal philosophy to linguistics as well. As a pioneering venture, see VILLÓ, I.: *A nyelvi norma meghatározásáról* (On the Definition of Linguistic Norms) (in: *Normatudat — nyelvi norma* (Norm Consciousness—Linguistic Norms), ed. Gábor Kemény, Budapest, MTA Nyelvtudományi Intézete, 1992, 7–22), and, for a practical case-study KASSAI, I.: Nyelvi norma és nyelvhasználat viszonyáról az -e kérdőszó mondatbeli helye(i) kapcsán. (On the Relationship between Linguistic Norms and Language Use in Relation to the Place(s) Taken by the Interrogative Particle '-e') *Magyar Nyelv*, 1994, Vol. 90, 42–48.

2 Saussure's importance is analysed in a wide context by HARRIS, R.: *Reading Saussure: A Critical Commentary on the "Course de linguistique générale"*, London, Duckworth, 1987;

the trap of naive realism and the false duality of objectivism and subjectivism—, according to which language does not have separate 'construction' and 'functioning' which could be interpreted, defined or assessed in and of themselves. These are purely correlative concepts mutually supporting one another that can only be interpreted in their relative opposition within a unity. Consequently, both of them can only be treated analytically: presuming one of them is the precondition to positing the other. We might recall *Gilbert Ryle*'s figurative expression, according to which things have no independent "souls" that some sort of external force could make the existing "body" function. On the one hand, the phenomenon is fully brought to life by 'construction'. The thing is thereby completed, since its 'functioning' is rooted in the very existence of the phenomenon understood as a thing. In retrospect, it is precisely the 'construction' that qualifies as a randomly complementary function of something else, the 'functioning', since it cannot be torn off what—in one way or another—actually 'functions'. On the other hand, about the existence conceived as a process we cannot state that it 'functions'; it exclusively exists (happens or occurs), i.e., ontologically prevails.

Thus, with the help and as the result of scholarly analysis we just give expression to continuous repetitions and relative consistency in the very process by means of notions. We have to notionalise in order to distinguish and detach the process in question as a phenomenon from its 'environment', in order to be able to describe it in its distinctive and discrete form as potential 'appearance' or 'state' of the same 'essence'. In other words, we may say that what we do is merely construe a notional structure through scientific description. And this we only do to for allow us to characterise the functioning we constantly observe as the functioning of something, broken down into the sequence of discrete elements.

From the above derives the position that presuming the existence of a norm is nothing other than an additional aspect to the above abstractions. For we must presuppose the existence of a norm to be able to analyse it as a given set of 'functionings' and then propose further conceptual distinctions for the analysis of such functioning. In consequence, the hypostatisation of its existence is not only a precondition to being able to define the main direction(s) of its observable functioning and differentiate its constant features from its peripheral

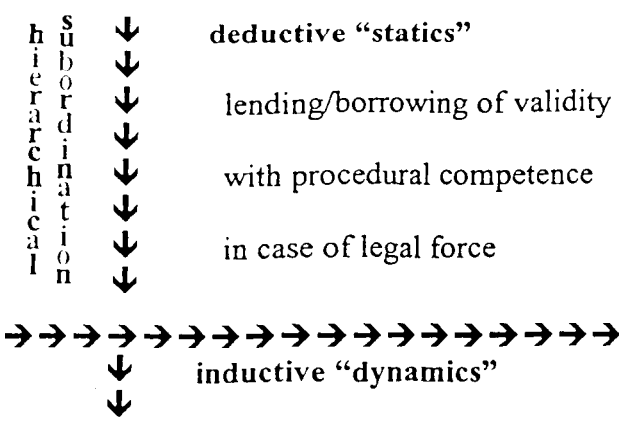
---

HOLDCROFT, D.: *Saussure: Signs, System, and Arbitrariness*, Cambridge, Cambridge University Press, 1991; HARRIS, R.: *Language, Saussure and Wittgenstein: How to Play Games with Words*, London, Routledge, 1988.

parts and additional incidental components. It is also a precondition to being able to separate 'right' procedures from 'wrong' ones in the course of a generalising abstract operation based on the differentiation of the 'norm-conform' uses of the hypostatised norm from what we will later label as 'norm-breaking'.

The same fundamental point is raised by *Hans Kelsen* in his *Pure Theory of Law* as wellin the form of the following question; shortly and simply, what construction and functioning are needed to justifiably speak of law at all? Or, in more professional terms: into what mentally construed order (which, once established, is capable of self-definition, and through its functioning also of incessant self-assertion and self-determination) are we expected to place the norm in order to be justified to speak about it as part of the law?

Kelsen, despite the far-reaching changes of emphases in his gigantic oeuvre, bearing, however, a consistent basic message (notwithstanding the sometimes inconsistent or contradictory conclusions he drew therefrom), answered the question without ambiguity. Namely, validity, as the specific quality of what is distinctively legal, is transferred by legal functioning through a statically built hierarchy, advancing act by act from top to bottom, while all other forms of generating validity at equal levels at any given time are also conceivable when there is procedural action and it is actually taken. Validity becomes unchallengeable when the chance of taking an otherwise available procedural action is not effectuated or is procedurally excluded, whereby the validity becomes final by the legal force (figure 1).



(figure 1)

We still have not answered the question: do norms exist at all?[3]

In law we usually think of their existence as obvious, although they are only paradigmatic in modern formal legal arrangements. We may recall that in ancient cultures (pertaining to the Old Testament, Northern Europe or even Albania) the task of the *lag saga* meant the annual recitation of the law. The reason for this was that law was considered to live in and through customs. The law's only task was to provide a framework for action and its only quality was to be considered "just", but only in as much as it was acknowledged and proven by the community as being formed along what was recognised as "tradition". As we may recall, *Talmud*ic justice relied on parables, golden rules and eternal truths, and it strove to find the individually concrete justice when solving or resolving a particular case. The circumstance that the very cases were projected onto a mentally erected plane woven of norms and referred to within a normative framework served only as the rationalising justification of the given solution. As is known, China followed a different line of developing tradition. The codified, written and recorded Chinese *fa* only served as a framework of last resort, keeping in mind those rather extraordinary situations when order ought to be kept notwithstanding that the *li* living in moral teachings did not prove capable of fulfilling its task due to the stubbornness of the parties. Although in average cases and according to average moral expectations, consideration and careful leading should provide sufficient points of reference within the realm of *Confucia*n morals. Finally, according to another tradition, the law built upon the ancient Greek-Roman ideal of *dikaion* was regarded as a jump-board, starting from which any judge or layman could arrive at the just solution of the case to be decided.

Thus, the question arises: what kind of norm-setting and positing characterises "law" in modern formal legal arrangements? Does it have a principle according to which everything that can be said should be said? Or, just the contrary, its underlying principle is everything can be said that should be said? The former reflects the ideal of a comprehensive regulation. It expresses the demand for legal homogenisation along lines of relevance, as well as for gapless norm-setting. On the other hand, the latter is somewhat freer. By means of formal norm-setting it actually tries to define normatively only the contents the legal status of which are questionable or contradictory, that is, those crying for direct and open regulation.

---

3 For the most recent summary, see ULLMANN-LARGALIT, E.: *The Emergence of Norms*, Oxford, Clarendon Press, 1977.

The first one is familiar from civil law traditions. The second is nonetheless known, although not in continental Europe. Its variants are displayed by the legal lives characteristic of so-called primitive societies and of English-American common law arrangements. In early legal cultures, "the law" is pronounced by the high priests or magicians of the community but only at exceptional and festive occasions. In average situations when disputes or conflicts occur, the tradition consecrated by customs was most often revoked. Accordingly, legal reasoning is considerably loose in everyday life: it appears as though it were going around something. Yet, one cannot state or revoke as factual knowledge whether there are norms at all, and providing that there are, what they say. English-American law may have statutory provisions for ordinary situations, but the question of what they actually provide for a case to be decided can (and will) only be answered by the proceeding court—purely on grounds of a somewhat predictably consolidating judicial practice. In the amalgamate of precedents, accepted as guidelines for and by judicial practice, it is not so much the stand finally taken by any one actual decision that will provide genuine directions, but those reasons, considerations, principles and arguments [*ratio decidendi*] that served as the channelling framework, both spring-board and cogent reason alike, for the judges proceeding in the case to make their decisions. The *ratio decidendi* is formulated within the context of and for the facts established in the case, while the *obiter dictum* relates to other comparable (actual or imaginary) cases. Posteriorly, and basically in every situation, it is the reason given in the case, i.e., the *ratio decidendi*, that is of binding force for the judge at any later time, unless he proves (making use of his art of distinguishing) that despite all appearances, it is not the considerations in the previous precedent(s) that provide guidelines for his case due to the fact that there are distinctive factual differences and these are so weighty that they justify another principle to be followed. The selection of arguments for distinguishing is given free scope and is purely the pragmatism and self-discipline (and, of course, the desire to get the approval of higher fora) that bind the judge in complying with the tradition of ancestors when making his own decision, or, as the case may be, attempting to follow new paths. After all, in principle, no matter whether he complies with or diverges from the past, he always follows his own rule of decision which he shapes inductively, unless he follows his own past decision by claiming it covers the case again.

So, are there norms at all? When pondering the question again we must arrive at the conclusion that order is conceivable even if norms are set individually by and for each person apart. In consequence, ordering formal

norm-setting cannot be regarded as sufficiently complete in perfecting the job in and of itself, that is, as some sort of total everything stepping in place of nothing, in the literal sense of the words. Implanting norms only introduces a further factor into social discourses on and within the established and acknowledged order. It does so emphatically and with elementary force in cultures where the construction and preservation of order is expected to derive from the sole gesture of elevating some external signs into a kind of fetish (and we may recall the stele with *Hammurabi*'s laws or the engraving of the Ten Commandments onto a table of stone) and not (yet) from the democratic culture of discourse. However, we thereby do not intend to suggest that norms are nothing more than showy clothes. It may sound paradoxical, but norms may be transformed into objects of adornment at most in the hands of those who expect them to display the magical force of being capable of solving everything—in and of themselves. So, in the hands of those who ignore the fact that stelae or stones do not have a restrictive force in and of themselves, neither do they command respect. The sheer fact that they stand does not prevent anyone from spitting on them, or from evading or going around them. When characterising the basic situation we may even increase the paradoxity of the expression: norms become genuinely valuable and purposeful instruments only in the hands of those with whom a formal culture is developed, requiring the norms themselves to transform them into actual mediators in the process of social mediation into which they are built—that is, into useful and at the same time merely mediating standards, and so much the signs, symbols and fortifiers of a by and large efficaciously prevailing order.[4]

On final analysis, we can only state that the source of certainties in our everyday life, individual and communitarian, can hardly be identified from within the "things" themselves. They can only be founded upon the continuity of human practice and the reliability of our faith in such a continuity.

2. The nature of law

We usually think of law in a simplifying manner, and this holds for common people, professionals and scholars alike.

4 KELSEN, H.: The Pure Theory of Law and Analytical Jurisprudence. *Harvard Law Review*, November 1941.

According to its most common definition, law is the aggregate of rules of behaviour, with the coercive force of the state ultimately standing behind them. It is an issue of conception and further investigation to decide whether such definition should be confirmed unconditionally or whether objections should instead be emphasised concerning certain elements of this definition. All this is also a matter of expectations. When we regard the definition as one allowing us to elevate some of its presumably important elements, we can most probably confirm it. Whereas when we treat the definition as expressing the notions of *genus* that serves for common foundations in a strict logical sense [*genus proximus*], and as those distinguishing features within the *genus* that specify the law [*differentia specifica*] standing for a denotation applicable as a criterion, we are likely to give free reign to our doubts. For example, can it qualify as a rule of behaviour that has yet not been formulated, or that is only existent as a culturally relative normative expectation, or as the mere derivative of an otherwise recognised principle? Can we regard something as supported by the coercive power of the state if the state has no factual knowledge of it—either because there is no state (then and there), or because the state could exclusively learn about it passively, and, what is more, posteriorly (e.g., only after a certain procedure becomes customised and acknowledged as a custom is the state bound to recognise it as its own norm)? Well, inasmuch as such a definition is merely a sign of the way we think and of how we approach notional dilemmas, the above questions will become irrelevant. That is due to the fact that the definition itself can just as well be interpreted metaphorically, its contents serving as mere signs and guiding principles in the absence of anything better. In the reverse case, however, if we treat the definition as conceptual demarcation excluding any other occurrence *(omnis definitio negatio est)*, then, and especially in borderline cases, we must make a choice: do we rather agree to approve the conceptual direction of the definition, or, instead, do we appreciate the consequences of its criterion-generating significance unavoidably excluding all different formations (e.g., pre-state or extra-state norm-systems) from the sphere of the notion?[5]

5 "On the basis of the comparative study of legal cultures and allowing for purely social considerations I propose concluding:

(1) Law is a global phenomenon embracing society as a whole. Accordingly, criminal gangs (mafia, *Cosa Nostra*), economic associations (guilds), secret societies (religious and/or political as early Christians, Garibaldists), as well as other club- and party-like organizations fall outside the domain of law in so far as society is territorially organized and those groups

What to regard as other formations, as pre-state or extra-state normative systems, is a separate issue. Twentieth century East-European history has, for example, generated the multitude of such potentially entagled situations in

---

are closed, involving only so-called members. If social organization is still personal, the ground of separation between law and non-law is whether the given organization is exclusive and, if so, it theoretically involves all in compliance with its personal categories. The next consideration I propose is:

(2) Law is a phenomenon able to settle conflicts of interests which emerge in social practice as fundamental. In society law is supposed to be the prime check and control performing this function. Law is to regulate relations sufficiently fundamental so that it can create society (by drawing structure and boundaries). In European urban development, some guilds settled conflicts of interests fundamental to society as a whole. If conflict-settlement is restricted to partial relations (e.g. life within the guild, order of external relationship relevant to guild activity), it can at the most be regarded as a set of rules integrated into the law or parallel with it, but in any case as one of a different kind. Or, in situations of transition (e.g. in times of the dissolution of state-organized power machinery) political parties can assume a role amounting to function as the main controlling factor of society, filling in the vacuum that has arisen. Lastly, in religious communities having sect-like claims of exclusiveness and aiming at the assertion of their own commands in all fields of common life it may occur that, organizing themselves as self-supporting communities, they make use of their own set of rules as a legal system. This was attempted, for example, by Quaker communities withdrawing from civilization (18–19th century British emigrants) or separating within civilization (19–20th century settlers in America). Finally:

(3) Law is a phenomenon prevailing as the supreme controlling factor in society. Should several systems of norms assert themselves in society, the law's set-up is the one whose procedure can, in a situation of conflict, be successfully resorted to in order to implement and enforce ultimate solution.

It is to be noted, however, that procedural efficacy never asserts itself in pure form. For instance, is the legal character of Estonian or Texas law to be derived from a further source when Soviet or American law has been superimposed on them, respectively? How is the supremacy of the own procedure to be interpreted if there is a direct recourse to international legal authorities in minority or human rights affairs? How to assess of criminal gangs, secret societies, political or religious organizations attempt to win acceptance for their claims by coercively preventing (through assassinations, etc.) their conflicts from being presented to external authorities?

These social considerations are conceived of as mutually reinforcing each other within a cluster. The more completely they are manifested, the more probably one may talk about the presence of law in a sociological-anthropological sense." From the author: *Anthropological Jurisprudence?: Leopold Pospíšil and the Comparative Study of Legal Cultures* (1985) (in his: *Law and Philosophy: Selected Papers in Legal Theory*, Budapest, ELTE "Comparative Legal Cultures" Project, 1994, 451–452).

which it could occur, for instance, that a new statehood establishing itself in the wake of foreign occupation would be condemned and retaliated against by the successor returning to the *status quo ante*, declaring its institutional arrangement and the legal effects of its administration null and void and never even to have existed. In addition, this successor state, acting with some fundamentalist Balkanese coarseness, stigmatised and punished posteriorly any past contact (indispensable for leading everyday life) on the part of the civilian population under occupation with such statehood declared never existent by the successor state, as if life under occupation and the bare fact of having survived were done for and within the framework of collaboration with the enemy.

From the former Soviet Union, the Baltic states and the larger part of the Ukraine were the first to fall under German occupation. Firstly a partisan movement of nationalist drive was formed, wanting to be freed by any means from Soviet occupation, followed by a pro-Soviet movement, especially in the swampy areas. The prevalence of local administration controlled by the German occupants (undisturbed sometimes only in daylight) was soon challenged by the rising influence of partisans (whose wishes and demands grew stronger and stronger with their ability to get enforced during the nights). At the same time, other occupant military administrations (i.e., the Hungarian one), balancing between the former two, tried to impose a counter-balance; insuring itself, despite being in alliance with the Germans, by helping the local population, and concomitantly maintaining a reasonable relationship with the partisans. All local efforts notwithstanding, the Soviet power once re-imposed after the war immediately declared every "politik-real" a treason when appraising the local survivors, and stigmatised entire populations of territories which had ever fallen under German occupation as unreliable, excluding them for this reason even from the Soviet-type of advancement (positions of confidence, including both foreign service and travel abroad).

In the former Yugoslavia, after the dismemberment of the kingdom and the German occupation of the decomposing state, various partisan movements with different national inclinations and networks of political connections were born and began to control the territories next to their base with varying chances and continuity. By the end of the war, one of the existing dozen partisan movements rose above the others. This movement one-sidedly announced all the others traitors and the entire law prevailing under the occupation non-existent as well as all cases that occurred during

the war between the surviving population and local administrations and jurisdictions legally to be non-instituted and therefore *ex tunc* null and void so far as their legal consequences were concerned, and branded personal relations as collaboration with the enemy.

Confusion, unilaterality, simplification and conceptual narrowing in the conception of law was, however, primarily caused by the fact that legal ideologies determining the motility within law and the particular way of professional argumentation, characteristic of individual legal cultures, stepped beyond their own sphere, thus dominating the general (everyday and scholarly) approach to law as well. In the English-American legal culture, i.e., in the world of precedents, the above definition could be accepted since their practice (according to which establishing what the law is is ultimately performed by the judge proceeding in the name of the law and under the authorising seal of the state) was compatible with the conceptual sphere of the prevalent ideologies. This practice conceived of anything else (statutory instruments, administrative decrees and local governmental acts, as well as the previous jurisprudence of courts) as the mere antecedents of the present judicial function of decision-making to which precedents afford a brute medium requiring actualisation. Although the legal cultures of continental Europe could accept the same definition as well, for they disposed of proper grounds to understand it as meeting their requirements, their underlying concept was one of tracing back the law to the textual manifestation of some previously established rules. From our methodological perspective, it is worthy of attention that such an allegedly concise and unambiguous definition could provide the background for these two almost antagonistic conceptions.

Beyond this, legal positivism, solely prevalent (especially in Europe) from the end of the last century on, and particularly its most narrow off-spring, the so-called statutory positivism (recognising statutes as the only forms of law), did the most for our conception of law to have a reified and static phenomenon suggested for law. Actually, all cultures that recognise law exclusively in the form of previously enacted statutes utterly dissolve the *ius* into the concept of the *lex*. (A definition of this kind is one which conceives of law as of an aggregate of rules created through a procedure recognised and in the way prescribed by law.) As is known, legal positivism builds on the lexical theory of meaning to substantiate interpretation. Accordingly, the *lex*, comprising its meaning in a codified, immutable and exhaustive manner, is identical with the textual appearance of the statute. So, it is ready-made, a complete objec-

tification, and stands in and by itself. Thus, it is not a conceptual precondition to, or element of, its very existence but an eventual complement at the most that it may come to be applied at some later time. This may prove good or bad, suitable or unsuitable, feasible or unfeasible, regardless of the value of the *lex* itself. The European culture of legal positivism still considers law a static and self-sufficient entity, completed once and for all, given and ready-to-take, the only thing we have to do with it is to sense its existence and use it for legal patterning as soon as possible.

The theoretical experience from the previous reasoning drives us toward reconsideration. Science-philosophical and methodological, cognitive and semantic considerations encourage us to draw a more complex picture of the nature of law. These considerations do not refute earlier truths, although they still allow a more differentiated understanding of the specificity of the law's existence. They urge us to transcend the reified and static view of law without denying its ontologically significant elements which determine legal functioning in the respective legal cultures, i.e., the elements of legal ideology in the actual practice standing for the deontology of legal profession.

In the following we will give an overview of some aspects of the existence, nature and ontological character of law, despite the fact that they only contribute marginally at best to our understanding of the nature of law. They are neither definitions, nor are they intended to substitute definition. Thus far we have attempted to provide instances of how we can interpret a usual definition according to usually acknowledged old paradigms that seem to stand all trials. Henceforth we will investigate how the same definition can be interpreted in the same valid and right way according to our new view to be formed on the nature of law and to the new paradigms underlying it.

2.1. Law as process

By definition and in accordance with its ontological standing, law is a process-like phenomenon.

Given that we must regard the textual body of the law as sheer historical reference, as an open potentiality within a given framework in order to be able to establish its meaning through a posterior operation called judicial interpretation, then it will become obvious that this textual objectification itself is nothing more than mere chance, which can become truly law through actualisation. This actualisation takes place in various social processes labelled legal.

This, however, goes against all former conceptions, since it builds upon the recognition that law cannot be identified with any material manifestation or objectification of a *per se* dead subject. Therefore, as a more developed version of our previous definition we can claim: only the social mediation of the actual meaning of a rule of behaviour can serve for law inasmuch as it is ultimately backed by the coercive force of the state. Yet the social mediation of any kind of meaning not only presupposes the existence of an alleged sign, but the definition of its meanings as well. As we have seen before, there are no meanings in general. They are ascertainable only in concrete situations as defined by concrete context. And as we have also seen, the meaning in a concrete situation and context must be established by some forum at some time.

In different situations and contexts the same textual body may suggest variations of meaning intermediate to some extent—and so far continuously changing in space and time. One consequence, however, is the following: since law is not a textual body in itself, neither is it some sort of mere referential practice, but precisely the juncture of these two—namely, the sequence of actualisations at all times of a textual body by and through a practice making reference to it—, so law should rather be conceived as a process-like dynamic continuum, instead of reducing it to a static reified entity. Law is obviously an aspect generated by the social processes that make use of it by referring to it. Thus, when the coercive force of the state stands behind such a social process, we ought to presume the existence of law as well.

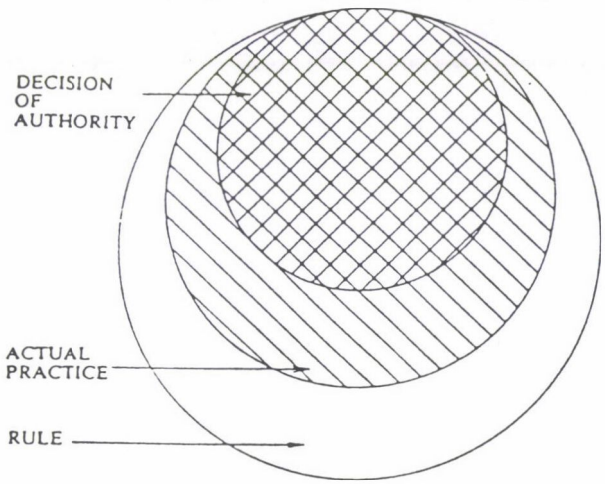
2.2. Multifactorality

By definition and in accordance with its ontological standing, law is a multifactoral process, that is: all of its components are processes.

The question of what components can generate law is defined through the history of a society and the evolvement of its culture. We may draw a conclusion from our known history (and from the cultural and anthropological generalisation of the result of sociological examinations)[6] as to which law may—by eventually being backed by the threat of coercive force of the state—result from (a) the

6 On the specific nature of Canon Law (with regard to both the organisation of the Church as a special subject and the congregation as a particular circle of addressees) see, e.g., ERDŐ, P.: *Az egyházjog teológiája intézménytörténeti megközelítésben* (The Theology of Church Law: From an Approach of the History of Institutions), Budapest, Szent István Társulat, n.y., para. 31–32, 53–56.

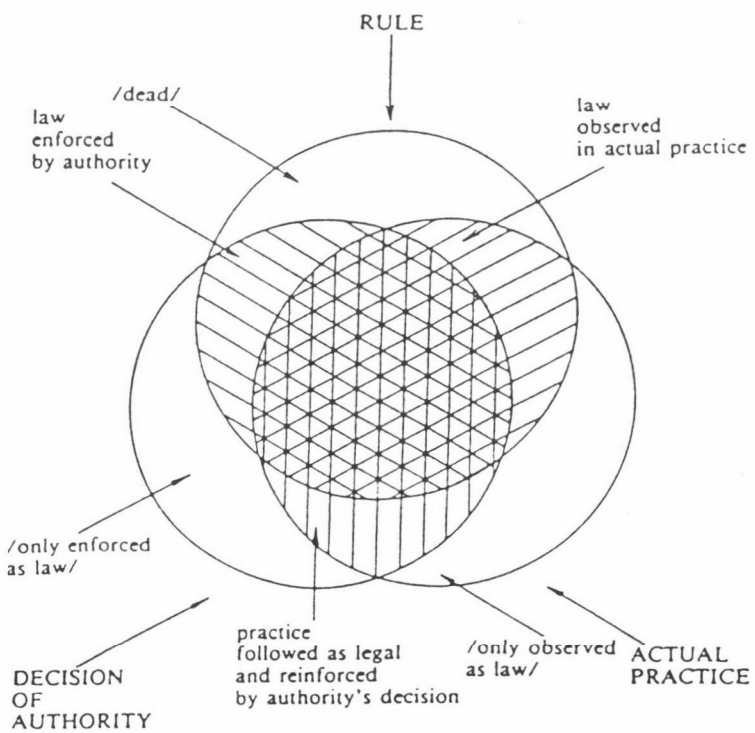
pressure of customary social practice, as well as from (b) 'legislation' and (c) 'jurisdiction' differentiating this later into separate functions resulting from the division of labour and power as part of the institutionalisations developing along with the birth of the state (figure 2).[7]



(figure 2)

7 "Thus, as regards its ontological existence, law is a complex phenomenon comprising the interaction, interpenetration and temporary separation, i.e. the complex motion of at least three factors, namely, rule, authority's decision and actual behaviour. Anyway, law is not a phenomenon homogeneously or statically identical with itself. Its quality of law may be reinforced or weakened, rendered more or less legal by the intertwining and/or separation of its components, since ontologically a phenomenon supported not only by its enacted nature but also by a state practice of coercive measures taken in the name of the law and made accepted as such by society by and large is obviously »more legal«. That is, the more completely it comprises its three components, the more completely it will display the features of law. At the same time, law is a dynamic factor of reality; its components respond to external challenge in an ever renewing manner and this brings about internal shifts of emphasis. Here is the reason why law is not and cannot be identical with itself. It is in a ceaseless and endless motion of internal change oscillating between the qualities of more legal and less legal between the extreme points of becoming legal and ceasing to be legal. This approach, on the one hand, avoids the danger of replacing one simplification with another: the reduction to rules with the reduction to conflict. On the other hand, it tries to make it clear that rule is not simply an incidental element of law. Not so much its presence as its part played in the whole complex is liable to change." VARGA, *Anthropological Jurisprudence?*, 443–445.

All components of this approach have one common characteristic: They count with the nature of legal processes from the beginning. Most notably certain social processes declare themselves to be of legal character, and none of the other components of law deny this, on the contrary, they accept it and confirm it as such. Parallel to this formal, hierarchical and deductive origination of validity, "lending/borrowing" the validity, concomitant with "breaking down" the legal system from the normative top (the basic norm), a counter-running motion begins to consolidate itself as well. This, relying on the self-qualification of the actual processes declaring themselves legal, building from bottom to top and also along a horizontal plane, supports the legal self-assertion of all the levels that are connected with it. Thus, the formal origination of validity advancing from the top down is complemented by an informal lending/borrowing of validity advancing from bottom to top and horizontally, providing support by recognising this validity. So, at this point, the actual motion (strengthening or weakening it, or eventually running on a parallel path) joins the breaking down of validity according to the theory of gradation (figure 3).



(figure 3)

Let us repeat that this holds for all components: the recognition and enforcement as "legal" (i.e., as the realisation of "the law") of (a) the customary social practice, (b) the acts 'creating' norms, as well as acts 'applying' norms. These take place through a double justification: through origination by hierarchical breaking down of legal validity according to the theory of gradation, on the one hand, and through the self-qualification of given institutional procedures, on the other. During the course of this process (a) the self-assertion of customary social practice, (b) law-making and (c) law-application present themselves as distinctively legal. Other procedures (also presenting themselves as though they pertain to the law) do not refute this claim. In case where the lack of counter-running motion (or, in case of a judicial decision gaining legal force, its unsuccess) this can build itself into the given legal order. According to new recognitions, the actual driving force of any one-way formal origination of validity as a sheer basis for reference is this mutually supportive circular lending/borrowing of validity proper, on the one hand, and the horizontal confirmation of validity, on the other.[8]

This statement involves an important recognition concerning the nature of law, namely that (1) it counts the ideology characteristic of the legal profession[9] merely as the internal self-description of law. This it does independently of whether it sets criteria for the ways and chances of the generation of law as well as whether it is open all forms and possibilities of law, including the ones that can be enforced through long-term practices even if eventually opposed to already recognised ones. It is another important step to realise further that (2) breaking with the narrowly unifactoral and reified view of law, as well as with the speculative definition through normative conventionalisation of the acceptable ways of generating the law, it recognises that the catalogue of

8 KRAWIETZ, W.: *Die Lehre vom Stufenbau des Rechts — eine säkularisierte politische Theologie?* (in: KRAWIETZ, Werner—SCHELSKY, Helmut (eds.), *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen*, Berlin, Duncker & Humblot, 1984, 255–272).

9 "In my opinion, in the case of communities identifying law with rules, an ideological concept of law can be put forward which conceives of the boundaries of law as those covered by legal regulation, and of the areas covered by actual behaviours and authority decisions in »realization« of the law as domains within itself. As it is a matter of the ideology of an institutional system as well as of a profession called to its functioning, in ideal is reflected in it. Theoretically, the realization of that ideal is not impossible but in practice, due to the complex definitions prevailing in life, mostly its approximations are to materialize. Thus, in communities identifying law with rules, norms established and fixed in a given way are the preponderate media and mediators of legal normativity." VARGA, 442–443.

acceptable ways of generating law cannot be codified by any previous definition. Therefore, the opportunities to follow geographically and historically varying paths are equally feasible and welcome to compete. Taking all of these, (3) it refuses to recognise exclusive, primary or distinguished ways of the formation of law. Instead, it leaves it up to history and the self-assertive practice of society to select and decide in practice which of the competing ways of generating and forming phenomena (and how and how much persistently) will come out as the exclusive, primary, distinguished, recognised or tolerated one. In consequence, (4) it takes cognisance of the fact that a variety of ways of generating and forming law may concomitantly prevail and assert themselves in society—with varying impact, effectiveness and persistence. It is a function of social self-regulation and feedback whether one or more of these can become selected as dominant or "official" ways of the law's formation, letting the rest freely prevail, or maybe just tolerating or attempting to exclude or even ban them. Simultaneously, however, (5) independent of how we think of either of these ways of law formation, none of them can prevail in isolation, untouched by the others: they function in mutual influence of the others—strengthening or weakening, or parallel to one another.

As to its fundamental nature, law is a multifactoral phenomenon. Its specificity is provided precisely by the fact that, in principle, its multifactorality can be identified in any of its components. Multifactorality is not simply a characteristic expressing consecutive (imaginary or actual) phases, but is a characteristic truly prevailing (pervasively and permeatingly) in every moment. For one can reveal each legal phenomenon's coming into being in the originally dominant way (on the one hand), somewhat coloured (strengthened, weakened or providing extra backing) by the parallelity or opposition of the dominant way to, or even the latter's independence of, other paths and ways of generating law.

When defining the fundamental nature of law we ought to keep in mind the following considerations: (1) law is a homogeneous entity that is not unchangeably (and in a static and reifying manner) identical with itself, but is rather a changing and dynamic concept expressing the continuous process of social practice. Therefore, (2) we cannot think of law as though it were some unity, because it is composed of various motions that support or neutralise (extinguish) one another by their parallelity or opposite direction. Consequently, in this constant motion (3) we cannot from the very beginning make categorical statements about either of the components and whether they embody the 'legal' or 'non-legal'. Rather we ought to formulate the following in a more subtle manner: it qualifies as 'legal' or 'non-legal' in this or that recognised

or truly prevalent sense of how law originates, and respectively, it qualifies as 'more legal' or 'less legal' in either of the above senses. Finally, (4) as law is an uninterrupted process, we cannot conceive of its totality at any given time as uniform or complete and unchangeably identical with itself. Being a phenomenon issued (as woven together) from the various incessantly running and counter-running motions, it always displays different sides, components and ways of legal formation (i.e., their conflict and momentarily final outcome) at any moment in time. In consequence, in every such and similar sense, recognised or truly prevalent sense of the emergence of law, it continuously features up and englobes the motions and measurable states of transforming into and withdrawing from the law (always just in a relative sense, because it is measured to the aforementioned levels of 'more legal' and 'less legal').

2.3. Law as made up from acts

By definition and in accordance with its ontological standing, law is a multi-factoral process composed of the sum of actualisations made in the sequence of various consecutive acts.

We may probably claim that this is some *condition générale*. That is, it is a pervasive characteristic of legal development at all times, although only in most recent times did it become conspicuously criterion-like in relation to the description of the nature of law. This shows that our social life is becoming more and more controlled by law and pushed to juridified channells: legal mediation and especially socially widespread confidence, both popular and professional, in relying on the power of judicial decision-making have just moved into the limelight and primarily in more developed countries. In more philosophical terms: increasing socialisation and accentuating legal mediation in social processes confer a stronger emphasis in selecting the established ways of how law is originated, upon the settlement of conflicts by means of authoritative decisions and upon the concrete actualisation of the latent and potential abstract messages of the law.

Utilising symbolic images that might seem rather bizarre at the first sight: (a) legal enforcement of the customary social practice may be reminiscent of the roll of a stream, (b) '*legis latio*' as a sequence of discrete motions may remind us of the advancement of a huge walking excavator, and, finally, (c) '*juris dictio*'—with the immense number of authoritative (administrative, judicial and other) decisions, accumulated consecutively in time—makes us think of the juice uninterruptedly pouring out from the machine-line in a canning factory. The

demand for regulation has incredibly increased in our days. Numerous situations require prompt decisions and this induces an incessant flow of actualisations through the generation of laws.

At the same time, today's cognitive sciences ascertain for us that—according to in-depth analyses—events of everyday life, minor and major alike, are composed of nothing but acts. Acts are performed within a conventionalised framework. In a changing context they undergo shifts of emphasis and changes of meaning—maybe unnoticeable or, moreover, unimportant in and of themselves—that can nevertheless add up in the longer run to changes in direction. Accordingly, tradition and innovation, routine and creation, fertilisedness by deep roots, on the one hand, and lostness in *tabula rasa* limitlessness, on the other, can intermingle in these processes into one organic evolvement.

English-American and Scandinavian legal realism, as well as the existentialist legal philosophy always put the emphasis on the judicial event as the key for testing law in action, and this realisation gains added meaning at this point in the light of what was said above. If the socialisation [*Sozialisierung* in LUKÁCS' social ontology] of societal life arrives at a stage where the actualised law is increasingly becoming the sole variant of law to bear genuine legal meaning, then—independently of how we think of our life under either the rule of precedent law arrangements or the traditions of legal realism or existentialism—the 'judicial' event will be more likely to truly create law and carry its actualised (if there is any) message. (And, in turn, this may influence the theoretical explanations through which we attempted to reconstruct the other ways of generating law, that is, the specific integration, conferring legal validity, into the formal domain of law of the customary social practice and the law-making significance of 'legislation'.)

3. The nature of legal thinking

On basis of the above survey involving some common methodological questions, as well as the attempts at answering them, related to everyday thinking, the scientific pattern of thinking, and questions related to the thinking characteristic of the legal profession that arose throughout the millennia it is extremely difficult, actually almost impossible to draw conclusions in the form of generalisable statements. The particularity and distinctive feature of law almost gets lost in the cavalcade of various attemptable ways of thinking since from induction to deduction, from the temptation by meditation resolving

conceptuality to rigorous axiomatism, from fiction, metaphors, symbols and various sorts of substitution to narrations through proverbs, precepts, allegories and parables, everything that human kind has developed throughout the millennia can also be encountered within the domain of law. What is typical of law among these is mainly treated within the framework of comparative law studies by the specialised fields of comparative legal cultures and comparative judicial mind.[10]

Therefore, our most trivial conclusion from the present methodological perspective can hardly be more than that any kind of conceptual definition can become law (at least to some extent) and, consequently, any conceptual operation can become subject to legal thinking (at least to some extent). Accordingly, the doctrinal study of law is not necessarily more or less than the strict conceptual elaboration for legal purposes (at least to some extent) of any kind of conceptual definitions by means of definition, classification and systematisation.

So, we can hardly say anything more, because the conditions of what the ways and means of legal reasoning are, i.e., of how to originate validity and draw conclusions, acknowledgeable and to be acknowledged in a given legal order, will be defined by the legal order itself on grounds of potentialities inherent in the underlying legal culture and of the legal ideology which would convert these into a professional practice. What was precisely revealed by the above survey is that neither law, nor legal thinking can stand in and by itself: any formal carrier of sign can only be interpreted in a meaningful way within its own informal context and medium. This environment provides the framework called legal culture, which, in turn, is rooted in the general culture of society. Among others, legal culture is composed of the ethos and values of the legal profession, its problem-sensitivity towards law and its conceptualisations, the conceptual and referential framework available in law, judicial and administrative skills and practices, as well as the moral expectations toward the legal profession. Legal ideology, on the other hand, is mainly composed of the image to be formed in the legal order on how to 'construct' and 'operate' the law, that is, on the law's nature, sources and criteria of validity, and on the

10 Cf., e.g, VARGA, Cs. (ed.): *Comparative Legal Cultures*, Aldershot–Hong Kong–Singapore–Sydney, Dartmouth & New York, New York University Press, 1992 and GESSNER, V.–HOELAND, A.–VARGA, Cs.: *European Legal Cultures*, Aldershot–Brookfield–Singapore–Sydney, Dartmouth, 1995, Part II, 87–166.

conditions of how a conclusion can be drawn in law and what consequences that would imply.

So, the most general characteristic of law, present also in legal thinking, is that law (1) itself creates the features of its own constitution, both limits and criteria, (2) strictly, without dialectics or compromises, by defining a feature expressed in the formal facts that constitute a case. In consequence, (3) law must select from two possibilities existent in form of a binary code[11] regarding its construction, operation and form of manifestation: something is either inside or outside the law, and it either qualifies as legal or as non-legal.[12] (4) The conditions of making this selection are also established by the law itself through its own "system of fulfilment".[13] Therefore, (5) it is normatively closed while being open to new information: anything can be run through its filter to receive the qualification of the law (as 'compulsory', 'forbidden', 'permitted' or

---

11 Niklas Luhmann's expression.

12 "Qualification necessarily amounts to alternative exclusivity and to the declaration of certain duality, since the subsumption of facts under some defined notion(s) and the more or less automatic drawing of more or less narrowly defined legal consequences therefrom can only be performed unconditionally in exclusive totality, without any inclusion of the idea of alternativity, division, decomposition, or reservation in regard of some further potential qualification(s), of the qualification and the drawn legal consequences. Therefore, providing that given facts have been duly qualified, all provisions of the law relevant to the qualification of the facts in question and the consequences issuing therefrom are to be cogently and properly applied, while, on the other hand, the relevancy of any other provision is automatically excluded by the bare fact that the given qualification in question is made—at least in the same respect: at the same point in time and within the same system and branch of the law." From the author: A joglogikai vizsgálódás lehetőségei az újabb megközelítések tükrében. (Prospects of Logical Investigations in Law in the Mirror of Recent Approaches) *Állam- és Jogtudomány*, 1971, Vol. XIV, No. 4, 718–719 (reprinted in his *Jogi elméletek, jogi kultúrák: Kritikák, ismertetések a jogfilozófia és az összehasonlító jog köréből* (Theories of Law, Legal Cultures: Critical Essays and Reviews in Legal Philosophy and Comparative Law), Budapest, ELTE "Comparative Legal Cultures" Project, 1994, 95–96).

13 "Subsumption will get a particular shape owing to the fact that some teleological project (the law) is destined to produce another teleological project (its application), and thus the already mentioned dialectic, the conflict of class interests that springs from this becomes the ultimate determining factor, and the logical subsumption is based on this only as a phenomenal form." LUKÁCS, Gy.: *A társadalmi lét ontológiájáról*, II (Zur Ontologie des gesellschaftlichen Seins: Die wichtigsten Problemkomplexe), Budapest, Magvető, 1976, 220, for the manuscript in German, see *Lukács Archives and Library*, Budapest, M/120, 124. Cf. from the author: *The Place of Law in Lukács' World Concept*, Budapest, Akadémiai Kiadó, 1985; reprint: 1998, 145, note 300.

'indifferent'), yet (6) this very qualification can only be gained by means of logical deduction as one previously codified feasible answer.

What can still be said at this point for a generalisable conclusion? Well, there is at least one common characteristic of respective legal ideologies: the requirement that law should contribute to the resolution of social conflicts by transforming (through refining and stylising) real conflicts of interest firstly into conflicts within the law, just for those administering justice to be able to formulate—on basis of values, principles, considerations, references and perspectives recognised as referable objects in law, that is, as based on the law and the conclusions drawn therefrom—their own response in the name of the law. These in turn will be presented as the sole and exclusive response of the law strictly derived from the propositions of the law. This is the process of transformation which formal analyses have for long attempted to formulate as the particular (yet inexplicable) casual resolution of irresolvable contradictions between law and logic, on the one hand, and fact and norm, on the other.[14] This duality stretches between two poles—the own network of traditions, normatively recorded propositions, recognised techniques and procedures of argumentation, as well as referential practices within the law, on the one hand, and the practical nature of the issue to be decided and the demand for

14 "As far as law-application is concerned, those conflicts require judicial decision which themselves are socially real together with their economic, political and moral implications.

But in order to formulate conflicts in his reasoning, the judge first has to convert them into conflicts within the law. Then, in the first phase of manipulation, the selection and clarification of the facts of the case take place in conformity with the choice and interpretation of the corresponding ('relevant') norms of the legal system. The phenomenon which neo-Kantian legal philosophy used to call the conflict between the abstract wording of the law and the concrete facts constituting a case, takes place in this phase. It may also be revealed at this time that there is a gap in the law or even a 'critical gap' (when a 'legally relevant' norm is available but one that would have a socially undesirable result), which the Anglo-American literature usually describes simply as »hard cases«.

In the second phase of manipulation, the conflict thus converted into a conflict within the law is dissolved, i.e. reduced to a false conflict in legal reasoning. This is when the »facts constituting the case«, already qualified from a juristic point of view, and the correspondingly interpreted provisions of »the law« are formulated, i.e. manipulated so that they make possible the presentation of the desirable decision as also a logical result deriving from the »facts constituting the case« as well as from »the law« based on »legal reasoning«." VARGA, *The Place of Law...*, 146–147.

practicality of solutions, on the other[15]—, the concrete resolution of which, i.e., the intensification of their tension through repeated confrontation, followed by taking them to a point of rest, will be done in a solely hermeneutically constructible situation and through such a process.[16]

4. Concluding thoughts

We followed a path that led to law from the paradigms of legal thinking, and from the self-assertion of legal formalism to its overall cultural determination. Yet, our human yearnings peeked out from behind the illusory reference of our security and we could discover reliable solid grounds only in the elusive continuity of our social practice. In the meantime it proved to be a process which we had thought to have been present as a material entity. What we had believed to be fully built up proved to build continuously from acts in an uninterrupted series.

What we have discovered about law is that it has always been inside of us, although we thought it to have been outside. We bear it in our culture despite our repeated and hasty attempts at linking it to materialities.

We have identified ancient dilemmas as existent in our current debates as well. We have found long abandoned patterns again. We have discovered the

---

15 It is precisely the hermeneutics of our explanation on the concept of God that provides such characterisation of law (considered a parallel field therefore worthy of examination): "It is a task of understanding that derives from the relationship between the sources of law and the tasks of jurisdiction, in a way that traditionalised sources of the law can set the path leading to present-time jurisdiction by becoming the source of understanding throwing light on problems of the present case in law [...]. It is expected that in encountering the present-day concrete case the traditionalised text can serve as enlightening, explanatory and guiding word, becoming the source of legal interpretation and thereby also the source of jurisdiction." EBELING, G.: Wort Gottes und Hermeneutik *Zeitschrift für Theologie und Kirche*, 1959, Vol. 56, No. 2, 224–251.

16 As we have already characterised it before, "[t]his is Fikentscher's theory of the case norm, in which the hermeneutic pressure »pushes the hermeneutic process to turning point«, which, at a time when »with the given yardsticks of the object and the justice, neither the further specification of the norm nor the further breaking down of the notions of the facts that constitute a legal case is not possible any longer« [FIKENTSCHER, W.: *Methode des Rechts*, IV, Dogmatischer Teil, Tübingen, Mohr, 1977, 100 and 198], will be reached." Cf., from the author: *Theory of the Judicial Process: The Establishment of Facts*, Budapest, Akadémiai Kiadó, 1995.

realisations of common recognitions in those potentialities and directions in law which we believed to have been conceptually marked off once and for all.

However, we have found an invitation for elaboration in what has revealed itself as ready-to-take. Behind the mask, and in the backstage, the demand for our own initiation, play, role-undertaking and human responsibility has presented itself. We have become subjects from objects, indispensable actors from mere addressees. And, we can be convinced that despite having a variety of civilisational overcoats, the culture of law is still exclusively inherent in us who experience it day by day. We bear it and shape it. Everything conventional in it is conventionalised by us. It does not have any further existence or effect beyond this. And with its existence inherent in us, we cannot convey the responsibility to be born for it on somebody else either. It is ours in its totality so much that it cannot be torn out of our days or acts. It will thus turn into what we guard it to become. Therefore, we must take care of it at all times since we are, in many ways, taking care of our own.[17]

17 In a wider context, cf., from the author: Measuring through Patterning in Law: Development of an Idea in Europe. *Acta Juridica Hungarica*, 1998, Vol. 39, Nos. 1–2; *Norms through Parables in the New Testament: An Alternative Framework for Time and Law* (in: HOECKE, M. van–OST, F. (eds.), *Time and Law*, Brussels, Bruylant, 1998, 213–224); Patterns of Thought, Patterns of Law. *Acta Juridica Hungarica* 1997, Vol. 38, Nos. 3–7, 93–105.

ACTA JURIDICA HUNGARICA
1999 40 Nos 1–2, pp. 43–54

1216-2574 / 99 / USD 5.00

György SZÉNÁSI

The Role of the International Court of Justice in the Development of International Environmental Law*

The Charter of the United Nations which established the International Court of Justice gives to the Court the power to decide any legal disputes which are submitted to it by the parties.

Article 36 embodies a decision to give the Court *general* jurisdiction over legal disputes of whatever character. And the Court has always taken the view that there are no *a priori* limits to the subject of international regulation. The jurisdiction of the Court thus includes disputes of a legal character, that is to say, disputes between states as to their respective rights and obligations on questions related to the environment as well. And the potential breadth of this jurisdiction has been reaffirmed by influential agencies. For example, Agenda 21, drafted by the UN Conference on Environment and Development, encouraged the recourse of States to the ICJ in environmental matters (Chapter 39.10). International treaties aiming at the protection of the environment or including provisions which concern environmental protection often explicitly state that disputes arising from the application or the interpretation of their clauses should

---

* Paper prepared to the ICJ/UNITAR Colloqium to Celebrate the 50th Anniversary of the International Court of Justice (The Hague, April 16-18, 1996). A shorter version of this text has been delivered by the author at the colloquium.

be referred to the ICJ.[1] Practically all the major treaties concerning environmental protection adopted later than the mid-1980's include such provisions. The Court itself has formed a standing special Chamber, on the basis of Article 26(1) of its Statute, in order to be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction.

In a statement at the UN Conference on Environment and Development held in Rio de Janeiro in June 1992, Sir Robert Jennings, then President of the Court, declared that «the function of the established 'principal judicial organ of the United Nations' must include not only the settlement of disputes but also the scientific development of general international law». He also indicated that principles and rules of law can be gradually developed and elaborated by the very process of interpreting and applying them to the specific and often unforeseen factual situations that arise in actual disputes brought before them.

---

1 Agreement for the Establishment of a General Fisheries Council for the Mediterranean Sea, Rome, 24 September 1949, Art. 13; International Convention for the Prevention of the Pollution by Ships, London, 12 May 1954, Art. 13; Antarctic Treaty, Washington, 1 December 1959, Art. XI(2); Convention on Civil Liability for Nuclear Damage, Vienna, 21 May, 1963, Optional Protocol, Art. 1; Convention on the Physical Protection of Nuclear Material, New York, 3 March, 1980, Art. 17(2); International Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980, Art; XXV(2); Convention for the Protection of the Ozone Layer, Vienna, 22 March, 1985, Art.11(3)(b); Convention on Early Notification of a Nuclear Accident, Vienna, 26 September 1986, Art. 11(2); Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, Vienna, 26 September 1986, Art. 13(2); Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Basle, 22 March 1989, Art. 20(2); Convention on the Ban of the Import of Hazardous Wastes into Africa and on the Control of their Transboundary Movements within Africa, Bamako, 31 January 1991, Art.20(2); Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, Art. 15(2)(a); Protocol to the Antarctic Treaty on Environmental Protection, Madrid, 4 October 1991, Art. 19(1); Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17 March 1992, Art. 22(2)(a); Convention on Transboundary Effects of Industrial Accidents, Helsinki, 17 March 1992, Art. 21(2)(a); Framework Convention on Climate Change, Rio de Janeiro, June, 1992, Art. 14(2)(a); Convention on Biological Diversity, Rio de Janeiro, June 1992, Art. 27(3)(b); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, Paris, 13 January 1993, Art.XIV(2); FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 24 November 1993, Art. IX(3); Protocol to the Convention on Long-Range Transboundary Air Pollution on further Reduction of Sulphur Emissions, Oslo, 13 June 1994; UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 17 June 1994, Art. 28(2)(b).

International environmental law—and environmental law in general—constitute a new field of law and, as Judge Jennings stated: «That new international law for the protection of the environment needs urgently to be developed cannot be a matter of doubt».

Perhaps the Court's decision to establish the Chamber for Environmental Matters also reflects the need to develop this new field of international law.

How can the Court contribute to the elaboration and the development of international environmental law? The list of the sources of law which the Court shall apply, as defined in Article 38 of the Statute gives the elements of the answer.

a) The first of such sources are «international conventions, whether general or particular, establishing rules expressly recognised by the contracting states».

This rule naturally includes the treaties which contain provisions concerning environmental protection.

It also means that the application of treaty provisions is not restricted to those of the particular treaty whose interpretation and application is at stake. Other treaties binding upon the parties to the dispute, including conventions which contain general rules and principles concerning environmental protection, can be utilised, «whether general or particular», in order to determine the interpretation or the scope of application of a given treaty. In this regard it should be noted that Article 22(1) of the Rio de Janeiro Convention on Biological Diversity, now binding upon more than 130 states, foresees that:

«The provisions of the present Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause serious damage or a threat to biological diversity.»

This provision should certainly be applied when appropriate in disputes between parties to the Convention, even if the Court is asked to pronounce on the application or the interpretation of another treaty.

The Convention on Biological Diversity is very significant in respect to the question of whether rules and principles which emerged after the conclusion of a treaty should be taken into account. The Court itself has stated that: «...an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation...».[2]

A further step in the present investigation is to ask whether rules of conventions can be utilised in disputes between states which are not parties, or

2 Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports, 1971, 16 ff, at 31.

all of which are not parties to such conventions. This raises on the one hand the problem of «erga omnes» obligations created by treaties, and on the other hand the question of the extent to which treaties on environmental matters can contribute to the development of general international law, binding on all those states who have not expressly disagreed with the particular development.

A fundamental element of the answer can be found in the Advisory Opinion related to the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. This Opinion of the Court admits that principles underlying a convention can be recognised as binding on states, even without any treaty obligation. The Court also noted the unilateral nature of the humanitarian purposes and obligations of the Convention, rejecting the concept that all international treaty matters are directly inspired by the notion of contract:

«In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.»[3]

In the case concerning the Barcelona Traction, Light and Company, Limited, the Court referred to its former opinion, further developing this distinction:

«...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*».

The examples given by the Court of such obligations are significant: the outlawing of acts of aggression, genocide, principles and rules concerning the basic rights of the human person. As the judgment states: «Some ofthe corresponding rights of protection have entered into the body of general international law ... others are conferred by international instruments of a universal or quasi-universal character».[4]

---

3 Advisory Opinion, 28 May 1951, ICJ Reports, 1951. 21 and 23.

4 Judgment of 5 February 1970, ICJ Reports, 1970. 32.

By these *dicta* the Court has clearly designated the way in which international law can be developed, and its approach can equally be applied to international environment protection as to other areas. Indeed this has been expressly recognised by the International Law Commission in its work on state responsibility; I refer particularly to the definition of state crimes in Article 19 of Part I, but also to the more generally applicable definition of "injured State" in Article 5 of Part II. The Court should not only interpret and apply treaties which are submitted to it, taking into account other conventional provisions existing between the parties to the dispute, which aim at the protection of the environment. It also should use rules and principles included in treaties having a general scope and tending to the same objective, independently of the fact of whether the parties to the dispute are contracting parties or not to such treaties. Indeed, many multilateral conventions related to environmental protection fall into categories comparable to those designated above, as the contracting states do not have any interest of their own and act for a common interest.

Such treaties, but also other instruments respected by all the states in the World, such as the Stockholm Declaration of 1972 and the Declaration of Rio de Janeiro of 1992, demonstrate that the protection of the environment constitutes a common interest. The fundamental importance of environmental concern is also shown, as it were *in extremis*, by its incorporation into international humanitarian law. The 1977 Protocol Additional to the 1949 Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts, bans employing methods or means of warfare which are intended, or may be expected, to cause wide-spread, long-term and severe damage to the natural environment.[5] The Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission includes a provision punishing an individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment.[6] One may thus conclude that environmental protection is a major interest of mankind and that rules and principles which tend to ensure it must be considered as having a general relevance.[7] The Court could be inspired by

5 Protocol I, Geneva, 8 June 1977, Articles XXV.1, XXXV.3, LIV.2, LV.1 and LVI.1. Cf.: Protocol II, Art; XIV and XV.

6 Article 26, Wilful and Severe Damage to the Environment, *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, 107.

7 See also DAILLET, P. and PELLET, A., who recognise the importance of the «édiction de normes à vocation universelle »which creates situations where treaties can be applied to non-party states without their consent. *Droit international public*, 5th ed., Paris, 1994, 244–248.

such conclusions and consequently develop international law in environmental matters.

b) Rules and principles concerning environmental protection can also fall into the category of «international custom, as evidence of a general practice accepted as law» (Statute of the ICJ, Art. 38(1)(b)).

The core problem of this very classic definition of custom is to determine, especially in matters concerning environmental protection, what is «practice». General awareness of environmental problems is little older than a quarter of a century. Can a general practice be established in such a relatively short time? On the other hand, what type of behaviour should be considered as contributing to the emergence of international customary rules?

It has been suggested that repeated expressions of the consensus of states on certain rules can make customary law rules emerge. Indeed, such expressions can be considered a practice and at the same time as the acceptance of their legal nature, the «opinio iuris». Such expressions of a consensus can figure in legally binding instruments or in «soft law» instruments, that is to say, in non-binding declarations, resolutions or recommendations. The two hypotheses should be examined separately, although quite often the same rules and principles are formulated successively in both types of instruments.

1. Rules and principles which repeatedly appear in different treaties can be considered to reflect a growing consensus on their content. On the contrary, it can be argued that the very fact that the authors of more recent treaties believed it necessary to repeat them shows their uncertainty concerning the existence of such rules and principles. In some cases the uncertainty has been eliminated by a more or less formal recognition of the customary nature of such rules and principles. This was the case of Part XII of the UN Convention on the Law of the Sea, related to the protection of and preservation of the marine environment. Even before the entry into force of the Convention the preamble of the Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992) explicitly stated:

«Recalling the relevant provisions of customary international law reflected in Part XII of the United Nations Law of the Sea Convention and, in particular, Article 197 on global and regional cooperation for the protection and preservation of the marine environment...».

In reality, Part XII of the Convention includes many provisions which did not exist as international law rules before the opening of the Conference on the Law of the Sea, but the extensive processes of that Conference, and related activities in the law of the sea, have had a catalytic effect.

2. Rules and principles formulated in non-binding instruments can also be recognised and thus acquire the status of customary law rules. In this regard a paragraph of the preamble of the Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979) is significant:

«Considering the pertinent provisions of the Declaration of the United Nations Conference on the Human Environment, and in particular principle 21, which expresses the common conviction that states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction...».

It may be added that the rule for the respect of the environment outside the limits of the jurisdiction of states, formulated by Principle 21 of the Stockholm Declaration, was later included in several international conventions.[8]

By acknowledging the emergence of customary law rules related to the protection of the environment, the World Court can contribute to the development of international law in this field.

c) The problem of identifying «the general principles of law recognised by civilised nations» (Statute, Art. 38(1)(c)) has been a much debated one since the creation of the Permanent Court of International Justice. Concerning environmental law, it is clear that a set of rules and principles appears both in international law and in domestic legal systems.

The Rio de Janeiro Declaration proclaims several of these principles. Some of them originated in domestic law systems, such as the principle of public participation[9] or the prior assessment of the environmental impact of

---

8 UN Convention on the Law of the Sea, Montego Bay, 10 December 1982, Art. 194(2); ASEAN Agreement on the Conservation of Nature and Natural Resources, Kuala Lumpur, 9 July 1985, Art 20; Convention of Biological Diversity, Rio de Janeiro, June 1992, Art; 3; UN Framework Convention on Climate Change, Rio de Janeiro, June 1992, Preamble.

9 According to principle 10 «Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.» Public participation also is emphasised in Agenda 21 (Section III). See, on public participation in the European Union and in domestic law systems: KISS,

projects.[10] Others were first formulated in international instruments, such as the precautionary principle,[11] the requirement of notification to concerned

---

A.—SHELTON, D.: *Manual of European Environmental Law,* Cambridge, 1993, 443–501. In recent international treaties public participation appears more and more often: ASEAN Agreement on the Conservation of Nature and Natural Resources, Kuala Lumpur, 9 July 1985, Art. 16; Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, Art. 2(6); Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17 March 1992, Art. 16; Convention on Transboundary Effects of Industrial Accidents, Helsinki, 17 March 1992, Art. 9; Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 9 April 1992, Art.17; Framework Convention on Climate Change, Rio de Janeiro, June 1992, Art; 4(1)(i); Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992, Art. 9; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, 21 June 1993, Art. 13–16; North American Agreement on Environmental Co-operation, 13 September 1993, Art. 2(1)(a); Convention on Co-operation for the Protection and Sustainable Use of the Danube River, Sofia, 29 June 1994, Art. 14; Protocol to the 1976 Barcelona Convention Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, Barcelona, 10 June 1995, Art. 19, etc.

10 According to Principle 17 of the Rio Declaration «Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.» Cf.: KISS—SHELTON: *Manual of European Environmental Law, op. cit.*, 58–61. In the international field see: Kuwait Convention on the Protection of the Marine Environment from Pollution, 24 April 1978, Art. 11; Convention on the Protection of Nature in the South Pacific, Apia, Art. 5(4); UN Convention on the Law of the Sea, Montego Bay, 10 December 1982, Art. 206; ASEAN Convention on the Conservation of Nature and Natural Resources, Kuala Lumpur, 9 July 1985, Art. 14; Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 April 1991; passim; Protocol to the Antarctic Treaty on Environmental Protection, Madrid, 4 April 1991, Art. 8; Convention on Transboundary Effects of Industrial Accidents, Helsinki, 17 March 1992, Annex IV and V; Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 9 April 1992, Art. 7; Convention on Biological Diversity, Rio de Janeiro, June 1992, Art. 14; Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992, Art. 6; North American Agreement on Environmental Co-operation, 13 September 1993, Art. 2(1)(e); etc. Many non-mandatory international instruments also advocate the prior assessment of potential environmental impact: see KISS, A.—SHELTON, D.: *International Environmental Law, Transnational Publishers*, 1991, 147–148.

11 Principle 15 of the Rio Declaration provides: «In order to protect the environment, the precautionary principle shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.» See: Convention on the Ban of the Import of Hazardous Wastes into Africa and on the

governments of emergencies[12] and of projects which can affect their environment, and the duty to consult with such states.[13] It seems that in given

---

Control of their Transboundary Movements within Africa, Bamako, 31 January 1991, Art. 4(3)(f); Maastricht Treaty on European Union, 7 February 1992, Art. 130R(2); Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17 March 1992, Art. 2; Convention on the Protection of the Marine Environment of the Baltic Sea, Helsinki, 9 April 1992, Art. 3(2); Framework Convention on Climate Change, Rio de Janeiro, June 1992, Art. 4(1)(f); Convention on Biological Diversity, Rio de Janeiro, June 1992, preamble; Convention for the Protection of the Marine Environment of the Northeast Atlantic, Paris, 22 September 1992, Art. 2(2)(a); Protocol to the Convention on Long-Range Transboundary Air Pollution on further Reduction of Sulphur Emissions, Oslo, 13 June 1994, Preamble; Convention on Co-operation for the Protection and Sustainable Use of the Danube River, Sofia, 29 June 1994, Art. 2(4); Protocol to the 1976 Barcelona Convention Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, Barcelona, 10 June 1995, Preamble; Agreement on the Conservation of African-Eurasian Migratory Waterbirds, The Hague, 16 September 1995, Art. 2(2); Agreement for the Implementation of the UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 December 1995, Art. 5(c) and 6; etc.

12 Principle 18 of the Rio de Janeiro Declaration provides that: «States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.» See: UN Convention on the Law of the Sea, Montego Bay, 10 December 1982, Art. 198, preceded and followed by comparable provisions of a series of 8 conventional systems concerning regional seas and their protocols (KISS–SHELTON: *International Environmental Law, op. cit.*, 194–196), as well as Convention for the Protection of the Rhine Against Chemical Pollution, Bonn, 3 December 1976, Art. 11; ASEAN Convention on the Conservation of Nature and Natural Resources, Kuala Lumpur, 9 July 1985, Art. 20(d); Convention on Early Notification in the Case of Nuclear Accident or Radiological Emergency, Vienna, 26 September 1986 passim; Convention on the International Commission for the Protection of the Elbe, Magdeburg, 8 Oct. 1990, Art. 2(1)(h); Agreement on Co-operation for Combating Pollution in the North-East Atlantic, Lisbon, 17 October 1990, Art. 9(2); Convention on Oil Pollution Preparedness, Response and Co-operation, London, 30 November 1990, Art. 3–5; Protocol to the Antarctic Treaty on Environmental Protection, Madrid, 4 October 1991, Art. 15(2); Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki 17 March 1992, Art. 14; Convention on Transboundary Effects of Industrial Accidents, Helsinki, 17 March 1992, Art. 10; Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 9 April 1992, Art. 13; Convention on Biological Diversity, Rio de Janeiro, June 1992, Art. 141)(d); Convention on Co-operation for the Protection and Sustainable Use of the Danube River, Sofia, 29 June 1994, Art. 16, etc. Cf. International Court of Justice, Corfu Channel Case (UK v. Albania), Merits, 3 April 1949, ICJ Reports, 1949, 22.

13 According to Principle 19 of the Rio de Janeiro Declaration «States shall provide prior

circumstances the Court could apply such rules and principles as falling within the scope of rules envisaged in Art. 38(1)(c).

d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations can be used as subsidiary means for the determination of rules of law (Statute, Art. 38(1)(d)).

The decision of an international tribunal which is most often quoted on matters relating to the environment is the 1941 arbitral award in the Trail Smelter case. The Tribunal proclaimed that

«...no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence».[14]

Although it was concerned with a very different problem, the International Court of Justice later confirmed the basic rule that no state may utilise its territory contrary to the rights of other states.[15] An *obiter dictum* of the arbitrators in the Lake Lanoux Case[16] can also be considered as reinforcing the rule that no state should cause significant injury to the environment of other states. One may presume that the International Court of Justice would consider these decisions in a given case submitted to it.

The last type of potential source of law which the Court can apply, the teachings of the most highly qualified publicists of the various nations,

---

and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith». See: Nordic Environmental Protection Convention, Stockholm, 19 February 1974, Art. 4–7; Kuwait Convention on the Protection of the Marine Environment from Pollution, 24 April 1974, Art. 11; ASEAN Agreement on the Conservation of Nature and Natural Resources, Kuala Lumpur, 9 July 1985, Art. 20; Agreement between Germany, the EEC and Austria on Cooperation in Managing Water Resources of the Danube Basin, Regensburg, 1 December 1987; Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, particularly Art. 3(2) and (3); Convention on the Protection and Use of Transboundary Watercourses and Lakes, Helsinki, 17 March 1992, Articles 9(2)(h), 10, 13 and 16; Convention on Co-operation for the Protection and Sustainable Use of the Danube River, Sofia, 29 June 1994, Art. 10 and 11, etc.; See also for non-binding international instruments: KISS–SHELTON: *International Environmental Law, op. cit.*, 138–141.

14 *United Nations Reports of International Arbitral Awards*, vol. 3, 1938 at 1963.

15 Corfu Channel Case UK v. Albania, Merits, ICJ Reports, 1949, 4.

16 Affaire du Lac Lanoux, France c. Espagne, 19 November, 1956, United Nations Reports of International Arbitral Awards, vol. 12, 281.

naturally raises the problem of the identification of such teachings. What can be stated at this point is that since the beginning of the 1970s a huge number of books and articles has been published concerning international environmental legal problems. It can be estimated that the number of monographs is above 50 and there are at least 20 law reviews which focus on this field. All international law reviews and treatises also publish articles and developments on international law problems concerning environmental matters. Naturally, such a quantitative approach is not sufficient to reveal sources of law, but its significance cannot be denied. The Court itself does not, of course, refer by name to any legal writers at all; it focuses, and rightly focuses, on the specific case and refers to doctrine only in general terms. Nonetheless, as separate opinions reveal and other evidence suggest, the Court collectively is fully aware of the trends of doctrinal development, and is careful to take those broad trends into account, without being unduly influenced by any specific "school" or approach.

* * *

In conclusion, it may be submitted that the values which will constitute the foundation of international law in the coming decades or even in the latter part of the 21st century are human rights in the broadest meaning of this concept, including the right to a healthy environment, both for present and future generations. Jurisdiction in respect to the protection of human rights was conferred upon special tribunals and structures outside of the International Court of Justice both for historic and political reasons. It is highly desirable that, as emphasised by Sir Robert Jennings, the Court play a role, which will be of crucial importance, in the implementation and the development of international law in this new area. The tasks of the Court are, however, far from being easy in this respect. As one of the cases currently listed by the Court demonstrates, issues of international environmental law may relate to a whole range of other important questions, the Court is therefore expected, while dealing with the former, to contribute also to the doctrine of material breach of a treaty, clausula rebus sic stantibus, repudiation of a treaty by the violation of its provisions, as well as to the doctrine of state succession, all closely connected to the "basic" dispute. May I express my conviction that the International Court of Justice will perfectly master this extremely difficult task by delivering specific answers to specific questions. But—and this is the special feature and strength of law—it can thereby contribute to the development and better understanding of international law in a field of profound human interest,

whilst at the same time help to restore the mild climate necessary to further develop the friendly relations between the two States concerned. It is a formidable task, calling for deep study and reflection, but above all for judicial wisdom, which is undoubtedly characteristic to this august body.

ACTA JURIDICA HUNGARICA
1999 40 Nos 1–2, pp. 55–75

1216-2574 / 99 / USD 5.00

André P. den EXTER

Conceptualising a Model of Health Care Law-making: Relevance to Central and Eastern Europe by Exploring Hungarian Reforms

1. Introduction

Reshaping their health care systems towards a more market-driven model, most countries in Central and Eastern Europe (CEE) face serious legal problems. This article analyses therefore the shift from a severely regulated health care system towards a more flexible health care scheme from a legal perspective.

To increase understanding in the legal consequences of reforming CEE health care system schemes, author has developed a tentative theoretical model of health care law-making (section 2). This model can be characterised by its interactive and circular concept of legal decision-making. As such, the model considers the legislative process as a circular systematic activity. Its progressively introduced legislative changes enable to review (un)intended consequences of opted measures and to modify if necessary. Whereas the underlying health care legal principles of the normative frame function as the raison d'être of legal measures, the derived normative approach conceptualises the optional pace of change (section 3).

To review the feasibility of the theoretical model, the model has been compared to the actual legislative reform process in Hungary. This article outlines some of the results, which prima facie confirm the validity of the model given the experienced parallels (section 4). It is, however, concluded that further comparative research is necessary to verify the feasibility in a different legal setting (section 5).

2. An analytical framework of health care law-making

Due to the rather inconsistent legal reform strategy, legislative changes of the health care structure in Central and Eastern Europe have been frequently characterised as 'crisis management'. Too often, rapidly changing circumstances have resulted in less developed, temporary and ad hoc legislative measures. These experiences give rise to reconsider the current unsatisfactory approach of law-making. In order to develop a more structural and systematic approach of health care law-making a tentative model that is founded on correlating legal-formal understanding with substantive parameters may provide a useful instrument. Consequently, it is questionable in what respect the application of such an analytical model may improve the contemporary practise of law-making in Central and Eastern Europe. The answer refers to the relation health care law-making and health policy since health policy objectives to certain extent shape the legislative agenda and reverse. Fundamental legal principles determine the policy-objectives of the legislature including values as equal access to health care and respect for human rights. The balance between both perspectives reflects a compromise that corresponds to a minimum level of services and facilities available to the entire population.

2.1 The underlying strategy of incremental changes

The underlying idea of the suggested model is one of incremental changes of the current health care structure. Since the disappointing experiences in the early 1990s with mainly duplicating an existent model, a gradual system change has been suggested as more appropriate.[1] The proposed circular concept of law-making translates this notion into law-making by maintaining certain elements of the 'ancient' legal system combined with additional changes. These reforms can be structured according a frame of universal legal norms irrespective the uniqueness of each country's present status of the health care system. From a legal-analytical perspective, the progressive approach of constantly monitored effects may reveal possible ramifications and pitfalls in reforming the legislative structure. As such, the circular idea of law-making buttresses the legislative reform process by timely intervention and geared to underpinning objectives and principles. Here it is assumed to provide a scientific basis for developing health care legislation.

---

1 SALTMAN, R. G.–FIGUERAS, J.: *European Health Care Reform: Analysis of Current Strategies.* World Health Organization Regional Office for Europe, Copenhagen, 1997. 264.

2.2 A legal-theoretical model of law-making

Derived from both legal as organisational sciences,[2] the idea of law-making can be considered as a methodological concept that consists of various successive elements.[3] Graphically, the method can be reflected according to a (simplified) model.

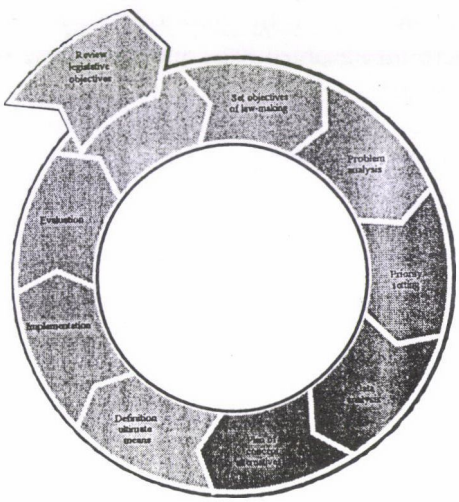


Figure 1. Elements of law-making

---

2 Cf., for example NOLL, P.: *Gesetzgebungslehre,* Hamburg, 1973; CAROLL, S. J.–TOSI, H. L.: *Management by Objectives: Applications and Research,* New York, 1973.; KREMS, B.: *Grundfragen der Gesetzgebungslehre,* Berlin, 1979.; WRÓBLEWSKI, J.: *Einführung in die Gesetzgebungstheorie.* Wien, 1984, *Contemporary Models of the Legal Sciences.* Wroclaw, 1989.; Van der VELDEN, W. G.: *The development of the science of Legislation. A legal theoretical inquiry,* (dissertation), Utrecht, 1988.; WINTER, H. B.: *Evaluation of law-making,* Groningen, 1996.; ÖHLINGER, T.: Methodik der Gesetzgebung: Legistische Richtlinien in Theorie und Praxis. Wien, 1982, 21–22.; SARNECKI, P. Gesetzgebungsqualität und Gesetzgebungsverfahren in Polen, in SCHÄFFER, H.: *Gesetzgebungsverfahren und Gesetzgebungsqualität,* Manz, Vienna, 1992. 37–40.; SZURGACZ, H.: Entwicklungen im Polnischen Sozialrecht unter besonderer Berücksichtigung der Krankenversicherung und der Sozialhilfe, 174-175., in: *Rechtsberatung und Verwaltingsförderung in Mittel- und Osteuropa: Vorträge und Diskussionen im Zweiten Werkstattsgespräch zur Verwaltungs förderung der Hochschule für Verwaltungswissenschaften Speyer,* München, 1994. 174–175.

3 Method defined as: 'a collection of well-ordered and specified activities and possibly other instruments, in order to achieve a particular aim or aims, in a particular field and under particular conditions'. In the legislative setting, the aim or objective of the method is to rationalise the law making process. Van der VELDEN W. G.: *op. cit.* 192.

The first element is identified as 'objectives of law-making' and refers to the law-jobs or functions of law. The objective-approach imposes the legislature to legislative intervention. Whereas the magnitude, complexity and urgency of occurring problems necessitate to prioritise legislative issues, based on a first problem-analysis. An extensive descriptive analysis of the specified issue(s) will ultimately result in initiating a range of legislative measures that need to be implemented and monitored by its effects. To review the extent of realisation by its underpinning objectives, and to analyse possible (side-)effects of intervention mechanism, evaluation is an effective element that could ultimately result in adjustment or modification of the opted instrument. Consequently, a motivated consideration of chosen objectives, priorities, means, content of the legal document, evaluation-criteria may contribute in a more systematic and rational approach of the law-making activity.[4]

2.3 Relevance to health care law-making

Health care legislation as part and parcel of health care law functions as an inherent means to perform the main objectives of intended legal reforms. The World Health Organization (WHO) has propagated such a systematical approach of law-making several years ago.[5] Despite its (theoretical) attractiveness, deficits in the implementation and evaluation of legislative mechanisms and insufficient considered measures complicate a successful realisation of the law-making reform strategy in most Eastern European countries. Integration of the universal functions of health care law into a general concept of law-making could improve that activity. A theoretical concept that reflects both normative and instrumental qualities may support the legislature in redefining health care legislation. Particularly in a state of flux with rapid and profound changes, the discerned functions of health care law provide a useful tool for a further to be elaborated conceptual frame of legislation.

---

4 The rationality concept of law-making has been critised by its rather theoretical approach, both in legal as well as in political sciences (KREMS and GÖRLITZ: *op. cit.*). Rational law-making is more a legal fiction, than a political reality. Nevertheless, the endeavour to achieve a certain degree of rationalisation and controllability in the law making process is legitimate, although it has its restrictions.

5 World Health Organization. *Strengthening Ministeries of Health for Primary Health Care,* 1988. Technical Report Series No. 766 WHO, Geneva, 1988, 92. This classification has been adopted from Roemer, (ROEMER, R.– MCKRAY, G.: *Legal Aspects of Health Policy Issues and Trends.* Westport, 1980. 439) and corresponds largely with the categories of fundamental legislative tasks in health care. MONTEGOMERY, J.: *Health Care Law.* New York, 1997, 53.

The functions (or law-jobs[6]) were successively grouped according to clusters such as public health, organisation of health resources, financing and tariffs, quality control, and patients' rights. The law-jobs symbolise basic legal principles formulated by the WHO as:[7]

— to prohibit conduct, and ban or regulate the use of products injurious to health;

— authorise programs and services that promote the health of individuals and the community;

— regulate the production of resources and the production, deployment, and the management of the health manpower required for the delivery of health care to individuals and of the environmental health services;

— provide the social financing of health care;

— exercise surveillance over the quality of health care;

— to ensure the rights of individuals.

Combining these functions with the previous model of law-making concentrates its application to the field of health care. As a result of the circular approach, the law-making activity can be reflected according to the successively discerned elements.

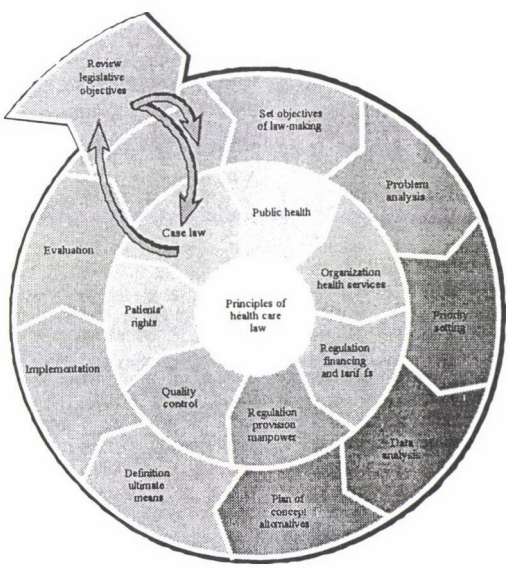


Figure 2. Model of health care law-making

6 LLEWELLYN, K.: The Normative, the Legal and the Law Jobs. 1940. *Yale Law Journal* 49, quoted by: Longley, D. Health Care Constitutions. Cavendish Publishing, 1996, 12.

7 WHO 1988, *op. cit.*, 92.

The conceptual framework of health care law-making is defined as a coherent model of concepts, definitions, assumptions and other analytical instruments intended to develop and assess a normative frame of legislation by its underpinning ideas. It is assumed to provide a scientific basis for health care legislation. Since it is an intellectual construction it does not have to represent the actual situation. Such a model is always a simplification, though not a blueprint of reality. Accordingly, any description must include certain elements of reality while excluding others. Its qualities mainly concern formulating and verifying theoretical concepts of health care law-making, which might have consequences to the actual legislative activity.

Obviously, the chronology of the suggested sequence of law-jobs does not include a hard and fast rule but it offers a tool to redefine health care legislation in a more systematical manner. It 'colours' the theoretical perspective of health care reforms; it enables to correlate the multitude of changes in the interactive law-making process.

Differences in implementation and stages of development of the reform-process do not a prima facie alter the methodology as well influence the time-table of intended reforms. In general, the primacy of public health has been considered as a fundamental condition for society to enjoy its health.[8] It requires measures that protect, prevent and promote the health of society. As a consequence, such a definition places explicit obligations on the state to ensure the conditions for a climate that guarantees a certain level of physical and mental health (including healthy environment, decent sanitation, hygiene, vaccination programs, medical care, health education and promotion). Besides basic public health facilities, other health care resources that concern individual aspects of health care necessitate to plan and allocate such provisions according to the needs and available resources (organisational aspects). Whereas to guarantee and maintain a financially affordable health care system, regulation of the finance, including tariffs, is a legislative affair par excellence. These three elements, public health, regulating the organisational aspects of health care resources and the sources of finance initiate the need for additional regulative mechanisms related to quality and professions (audit and control systems as well as regulation of professions), and patients' rights. Graphically, these law-jobs corresponds with the mid circle of interventive clusters according to the suggested sequence.

---

8 DONALDSON, R. J.—DONALDSON, L. J.: *Essential Public Health Medicine,* Dordrecht, 1993. IX.

It will be clear that the complexity of (re)defining health care legislation needs a long-term strategy that cannot be realised in a singular process. Reforming health care legislation therefore requires a continuous approach carried out progressively by selected cluster(s). The review element in the legislative process suggested this already, more or less. In this respect, besides review based on legislative evaluation, case law review also reveals possible shortcomings of legislative deficits and changes. Assessment of legislation to its objectives by means of case law uncovers incidental and/or structural deficiencies that may initiate a reconsideration of the original rule. Whereas the systematical sequential approach of reforming health care legislation strengthens the idea of a circular and gradual process.

Finally, the nucleus of the model reflects fundamental principles of health care law in the process of (re)defining law-making. Both the right to health care and patients' autonomy function as central benchmarks, which represent underpinning principles of this frame of law-making.[9] [10] [11] Changes in interpreting

---

9 Leenen, H. J. J.—Pinet, G.—Prims, A. V. (eds.): "Trends in Health Legislation in Europe". *Masson/World Health Organisation,* Paris, 1986. vii.; LEENEN, H. J. J.—GEVERS, J. K. M.—PINET, G.: *The Rights of Patients in Europe.* World Health Organization, Regional Office for Europe, Deventer, 1993, VII.

10 Health as defined by the Preamble of the WHO Constitution, 1948: 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.' This view of health goes well beyond the absence of disease or physical and mental infirmities. In fact it proposes so broad and inclusive a conception that it turns health into a norm virtually synonymous with human well-being. Although the WHO definition offers an attractive aspirational standard, it is a problematic grounding for a human right. As such, it would imply that governments have the duty to guarantee or provide complete physical, mental, and social well-being for citizens. This is an impossible goal. CHAPMAN, A.: Violation of the Right to Health, in: *"The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights".* (eds.: Van Boven, Th. C.—Flinterman, C.—Westerdorp, I.) Netherlands, Institute of Human Rights, Utrecht, SIM Special No. 20, 1998. 87–88. It is more feasible to speak of the Right to Health Care, interpreted as access to benefit from (a minimum of necessary) health care services and facilities. For example, the interpretation of the Committee on Economic Social and Cultural Rights of the United Nations (Ecosul Committee) discussed in: *The Right to Health Care in Several European Countries.* (eds.: Den Exter, A. P.—Hermans H. E. G. M.), Studies in Social Policy. The Hague, 1999.

11 The central idea that underlies the concept of autonomy is indicated by the etymology of the term: *autos* (self) and *nomos* (rule, governance or law). The term was first applied to the Greek city state. A city had *autonomia* when citizens made their own laws, as opposed to being under the control of some conquering power. DWORKIN, G.: *The theory and practice of autonomy.* 1991 (1988), 12–13. Such a perception of autonomy refers to independent actions or decisions without external interference; when they are self determined. Liberty or

these principles may affect the function of law and the legislature in health care, and therefore influence the content of health care legislation. Hence, such an integrated circular model correlates principles, law and law-making. Moreover the systematic approach by means of stages of law-making and discerned law-jobs in health care may contribute to review legislative decision-making. It may reduce the level of 'trail and error' by rationalising the process of law-making in health care.

---

freedoms are however, not equivalent to autonomy (The Oxford Dictionary (1991) defines autonomy as 'freedom of the will', equivalent to self-determination: the free determination of one's own actions, Webster's Dictionary, 1992) but may be a necessary condition for individuals to develop their own aims and interests. In order to clarify the difference, Dworkin refers to an example from John Locke (105). "Consider a person who is put into a prison cell and told that all the doors are locked. The guards go through the motion of locking the doors but in fact one of the locks is defective and the prisoner could simply open the door and leave the cell. Because he is not aware of this he, quite reasonably, remains in his cell." The prisoner is, in fact, free to leave the cell. His liberty has not, although he does not know this, been limited. His autonomy has been limited. His view of the alternatives open to him have been manipulated by the guards in such a fashion that he will not choose to leave. This example shows that self determination can be limited without limited liberty. Dworkin characterised autonomy as the capacity of a person to reflect critically upon, and then attempt to accept or change his or her preferences, desires, values or ideals (20). Thus autonomy is not simply a reflective capacity but also includes some ability to alter one's preferences and to make them effective Derived of the ancient autonomy principle, in the contemporary legal doctrine patients' rights are generally considered as part and parcel of human rights. Like other individual rights and freedoms, patients' rights are aimed at protecting the individual sphere and individual liberty. This new category of rights include, for example, informed consent, confidentiality, and access to (medical) records. These rights in turn generate several new rights including disclosure, correction and the removal of data recorded by various kinds of information systems, as well as the right to a second opinion and not to be informed (LEENEN: *op. cit.* 1993. 28–29, 60–61, 81–82). in action (108). Generally, autonomy and self determination can be considered as exchangeable. The underlying idea of individual self determination, reflected by concepts such as respect for human dignity and the integrity of the human body, functions as the cornerstone of international human rights law. In health care the right to self determination created a new category of rights, so-called patients' rights. Derived of the ancient autonomy principle, in the contemporary legal doctrine patients' rights are generally considered as part and parcel of human rights. Like other individual rights and freedoms, patients' rights are aimed at protecting the individual sphere and individual liberty.

2.4 Correlation law-making activity and health policy

Until now (the start of) the legislative process has been considered as a rather autonomous and mechanical activity, without external influence. Nothing is further from the truth. For instance, the initiated transition from a strong centrally planned tax-based health care system, towards a decentralised health insurance scheme is the result of a political decision-making process. Subsequently based on primarily socio-economic motives. Thus, changing the health care legislative framework cannot be placed within a vacuum but must be commensurate with legal, political and social principles, transformed in a strategic plan of further defined and elaborated health policy-objectives. In other words, health care legislation and health policy are interrelated: health care legislation both expresses autonomous axiological norms (i.e. guarantee the rights of individuals, equal access, non-discrimination.) but it also reflects instrumental policy-objectives (cost-efficiency, efficient allocation health resources, etc.).[12] Health care legislation balances between fundamental normative principles and legitimising instrumental policy-objectives. Integrated into the previous model, health policy objectives embrace the categories as the discerned law-jobs of health care legislation. Moreover, the circular approach reflects the continuing interaction between law-making and policy-making. Whereas policy-objectives initiate legislative intervention, otherwise, diverging judicial interpretation may require legislative correction and/or adjustment of existing policy-objectives/programmes. Indeed, here law-making has a legitimising function besides its traditional guarantee-function. The presumed hierarchy between guarantee and instrumental qualities manifests itself particularly in health care: the dilemma between reflecting primarily economic effectiveness and efficiency vs. expressing universal access to health care (equality).

Differentiating the equality-principle could solve this dilemma. What matters is the motivation to differentiate. In health care that motivation can be found in the impossibility to guarantee full access to universal health care. Here, the collapse of previous Eastern European health care ideals is exemplary. Curtailment of a previously unrestricted right to access is inevitable and even necessary to guarantee a sustainable health care system accessible for the entire population. To legitimise such limitations the legislature, since that is pre-eminently a social consideration, has to guarantee a certain level of basic health care. This can be justified since certain categories do not have the ability

---

12 ROEMER–McKRAY: *op. cit.*, 437–438.; LEENEN: Trends in Health Legislation in Europe, *op. cit.*, VII.

to choose in a rational manner and opt for a certain level of facilities. Whereas above a certain basic level of facilities citizens can be expected to take out additional health insurance against for instance, supplementary, luxury facilities, and co-payments.[13] Thus, a certain degree of legal equality should be aimed at, whereas above that level differences could be accepted. Although initiated by economic reasons, from a legal point of view such a perspective can also be justified by criteria open to objectification.

To find the equilibrium between traditional legal and instrumental policy objectives is one of the most difficult aspects in the current health care legislative debate. Particularly in countries on their way to health care system reforms, changing the legal structure will emerge a debate about underpinning concepts of the role of the legislature and therefore the government in health care. On the one hand, the newly developed legislative strategy intends to introduce (market-based) efficiency measures, otherwise they have to express fundamental values. The centre of the model expresses such principles, which may correct a too instrumental approach of law-making initiated by instrumental objectives. Reverse, legal principles are bound by instrumental values that attempt to develop and maintain sustainable access to health care. Both perspectives interact and are reflected in figure 3. To indicate interactivity between the law-making activity and correlative health policy, the outermost circle of health policy has been drawn directly around the legislative concept. By singling out the review element, the model indicates the continuous mutual interaction between legislation and policy making.

However, the suggested rational approach of the legal decision-making process does not have to correspond to the actual process. Real legal or policy decision-making process has rather been characterised as "muddling through", instead of the more mechanical rational approach. Whether or not reflecting the actual process, and given its limitations, the rational concept of transforming policy-targets into legislative objectives and the suggested sequence of continuously passing stages may help to clarify problems, structure the diffuse process of making choices or selecting objectives. In this respect it may function as a instrument in attempting to increase the transparency and accountability of the decision-making process, without having the illusion to alter, in the long run, how policy-makers or law-makers reach decisions.[14]

---

13 Based on: RAWLS, J.: *A Theory of Justice*, Oxford, 1971, 12th ed. 1992.

14 FOLTZ, A. M.: The policy process, in: *Health policy and systems development. An agenda for research*, ed.: Janovsky, J., WHO Geneva, 1996. 211.

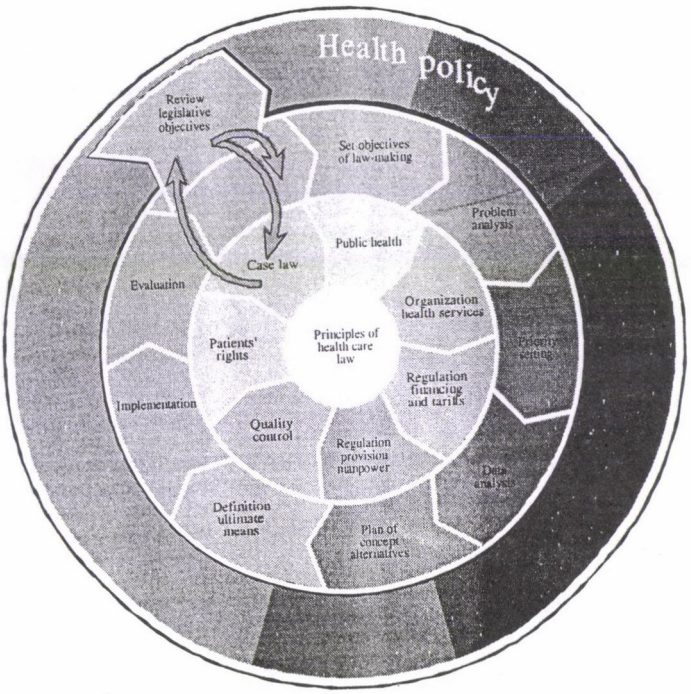


Figure 3. The synthesis of health care law-making and policy-making

3. Relevance to Central and Eastern European health care reforms

3.1 The pace of change

Clearly, the model's objective determined approach in law-making can not be considered as a panacea to rationalise law-making. Nonetheless, it has certain advantages; in particular in the Eastern European context where priorities and the extent of far-reaching reforms require a clear strategy of law-making policy to structure the reform process. Operationalising both the traditional guarantee function as well as instrumental conceptions in the health care setting may contribute to ameliorate the (re-)definition of the legal structure. It provides the legislature with a conceptual frame capable of modifying the legal structure in a more coherent manner. In effect, the model indicates the method and direction in reforming the health care legal system; based on an ongoing, evaluative approach instead of a radical transformation. Changing the

legal infrastructure in Central and Eastern Europe results in incremental legislative changes based on the objective determined approach (law jobs). Analysing previous experiences and optional reform scenario may clarify this idea.

3.2 Previous experiences in health care system reforms

From a legal point of view, health care system reforms have been frequently insufficient underpinned.[15] Exemplary is the abrupt (re-) introduction of a statutory health insurance system and large-scale decentralisation and privatisation developments in several CEE-countries. Legal reforms that fail to ensure a more efficient and effective allocation of resources undermine access to and the quality of health services and public health measures available to the public. This undesirable effect may have a direct negative impact on the general health status of the population, which will increase the need for health care. Demographic developments and the introduction of new medical technologies will strengthen those needs. Thus, deficiencies in legal reforms also affect the health situation of the population, besides a country's economic strength.[16]

The disappointing outcomes of massive deregulation and funding experiences resulted in a reconsideration or postponement of sudden and substantial legislative changes. At the moment, CEE-countries seem more carefully with duplicating (elements of) any existing model which transfer western problems in these countries. A more progressively introduced system change may seem to be more advisable. Such a concept includes several stages of reform.

---

15 Den Exter, A. P.–Hermans H. E. G. M. eds.: *The Right to Health Care in several European Countries.* The Hague, 1999. 170–172.

16 Whereas upward trends in unemployment and consumer prices have a direct negative effect on the health service expenditures in Eastern European countries since health service expenditures per head primarily depend on the economic strength of a country. MAJNONI D'INTIGNANO, B.: *Health Care Financing in Europe, Health Care Reforms in Europe.* Proceedings of the first meeting of the working party on health care reforms in Europe, 1992 Madrid. World Health Organization, Regional Office for Europe, Copenhagen, Doc. ICP/PHC 210(C)BD, quoted by ZARKOVIC, G.–MIELCK, A.–JOHN, J.–BECKMANN, M.: *Reforms of the Health Care Systems in Former Socialist Countries: Problems, Option, Scenarios.* Oberschleissheim: Medis Institut für Medizinische Informatik und Systemforschung, 1994. 31.

3.3 Themes in the reform stages

An extensive analysis of the content of the reform stages would be too far beyond the scope of this article. Here, several discerned elements will be roughly discussed since they affect all aspects of health care. What is important is the idea of gradually introducing legal modifications. Instead of losing the good parts as well as the bad parts, changing the legal structure should be aimed at combining the successes of a universal accessible health care system with western understanding to make a system more responsive to individuals' needs and economic incentives that encourage cost-efficiency. This concept implies a critical reflection on both former experiences and future legal changes. Instead of enforcing massive breakthroughs, a series of correlated incremental changes of the legislative framework seem to be more appropriate to cope with the unavoidable adjustments. In view of the overall trend towards a more market related health care system, legislative reforms may start with (relatively) minor adaptations strengthening the public health sphere which include organisational, allocative changes in health care services (e.g., redistribution of collective and individual health tasks, establishing health promotive and disease preventive activities at county and local level). Such regulatory reforms may function as precondition for a gradual shift towards a public/private funded health insurance system since many CEE governments have given preference to this method of finance above the chronic deficiencies in the contemporary health care funding.[17] Combined with allowing private physicians to act as independent contractors to health financing agencies, more and more the government will withdrawal from the organisation, provision and finance of health care. Combining different methods of funding could raise additional financial resources, as well as cost-effectiveness of their utilisation. After all, the introduction of new finance methods does not a priori conflict with the previous national health care system.

17 GOLDSTEIN, E.—PREKER, A. S.—ADEYI, O.: *Trends in Health Status, Services, and Finance. The Transition in Central and Eastern Europe.* Washington DC: World Bank 1996 Tecnolcal Paper No. 341 Vol I. 24. Also BECKMAN, M.—ZARKOVIC, G.: *Transition to Health Insurance in Former Socialist Countries in: The Process and Management of Change. Transition to a Health Insurance System in the Countries of Central and Eastern Europe.* Proceedings of the second meeting of the working party on health care reforms in Europe. Essen, 8. 1993 October 19–21.

Initial reforms

Restructuring the health care organisation is a main issue in the contemporary reforms. Interesting experiences have occurred in countries characterised by a 'classical' NHS-model. Governments are making or have intended to make the health care system more competitive by retaining public funding.[18] The purpose of these reforms is to make the resource allocation in health care more efficient, more innovative and more responsive to the consumers' preferences. Here, the separation between the purchaser and provider of health care was an essential element in the reform strategy. As concerns the split of primary care services, many CEE-countries are already familiar with this idea. Primary care providers function, to certain extent, as a gatekeeper to secondary care such as specialist care, prescribing drugs and hospital care. Strengthening their position can improve efficient care. A further step is to give primary care providers financial responsibilities for (part of) the costs of the follow-up care provided by others to their patients.[19] In this respect, several European forms with "budget holding primary care centres" already experience with financial responsibility for purchasing part of the second-line care (e.g., Russia, Leningrad, Sweden, Bohus).

The provider-purchaser split can be rather easily realised by introducing a kind of contract-model. In such a scheme (groups of) general practitioners, dentists, pharmacists are independent and contracted by the third-party purchaser (e.g., health authority or insurer) who acts as a prudent buyer of care on behalf of its members. Whether representatives of the profession negotiate its terms. Part of contracting providers concern the negotiations about the quality, volume and price of care. It is supposed that selective contracting by third-party purchasers will initiate competition among providers.

In a latter stage contracts with other providers (specialist care and institutional care) could then be a natural complement to these contracts and in fact could then be supportive to the conditions agreed upon in the contracts between purchaser and the primary care physicians.[20] Where agreement is not forthcoming, the government can use its legislative power to impose a contract.

---

18 FATTORE, G.: Cost containment and health care reforms in the British NHS, in: *Health Care and Cost Containment in the European Union.* Mossialos, E.—Le Grand, J. eds., Ashgate Aldershot, 1999. 733 e.a.

19 VEN VAN DE, W. P. M. M.: *Market-Oriented Health Care Reforms: Trends, and Future Options.* Soc. Sc. Med. 1996. 43. 5., 656–657.

20 VEN VAN DE: *op. cit.*, 658.

Reverse to the enforcement of health authorities, the contract give rise to private law rights, and providers can bring actions for breach of contract if payment is wrongly withheld.[21]

The gradual development of a public financed model (e.g., general taxes, earmarked taxes, compulsory insurance) combined with a system of contracts between (quasi) autonomous providers and third-party purchaser(s) of care reflects a shift away from a vertically integrated system towards a contractual model in which purchaser and provider of care have to conclude contracts with each other. The increased competition that will arise among providers is one of the elements of "managed or regulated competition" and is intended to allocate resources more efficiently.[22]

But despite the presumed attractiveness of managed competition, a major legal dilemma concern the package and scope of health care benefits to which patients are entitled to. The entitlements may conflict with the objectives of the managed competition reforms encouraging cost-effective substitution of care and increasing consumer choice.[23] Encountering an appropriate definition of health care (and thus the package of benefits) combined with sufficient room for managed care and attractive for alternative methods health care delivery creates another dilemma.

To deal with such dilemmas will be one of the main issues that might occur in the suggested strategy. In the short term, legislative incentives, which initiate the provider-purchaser split, should anticipate to the described problems.

For this moment, it can be concluded that current Western reform strategies with for instance separate (financial) resources for separate service packages offer interesting opportunities to CEE health care reforms.[24] Introducing comparable experiences require however a basis in the legal systems as they stand now. This means that the contemporary legal structures are not automatically incompatible with suggested new initiatives. But the legal conditions

---

21 MONTGOMERY: *op. cit.*, 106–107.

22 The prototype model of managed competition was developed by Enthoven as an alternative to the fragmented, inefficient inequitable U.S. health care system, in which unmanaged competition had resulted in an expensive and uncontrollable medical arms race. ENTHOVEN, A. C.: Consumer Choice Health Plan, *New England Journal of Medicine*, 1978. 298., 650, 709.

23 SCHUT, F. H.—HERMANS H. E. G. M.: Managed Competition Reforms in the Netherlands and Its Lessons for Canada. *Dalhousie Law Journal*, 1998. Vol. 20, no. 2., 2.

24 Cf, for instance, HERMANS, H.—NOOREN, J.: Contracting and the Purchaser-Provider split in Western Europe: A Legal-Organizational Analysis. *Medicine and Law*, 17, 1998. 167–188.

among which the transformation of the current regulative structure should occur, require a critical analysis concerning underpinning health care legal concepts.

Towards a pluriform health insurance system?

In a later stage, the hybrid finance scheme will more and more substitute elements of the national health care scheme into a mandatory health insurance system. This includes also generating additional finance mechanisms to provide in extra funding since the often unbalanced compulsory insurance scheme cannot guarantee (near) universal health care by itself. In CEE countries, voluntary insurance has been considered as a promising mean to provide in additional revenues such as nonessential care excluded from statutory insurance.[25] Besides, conditionally, a restricted private scheme offers the better off the possibility to opt out of the statutory insurance scheme and to insure themselves additionally and/or exclusively with a private insurer. Were voluntary insurance is available in the CEE [...], it currently provides only a small proportion of the total health care financing. It is, however, a source of financing that may grow significantly as institutional and regulatory frameworks are developed and the transition to new funding mechanism progresses.[26]

Besides voluntary insurance, other modalities of cost-sharing mechanisms such as co-payments and external sources will be or have already been introduced.[27] A comparable shift from a declining share of public to private funding has been noticed in EU countries. Patients in many countries have experienced substantial cost-sharing increases as a result of higher charges; indeed, this seems to be an important component in the shift of the public-private mix in these countries.[28]

The increasing necessity to contain costs and improve efficiency will further pressurise patients' rights. Protecting these rights is a legal affair par excellence. Therefore, changed circumstances impel the legislature to develop

---

25 Such arrangements (although in an embrionic stage) can already be found in several CEE countries: e.g., Czech Republic, Slovakia, Slovenia.

26 SALTMAN—FIGUERAS: *op. cit.*, 133.

27 Cost-sharing defined as a form of splitting the costs of health care services in order to make users economically responsible for their behaviour. However, in the CEE setting its primary aim is to raise the revenues. SHEIMAN, I. in: Den Exter—Hermans: *The Right to Health Care in several European Countries. op cit.*, 110–111.

28 HUBER, M.: Health Care Financing in European Union Member States. An Initial Perspective Based on Recent OECD Work on Overall Social Trends, in: *Health Care and its Financing in the Single European Market.* Ed.: Leidl, R., Amsterdam, 1998. 63.

or modify the contemporary codes in a more sophisticated frame of (new) patients' rights including the inviolability of the human body, informed consent, disclosure, correction, and removal of data recorded by different types of information systems. Needless to say that the codification of patients' rights must be considered in a broader perspective. To effectuate these rights requires, inter alia, an easy accessible system to complain.

4. Validity of the law-making model: Interim results

4.1 Methodology and objective of research

To verify the feasibility of the optional scenario as outcomes of the theoretical model, an explorative study has started with describing the main features of the Hungarian legislative framework. The selection of Hungary was inspired by future enlargement of the European Union, which necessitates revision of the national legal framework according to EU standards. Furthermore, the Hungarian health care system reforms have already experienced considerable changes with related legal questions.

Outcomes of research enable to examine the state of the law-making practise. Comparing the actual legal decision-making process with the analytical method of law-making may contribute to verify the validity of the hypothesis: a rational model of health care law-making.

In view of the scope and complexity of research, limiting the field of research is inevitable. Selected clusters of health care legislation include public health, organisation and planning of health care resources, health financing and patients' rights) and type of regulation (parliamentary acts). Besides Hungary, comparative research will mutatis mutandis include the Czech Republic and Poland as eligible EU candidates. Hereafter, temporary outcomes are focussed on a first analysis of the model in Hungary.

4.2 Initial outcomes: Patterns in legislative reforms and (lacking) correspondence with the analytical concept

Besides the Constitution,[29] the health care right in Hungary is embedded in its legal framework. A system which is still under construction. It appeared that

29 According to article 70 D, access to health care is still defined as a citizens right, contrary to recent legislation (Compulsory Health Insurance Act 1997) which formulated such a right as a social insurance entitlement based on compulsory individual contributions.

legislative reforms were primarily concentrated on clusters such as, public health, organisation and planning of resources, health financing and patients' rights. Furthermore, the described features of the legal structure and sequence of legislative reforms since 1989 largely endorse the notion of a step by step approach, starting with reorganising public health legislation.

Sequence clusters of health care law

In general, the sequence and regulated subjects of the enacted laws corresponded with the previously discerned clusters of health care law. Nonetheless, a separate legal cluster on controlling quality of care is largely absent. This could be explained by the legislative system itself, which considers quality control as subordinated to public health given the referrals in the Public Health Act, Health Care Act and Hungarian Medical Chamber Act (1994). The indirectness of references, however, does not seem to support this notion. Otherwise, it is more likely that the Hungarian legislature did not prioritise quality control in the legislative reforms at all. In that case, omissions and latent problems on quality control call for adequate legal measures. In view of future enlargement, conformity towards Community legislation is a precondition for entering the market. Incorporating European directives concerning equivalent professional qualifications and skills (as part of quality control) are particularly important when the common market will be opened for Hungarian health professionals. The Community already adopted specific directives concerning the mutual recognition of diplomas of doctors, dentists, pharmacists, midwives and nurses.[30] However, up until now, the implementation of those European qualification standards, which enable free movement of persons with regard to health, have hardly been taken into consideration since the Hungarian Minister of Health does not expect a mass outflow of health personnel even with the present major differences in wage levels between Hungary and that of the EU Member States.[31] Given the structural overcapacity of medical doctors and the intended drastic measures to reduce the number of hospital beds, nevertheless, such an outflow of physicians is quite likely. Reverse, the recognition of foreign diplomas and licensing of health personnel who intend to start a (specialised) practice in Hungary has not

30 E.g. Directive 93/61/EEC to facilitate the free movement of medical doctors, and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications. Official Journal of the EC no. C 323, 1992.

31 Health and Enlargement of the EU: Views of a candidate Country. Dr Árpad Gógl, Minister of Health of the Republic of Hungary. Eurohealth Vol. 4, No 4, Autumn 1998. 18.

been addressed either, although that might interfere with planning and allocation policy.

Problem analysis: Health financing example

Introducing a compulsory health insurance system was a second major reform issue, initiated in 1993 and modernised with the introduction of a new Compulsory Health Insurance Act 1997.[32] According to the act, the Health Insurance Fund (Országos Egészségbistositási Pénztár – OEP) contracts with health care providers to guarantee the insured adequate care without reasonable time. The insured are entitled to a universal package of services, including preventive care, primary, secondary and tertiary care, and child care 'provided in kind' and free of charge.

With the introduction of the package of health insurance legislation, several problems remained. For instance, the act failed to define the benefit package covered by the National Health Insurance Fund. Due to the lack of an explicit catalogue of defined services, all services are practically included although some types of health care services are not covered by the fund. In the near future, limiting the scope of services covered by the Fund will be inevitable given its structural distorted funding.[33] Such a debate introduces a new impetus into the public/private insurance discussion. After all, restricting the number or scope of entitlements creates a potential market for both non-profit as for-profit insurance companies to reinsure the generated deficit by means of additional or supplementary insurance. Up to now, politicians has avoided such a discussion. But it will be clear that priority setting by means of limiting individual entitlements will to a large extent determine the future discussion.

The discussion on priority setting and creating legal conditions for private health insurance cannot solve the problem of shortage of funds on its own.

---

32 Act LXXX 1997, Act LXXXI 1997, Act LXXXII 1997, Act LXXXIII 1997 and Act LXXXIV, 1997. This package of laws encompasses further regulative reforms of the social insurance right, formalising the split of the health care and pension financing. In January 1998, these acts came into force (with the exception of Act LXXXII that came into force in September 1998).

33 Each year, since 1991, the deficits of the OEP have increased. Up to now, both the Ministry of Health and the OEP have been unable to contain expenditures. Limiting the scope of the compulsory benefit package has been considered as an option to bridge the financing gap since such a measure would strengthen the role of private insurance. National Economic Research Associates (NERA). October *1998 Financing Health Care. The Health Care System in Hungary.* 172.

Imperfections in the methods for levying health care funds and revenues, which do not reach, anticipated levels are mentioned as other major reasons of the distorted funding.[34]

Pathology of law-making practice: failing implementation and absence of systematic evaluation

Vaguely formulated policy objectives may be accompanied by only limited program design at legislative stage. Thus at implementation stage all the battles about conflicting objectives or values which were ignored or circumvented at the earlier stage will emerge.[35] This is exactly what happened with the programmatic declaration of a Health Insurance Act (1993). Drafting the Compulsory Health Insurance Act was not accompanied with a debate on limiting entitlements. Since it was, and still is such a highly controversial issue, government could do nothing else than preserving a comprehensive benefit package ignoring the financial consequences. After enactment, the changing position and function of OEP from a 'passive' purchaser into a more proactive contractor has caused various conflicts both on reimbursement of entitlements and types of contracted services. These disputes reflect the underlying dilemma between insufficient finances and practically unrestricted claims.

Furthermore, an extensive legislative production in a rather short period of time hinders an effective realisation. Besides guidelines for those operationalising the rules, administrative and judicial enforcement mechanisms are indispensable to effectuate legal standards. Generally, this aspect of the law-making circle has been neglected. Too often, enactment of a legal norm was considered as final stage in the legislative process while self-implementing norms do not exist. Administrative enforcement, if present, frequently faces serious problems. Judicial enforcement however, was not considered a serious option and happened sporadically. Mobilising public opinion is still more effective than starting a court procedure to enforce individual rights.[36] However, it is expected that recently introduced complaint procedures may change this situation.

---

34 NERA, *op. cit.*, 55.

35 Hogwood, B. W.—Peters, B. G. (eds.): *The Pathology of Public Policy.* Oxford, Claridon Press, 1985. 25.

36 Interview Data Protection Parliamentary Commissioner Office, Dr. Székely, I. Budapest, October 1998.

Besides individual (quasi) judicial procedures, in Hungary, systematic monitoring and reviewing legislation is absent. Since the first parliament (1990–1994), no scientific evaluation of (key elements of) formal acts has so far undertaken. Indeed, yearly parliamentary budget debates include some monitoring and evaluation aspects but has its limitations. A systematic scientific assessment, however, about effectiveness on legislative experiences is unknown. Consequently, review and correction of legislation and legislative policy based on evaluation studies do not take place.

5. Conclusions

The Hungarian example illustrates that the described method of systematising the legislative structure can identify existing and potential obstacles. By means of analysing the steps of the theoretical model, it has been attempted to diagnose pathological features and suggest treatment for law-making. Drawn from described disorders and consequences of invalid legal rules and its legislative strategy, the diagnosis of legislative 'malnutrition' concerns both the method of lawmaking as the substantive legal concept of health care law. Proposed treatment starts with strengthening the legislative role in the reform discussion specifying objectives, legal preconditions, and selection criteria of needed legal rules. Besides emphasising a more rational decision making on substantive norms, quality of law-making would improve with structural assessment of legislative results. Review to meta standards as legality, legitimacy, effectiveness and efficiency enable to evaluate outcomes with underlying targets that subsequently may entail alteration of the reform plan.

More concrete, initial analysis of the Hungarian legal framework has revealed several lacunas, regulatory imperfections in different fields such as health care financing and quality control. While poor enforcement mechanisms and its consequences exposes a more methodological deficit. Promoting a circular approach of law-making provide a cocktail of remedies presenting a combined cure with a methodological conception of health care law. Intended to treat the disease, suppressing symptoms and alleviation of suffering are considered as supportive objectives. A second and third opinion in different CEE settings enable to verify the acceptability of suggested therapy.*

* Acknowledgement — The author would like to thank Umberto Hermans and Ernesto Hulst for their stimulating comments on an earlier draft.

ACTA JURIDICA HUNGARICA
1999 40 Nos 1-2, pp. 77-103

1216-2574 / 99 / USD 5.00

Gábor TÖRÖK

The Classical Model of Bankruptcy Law

The common *legal policy basis* of the Bankruptcy Acts of Europe in the 19th century was clearly the *liberal capitalist economic concept.* Whereas in terms of legal policy those Acts *sought the fullest possible satisfaction of creditors' claims* on the one hand and, on the other, *displacement of bankrupt persons and firms* from the economic life, especially those who engaged in trade.

In the *French*[1] *and Italian*[2] law and within the ambit thereof no one but *traders or merchant companies* were allowed to be subjects of bankruptcy. In addition to the historical roots, this approach was justified by claiming that trade was the area where failure of a commercial firm was able to start, almost always and within a very short period of time, a chain-reaction that was liable to undermine the economic stability of the particular region. Therefore it was held necessary to intervene as quickly as possible, isolating and then liquidating a ruined firm, thereby preventing the occurrence of a chainreaction and turning bankruptcy into an "isolated phenomenon"[3] of the economy. This purpose was

---

1 *Code de Commerce* (Book III, 22 September 1807).

2 *Italian Commercial Act of 1865.*

3 KISS Gy.: *A csőd közgazdasági és jogi megközelítése. (Vázlat a polgári magyar és a mai francia csődjogról.)* A "szocialista vállalat" kutatási főirány keretében készült tanulmány. Kézirat [An Economic and a Legal Approach to Bankruptcy. (Outlines on the bourgeois Hungarian and the modern French Law of Bankruptcy.) Study prepared in line with the Main

served by the relative speediness and the informality of bankruptcy proceedings. The failure of other than traders and firms did not pose such direct dangers in respect of the economy, rather their elimination had a much more indirect effect, with creditors seeing their claims satisfied under the rules of ordinary execution.

The solutions of the German-Austrian type[4] *of legislation extended bankruptcy both to traders and non-traders.* The reason, along with the less determinant role of trade, was to seek in the German thought of legal dogmatics: the precise and exhaustive "search for truth" obviously could not allow the parties as large elbow-room as it was left by the *French* approach. Of course, the consequences of this were also manifested in the proceedings themselves: as everything or almost everything was done or supervised by the court, the proceedings became time-consuming, with creditors often waiting for years to get their money. The preference to trade, however, made its effect felt in this field as well, since even these codes applied different rules to traders for the purpose of relatively simplifying and expediting proceedings, with no great success after all.

1. Procedural bankruptcy law (bankruptcy proceedings)

The device adopted by the French Code of Commercial Law[5] represented one of the early prototypes of the bankruptcy law system during the period of liberal capitalism. The procedure devised by this Code can be summed up as follows.

When a trader stops making payments he goes bankrupt, and the Commercial Court orders a declaration of bankruptcy against him if it learns the fact of failure, whether from the debtor or any creditor or otherwise. In its decree of bankruptcy the Court appoints a trustee among its own members and assigns one or more proxies (agents) to attend to the affairs of the bankrupt's estate temporarily. Thereupon the Court recedes into the background since most of the judicial tasks, mainly operative measures, are handled by the trustee in bankruptcy, who conducts the proceedings and controls the activity of the administrator of the estate, while his consent is required to the performance of legal acts by administrators in specific cases.

The proceedings can be divided into three phases.

Trend of Research on the "Socialist enterprise", Manuscript], Pécs, 1982, 1.

4 *The German Reich Bankruptcy Act* was promulgated on 10 February 1877.

5 See fn. 1.

In the first phase the chief duty of proxies, or agents is to take preliminary security measures (attachment of the bankrupt's estate, arrest of the bankrupt where appropriate, sale of perishable goods and drawing up of a balance-sheet).

As the first step in the second phase, the trustee summons the creditors to meet and to elect provisional representatives from their own ranks, the elected representatives to be confirmed by the court in their post. (Thus, in the last analysis, the right of appointment is vested in the court.) Their function is to administer the bankrupt's estate, but their decision concerning the collection of claims or the sale of movables is subject to the trustee's approval. Furthermore, they have to find the creditors yet unknown, with as little as 40 days allowed for this task.

An important right of provisional representatives is to ascertain the total value of "passive estate", or the aggregate sum of claims. The representatives may propose acceptance of a particular claim or may even dismiss claims. In the latter case it is for the court to decide on the validity of a creditor's claim after the prior hearing of the trustee. The closing step in this phase consists in calling together the creditors, who are invited by the trustee to reach a condordat in the first place. the validity of the condordat requires the votes in favour of the majority of creditors present if the total number of voters in favour covers three-fourths of all claims.

Where no concordat is reached, the proceedings reach the third phase: at the same meeting the trustee proposes conclusion of a so called "union" contract, the substance of which consists in creditors deciding, by a majority of votes, to sell the bankrupt's estate, with permanent representatives elected from among their own ranks for the performance of this task. The permanent representatives submit monthly reports on their work to the trustee, who orders, on the basis of reports, satisfaction of privileged claims or, if funds are available, that of the rest of creditors. They rely on this order of the trustee for drawing up the plan of division and effecting payments. The proceedings are terminated upon the court's acceptance of the representatives' final account.

This procedure as set out in the *Code de commerce* was further simplified by the Bankruptcy Act of 1838, which abolished the status of "proxy", or agent and provided that the court must appoint, already in its decree of bankruptcy, the provisional representatives, who were either confirmed or simply replaced by the creditors summoned to meet later. The Code set shorter time-limits to expedite proceedings and prescribed other measures of substantive law in an effort to promote early conclusion thereof.

In Germany the uniform *Reich* Bankruptcy Act was promulgated on 10 February 1877, shortly after the proclamation of imperial rule. The promul-

gation of the Act was preceded by seven years of preparatory work. The Act was based on the Prussian Bankruptcy Act,[6] but it went far to take into account the results of legal development in Europe, especially in France.

The Code covers substantive law, procedural law and penal sanctions in three parts. In an effort to regulate the economic processes at work as accurately as possible it determined the rights and duties of the subjects of bankruptcy extensively and minutely. As under the Prussian Act, the main actor was the court.

Under the Code, the institution of proceedings can be requested by the debtor or the creditor, and in exceptional cases it may also be ordered *ex officio*. If the positive law basis for adjudication in bankruptcy exists, bankruptcy is declared by the court. Then the bankrupt's assets are attached and the creditors file their claims. Appointed in the decree of bankruptcy, the administrator of the bankrupt's estate (receiver) tabulates claims and makes a proposal for the extent of satisfying them.

It is at the so-called liquidation hearing that the court decides on the satisfaction of creditors' claims or, to be more precise, on the rate of satisfaction (this is called "sorting"). Thereupon the administrator's role is terminated and replaced by the so-called committee of bankruptcy elected by creditors from among themselves. Acting under supervision by the court and the trustee in bankruptcy, the committee disposes of the assets and divides the proceeds according to strictly defined principles and the ranking of creaditors for dividend. After distribution of the estate the court declares the bankruptcy closed, but if unknown bankruptcy assets happen to be disclosed later, the same proceedings are continued.

At any time during the proceedings (naturally before the deadline) the bankrupt may reach settlement with his creditors. The legal form of such settlement is called compulsory settlement, or concordat.

In Hungary the system of the liberal capitalist bankruptcy law was established by the Act XVII of 1881.

Under it, proceedings generally commence on petition; *ex officio* institution thereof is only exceptional. The Act regulated two cases of proceedings instituted on petition: either immediate proceedings (without preliminary evidence) or proceedings after court hearing:

Immediate declaration of bankruptcy, if

— a petition in bankruptcy is filed by the debtor;

— a petition in bankruptcy is filed by an heir against the decedent's estate;

6 *Prussian Bankruptcy Act of 1863.*

— the creditor files a petition in commercial bankruptcy and shows beyond question that the debtor has stopped making payment.

Declaration of bankruptcy after court hearing, if

— on the basis of claims duly evidenced by documents the creditors show the probability of their claims exceeding the debtor's assets. If at the hearing the debtor is unable to prove his solvency or fails to give other assurance for satisfaction of claims or is absent from the hearing, the proceedings are commenced by the court.

Like the other systems of law, the Hungarian law of bankruptcy leaves it to judicial practice to actually establish the existence of bankruptcy or to define the criteria for adjudication in bankruptcy. It follows as a matter of course that the statements of policy issued by courts have focused mainly on what is insufficient to prove a debtor's bankruptcy.

According to judicial practice,

— bankruptcy may not be declared if the petitioner specifies only such assets as were, prior to bankruptcy, attached[7] to cover claims exceeding the value thereof;

— the fact that the bankrupt's movables were partly sold at auction by order of the court and are partly administered by the sequestrator is insufficient to establish the probability that the debts will exceed the bankrupt's assets.[8]

In Art. 84[9] the Act made it a duty of the creditor to duly verify the legal title to his claim. Judicial practice defined the range of claims that could not be deemed to be "duly verified", *namely*

— claims depending on the occurrence of a subsequent event;[10]

---

7 *Curia*, 1404/1885. 8.

8 *Curia*, 1044/1913.

9 "Art. 84. Where one or several creditors file a bankruptcy petition on the basis of duly verified but unexpired claims and show the probability that the debtor's liabilities exceed his assets, the court shall appoint a date of hearing on not later than the third day and shall, under the rules of procedure relative to the service of the first bankruptcy order, summon the debtor with an in junction to give security to the creditors filing the petition or to prove his solvency by presenting a statement of his assets and liabilities.

If the debtor fails to comply with the said injunction and the creditors do not withdraw their petition, bankruptcy shall be ordered forthwith.

Postponement of the hearing shall be subject to the assent of the creditors who have presented the petition of bankruptcy. For an important reason the court may postpone the hearing without the creditors' assent.

If the court finds the bankruptcy petition unfounded, it shall reject it without ordering a hearing."

10 *Curia*, 596/1884.

— doubtful claims at issue;[11]

— claims based on a statement of account[12] annexed by the creditor to the bankruptcy petition, but challenged by the debtor.

Claims are also deemed not to be "duly verified" if

— a petition in bankruptcy is not filed by all the heirs;

— by relying in the documents enclosed, the court is unable to establish beyond question the existence of preconditions for adjudication in commercial bankruptcy.

Proceedings are instituted ex officio

— in respect of property situate in Hungary and owned by a corporation with foreign interests;

— in cases where the procedure for concordat without bankruptcy proceedings against a trader was terminated because the trader

— had failed to pay in advance the costs of proceedings;

— had failed to submit a list of his creditors and debtors;

— had failed to submit his inventory and balancesheet of assets and liabilities within the set time-limit;

— had kept delaying, with intent or by gross negligence, the notification of his insolvency, thereby reducing funds accessible to creditors;

— because his offer to reach settlement had been refused by the majority of creditors;

— because the court had denied approval of the concordat accepted by creditors.

No bankruptcy proceedings are instituted if the debtor has a single creditor, if the bankrupt's estate is insufficient to cover even the costs of proceedings,

---

11 During the bankruptcy proceedings no evidence is admitted of the justice of the claim of the creditor filing the bankruptcy petition, but, in accordance with Art. 84. of Act XVII of 1881, the creditor must, already in his petition, certify by document that his petition would have been impossible to grant if only for the reason that he has no duly verified claim, because for the purpose of establishing whether the complainant became the defendant's creditor by virtue of the business transaction mentioned in the petition it should necessarily have been considered whether the transaction contested by the defendant had actually been effected and performed in such a manner and under such conditions as are claimed by the complainant, but, since this question could not be decided by the court within the frameworks of the present bankruptcy proceedings, the complainant's status as creditor is not established (*Curia*, 1699/1890, 7 January 1891; 1155/86 in similar terms).

12 The statement of account annexed by the creditor to his bankruptcy petition and challenged by the debtor is inept for proving in itself the existence of the claim (*Curia*, 233/910, IV, 15 March 1910).

or if proceedings not involving bankruptcy have commenced (these circumstances act to bar bankruptcy).

The Act provides specific facilities for creditors to file a bankruptcy petition against traders and commercial firms. While the facilities are undoubtedly enjoyed by creditors, the primary goal contemporary legal policy was to sort out bankrupt traders as soon as possible.

The court decides by order on each bankruptcy petition, such order to state the reason for the decision and to be sent to the parties involved.

The court's decision is appealable, but the appeal has only partial delaying force, as the declaration of bankruptcy takes effect under substantive law irrespective of appeal, with the appointment of trustee and administrator and with the order of attachment becoming valid. On the other hand, the delaying force of appeal is manifested in that the so-called bankruptcy notice may not be issued before the final decision, meaning also that the procedures for liquidation and property administration will not commence.

The court issues the bankruptcy notice after its order becomes final.

The notice must show

— the name of the court;

— the name, occupation and address of the bankrupt;

— the names and addresses of the trustee and the administrator;

— the time-limit set for the filing of claims;

— the day of the liquidation hearing, and it must contain;

— summons to those wishing to act as creditors in order to file their claims with a view to judging their legal ground and classifying them, even if a separate action has been brought in respect thereof;

— summons to lienors and persons entitled to retention to notify their acquired rights or the show the pledged property itself to the trustee in bankruptcy;

— a warning to persons entitled to failure to assert their rights will be no bar to realisation and distribution of the bankrupt's estate;

— summons to bankruptcy creditors to attend the hearing.

The court orders attachment of the estate immediately after the declaration of bankruptcy. The bankrupt's business documents will be transmitted to the administrator, while his securities and cash not absolutely necessary for his daily activity will be deposited in court. Acting under the trustee's supervision, the administrator takes an inventory of the bankrupt's assets. Concurrently with stock-taking and attachment, the trustee may instruct the bankrupt to draw up a balance-sheet of assets and liabilities.

The time-limit for the establishment of claims against the bankrupt's estate must be set between 30 and 90 days. The administrator must carefully examine

the claims filed and their enclosures, the bankrupt's accounts and other business records, and he must hear the bankrupt on the claims in order to enable him to state his view during the hearing about the justice and classification of claims.

The committee of bankruptcy is elected during this same period, at the first hearing, which is to be presided over by the trustee.

The liquidation hearing must be held within 30 days from the expiry of the time-limit for the filing of claims. During the intervening period the administrator must tabulate creditors' claims, such tabular statement to contain the personal data of creditors, the amounts of claims and incidental charges, and the legal titles to claims.

The liquidation hearing is conducted by the trustee and must be attended by the interested creditors, the administrator and the bankrupt, but absence of the bankrupt and creditors is in itself no bar to holding the hearing.

The first to speak during the hearing about claims not included for some reason in the tabular statement and then about the claims contained in the statement are the administrator, the creditors and the bankrupt. Anyone may contest any claim in respect of its classification and justice (right of challenge).

If no one exercises his right of challenge in respect of a particular claims, the record of the hearing itself becomes an executory deed. In cases where the parties uphold their objections and the trustee did not succeed in his attempt to reach a settlement, the creditors are to enforce their claims in legal proceedings (this is called separate litigation).

The so-called deadline for liquidation is decisive to the sale and administration of the bankrupt's estate, for, prior to its expiry, the bankruptcy assets are manager by the administrator under the supervision of the trustee, the bankruptcy court and the provisional committee of creditors. The administrator may not sell movables except when an obvious advantage to the estate is obtained or their retention would incur extra costs *par excellence*, whereas immovables may be sold only and exclusively with the aim of preventing damage. Accordingly the only positive task to be accomplished during the period indicated is recovery of outstanding debts.

The situation is completely changed after the deadline for liquidation, which is fixed by the trustee at the liquidation hearing. From that day onwards, after the election of the permanent committee of bankruptcy, the estate is administered by creditors independently, and the process of actual realization is started.

The proceedings concerning the distribution of the estate are conducted by the administrator on the basis of a plan he drew up previously. The order of payments to be made is stated in the plan, so the creditors gain full or proportional satisfaction from the fund of distribution, according to the classifi-

cation and ranking of their claims, after deduction of the costs and debts chargeable to the estate.

Distribution proceedings must take place as many times as enough funds have accumulated from the proceed of realization. The last procedure of this kind is referred to in the Act as ultimate distribution, which is followed by the court's final decree closing the bankruptcy on the basis of the trustee's report.

The bankrupt may nevertheless achieve completion of the bankruptcy proceedings by concluding a concordat, since during the period between the liquidation hearing and the ultimate distribution he may at any time make an offer of concordat with his creditors. The substance of the offer lies in the bankrupt's willingness to pay part of the claims in return for termination of the proceedings. How great can that part be? Obviously, it is ultimately determined by agreement between debtor and creditors, but the law, precisely by reason of preventing any act calculated to deceive creditors, who are not in an advantageous position, determines the minimum rate, below which the concordat may not be approved.

The bankrupt may initiate the procedure for concordat only if he undertakes, in respect of his creditors not enjoying an advantageous position (Class II of bankruptcy creditors), to pay at least 50% of their claims during a period of 8 months or by equal instalments over 10 months (or if the offers 60% or more, he evidently must pay only 50% during 8 months, with the facility of an additional 10 months for payment of the rest by instalments).

If the bankrupt's offer is below 50%, the concordat may not be approved except when the bankrupt is able to effect prompt payment of 25 to 50% of claims and to enclose with his bankruptcy petition a written declaration of approval by creditors representing 50% of all claims. In this connection, however, it should be pointed out that the creditors are not bound at all by this declaration of approval, which may be revoked without comments at any time.

2. Legal effect of the declaration of bankruptcy

2.1. An overall view

The classical law is completely clear and unambiguous in that the primary purpose of this legal institution is to ensure satisfaction of creditors' claims. This had been the starting point, which ultimately led to the bankruptcy law being conceived of as universal execution, but it also called for a well

definable range of property (bankrupt's estate) that was in principle accessible to creditors, and it required an exact enumeration of the participants' rights and duties in the different phases of proceedings.

The court's decree of bankruptcy starts the bankruptcy proceedings on the one hand and, what is now more important to our subject, basically changes the previous, normal pattern of contract-law relations on the other, altering the legal position of the bankrupt and the persons maintaining relations with him and, chiefly in respect of the bankrupt, essentially influencing the debtor's status in social life. This impact results from the general and the special legal effect of the declaration of bankruptcy.

2.1.1. General legal effect

— The bankrupt person loses his rights of administration and disposal relative to the property constituting the estate.

— Any inheritance or legacy legally due to the bankrupt forms part of the estate.

— The bankrupt may not demand maintenance out of the property constituting the estate.

— The bankrupt's legal declarations regarding the property constituting the estate are invalid in respect to creditors.

— Any performance in the bankrupt's favour is valid only if he consigns the object(s) of performance to the estate.

— No legal proceedings may be started or continued against the bankrupt in respect of the property constituting the estate.

— No property, lien or retention right may be acquired, and no security or attachment or execution ordered, on the basis of the bankrupt's debts in respect to things or rights forming part of the estate.

— Claims against the bankrupt become due.

— Prescription does not commence or, if running, is interrupted immediately.

2.1.2. Special legal effect

The bankrupt's transactions preceding bankruptcy are judged differently in respect of whether or not the party effecting them acted in good faith. If the party acted in good faith, the contracts are valid and will have the status of creditors in the particular class, but if he did not, the invalidity or nullity of the contract may be established.

As can be seen, the consequences of the declaration of bankruptcy thoroughly change the existing pattern of relations and therefore a particular

measure of care should be devoted to the precise definition of the property constituting the estate and to the date of declaration, which is nothing else than that of the occurrence of the general and special legal effect.

2.1.3. Property constituting the bankrupt's estate

The classical law takes three different approaches to his question

— Under the French, Belgian, Italian, Austria, Hungarian and other laws,[13] the total assets admissible to execution, or any property accruing to the estate during the proceedings following the declaration of bankruptcy forms part of the bankrupt's estate.

— Under the Prussian Code,[14] the bankrupt's estate includes his total assets existing and expected.

— Under the German Reich Bankruptcy Act,[15] the bankrupt's estate includes only and exclusively the property existing and admissible to execution at the time of the declaration of bankruptcy.

As it appears clearly from this enumeration as well, the majority solutions of the 19th century focused on admissibility to execution, but regarded any increment of property during the proceedings as also forming part of the bankrupt's estate.

Accordingly, *the legal effect of declaration*

— extends only to the bankrupt's property, meaning also that the bankrupt must have the right of ownership under this general rule. Hence a thing possessed but not owned by the bankrupt forms no part of his estate. The bankrupt's total assets are constituted solely by liquid assets rather than by the sum of things, rights and liabilities, and they include any financial claims of the bankrupt, whether *in rem* or personal under the law of property, which he can validly raise on things of another, as well as all things not held but owned by him.

— Nor is it disputable than the overwhelming majority of codes considers any increment of property during the proceedings to form part of the bankrupt's estate. Such increment includes that part of property acquired by the bankrupt as a reward for his own activity, since no legislation prohibits him from engaging in gainful activity during the period of bankruptcy proceedings.

---

13 *French Bankruptcy Act* (Art. 443), *Belgian Bankruptcy Act* of 18 April 1851 (Art. 444), *Italian Commercial Act* (Art. 669), *Austrian Bankruptcy Act* (Art. 1), *Austrian Bankruptcy Act* of 28 December 1868.

14 *Prussian Bankruptcy Act* (Art. 1).

15 *German Reich Bankruptcy Act* (Art. 1).

The bankrupt may carry on such activity anywhere, and it is even possible for him to be employed at his own firm against which a bankruptcy order has been issued. Although this remuneration, or the reward for his work is, in theory, part of his estate, it should be stressed that it is this sum that was primarily destined for his maintenance and that of his family. All codes (except the Prussian, of course) agree in that the bankrupt's earnings serve above all for his maintenance and that of his family and that he must bring into the estate only that part thereof which is not required to cover the cost of living. This was taken so seriously that the law provided in principle that the bankrupt's income did not ipso jure form part of the estate and also left it to the court to determine any deductible part of income. The criterion of admissibility to execution is an essential element in respect of the bankrupt's estate. At this juncture we do not venture to give even an exemplificative enumeration of what can be and cannot be an object of execution as the list differs by country.

On the whole, classical literature concurred with the approach set out above, but, again, what followed from it was the concept of bankruptcy as execution. As Apáthy wittily wrote, "Both theory and practice have always concurred in that the legal effect of declaration of bankruptcy extends to all assets of a bankrupt. Still, nor can it be questioned, at least at present, that the property which cannot be an object of execution is to be exempted from the legal effect of declaration. Both views are in accord with the substance and nature of bankruptcy, both cases are natural concomitants of bankruptcy, which *cannot be considered other than general execution* (my emphasis — G. T.). The only difference between ordinary execution and bankruptcy consists in that the former is limited to a certain part of property, perhaps to some chattels, while the latter affects the totality of a bankrupt's assets. This approach entails the need for the definition of assets that can be surrendered to bankruptcy to be governed by the general principles of execution".[16]

2.1.4. Commencement of the legal effect of declaration

Under the Hungarian and Austrian laws, the date of commencement of declaration is the day on which the court's decree of bankruptcy is nailed up to the court's notice-board. The same solution was adopted by the French, Italian and Belgian bankruptcy acts, but the Prussian and German Reich

16 APÁTHY, I.: *A magyar csődjog rendszere. I. kötet, Anyagi csődjog* (System of the Hungarian Law of Bankruptcy. Volume I, Substantive Law of Bankruptcy), Budapest, 1887, 68–69.

bankruptcy acts[17] define the date of commencement of legal effect as the hour at which the court decree is issued. From this it directly follows that these Acts required the court decree to indicate its exact hour of issue.

As against the general concurrence of literature in respect to assets constituting a bankrupt's estate, Hungarian literature was also deeply divided on this question. For instance, Lajos Králik, another prominent jurist in bankruptcy of his time along with Apáthy, clearly links the date of declaration to the hour of issue of the court's decree of bankruptcy, considering it *ipso jure* in nature.[18]

2.2. The bankrupt's rights of administration and disposal

In terms of property law it is beyond doubt that the most serious consequence of the legal effect of declaration results in the bankrupt losing his rights of administration and disposal in respect of assets constituting his estate, exercise of these rights passing to the administrator of the bankrupt's estate. On the other hand, the administrator's rights are relatively limited since they showed a much stronger goal orientation of bankruptcy assets than they do today, namely the prevalence of the requirement for the property to be used for satisfaction of creditors' claims, mainly those who had a valid legal title already at the time of declaration. At the same time, however, loss of the rights of administration and disposal does not affect the bankrupt's right of ownership. The bankrupt remains the owner of the entire estate and loses only some partial, though undoubtedly significant, components of his ownership right. Contemporary literature[19] can be said to be completely unanimous on this aspect, and it also resulted from this approach that no separate provision on the right of ownership was necessary in respect to the assets possibly remaining after conclusion of the bankruptcy proceedings, since the bankrupt did not lose hid ownership right and hence there was no need to produce any legal ground for devolution of ownership in order for him to be again the actual owner of the remaining assets, that is, what terminated in respect to this part of property was the exercise by another of the rights of administration and

---

17 *Prussian Bankruptcy Act* (Art. 121), *German Reich Bankruptcy Act* (Art. 100).

18 KRÁLIK, L.: *Magyar csődjog* (Hungarian Bankruptcy Law), Budapest, 1881, 18.

19 See, e.g., HERCZEGH, M.: *A csődtörvénykezés Magyarországban és Erdélyben* (Bankruptcy Legislation in Hungary and Transsylvania), Pest, 1872, 22; KRÁLIK: *op. cit.*, 13; WENGLER: *Der Concurs der Gläubiger*, Leipzig, 1871, 940; SCHUSTER: *Darstellung der Concursordnung*, Wien, 1857, 13.

disposal heretofore restricting the bankrupt's right of ownership. From his point of view this meant no more than that he was free again to exercise his ownership right without restrictions.

Considering that the bankrupt loses his rights of administration and disposal only and exclusively in respect to his estate, the fact of declaration of bankruptcy affects neither his personal rights concerning other property, nor his right of disposal otherwise existing. So there is no bar to the bankrupt establishing legal relations with third persons or even with bankruptcy creditors, the only limitation being that such relations may not affect the bankrupt's estate itself.

It follows from the oft-mentioned approach of the classical law that while the bankrupt's rights of administration and disposal actually pertained to the administrator of the estate, the latter's strongly limited role gave rise to a serious dispute in literature about the creditors' status. The substance of the dispute can be summed up in that, according to some authors,[20] the tights of administration and disposal devolve only apparently upon the administrator, but, considering that he acts in the interest of creditors and ultimately carries out their "instructions", they are actually exercise by creditors after all. If such is the case, the question arises whether the legal effect of declaration of bankruptcy brings about *ipso jure* any community of creditors and whether such community takes on the character of legal entity.

The advocates of the opposite view[21] maintain that what we have here in respect of creditors is but a *quasi* joinder of parties, for the creditors themselves may not directly exercise the rights of administration and disposal. Some authors point out that, within the limitations imposed by national laws, these rights pertain only and exclusively to the administrator of the bankrupt's estate, who, acting in this capacity, may do everything the bankrupt might have done in the absence of declaration, notably both his right to decide on substantive matters and his right of representation are essentially unrestricted, with allowance naturally made for judicial control, but, on the other hand, the administrator may not exercise the rights which pertain by their nature to the bankrupt's person.

---

20 According to Apáthy, the rights of administration and disposal pass to creditors, but the latter may not exercise them. Creditors form a "causal joinder", which, however, does not qualify as a legal entity. APÁTHY: *op. cit.*, 78–80.

21 HERCZEGH: *A magyar csődtörvény* (The Hungarian Bankruptcy Act), Budapest, 1882, 21 et seq.; WENGLER: *op. cit.*, 70.

While the loss of the bankrupt's rights of administration and disposal or the nullity thereof when exercised can be said to be of full scope, that fullness is nevertheless limited for, as is clearly stated by several jurists in classical law,[22] the bankrupt's declaration at law is null and void only in respect to his creditors and to the extent that it goes to property forming part of the estate. Thus this *nullity* is by all means *relative*. Hence it directly follows that the bankrupt is free to dispose of any property and to assert any economic rights that do not form part of the estate either because they are inadmissible to execution or pertain to his person, and he may demand a valuable consideration for personal service and may even satisfy any of his bankruptcy creditors "from his own separate property". In this respect he is not tied to the ranking of priorities among claims as established by the bankruptcy act. In point of fact, he is deemed by law to be a third person, so in principle the possibility cannot be ruled out of his becoming, as it were, his own creditor by purchasing (satisfying) the claims of his creditors. (In that period, factoring did not naturally exist in its present form, and therefore practice was not influenced by any eventual precedence thereof, as research has found no trace of such cases causing any problem, or else legislation or at least judicial practice should necessarily have settled this question, since this "liberalism" as we see it today can be a rather serious source of abuse, let alone the fact that it is apt to easily upset the otherwise strict rank-order of creditors' claims.)

The relative nullity of the bankrupt's declarations at law has, among other things, entailed the need for law to cover the type of payments made to the bankrupt by third persons. The legal status of performance differs according to whether performance preceded or followed the publication of the decree of bankruptcy. If performance preceded publication, it was for the administrator to prove that the third person rendering performance knew of the fact of declaration, or else it was the duty of the third party to prove that he was ignorant of the fact of declaration.

Where the bankrupt brought the value of performance into the estate, the legal transaction was deemed to be absolutely valid, but if, as against the present-day solution, he did not do so, his failure did not by itself render the transaction invalid, it merely reversed the burden of proof in the manner indicated above. Thus, if the third person was able to produce reliable evidence that he had been ignorant (because of e.g., staying abroad) of the decree of bankruptcy despite its publication, he did not, in principle, face the danger of

22 HERCZEGH: *A magyar csődtörvény* (The Hungarian Bankruptcy Act), 30; KRÁLIK: *op. cit.*, 27; WENGLER: *op. cit.*, 104.

double performance. So good faith had a decisive role to play, but it naturally did not release the bankrupt from his obligation to add the countervalue of performance to the estate. The same rule applied when performance was effected by the representative of the contracting party.

Relative nullity continues to give rise to legal actión in which the bankrupt may be represented by himself or the bankrupt himself is made the defending party on account of some personal service.

Since these aspects bear on the bankrupt's personal capacity to sue or to be sued, which is not subject to restrictions, they do not affect the estate, but the situation is different if such legal actions (Whether active or passive) were brought prior to the declaration of bankruptcy and their subject-matter concerns even the estate itself wholly or in part. In these cases the administrator has the right of free option, deciding to act or not to act with full powers for the bankrupt in the legal proceedings. It is an interesting solution of these laws[23] that if the administrator discontinues an active legal action, while promptly recognizing the claim in an action against the bankrupt, the legal costs may not be charged as a debt to the estate. The materially "losing" party may, in the way of ordinary bankruptcy creditor, enforce his claim merely as a personal one. This is of immense disadvantage to him because at the ultimate distribution of the estate both accounts receivable and debts due enjoyed absolute priority. Practically there was no case in which such debts or costs were not paid off. For that matter, the proceedings could not even have been instituted in the face of such danger (cases in which the value of property is insufficient to cover even the costs of proceedings are deemed to be circumstances acting as a bar to bankruptcy).

2.3. Due-date of claims

An important element of the general effect of the declaration of bankruptcy is that creditors' claims against the bankrupt fall due with the fact of declaration. The reason for this provision of law is clear, as the administrator is thereby brought into a position to confront all claims against the bankrupt with the latter's accessible property. On the other hand, however, it is only the claims against the estate that fall due, in accordance with the general principle that it is exclusively the estate that serves as security for creditors' satisfaction. A

---

23 *Hungarian Bankruptcy Act* (Art. 9), *German Reich Bankruptcy Act* (Art. 10), *Austrian Bankruptcy Act* (Art. 10).

contract of the type which, e.g., aims at payment of some allowance or involves an obligation for periodic payments does not expire.

The classical laws were not completely uniform on the types of claims falling due. Under the Prussian, Austrian and Hungarian bankruptcy acts, for instance, only claims against the estate become due,[24] whereas under the French and Italian acts[25] the bankrupt's total debts can be regarded as falling due *ipso jure* with the fact of declaration of bankruptcy.

Another important question concerning this subject is whether the declaration affects and to what extent those persons who have, under some legal title, given security with regard to the bankrupt. The classical law referred to the totality of such persons as co-debtors and took the approach that the declaration was not to change their position, notably claims did not fall due against them. Králik justified that view along the following lines.

"It makes sense that a claim against a bankrupt should become due, because the bankrupt's right of disposal expired with the declaration of bankruptcy, so it is a commensurable incident that claims against him should also expire. However, this does not allow the conclusion that claims should expire against the bankrupt's co-debtors as well, that those who are to blame for nothing should be compelled to pay a debt which has not yet become due in respect of them. In the economic and business world of a trader and a manufacturer it is a matter of capital importance that calculated receipts and outlays should follow in line; payments cannot be undertaken and effected except in proportion to and by the date of receipts. Advancing expiry dates under such circumstance is equal to turning the most reasonable and most probable combinations upside down. It would ruin many traders or would at least compel them to establish a fund for that purpose, merely by reason of their going surety to meet such kind of unforeseeable contingencies, and it would divert much capital from productive operations, while causing innumerable failures in the case of banks and savings-banks going bankrupt."[26]

---

24 *Prussian Bankruptcy Act* (Art. 249), *Austrian Bankruptcy Act* (Art. 25).

25 *French Bankruptcy Act* (Art. 444), *Italian Commercial Act* (Art. 201).

26 KRÁLIK: *op. cit.*, 47.

3. Status of persons participating in bankruptcy proceedings, with particular emphasis on their liability

3.1. Debtor

A debtor may be a physical or a legal person. If the debtor is a physical person and he dies either before the institution of proceedings or during the period thereof, he is "replaced" by the estate, the net value of which — namely the part reduced by liabilities in accordance with what has been stated about the concept of the bankrupt's estate — will constitute the bankrupt's estate.

The deptor's having lost his rights of administration and disposal in respect to his estate did not naturally release him from certain obligations he could not behave like an outsider, playing the role of an illustrous stranger, because the Act imposed on him duties to be performed within an appointed date chiefly in the initial phase of bankruptcy proceedings. First and foremost among his duties was immediate provision of information for the court about the position of his estate. This duty to inform should be understood in a broad sense to include showing actually available assets, together with accounts receivable affecting the estate, as well as claims against the estate (liabilities). If the bankrupt failed to inform the court or informed it reluctantly, the trustee had the right and the duty to make him comply with his duty even by threatening penalty. The bankrupt had to submit the related statement himself, to sign it and to add a clause with a declaration of readiness to swear at any time that he had concealed no part of property and had not included "fictitious debts" in his statement. The act of swearing was not automatic, but if the administrator or any creditor submitted a request to the trustee to that effect, the bankrupt was under obligation to swear the oath. Swearing an oath was important for the added reason that any deficiencies that might come out afterwards were within the ambit of penal law and therefore the bankrupt was allowed to correct his statement before the act of swearing. In that case the law presumed good faith, basing itself on the assumption of a simple error.

Eventual arrest of the bankrupt is a most interesting provision of the classical law. There are two cases to be distinguished. In the first case the court orders arrest almost automatically, but it may do so only if there is good reason for thinking that the bankrupt would abscond. The court has discretion to decide on this issue, to hear anyone as a witness, but is not under obligation to hear anyone.

In the other case, however, the court was under obligation to order the bankrupt's arrest if during the bankruptcy proceedings there had emerged

evidence of the bankrupt's oath-breaking or the bankrupt had refused to comply with any court order in spite of repeated warnings.

The maximum term of detention was 2 months in both cases, the bankrupt was allowed to charge his cost of provision against the estate and had to give account thereof as a debt burdening the estate. Interestingly, this latter provision was incorporated in the text of the act only, whereas the bill had contained the diametrically opposed view which did not allow the bankrupt to demand maintenance out of the estate.

The relevant acts precisely determined the place and conditions of detention of this type. Practice was completely uniform in that confinement was executed in the least severe grade of punishment everywhere.

During the period of detention the bankrupt was free to request the court at any time to release him, and the court was to decide after a compulsory hearing of the trustee. In addition to his role in detention as outlined above, the trustee had another right in respect to the bankrupt's personal freedom, namely the bankrupt was not allowed to leave his place of residence after the institution of bankruptcy proceedings. The reason was obviously to ensure that the bankrupt was physically available to the trustee and the court. If he wanted to leave, he had to ask the trustee for "leave of absence", and if his request was declined, he had the right to apply to the court for a legal remedy, but no further appeal lay against the court's decision.

3.2. Creditors

Anyone having some material claim, pertaining to property rights, against the debtor—regardless of whether the debtor's entire property or a specified part thereof serves as security for the satisfaction of claimsy—is to be deemed creditor in the widest sense of the word. In this context, therefore, we can speak of creditors *"per se"* and "not *per se*". Bankruptcy creditors *per se* are those who at the time of declaration of bankruptcy have a claim based on a contract-law relationship. A person whose claim results from the law of things rather than the law of contracts, whose claim is on personal service by the debtor and, finally, who had no claim at the time of declaration was not included in this group and hence not deemed to be a bankruptcy creditor.

Defined as bankruptcy creditors not *per se* are persons whose claims arise from a legal transaction, not with the debtor, but with the bankrupt's estate, creditors entitled to claim back property and taking action for delivery from the estate of a thing forming no part thereof (e.g. the thing is not owned by the bankrupt) and, finally, creditors entitled to separate satisfaction, whose claims

are based on the law of things and who may seek satisfaction only from a certain part of the property, they are basically persons entitled to claims secured by a right of pledge or lien.

At a later stage we shall revert to the status of creditors in respect of their claims and of the committee of bankruptcy during the proceedings. Here we shall dwell on a very special aspect of liability.

Under the heading "Criminal Decisions" in Chapter 2 of Title III the Hungarian Bankruptcy Act defines practically two criminal-law facts, which can also be accomplished by creditors. The legislator proceeds from the assumption that creditors" interests may be prejudiced not only by the debtor's acts, but also by co-creditors, either directly or indirectly, in the latter case evidently by inducing a third person to commit a particular act.

In the first place, a case in point is that a person files a false claim or instigates another to do so in order to obtain an advantage for the debtor, for himself or perhaps for someone else. The offence can only be committed within a specified time, namely during the period of bankruptcy proceedings between the date of declaration of bankruptcy and the conclusion of proceedings. The perpetrator is punishable even if the bankruptcy proceedings are instituted on account of his filing a false claim, because the proceedings have commenced at his petition, that is to say that the offence was committed between the two dates indicated above. from this it logically follows that if the creditor withdraws his filing of the false claim — naturally this avenue in not open to every false claim, but only to the one which is to serve as a basis for the institution of proceedings —, withdrawal excludes punishability.

A claim is defined as false not only when the legal ground is untrue, but also when the person filing the claim changes the legal title to his claim in order to secure a more favourable ranking thereof, or when he raises the amount of claim in order to gain a higher rate of satisfaction at the ultimate division of the estate.

The perpetrator of the offence of filing a false claim is liable to imprisonment for a term of up to 3 years, to a fine of not more than 1.000 forints or to deprivation of office.

Similarly, a penal-law fact is deemed to be accomplished by a person who gives or promises money or other advantage to any of the creditors or, with the creditor's consent, to his relative in order for him to support adoption of a certain decision, his punishment being imprisonment for a term of up to 2 years and a fine of not more than 200 forints. The person accepting such money or advantage is liable to the same punishment. Contemporary literature definitely considers this buying of vote to be one of the most serious acts, since it will

cause the creditor "to vote, as a result of bribery, against his conviction as well as the desiderata of law and justice at the adoption of a decision within his province".[27] Whether or not the decision supported by the bribed creditor eventually obtained the votes of the majority is indifferent to the accomplishment of the statutorily defined fact, but, on the other hand, a creditor accepting a reward after the voting is not punishable unless the reward can be proved to have also implied his taking a certain position at the forthcoming vote.

3.3. Administrator of the bankrupt's estate

After the declaration of bankruptcy the administrator of the bankrupt's estate takes over the rights of administration and disposal lost by the bankrupt and exercises them until the deadline for the ultimate distribution of the estate. The administrator is appointed by the court declaring the bankruptcy generally, under Hungarian practice, from among lawyers practising and residing in the court's venue. The court's independence in appointment is practically limited by a single rule, namely the bankrupt may not be appointed administrator even if the said lawyer and the bankrupt's relatives are subject to a similar rule of incompatibility. Under the old Hungarian law, cousins were also included in the category of relatives. Appointment in violation of the rule of incompatibility was *ipso jure* invalid.

The most important prerogative of the administrator is to exercise the rights of representation, administration and disposal in respect of the bankrupt's estate.

In exercise of these right the administrator must identify and supervise the assets and liabilities, secure the active assets and ensure the collection of outstanding debts. In addition, it is mainly for him to judge creditors' claims filed against the estate, either contesting or recognizing them as just, and to decide whether to participate as representative in the legal proceedings under way or to terminate them.

His prerogatives rest basically on the court decision, as part of which a separate letter of appointment is issued for him in lieu of any separate authorization, entitling him to draw sums of money, to make out money-orders, etc. It is interesting, however, that while the administrator is vested with general powers of representation, this prerogative in nevertheless restricted in

---

27 APÁTHY, I.: *A magyar csődjog rendszere. Második Rész. Alaki csődjog* (System of the Hungarian Law of Bankruptcy. Part Two. Procedural Bankruptcy Law), Budapest, 1888, 199.

one aspect, notably the administrator is not authorized to receive securities, jewels or sums of money deposited with authorities, and should he want to receive them, he must apply to the bankruptcy court for a separate authorization issued for that purpose.

The administrator must exercise due diligence in carrying out his activity and is responsible for any damage resulting from his failure to observe this rule. According to the general view, he is also responsible for *culpa levis*,[28] as he has voluntarily accepted the post of administrator and receives a remuneration for his services.

Besides the administrator's liability for damages, the bankruptcy court may impose on him a fine of up to 200 forints for omission. If the imposition of a fine was of no avail, the court may relieve him of his duties, either *ex officio* or on motion of the trustee or the committee of bankruptcy. It is an interesting provision that in case of motion the court does not hear the bankrupt, but in case of release from office *ex officio* both the trustee and the committee of bankruptcy and even the administrator himself must be allowed to be heard. The court decision relieving the administrator of his duties may be appealed against in each case.

As in accordance with his legal status the administrator is interesting in an early conclusion of proceedings, he is given priority over everyone else in demanding reimbursement of his expenses and payment of his remuneration, so much so that the bankruptcy proceedings may not be terminated without satisfaction of his claims. In the question of remuneration, however, the committee of bankruptcy, too, has an import role to play inasmuch as it is essentially for it to approve the amount of remuneration in the first place. The agreement between the committee and the administrator on remuneration is subject to approval by the court, which, however, has a discretion to reduce the amount if it finds it unreasonably high.

3.4. Committee of bankruptcy

The setting up of a committee of bankruptcy—although, interestingly, it was not mandatory in all national legislations—came to assume extremely great importance during the proceedings. Its fundamental conceptual criterion consists in that its members, 3 to 5 on average, are elected by creditors from

---

28 APÁTHY: II, *op. cit.*, 47. A similar provision is contained in Art. 74 of the German *Reich* Bankruptcy Act, which ordains application of the maxim of *"bonus et diligens paterfamilias"* to the activity of the administrator of bankrupt's estate.

among themselves to defend and represent their own interests. Its function is to represent the creditors' interests before the court and the trustee *vis-à-vis* the bankrupt, namely to act in and on behalf of creditors. In the laws which do not prescribe the setting up of a committee the matters within the committee's province are dealt with either by the court itself or by a meeting of creditors convened from time to time. (This also naturally means that the proceedings are likely to lose considerable impetus.)

With a view to election of the committee, the trustee appoints a day in his notice, and the creditors present must elect their representatives by a simple majority of votes. The committee thus elected is not subject to approval by the court; its members are issued with letters of appointment by the trustee.

The committee's basic task is to support and control the administrator's activity. In exercising its right of control the committee may at any time request information from the administrator on any matter, inspect any official document and inquire into the status of property, the only limitation being that an inquiry may not be held at an inconvenient date, i.e., it may not disturb the normal course of property management.

The committee may, on its authority, terminate any irregularity disclosed by control (which obviously means that it invites the administrator to take the necessary measure within an appointed date) or turn to the trustee.

The committee adopts its own rules of procedure, the substantive aspects of which are not governed by law, but a chairman must be elected in any case.

Like the trustee, the committee must use due diligence in performing its functions and bears liability for any damage caused by omission. However, such liability exists only and exclusively in respect to creditors, since its members and the rest of creditors are bound by a relationship of agency. Any member of the committee may happen to detect a circumstance which, in his judgement, calls for immediate action, in that case he may act on behalf of the committee, but must bear responsibility alone, it is not shared by his co-creditors in the committee.

The right of proposal to call the committee or an individual member thereof to account is vested first of all in the administrator, since he must, as has been seen, represent the interests not only of the bankrupt, but also of all creditors. At the same time, however, any other creditor may take action against the committee if he believes that his own rights have been prejudice by the committee's measures.

The committee members may not demand any remuneration, but may demand reimbursement from the estate of their expenses incurred and certified. Such claims must be charged against the costs account of the estate.

In view of the fact that membership in the committee is in the nature of agency, committee members may be recalled at any time, but in actual practice recall is effected after the deadline for liquidation, when the right to dispose of the estate no longer pertains to the administrator, but to the whole body of creditors.[29]

3.5. Trustee in bankruptcy

The institution of trustee in bankruptcy was introduce by the French Commercial Code and the French Bankruptcy Act of 1838 related thereto. The creation of this post was clearly justified by the need to expedite proceedings through relieving pressure on the court. The trustee himself is appointed by the court, from among its own members of a lower grade, to conduct proceedings and to control both the administrator of the bankrupt's estate and the committee of bankruptcy. Owing precisely to his mobility, the trustee has lived up to the expectations in full. The court itself does not visit premises and confines itself to deciding on matters of fundamental importance or in cases where a complain against the trustee's measures is admissible.

Recall of the trustee may be ordered by the court in every case; its decision is not to be justified and is non-appealable.

4. Creditors' claims

4.1. Right of recovery

Considering that the bankrupt's estate includes but things owned by the debtor, the owners have the right to recover things that are held but not owned by the bankrupt.

Exercise of the right of recovery is essentially an act outside the ambit of bankruptcy in every case.

The legal ground for the right of recovery is created by the unjust enrichment of the bankrupt's estate. As a general rule, if another's thing in kind can be found in the estate, the administrator is under obligation to deliver it without any formal proceedings. However, in cases where a thing of another was sold, exchanged or otherwise alienated by the debtor before the declaration of bankruptcy or by the administrator after the declaration, the party entitled

29 KRÁLIK: *op. cit.*, 222–225.

to recovery may demand delivery of the receipts or, if no sun has yet been received, assignment of the claim.

4.2. Right to separate satisfaction

This right is vested in co-owners who act, together with the debtor, as owners at a company. Starting from the general principle of the law of bankruptcy that the bankrupt's estate may be constituted by nothing but things owned by the debtor, things pertaining to co-owners rather than to the debtor at the company form no part of the bankrupt's estate. Consequently the debtor's fellow-owners may demand that their share of property be separated from the estate and be delivered to them. Nevertheless, this general principle does not apply to certain forms of company. Thus, for instance, if bankruptcy has been declared against the senior partner in a limited partnership, the silent partner may enforce his claim only as a bankruptcy creditor and is not entitled to separate satisfaction.

The most important category of those enjoying the right to separate satisfaction is undoubtedly constituted by mortgagees. Since the contemporary private law practically allowed mortgage on real property only, such mortgage was one on the debtor's immovables and included eventual receipts therefrom.

As a general rule, the debtor's real property constitutes a fund of separate satisfaction in case of bankruptcy, the only exception being that when it is not mortgaged, it serves as a fund of separate satisfaction to the extent required by the liabilities and costs of the estate, taxes connected with bankruptcy proceedings, and the costs of maintenance of the real property. Another general rule is that the real property constitutes a fund of separate satisfaction in the state in which it was at the time of declaration of bankruptcy. The yields of pre-declaration real property do not belong to the fund of separate satisfaction, but the post-declaration gain does.

In cases where several creditors have a mortgage on the particular real property, they are subject to the principle of general ranking, practically meaning that after deduction of the expenses incurred (cost of auction, direct state and municipal taxes on real property, etc.) the administrator must satisfy them from the purchase pries of the real property.

Similarly, lienors of movables could enforce their claims by exercising the right to separate satisfaction. The Hungarian Bankruptcy Act did not cover the conditions for acquiring a right of pledge, but laid down the principle that lienors of movables must be satisfied from the value of movables forming part of the bankrupt's estate and burdened with lien or after payment of any debts and costs of that property.

It applies to all creditors entitled to separate satisfaction that they may enforce their claims in precedence of bankruptcy creditors, in the manner that the estate will be constituted by the part of property burdened with a right *in rem* and remaining after their satisfaction.

4.3. Estate creditors

Here belong expenditures necessarily incurred in connection with the proceedings and the administrator's measures. The classical laws drew a sharp distinction between the two legal grounds, referring to the former as costs of the estate and to the latter as liabilities of the estate. The costs included the administrator's remuneration, without payment of which the proceedings could not even be concluded, as has been seen above, but it can be stated in general that payment of the costs and liabilities took perforce precedence of satisfaction of other creditors and the extent of satisfaction was 100% in any case.

4.4. Bankruptcy creditors

The so-called general estate of a bankrupt is constituted by the debtor's property remaining after separate satisfaction and payment of the costs and liabilities of the estate.

Although each bankruptcy creditor is a personal creditor—therefore the legal title of his claim is based on contract law (for if it were based on the law of things he would be placed in another category of creditors) and even an equal mark might be put between such creditors—each of the classical laws classified creditors by different criteria, the result being a strict rank-order among them. This practically meant that until full satisfaction of creditors in the preceding class creditors in the subsequent class could not be satisfied, and where the remaining property was insufficient for full satisfaction of claims in the given class, creditors had to be satisfied in proportion to their claims. The national laws grouped bankrupt creditors in different classes, of which there were 5 in, e.g., the German *Reich* Bankruptcy Act and 3 in the Hungarian Act. A detailed description of the latter follows below.

Class I included creditors of the following claims:

— the debtor's employees who worked on a regular basis in the deptor's household or business were entitled to back-pay due to them for one year immediately preceding the declaration of bankruptcy or to their pay for the statutory period of notice even if their employment relations no longer existed at the time of declaration or were not maintained by the administrator of the

estate. If the administrator maintained employment, their pay and their wages for the period of notice were deemed to be liabilities of the estate;

— if the debtor died before the declaration of bankruptcy, his eventual medical and burial expenses belonged in this class insofar as payment there of had been made within one year preceding declaration;

— unpaid portions of arrears of rates and taxes within 3 years preceding declaration;

— satisfaction of claims of minors and persons under curatorship in general.

Class II, practically always the largest, was that of creditors whose claims did not belong in Class I; these were the general creditors, the only exception being Class III, which did not essentially constitute a separate legal ground. The difference between Classes II and III lay fundamentally in that interest and allowance-like liabilities which had existed earlier than 3 years prior to declaration were rated by the Act as the last item in the order of payments, representing the so-called Class III.

ACTA JURIDICA HUNGARICA
1999 40 Nos 1–2, pp. 105–118

1216-2574 / 99 / USD 5.00

Mónika WELLER

Application of the European Convention on Human Rights in the Hungarian Legal System

As a result of the political transformation in 1989–1990, Hungary became a member state of the Council of Europe and signed the European Convention on Human Rights and its additional protocols in 1990. Following a careful screening process (a compatibility exercise as it has become known in the Council of Europe[1]) the Convention was ratified on 5 November 1992.

At the time of ratification, the following statements were made concerning the competence of the supervisory organs:

> "The Republic of Hungary declares that for a period of five years, which will be tacitly renewed for further periods of five years, unless the Republic of Hungary withdraws its declaration before the expiration of the appropriate term:

1 See: Compatibility of Hungarian law with the European Convention on Human Rights: preparatory work prior to ratification. Council of Europe, Directorate of Human Rights, Doc.: H (95) 2. The „Hungarian Model" is set as an example for the new Member States of the Council of Europe, and Hungarian experts are often invited to take part in those compatibility exercises.

a. it recognises in accordance with Article 25 of the Convention, Article 6 of Protocol No. 4 and Article 7 of Protocol No. 7 the competence of the European Commission of Human Rights to receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of the rights set forth in the Convention and its Protocols, where the facts of the alleged violation of these rights occur after the Convention and its Protocols have come into force in respect of the Republic of Hungary;

b. it recognises in accordance with Article 46 of the Convention, Article 6 of the Protocol No. 4 and Article 7 of Protocol No. 7 as compulsory ipso facto and without special agreement, on condition of reciprocity, the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention and its Protocols and relating to facts occurring after the Convention and its Protocols have come into force in respect of the Republic of Hungary."

"The above declaration is interpreted by the Government of the Republic of Hungary, that measures taken by the Hungarian Republic for the reparation of the violation of the aforesaid rights which had taken place prior to the entry into force of the Convention and its Protocols shall not be considered as facts of the alleged violation of these rights."

In accordance with Article 64 of the Convention, the Republic of Hungary made the following reservation in respect of the right to access to courts guaranteed by Article 6 § 1 of the Convention:

"For the time being in proceedings for regulatory offences before the administrative authorities, Hungary cannot guarantee the right to access to courts, because the current Hungarian laws do not provide such right, the decision of the administrative authorities being final.

The relevant provisions of the Hungarian law referred to above are:

— Section 4 of Act No. IV of 1972 on courts, modified several times, which provides that the courts, unless an Act stipulates otherwise, may review the legality of the decisions taken by the administrative authorities;

— An exception is contained in Section 71/A of Act No. I of 1968 on proceedings for regulatory offences, modified several times, which allows for the offender to request judicial review solely against the measures taken by the administrative authority to commute to confinements the fine the offender had been sentenced to pay; no other access to court against final decisions taken in proceedings for regulatory offences is permitted".

Prior to and following ratification, a number of new acts were adopted in order to bring Hungarian legislation in line with the requirements of the Convention, and also the text of the Convention, in accordance with Article 7 (2) of the Hungarian Constitution, was incorporated into Hungarian law by Act No. XXXI of 1993 whereby the Convention became applicable before domestic courts.

The incorporation of the Convention into domestic law is a very important factor for its efficiency and it enables the Convention supervisory mechanism to play a truly subsidiary role as it was intended to.[2] In those countries where the Convention is not part of domestic law, as it was the case with the United kingdom until 1998, domestic courts are not in a position to establish violation of the Convention rights and to provide an effective remedy, therefore all those cases where otherwise domestic courts could effectively protect human rights have to be brought before and decided by the international court.

In order to avoid a flow of cases to the European Commission and Court of Human Rights,[3] therefore it is very important that not only legislation be constantly brought in line with new developments in the Strasbourg case-law but also domestic courts be ready to apply the Convention. From this perspective, Part A below explores how Hungarian courts apply the Convention, Part B examines the role of the Constitutional Court in bringing Hungarian legislation in line with the Convention standards, and Part C presents the applications introduced against Hungary before the European Commission on Human Rights.

A. Application of the Convention by the Hungarian courts

The Hungarian legal system is not a case-law system and not all judgments of (higher) courts are published (and therefore it is impossible to give a complete picture on the subject) but only a selection of judgments intended to provide guidance as to the most important questions of interpretation of laws. These judgments are not of binding force but of persuasive authority. A compilation is published monthly by the Supreme Court as "Decisions of Courts" (Bírósági

2 Herbert PETZOLD: The Convention and the Principle of Subsidiarity. In: Macdonald, R. St. J.—Matscher, F.—Petzold, H. (Eds.): *The European System for the Protection of Human Rights.* Martinus Nijhoff Publishers, 1993. 41–62.

3 Following the entry into force of the 11th Protocol to the European Convention on Human Rights on 1 November 1998, the Commission and the Court is replaced by a new single Court.

Határozatok; BH.) which also contains summaries of judgments of the European Court of Human Rights.

Many of these judgments of higher courts (County Courts and the Supreme Court) contain references to the Convention with a view to give weight to arguments based on corresponding national legislation. It is very rare that provisions of the Convention (that is the Act promulgating the text of the Convention and its protocols) are referred to as an independent basis for decision, and the courts very rarely refer to the case-law of the Strasbourg organs. It is interesting to note that when there is such a reference made in the judgment, the "source" is specified as it has been published in the above mentioned compilation (BH.) and not with reference to the original English or French sources (e.g. Series A).

In this context, two cases are interesting to mention. The first judgment (published as BH1996.189.) concerned the right to defence in case of two juvenile offenders where legal assistance was compulsory. Each of the defendants had a legal representative assigned to them by the court but one of the lawyers was substituted by the other at the first hearing, and both of them were substituted by a third one at the second hearing without authorisation by the court or the defendants. The appellate court held, with reference to Article 6(3) b of the Convention, that compulsory legal representation must not be interpreted formally: the mere presence of a lawyer is not sufficient, he must have enough time to prepare for the defence of his client. When the legal representative assigned by the court in respect of one of the defendants is substituted by the lawyer of the other defendant (which is possible only when there is no conflict of interest between them) the court must satisfy itself that the latter is well-prepared in the cases of both defendants.

The other case (BH1998.132.) concerned parental rights and the placement of children after the divorce of the parents. In the divorce proceedings, upon the agreement of the parents, the two children were placed in the custody of the mother. But very soon, the father filed a legal action for changing the placement of the children on the ground that the mother regularly attended meetings of Jehovah's Witnesses and by so doing she neglected her children and even put their life and health at risk. At the hearing, she failed to give a definite answer whether she would allow the children to undergo blood-transfusion in case of medical need. Evidence showed, however, that she did take care properly of her children. On the other hand, expert opinion stated that the elder boy was more attached to his father than to his mother, and that he had suffered some psychological damage (e.g. strong fear of death) on account of his mother's religious influence on him. Therefore the court decided that the older boy

should be placed with the father while the younger remained with the mother. The Supreme Court, however, held that, besides that the separation of the siblings was not in their interest, the judgment was unlawful because it was based primarily on the mother's religious conviction and failed to take into account other relevant factors favourable to her. With reference to Article 8 and 14 of the Convention, as well as the judgment of the European Court of Human Rights in Hoffmann v Austria, the Supreme Court stated that the religious conviction of a parent cannot be a decisive factor in custody cases neither in favour, nor to the disadvantage of the parent concerned. With reference to Article 5 of Protocol No. 7 to the Convention, the Supreme Court held that the equality of the spouses required that when there was a conflict between the religious or philosophical convictions of the parents each of them should equally be responsible to resolve this conflict in the interest of their children, and one of them (the parent belonging to the Jehovah's Witnesses denomination) could not be held exclusively responsible for the harmful effects resulting from this conflict.

B. The Convention in the practice of the Hungarian Constitutional Court

The primary role of the Constitutional Court is not deciding individual cases, individual human rights violations although it may do so in constitutional complaint procedures. Its primary and very important role is to control the constitutionality of legislation. As human rights are guaranteed by the Constitution and Article 7 of the Constitution provides for the observance of international obligations, the concept of constitutionality includes the observance of human rights and the standards of the European Convention on Human Rights. Therefore a survey of the practice of the Constitutional Court is very important for assessing the impact of the Convention on Hungarian law.

One of the most important and most debated decisions of the Constitutional Court was the one declaring the unconstitutionality of death penalty (Constitutional Court decision No. 23 of 31 October 1990). The judgment had been delivered a few days before the Convention was actually *signed* by Hungary. In item V/4 of the comments to this decision, reference is made, among other documents of international law relating to death penalty, to Protocol No. 6 of the European Convention on Human Rights as a demonstration of European legal development towards the abolition of death penalty, but the decision was, of course, based on arguments stemming from the text of the Constitution itself.

The Constitution prohibited arbitrary deprivation of life and a subsequent amendment to an other provision declared that substantive content of fundamental rights must not be restricted by law. The Court held that the right to life and human dignity was a source of and a precondition for many other fundamental rights and the execution of death penalty lead to a total and irreversible destruction of these rights, and therefore it was in contravention with the Constitution.

Constitutional Court decision No. 22 of 10 April 1992, in the period between signature and ratification, concerned the right to marry which, as opposed to the Convention, is not expressly provided for by the Constitution but it can be derived from the constitutional protection of marriage, as well as from the right to human dignity which includes the right to personal self-determination. The Court referred to Article 12 of the Convention in connection with Article 7 of the Hungarian Constitution providing that the Hungarian legal order accepts the generally recognised principles of international law. The Court stated that any restriction on the right to marry (e.g. a requirement of marriage licence for the members of the different armed forces and services) can only be justified when it is unavoidable, absolutely necessary and proportional.

Constitutional Court decision No. 30 of 26 May 1992 concerned the balancing between freedom of expression and the rights of others (the right to human dignity). Among Hungary's international obligations, the Court referred to the Convention (still before ratification) stating that it did not contain an obligation for the State to punish acts of incitement to hatred (as opposed to the International Covenant on Civil and Political Rights), it rather provided for the limits of restricting the freedom of expression. The Court also referred to the practice of the European Commission on Human Rights that prohibition of communications of racial hatred constituted a justified restriction under the Convention. The Constitutional Court held that freedom of expression was particularly important in a democratic society and it could be restricted only when it was proportional to the aim pursued and only by the lightest possible means of protecting the rights of others: e.g., subject to the circumstances of the case, civil law action for immaterial damages was preferable to measures of criminal law. Therefore the Court decided that freedom of expression was constitutionally restricted by criminal sanctions with regard to incitement to hatred but not with regard to the use of degrading expressions in general.

Constitutional Court decision No. 4 of 12 February 1993, in deciding on a series of issues raised by Act No. XXXII of 1991 providing for the restitution of formerly Church-owned real estate property, including buildings operated as State schools, the Constitutional Court relied on Article 2 of Protocol No. 1 to

the Convention in order to determine the scope of the State's obligations. It held that the freedom of religion and the right to education must be balanced. Referring to the judgment of the European Court of Human Rights in Kjeldsen, Busk Madsen and Pedersen, it stated that State schools were prohibited from providing any kind of education which could be considered as disregarding the convictions of parents (and the child). Parents have a right to choose religious education for their children but they also have the right not to be obliged to send their children to schools that provide education contrary to their convictions. The State is not obliged to establish religious (philosophically committed) schools, and "neutral" State schools are proper alternatives to committed schools in accordance with the right to freedom of conscience. The attendance of neutral State schools, however, must not impose disproportionate burden on those who do not want to attend religious schools. But it is only in the circumstances of each case that proportionality can be determined, and the Act was found to contain sufficient guarantees, therefore it was not declared unconstitutional.

Constitutional Court decision No. 60 of 29 November 1993 referred to two decisions of the European Commission on Human Rights (Appl. No. 8707/79 and Appl. No. 7992/77) in upholding the constitutionality of compulsory use of safety belts in cars.

In Constitutional Court decision No. 64 of 22 December 1993, the Court declared that its conception of protection of the right to property is the same as that of the European Convention on Human Rights as reflected in the case-law of the European Court of Human Rights, with special reference to the judgment in James and Others (Series A No. 98); and in Constitutional Court decision No. 35 of 24 June 1994 concerning the restrictions on acquiring agricultural land property, the President of the Constitutional Court, in his concurring opinion, referred to the case-law of the Convention (including the decision of the Commission in Szechenyi v Hungary, see below) to the effect that the Convention does not guarantee a right to acquiring property, only protects the peaceful enjoyment of property against unreasonable or disproportionate intervention or restrictions.

Constitutional Court decision No. 22 of 16 April 1994, referring to the judgement of the European Court of Human Rights in Van Leuven and de Meíere, declared that compulsory membership in a professional organisation established under public law (Bar Association) did not infringe the right to freedom of association.

The Constitutional Court referred to Article 10 of the Convention in many cases emphasising its fundamental importance in a democratic society (e.g. in decision No. 34 of 24 June 1994). In Constitutional Court decision No. 36 of

24 June 1994, the Court held that according higher protection to officials of State (including politicians, members of the Government) in terms of more severe punishment for "insult of an authority or of an official person" than for libel or slander was unconstitutional, since the European Court of Human Rights had held that the limits of acceptable expression were broader in case of politicians and public figures than that of private persons. This kind of restriction on expressing value judgments is not "necessary" and is disproportionate.

In Constitutional Court decision No. 14 of 13 March 1995, the Court stated that the right to marriage was reserved for a man and a woman (as confirmed by the European Court of Human Rights in its judgment in Rees) but relations of cohabitation (life-partnership) of couples of the same sex merit, without discrimination, the same legal recognition and protection than life-partnership of a man and a woman. So the Civil Code was changed accordingly.

Constitutional Court decision No. 58 of 15 September 1995 concerned the contradiction between the right to privacy of an accused person in relation to information on his mental conditions and the publicity of criminal trials. The Constitutional Court observed that according to the jurisprudence of the Strasbourg Organs, the publicity of trials is an important guarantee both for the individual and the public, and the person concerned do not have a right to exclusion of publicity. Although the Hungarian Code of Criminal Procedure is less detailed than Article 6 (1) of the Convention setting forth the grounds for exclusion of publicity, "moral grounds" mentioned in the Hungarian provision may be interpreted extensively, and the Constitutional Court added that there was nothing to prevent trial courts from bearing in mind the provisions of international conventions (such as the European Convention on Human Rights) in determining whether there was a need of excluding publicity from the whole or a part of the trial in order to protect the privacy of the accused. Thereby, in fact, the Constitutional Court ruled that ordinary courts may (or even should) apply the provisions of the Convention directly.

In Constitutional Court decision No. 67 of 7 December 1995, the Court held that in case of an objection by the defendant to the sentencing without trial (penal order) when a hearing must be held, the provision that this hearing is held by the same judge who previously imposed a sentence without trial was not, in general, contrary to the impartiality of judges. The Court referred to the jurisprudence of the European Court of Human Rights on the approaches to be applied in determining the impartiality of judges, as well as to Recommendation No. R (87) 18 of the Committee of Ministers encouraging the application of penal order as a means of expediting criminal procedures. The Constitutional Court laid emphasis on the fact that besides there being sufficient guarantees

for the defendant in case of a sentencing without trial, there was another fundamental right at stake, that is the right to a fair trial within a reasonable time.

Finally, a decision of great importance for the application of the European Convention on Human Rights was Constitutional Court decision No. 63 of 12 December 1997. The Court found that the lack of judicial review in cases of regulatory offences before the administrative authorities — a field covered by Hungary's reservation to the Convention — was in contravention with various provisions of the Hungarian Constitution and set this provision (Section 71/A of Act No. I of 1968 on proceedings for regulatory offences referred to in the reservation) aside pro futuro, as from 31 December 1998. This provision was also found to be unconstitutional on the ground that the possibility of access to court in cases of commuting to confinement the fine the offender had been sentenced to did not constitute sufficient guarantee in terms of protection against deprivation of liberty, since the court was only entitled to revise the decision of commutation on grounds of lawfulness but not in terms of facts. Thereby decisions of administrative authorities imposing fines were in fact decisions on conditional deprivation of liberty. So the provision restricting access to courts, covered by Hungary's reservation, shall cease to be in force by 1 January 1999, and it is for the legislature to adopt the necessary measures before this date. After the entry into force of the new provisions in conformity with the requirements of the Constitution, the Hungarian reservation to Article 6 (1) of the Convention has to be revoked. (It shall, anyway, lose its effect, the provision referred to in it having been emptied.)

C. Cases brought before the European Commission and Court of Human Rights

The instrument of ratification of the Convention and its nine protocols was deposited by Hungary on 5 November 1992 and this was the date of the entry into force of the Convention with respect to Hungary. In the period between 1993 and 1997, 823 provisional files were opened (there was a peak in 1995) and about 47% of them have been registered (387 applications in 5 years). The rate of registration has increased from 40% to 55% which shows, to some extent, that potential applicants (natural or juridical persons under Hungarian jurisdiction) are increasingly aware of the requirements and possibilities of this mechanism or that they more often avail themselves of the assistance of legal counsel.

During the period of 1993–1998, 26 applications were referred to the Hungarian Government for their comments. 13 of these applications were

declared inadmissible and 7 are pending admissibility decision. Of 8 applications that have been declared admissible, 3 cases have been ended by friendly settlement (both concerning protracted civil procedures) and 4 applications have been concluded by Article 31 reports of the Commission, one of which has been referred to the Court.

There are two cases which are interesting to note although they have been declared inadmissible by the Commission without having been communicated to the Government. Application No. 21344/93 by August Szechenyi concerned compensation for expropriation effected in or about 1945. As it has been mentioned, the Hungarian Government made a declaration upon ratification that "measures taken by the Hungarian Republic for the reparation of the violation of the [rights set forth in the Convention] which had taken place prior to the entry into force of the Convention and its Protocols shall not be considered as facts of the alleged violation of these rights." According to its content, this declaration could be considered as a reservation. The Commission, however, examined Szechenyi's application without even taking note of this declaration. The Commission held that expropriations in 1945 were instantaneous acts and did therefore not constitute continuous violations, and that the Convention did not guarantee a right to restitution or other reparation of injuries which were not in themselves violations of the Convention. Therefore we may conclude that this "interpretative declaration" had no relevance to the interpretation of the Convention.

The Commission has also examined the Hungarian reservation to Article 6 § 1 concerning limitation of access to courts with regard to regulatory offences before administrative authorities (application No. 31506/96 by Istvánné Rékási). The Commission found that the reservation complied with the requirements of Article 64 § 2 of the Convention and declared the application inadmissible.

Of the 26 applications referred to the Government, about 10 complained of the length of civil procedures: 4 of them have been declared inadmissible, 1 is pending admissibility decision, 3 have been concluded by friendly settlement, and in one case, the Commission has drawn up a report on the merits under Article 31 finding a violation of Article 6 § 1 of the Convention. There have been other applications under Article 6 concerning access to court and various aspects of fairness of criminal proceedings but they were declared inadmissible or are still pending admissibility decision, except for application No. 29082/95 (by Z. Dallos) concerning requalification of the criminal charge by the court of second instance which has been declared admissible.

An application (No. 22172/93 by Georgi Lukov Romanov) by a Bulgarian national complained under Article 5 of the length of his detention on remand

and the lack of any reasonable suspicion against him. He was suspected of having been involved in committing a currency offence and also the offence of receiving stolen goods. He was detained on remand for about one year and five months, then the criminal proceedings were "offered" to the General Prosecutor of the Republic of Bulgaria under a bilateral treaty on mutual assistance. The applicant was transferred to Bulgaria but no criminal proceedings have been instituted against him by the Bulgarian authorities. The Commission examined whether there was a reasonable suspicion against him to be arrested, whether there were sufficient reasons justifying his continued detention on remand and found the application manifestly ill-founded.

Other applications submitted by persons of foreign nationality concerned complaints under Article 3 of the applicants' proposed expulsion to their country of origin. The first application of this kind (No. 30471/96) was filed by four Somalian citizens who applied for refugee status with the UNHCR Branch Office in Budapest but their application was refused at first. Finally, upon intervention by Amnesty International, the UNHCR requested the Hungarian Government to grant provisional residence permits to the applicants. The Government did so, and the applicants were placed in the Red Cross Refugee Home in Budapest and were granted free movement in Hungary. In a few month, however, the applicants have illegally left Hungary and ceased to keep contact with the Commission. Therefore the Commission has struck the application off its list of cases. A similar application (No. 34772/97) introduced by 15 Syrian nationals is pending admissibility decision. An application (No. 43887/98) under Article 3 concerning extradition to Turkey was struck out of the list of cases because it was settled by a decision of the Minister of Justice refusing the applicant's extradition.

Further issues raised under Article 3 include the conditions of detention of a convicted disabled person in a prison hospital (application No. 23636/94 by P.M.) the Commission found a violation on account of the applicant's hygienic care in the prison hospital. There have been two applications introduced against Hungary concerning treatment by the police. One of them (application No. 26692/95 by Gábor Bethlen) has been declared inadmissible because of non-observance of the six month time-limit while the other (No. 31561/96) is pending admissibility decision.

Two applications raise issues under Article 11 concerning freedom of association. One of them (application No. 32367/96) is pending admissibility decision. It concerns the denial of registration of an association under a name containing reference to a public authority. In the other case (application No. 25390/94 by László Rekvényi), the applicant complained that participation in

certain political activities and membership in political parties were prohibited for him as a police officer. The prohibition of political activities of police officers, provided for by the Hungarian Constitution, also raised issues under Article 10. The Commission found that the prohibition concerning membership in political parties was not in contravention with Article 11 of the Convention, whereas the notion of political activity is so sweeping that its general prohibition by the Constitution without there being further legislation or practice providing guidance as to its precise meaning (which was found to be the case in a certain period of 1994) does not conform to the requirement of foreseeability, therefore the restriction at that time could not be considered as prescribed by law and it constituted a violation of Article 10 of the Convention. This case has been referred to the European Court of Human Rights and it remains to be seen whether the Court shall pronounce on the most delicate issue (avoided by the Commission) of the necessity of this prohibition in a democratic society in terms of the Convention.

Finally, three applications concerned issues primarily under Article 8. Application No. 21647/93 was introduced by Géza Szegő, a father who complained about the absence of enforcement of his right to access to his son. The Commission confirmed that besides an obligation to refrain from arbitrary interference by public authorities, there may be positive obligations on the part of the State inherent in an effective "respect" for family life. The obligation to take such measures, however, is not absolute, the co-operation of all concerned will always be an important ingredient which, in this case, was totally lacking. The Commission found that in the circumstances of the case the authorities made reasonable efforts to enforce the applicant's right of access to his son and, having regard to the margin of appreciation enjoyed by the competent Hungarian authorities, found the application manifestly ill-founded.

Application No. 23198/94 by László Beck complained about the control of correspondence of prisoners under Article 8. The Commission found that the Hungarian practice was in conformity with the Convention, the occasional opening of a prisoner's letters, chosen at random, did not exceed the scope of control measures warranted by the ordinary and reasonable requirements of imprisonment. Therefore this application was declared inadmissible on grounds of being manifestly ill-founded.

Similar complaints were introduced in application No. 21967/93 by Sándor Sárközi. He complained about the conditions of his detention under Article 3, the interference with his correspondence with his family under Article 8 and the lack of effective remedy under Article 13. None of these complaints were found to disclose any violation of the Convention. In the process of exami-

nation of the case, however, a letter addressed to the applicant by the Commission had been opened by the prison authorities before it was handed over to the applicant. The Hungarian legislation then in force prohibited any interference with letters addressed to international organisations but checking of mail coming from those organs (with a view of verifying that the sender is indeed the organisation indicated on the envelop) was permitted. So the measure in question was effected in accordance with the law but the Commission, having noted that under Section 36 para. 5 of the Law on the Execution of Sentences prisoners' correspondence may be controlled by the prison authorities for reasons of security, except for letters *sent to* international organisations (§ 94 of the Report of 6 March 1997), declared in its report that the opening of the letter *sent by* the Commission was not in accordance with the law (§ 95). This little confusion might have been created by the fact that Hungarian legislation had been changed to exclude the control of letters coming from international organisations well before the Commission's report has been drawn up. Fortunately, the Commission went on to examine "for reasons of completeness" whether other conditions under paragraph 2 of Article 8 had been satisfied and held that the opening of the Commission's letter could not be regarded as necessary in a democratic society within the meaning of paragraph 2 of Article 8 and found a violation of the Convention.

Conclusions

It can be concluded that the Convention has already had a considerable impact on the Hungarian legal order and, as human rights awareness increases and lawyers get more and more acquainted with the Strasbourg case law and procedure, an increasing number of individual applications against Hungary can be expected. It is very likely that some of them will point to problems in the legal system which should be remedied by modifications of laws or enactment of new legislation, so they will bring about an even greater impact of the Convention in the Hungarian legal system.

Other applications point at structural problems in the administration of justice. In many cases of protracted civil proceedings, by way of friendly settlement or as just satisfaction, the Government had to pay various sums between 600.000 and 1.100.000 Hungarian forints. In order to avoid such cases, the reform of the Hungarian judicial system and the codes of civil and criminal procedure is inevitable. Some elements of the reform have already been implemented but it remains to be seen whether they are more effective in

avoiding procedures exceeding a reasonable time. A new body has been established for the administration of the judiciary consisting of 9 judges elected by courts through delegates, the Minister of Justice, the Chief Public Prosecutor, the President of the National Bar Association and two members of the Parliament, and its president is the president of the Supreme Court. This body of *self*-administration (since two thirds of its members are judges) is the National Council of the Judiciary which shall have as its task to analyse the causes of excessive length of proceedings and to propose measures to prevent similar cases.

Reopening of proceedings before domestic courts following decisions by the Convention organs is a current topic in the Council of Europe. Athough there has not yet been a case in respect of Hungary where the necessity of reopening a domestic procedure following a finding of a violation by the Commission would have arisen, the new Code on Criminal Procedure which is to enter into force in 2000 provides that such decisions of international human rights organs are to be considered as "new evidence" for the purposes of reopening a criminal case. Similar provision is likely to be included in a new Code on Civil Procedure.

Independently of the cases agains Hungary, the adaptation of the Hungarian legal system to the requirements of the Convention must be a constant process because of the evolutive interpretation by the European Court of Human Rights. This statement underlines that the application of the Convention is likely to have an increasing impact on the Hungarian legal system in the future.

ACTA JURIDICA HUNGARICA
1999 40 Nos 1-2, pp. 119-120

1216-2574 / 99 / USD 5.00

BOOK REVIEW

Renard DEHOUSSE (ed.): **An Ever Larger Union?** (The Eastern Enlargement in Perspective), Baden-Baden, Nomos Verlagsgesellschaft, 1998. 155 p.

"An Ever Larger Union?" edited by Renard Dehousse in the result of the "Session d'études 1996 de l'Institut Universitaire International Luxembourg" and represents already the 30rd volume of this series.
The "séance inaugurale" by George Wohlfart, ("Secrétaire d'Etat aux Affaires Etrangéres, au Commerce Extérieur et á la coopération, Luxembourg"), precedes the contributions of the authors. It's the only text written down in the French Language, which breaches somewhat the style of the book. This presentation gives a short overview of the integration procedure into the European Union for the form East European countries, the conditions thereto, and some of the difficulties encountered.

Reviewed book has a very clear structure. It is divided into two parts, each consisting of three contributions. Part I describes Eastern Europe in Transition. Part II deals with the challenges. Each of the contributions is of a remarkable quality providing an interesting debate. Jab Zielonka tackles the "Decalogue of Democratic Consolidation in Eastern Europe". In his contribution Zielonka focuses on the question how to construct a new workable democratic system after the fall of communism. More specifically he debates on the consolidation process.

Krzysztof Drzewicki looks at the Protection of Human Rights and the Formation of Civil Society. He therefore explains first both key concepts before transposing this relationship to the former Eastern European countries. The first concept has three distinct stages: idealisation, positivisation and realisation. The second concept underwentan evolution through history until the modern comprehension as a collectivitey independent of government that can operate freely within a conducive system of governance. Civil society is then a remedy against failures of democracy. The relationship between the two concepts is illustrated with the accession of former Eastern European States to the Council of

Europe and the European Convention of Human Rights.

Susan Senior Nello discusses "The European Union and Central-East Europe: Background to the Enlargement Question." This large contribution tackles the economic developments and transformation process form a central planning system towards a changed role for the State and private property, identifying thereby the chief tasks faced by the Central-East European countries.

The challenges of Part II starts with a contribution by Alasdair Smith About the "Integration into the Single Market." Subsequently he discusses the European Economy, the relationship with the Central and Eastern European countries and the integration of those countries into the economy of the European Union.

John Roper continues with "Enlargement and Security". In this contribution the concept of security is explained and defined, and brought in relationship with not only the European Union, but especially with the existence of the NATO as institution established to defend security. Security dimensions have always been a key issue in the enlargement of the European Union. Roper examines in his contribution the political and security reasons leading to applications to join the European Union and/or the NATO.

The book closes up with contribution by Renard Dehousse, discussing "Institutional Models for an Enlarged Union: Some Reflexions on a Non-Debate". The European integration has been more functional in the first place rather than institutional. This also explains its effectiveness which could however be endangered by the enlargement if no adequate preparation has taken place. Dehousse discusses possible solutions like increasing the Parliamentary powers, but warns at the same time for the risk of a majoritarian option.

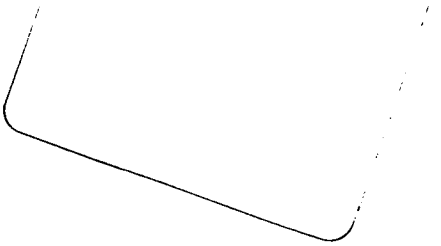
This book is not only a must, but obligatory reading for everyone who wants to understand better the background and the diverse aspects of the enlargement of the European Union with the Central and Eastern European countries.

Katia BODARD

PRINTED IN HUNGARY

Akaprint, Budapest

Only original papers will be published and a copy of the Publishing Agreement will be sent to the authors of papers accepted for publication. Manuscripts will be processed only after receiving the signed copy of the agreement.



HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

AUTHORS:

Vilmos PESCHKA, Member of the Hungarian Academy of Sciences, Institute for Legal Studies of the Hungarian Academy of Sciences, Budapest
Csaba VARGA, Professor of Law, Institute for Legal Studies of the Hungarian Academy of Sciences, Budapest
György SZÉNÁSI, Ambassador, Head of Department of International Law, Ministry of Foreign Affairs of the Republic of Hungary
André P. den EXTER, Professor of Law, Erasmus University Rotterdam, The Netherlands
Gábor TÖRÖK, Senior Research Fellow, Institute for Legal Studies of the Hungarian Academy of Sciences
Mónika WELLER, Senior Advisor, Ministry of Justice, Budapest
Katia BODARD, Research Fellow, Faculty of Law Vrije Universiteit, Brussel

HU ISSN 1216-2574

Vol. 40. Nos 3–4. 1999

HU ISSN 1216-2574

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Editor in Chief *Vilmos Peschka*

Akadémiai Kiadó
Budapest

Kluwer Academic Publishers
Dordrecht / Boston / London

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Acta Juridica Hungarica presents the achievements of the legal sciences and legal scholars in Hungary and details the Hungarian legislation and legal literature. The journal accepts articles from every field of the legal sciences.

Recently the editors have encouraged contributions from outside Hungary, with the aim of covering the legal sciences in the whole of Central and Eastern Europe.

Manuscripts and editorial correspondence should be addressed to

ACTA JURIDICA HUNGARICA
H–1250 Budapest, P.O. Box 25
Tel.: (36 1) 355 7383 Fax: (36 1) 375 7858

Distributors

for Hungary

AKADÉMIAI KIADÓ
P.O. Box 245, H–1519 Budapest, Hungary
Fax: (36 1) 464 8297
http://www.akkrt.hu

for all other countries

KLUWER ACADEMIC PUBLISHERS
P.O. Box 17, 3300 Dordrecht, The Netherlands
Fax: (31) 78 639 2254
http://www.wkap.nl

Publication programme, 1999: Volume 40 (in 4 issues).
Subscription price: NLG 450.00 (USD 225.00) per annum including postage & handling.

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

Vol. 40. Nos 3–4. 1999

CONTENTS

ACTA JURIDICA HUNGARICA
1999 40 Nos 3–4, pp. 121–123

1216–2574 / 99 / USD 5.00

PREFACE

Zoltán Péteri at Seventy

On this occasion, the editor-in-chief, the editors and the staff of *Acta Juridica Hungarica* take this opportunity to congratulate the internationally known and recognised scholar, an eminent professor, a dear colleague and friend, who has been author to this journal ever since its inception. The *Acta Juridica Hungarica* is a periodic of the Hungarian Academy of Sciences attributed to the Institute for Legal Studies of which Professor Zoltán Péteri has been a research fellow for almost 50 years. Nothing is more natural for the colleagues and members of staff of the Institute than to express their sincere best wishes to him as it is conveyed in the given statement.

It is in this Institute that Professor Péteri has carried out his research activity, its fields of research being political and legal philosophy and comparative law, their theoretical and methodological aspects in particular. As a young research fellow, his interest was in the problems concerning the forms of government and wound up writing his Doctorate Thesis and many scholarly writings on the form of government. It is impossible not to mention his exceptional writings on the theory of the state which exposed its problems like a constitutional state and/or a welfare state. This was considered alien from the era's mentality. A similar tendency is shown by his works on legal philosophy in which it is evident that he was attracted to natural law and its theories and demonstrated by his published studies on the history of ideas and the revived analysis of natural law after the II World War.

The legal philosopher Gustav Radbruch had a great influence on Professor Zoltán Péteri's thinking on legal theory. His profound writings on Gustav Radbruch evoked a great interest in contemporary Hungarian thinking on legal theory and had an impact not only on the fascination in natural law but, also expressed Professor Zoltán Péteri's legal thinking and his entire philosophy of life. Natural law and its values are an integral part of that notion of legal philosophy, what we call human rights. Hence it is not surprising that the celebrity has devoted many of his writings to the natural law element of human rights and the history of human and civil rights.

It is from the doubtful validity of the natural law, human rights and the eternal values poised above people and nations that legitimately leads to the examination of the categories, elements, institutions, characteristics and values that are both similar and different in positive law and legal systems. Consistence in legal thinking necessities one to acquaint oneself with the study of comparative law in order to look for the similarities found in laws and legal systems and to identify the special, particular and distinctive features thus leading Professor Zoltán Péteri to the problems of comparative law and given his interest in the theory, it was natural for him to familiarise himself with the history and methodology of comparative law. The problems of comparative law were not only an object of his scientific research but also a centre of his professorial work.

Professor Zoltán Péteri is not only a legal scholar, a theoretical on legal philosophy and political science and comparative law but also a professor specialised in these academic areas. In him we find the optimist, belief and hope of a teacher, that he can pass on the acquired knowledge to his students or at least guide them into this area of studies. Other than excellency in the field, it is through articulacy accompanied with irony and self-irony that he has been able to use his capabilities to the aid of his students, a style Goethe referred to as the „salt of lite". He has been a lecturer at the Eötvös Loránd University Faculty of Law and Political Sciences, the Péter Pázmány Catholic University Faculty of Law, a rapporteur and speaker at many international forums, congresses and conferences and for years now he is been a professor at the International Faculty of Comparative Law in Strasbourg.

To be a scholar, professor is not just a profession. In the present case it is the deep and thorough knowledge of law and science as the great Hungarian specialist in civil law Béni Grosschmid wrote that „the legal profession is erudition". Even more is the law professorship! He is widely read in Hungarian fiction literature starting from Balassi to Árpád Tóth, from Zsigmond Kemény to Ferenc Herczeg let alone his acquaintance with world literature, whether Roger Martin du Gard, Galsworthy, Thomas Mann, Tolstoy or Tsechov is the topic

of conversation. Reading is a function of his life. His knowledge of arts is not limited to literature but is also he has a passion for opera, and as globe trotter he is an expert and admirer of Gothic Cathedrals and not forgetting his familiarity with fine art it is worth mentioning his favourites like Vermeer or Rodin. Science, art and diverse education in one word culture, as Huizinga emphasised in his works, sprouts from a game: culture has the character of a game. In the person of the celebrity is a true *Homo ludens*: a master at chess, a brilliant bridge player and a sport fan.

This appraisement showing the achievements and capabilities and at the same time expressing our birthday wishes to Professor Zoltán Péteri would not be complete without mentioning the integrant and definite element of his personality: morals. There has been mention of the orientation and commitment to values and this is obviously not only devotion to philosophy or legal philosophy, but is suggestive of the celebrity's personality and morality. He made is choice among relative values and to him the most important value is human life. He weighs everything in context with human life. It is this value that moulds his moral attitude, as represented by Horatio "integer vitae scelerisque purus" to pay tribute to this excellent latinist as well. Another rare moral character of his is one of tolerance and patience which is expressed in the words of Gustav Radbruch, his favourite legal philosopher that "wins the permanent value from the ephemeral, retains the evanescent moment, prevails over time, for it is in no fear of losing it, reaches home at every station of the road and, while at work, enjoys the work created. Tolerance is balance, faith and trust. It has created the Persian carpet and the Gothic cathedral. It is the gentle mother of culture". It is knowledge, erudition, moral stature and playfulness that give a full picture of Professor Zoltán Péteri's personality and human element.

It is this totality of human quality that motivates the respect, esteem and affection contained in the following few articles.* All is with the heart-felt best wishes on this occasion of his 70th birthday.

Vilmos PESCHKA

* The editors of Acta Juridica Hungarica wish to express their thanks to Professor Csaba Varga for his kind assistance in the preparation of that number.

ACTA JURIDICA HUNGARICA
1999 40 Nos 1–2, pp. 125–157

1216-2574 / 99 / USD 5.00

STUDIES

András BRAGYOVA

CONSTITUTIONAL REVIEW AND DEMOCRACY

The "countermajoritarian difficulty"

I met for the first time Professor Péteri as a first year law student many years ago. He lectured on one of his favourite subjects, English law, common law, the peculiarities of the Anglo–American legal thought. I still remember well, how exhilarating these lectures were, how they stimulated my interest in what might be called (and in his case rightly) legal science. It was he who first acquainted me with the idea of constitutional review, and the foundations of constitutional theory. Moreover, without his active assistance I would never have been able, about a decade later to study in Strasbourg at the International Faculty of Comparative Law; where I collected unforgettable experiences. One among them was the first meeting with judgements of constitutional courts; and I could not even fancy that I will ever live to in my country the same I so envied of others. Since our first meeting there came many others; for instance I passed my last exam at the law faculty with him. Later, again, I had the pleasure to be a junior colleague of him at the Institute for Legal Studies; afterwards, as a not–so–junior fellow of the institute even worked together with him for years. All that time I learned to appreciate his wit, and sarcastic humour, inseparable from a great deal of self–irony. All this has been and buttressed by his vast erudition in many fields outside his own, as in history, classics, and literature. I wish him to conserve this wit and good humour all along his life.

Introduction: Setting and Stating the Problem

"Judicial review [is] particularly hard to justify in a democracy"—remarked H. L. A. Hart in a seminal article.[1] Indeed, probably the most difficult question in the justification of constitutional review of legislation is what has been called the "antimajoritarian" or "counternajoritarian difficulty".[2] To put it roughly, the *countermajoritarian problem* questions the legitimacy of constitutional review on the ground that the judicial review of legislation has no democratic legitimation, since constitutional review inevitably opposes to decisions (laws, acts) of state organs with unquestionable democratic legitimacy. Thus, it is possible, or indeed quite plausible, to argue that the judicial review is, or appears to be, *ex hypothesi* antidemocratic, since it has been established exactly to turn down, reverse or invalidate, briefly to control, "democratic" decisions. For this reason it might be interesting to examine the relationship between democracy and constitutional review.[3] Conversely, for those who for some reason oppose, dislike or distrust democracy, constitutional review is attractive just for this: strong or weak anti-(or simply non-)democrats would probably see in the alleged or real "anti-democratic" nature of constitutional review an important argument *for*, rather than against, constitutional review. What I am to say about the relationship of democracy and constitutional review is, therefore, applicable (with inverted signs, of course) to this argument too.

In constitutional democracies already practising judicial review the countermajoritarian problem arises somewhat differently (since the discussion on the justification of the constitutional review in its pure form is moot), i.e. as the problem of the *proper limits* of judicial review. A theory aiming at the definition

---

1 Hart, "American Jurisprudence Through English Eyes" in HART, H. L. A.: *Essays in Jureisprudence and Philosophy*. Oxford, 1983, 125.

2 THAYER, J. B.: "The Origin and Scope of the American Doctrine of Constitutional Law" *Harvard Law Review* 7 (1893) 129 ff was first to expose it. The term itself stems, so far as I know, from Alexander Bickel, *The Least Dangerous Branch*, New York, 1962, 16. For a more recent view see TUSHNET, M.: "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty" *Michigan Law Review*, 94 (1995) 245 ff and see TRIBE, L.: *American Constitutional Law*, St. Paul, 1978, 9 ff.

3 From the recent non Anglo-American writing on the subject see first of all: DOLZER, R.: *Die staatstheoretische und staatsrechtliche Stellung des Bundesverfassungsgerichts*, Berlin, 1972, EBSEN, I.: *Das Bundesverfassungsgericht als Element gesellschaftlicher Selbstregulierung*, Berlin, 1985., and in particular KÄLIN, W.: *Verfassunsgerichtsbarkeit in der Demokratie*, Bern, 1987 and TROPER, M.: "Justice constitutionelle et démocratie" reprinted in his *Pour une théorie juridique de l'Etat*, Paris, 1994, 329 ff.

of the constitutional limitations of judicial review requires something that might be called the "background theory" of the constitution that, in turn, should by necessity contain a justificatory theory of judicial review too. In this way, the problem of the *limits* of the constitutional review—especially the definition of its scope and the cases not falling within it, such as "political questions"—is reducible to a general theory of constitutional review.

Indeed, the argument from democracy against constitutional review is the most powerful argument against it: if this argument can be defeated, there will be hardly any reason for democrats to oppose *in principle* judicial overview of legislative acts. Thus, in this paper I shall argue that there is a "democratic" justification for judicial review that must be accepted by any sufficiently rational democrat. What I want to do is, more precisely, to demonstrate that there is a democratic justification of constitutional review: in the following I will distinguish between *weak* and *strong* democratic justification of constitutional review.

A more precise setting of my task requires certain (admittedly relatively vague) definitions. First, by "*constitutional review*" I mean a set constitutional norms (written or unwritten) ascribing a competence to a "court" or a "tribunal" to invalidate any norm of the legal system if it finds that it is contrary to the constitution, except the constitution itself. In practice the key question is the invalidation of *legislative acts*, i.e. norms made by a democratically legitimated (that is, elected) organ of the state. Another fundamental concept is here that of a "*court*": it denotes an organ of the state that is a "court" in the sense of being independent of any organ of the state and decides exclusively based on law. A satisfactory definition of a "court" is, by the way, not so an easy task as it might seem to be,[4] but here it is sufficient to limit myself to certain well-known features of courts, first of all to the circumstance that a court is exclusively an organ of the *legal system* designed to function exclusively for the system, such as banks are organs of the economic system whose function is to work exclusively from the point of view of the system, disregarding any other consideration.[5] The really decisive argument seems to be that the concept of a "democratic court" is no less an absurdity than the concept of the "exploding goldfinch". It is difficult to explain briefly why is this so, but the main point appears to be that courts *ex hypothesi* are not making arbitrary choices, and they are not allowed to do so. Indeed the very idea of a court bound by law excludes

4 See e.g. SHAPIRO, M.: *Courts*, Chicago, 1977.

5 The metaphor is borrowed from LUHMANN, N.: *Das Recht der Gesellschaft*, Frankfurt. a.M., 1990.

this. Thus, even if courts are "democratically" elected (as it sometimes happens, especially in jury systems or where the *professional judges* are elected too), the election does not—indeed cannot—change in any way their *function*, which is inherently non-democratic (but not, of course, for that matter, anti-democratic). It does not interest me here why the "ordinary" courts of law (as distinct from constitutional courts) are essentially non-democratic. Obviously, the answer to this question would presuppose a definition of "democracy" which I shall analyse below; suffice it to say here that ordinary (non-constitutional) courts are essentially non-democratic because their decisions—contrary to that of constitutional courts—do not invade, in theory at least, into the domain reserved to democratic decision-making.[6]

I shall define a "constitutional court" as a court that has the power to strike down (i.e. render by its decision invalid, in fact repeal) any law which otherwise should be considered perfectly constitutional. In that sense any court, including the US Supreme Court or the Swiss *Bundesgericht (Tribunal fédéral)* possessing the power, but not only that, to declare a legislative act contrary to the constitution and therefore void (invalid) is "constitutional court". The important distinctive feature of these courts is that they are bound to the constitution *as law*; so that they are required to base their decision on legal argument exclusively, excluding any other, say prudential, political, economic, moral, and other reasoning as fas as they could not be couched in terms of legal argument of some kind. The scope and contents of "legal argument" cannot be defined invariably, since it is very much different in various jurisdiction and times. All this being true, in any legal system there is a set of propositions accepted for good or bad as "legal argument", completely distinguishable from any other kinds of argument. The distinctive characteristic of the legal argument is, briefly and summarily, that at least one of its premises is a statement of positive law and its conclusion is also a proposition of law: it could be pure or mixed depending on whether its truth conditions are only its correspondence to norms or to facts too.[7] Much of the legal argument pertains to *interpretation*, i.e.

---

6 Apart from judicial law-making; but, since it is always open to the legislation to change the norms made by courts, judicial law-making could be regarded for this purpose as subordinated legislation. This does not apply, of course, and this is the core of the problem, to constitutional courts: their decisions may not be overruled by legislation. Of course, if an ordinary court is at the same time a constitutional court, this applies only to its decisions not performing constitutional review.

7 I borrow this concept from RAZ, J.: *The Concept of a Legal System*, Oxford, 1970, 2d ed. 1980.

(roughly) to establishment of the "precise" meaning of norms; in the case of constitutional courts this means that their main task is to interpret constitutional norms. Since the authority of the interpretation is parasitic upon the norm interpreted, that is, interpretation follows the authority of the norms (at least in the case of judicial interpretation), the authority of the dictum of constitutional court us higher than that of the legislation.

The argument from democracy against constitutional review could be summarized in (or reduced to) the following two propositions (and the arguments supporting them):

(1) constitutional courts exercise, without having right to do so, [arrogate themselves, usurp] the *constitution-making power of the people*;
(2) constitutional courts illegitimately exercise the *law-making* power of the people

Proposition (2) is much weaker than proposition (1), since if legislative (law-making) power is a power *derived* from (or based on) the constitution, than even the legislative power could (conceptually) usurp it. In practice, however, the conflict between democracy and constitutional review only appears to be a conflict between the "democratic" legislative power and the constitutional court. A dispute on the conformity with the constitution of a law—a legislative act—is in fact *a conflict on the proper meaning (interpretation) of the constitutional norms* defining the powers and so the limits of the legislation, whatever they are.[8] It might be understood also as a dispute over the power to interpret the constitution, since "he who has the power to interpret, has the power to say what the norm is" as Bishop Hoadly said.[9]

In fact, proposition (1) presupposes that the power to interpret the constitution is equivalent to the making of the constitution. Moreover, it tacitly assumes a second premise, viz. that the interpretation of the constitution should be reserved to the constitution-maker alone, any other interpretation of the constitution being the usurpation of the power of the *pouvoir constituant* of the

8 These norms usually are of two types: first, norms of competence (defining which organ of the state has the power to decide) or substantive norms defining the contents (acceptable outcomes) of the law (mostly fundamental constitutional rights). I shall revert to this subject below.

9 As quoted by KELSEN, H.: *General Theory of Law and State*, transl. A. Wedberg, Cambridge, 1946. The point is marvellously illustrated by Lewis Carroll in the dialogue between Alice and Humpty-Dumpty in the *Through the Looking Glass*.

people. It is easy to discern that the reservation of the power of interpretation of the constitution to the people or to their representative organ(s) (Parliament) amounts to the denial not only the very possibility of the constitutional review, but also to the refusal of the legally binding character of the constitution. Since no norm is able to determine its own application.[10] if one accepts the idea that a constitution is (among others) a set of binding *normes*, one should also accept that it will be inevitably interpreted, and sometimes in different ways. If the organ that made the norm has the power to interpret it too—that is, the power to decide in a legally binding way the disputes on the correct interpretation of the norm—the norm will not exist as a norm, properly so-called. In other words, a norm does not exist as a legal norm unless the power to make it and the power to interpret it are separated.[11] Thus, in speaking of the existence of constitutional review by a court, one has already assumed the possibility of an *objective interpretation*[12] of the constitutional norms.

By the way, proposition (1) would certainly be true in a constitutional system *based on parliamentary sovereignty,* merging the power to modify the constitution and the law-making power in *a single organ* of the state (usually, in modern times in a parliament or, for instance in the king, president etc.). Indeed, in a constitutional system of parliamentary sovereignty, the most conspicuous case of which is Britain,[13] any form of constitutional review is excluded *a priori*, since here the legislative power is not bound *legally* by the constitution. Kelsen very pertinently remarked that in a constitutional arrangement not providing for the review of the constitutional conformity of the legislation, there are in fact *two* constitutions in force: one setting limits to the legislation and another implied one accepting the violation of the constitutional provisions;[14] one might add that there is only one, at least in the legal sense: the latter. This Rousseauian conception[15] of legislative power in fact assumes at the outset the

---

10 WITTGENSTEIN, R.: *Philosophische Untersuchungen*, § 193 ff. See BAKER, G. P. and HACKER, P. M. S.: *Wittgenstein: Rules, Grammar and Necessity (An Analytical Commentary on the Philosophical Investigations 2)* Oxford, 1985 See also SCHAUER, F.: *Playing by the Rules*, Oxford, 1991, 118 ff.

11 This argument echoes that of Montesquieu on the danger of uniting in one organ the legislative and the judicial power. *See Esprit des lois*, XI. VI.

12 GREENAWALT, K.: *Law and Objectivity*, New York, 1992.

13 One might add to it nearly all the constitutional systems of the European continent in the 19th and early 20th century, modelled on the French constitutional theory.

14 KELSEN, H.: "La garantie juridictionelle de la constitution" *Revue du droit public*, 1928. See also KELSEN: *General Theory of Law and State*, op. cit.

15 *Du contrat social* II. II.

absolute superiority of the "democratic" legislator as sovereign. In this model, at any rate, there could be only a minimal and relative constitution, since the legislator as sovereign could not, by definition, be limited by norms (if not in fact).[16] For this reason alone it could not endorse anything even remotely similar to the separation of powers. If so, there is no room for constitutional review either.

As we have seen, the proposition (1) above is of decisive importance. This shows that the countermajoritarian difficulty is essentially a problem of *constitutional theory*. By the term "constitutional theory" I mean a theory—a set of normative propositions—*justifying* a given constitution.[17] This theory might, of course, be very different from the *actual* theory or articulated doctrine (if any), which lead the historical constitution-maker. The essential point is that a background theory is a set of normative propositions *ascribed* to an ideal constitution-maker (and not to any empirical one); it is the *best possible justification* of the constitutional norms that could be given.[18] The background theory method (if not the term) is highly characteristic of constitutional interpretation although it is applicable in many other fields. It is a normative construction that allows to deduce the best possible norm-variants of the constitutions, I. e. those norm-variants which cohere the best with the justificatory theory of the constitution. Furthermore, it allows to fill the gaps left open in the constitution. The background theory is, needless to say, not part of the constitution as a set of norms, though it is an indispensable tool to its understanding and interpretation. In the case of a constitution the background theory is far more important than usual in legal interpretation mainly because the constitutions typically consist of norms much more vague than normal legal rules. Hence constitutional texts containing norms are, on the one hand, much more context-dependent; on the other, they allow much more norm-variants consistent with the text—acceptable interpretations consistent with the norm text—than other legal norm texts typically do. The background theory is *ascribed* to the constitution, i.e. it is in a normative connection with it, in the sense that the background theory contains a set of propositions from which the norms of the constitution should be reducible to. Indeed, I shall argue that any constitutional arrangement necessarily has at least one background theory, explicit or implicit; it might have many at the same time or successively.

---

16 "Le souverain est, par ce qu'il est ce qu'il doit être." ROUSSEAU: *Du contrat social.*

17 See DWORKIN, R.: *Law's Empire*, London, 1986, 176 ff.

18 The developments above have been insprired by Ronald Dworkin's theory of constitutional interpretation, as the reader will recognize.

Thus, the background theory (or the relevant part of it) relating to constitutional review is decisive for any constitutional system. In this paper I shall try to construct a background theory of constitutional review appropriate to any reasonable democratic constitutional system. In doing so, I endeavour to construct a justificatory theory of constitutional review in a democratic constitution. That means that I shall not attempt to examine the relations between constitutionalism and democracy independently of the justification of constitutional review. In this way, I shall not examine the justification of constitutional review based on the argument from the binding force of the constitution alone; if this argument is considered conclusive, no more effort is needed. But the fact is that the legal binding force (validity) of the constitution itself is hardly ever admitted as a conclusive reason to accept constitutional review. This is a necessary, but by far not sufficient justification of the control of constitutionality of norms emanating from a pre–eminently "democratic" organ by an admittedly non-democratic one.

On the whole my aim is to put forward a possible constitutional *democratic justificatory theory* of constitutional review. The novelty (if any) of my argumentation is only that it accepts the democratic premisses as a starting point and argues that a thorough analysis of the concept of democracy itself provides sufficient ground to admit constitutional review. To do this, I shall proceed in the following way. First I propose to distinguish between two concepts of "democracy": a procedural concept and a substantive one; next I suggest a distinction between statute–type and Rawls-type (as I call it) constitutions. Then I proceed to construct two fundamental types of democratic justification of constitutional review: a weak, or procedural and a stronger, substantive justification of constitutional review. In this way I hope to prove that a reasonable idea of democracy makes not simply acceptable but, in a stronger (and for me at least better) version, even necessary the adoption of constitutional review in any democratic constitutional system.

Two types of the concepts of democracy

I begin my argument with an analysis of the concept of "democracy". I suggest two divide, exclusively for the purpose of the present essay, *all possible* concepts of democracy into two clusters: the first cluster includes those concepts which define "democracy" as a *procedure*; the second cluster comprises all concepts of "democracy" which construe "democracy" as the property, i.e. correctness, goodness etc. of a social arrangement, institution or norm. I maintain that any

concept of "democracy" whatsoever used in political theory as well as in ordinary political rhetoric, i.e. from the most refined to the crudest forms of discourse in politics and society could be allotted to one of these clusters, or, at least could be analysed as a combining the two concepts. I do not say that all the concepts of "democracy" could be reduced to these clusters without a remainder; but I do claim that any concept of "democracy" which is not a plain abuse of the language should necessarily contain at least an element assignable to one of the two clusters defined above.[19]

The clusters I suggested are not intended to be understood as corresponding to the types of democracies, but only as the *concepts* of democracy. Of course, concepts of democracies are inevitably used in describing political, social or constitutional systems, but I do not intend to give the classifications suggested above an unnecessary "ontological" connotation. Furthermore, the concept of democracy is not an equivalent of a *democratic theory*: it is much less than that. A democratic theory should include a justification of democracy, while a concept of democracy claims much less: it wishes to suggest simply *what* democracy is, but not what it ought to be and why. My analysis therefore does not claim, and cannot do so, to be a moral, rational, political etc. justification democracy (or one of its variants or "conceptions"). In fact there is no need to go further, since the problem of justifying democracy is different from its concept although there is some kind of overlap between them. This approach is, I think, justified by the undeniable fact that in modern constitutional theory there is, by now at least, hardly any discussion about the inevitability of some form of "democratic" basis for any constitutional system; the difficulty is much more with the concept of democracy suitable for constitutionalism. The justification of democracy, in its pure form, is not immediately a problem for constitutional theory.

---

19 The main works I used as basic for the understanding of the concepts of democracy are, in addition to those referred to elsewhere, the following standard works. KELSEN, H.: *Wesen und Wert der Demokratie*, Berlin, 1928, SCHUMPETER, J.: *Capitalism, Socialism and Democracy*, New York, 1942, DAHL, R.: *A Preface to Democratic Theory*, New Haven, 1956, SARTORI, G.: *Democrazia e definizioni*, Florence, 1962 (English translation: *Democratic Theory*, Chicago, 1966); CHRISTOFERSEN, J. A.: *The Meaning of "Democracy" in European Ideologies*, Oslo, 1966; MacPHERSON, C. B.: *Democratic Theory*, Oxford, 1973, SINGER, P.: *Democracy and Disobedience*, Oxford, 1973; ARBLASTER, A.: *Democracy*, Minneapolis, 1987; HELD, D.: *Models of Democracy*, Oxford, 1987; BIRCH, A. H.: *Concepts and Theories of Democracy*, London, 1991; Beetham, D. (ed.): *Defining and Measuring Democracy*, London, 1994.

The question remains, nonetheless, why are these two types of concepts of democracy are really types (or variants) of *one and the same* concept. My answer is this: the common core of the two types of democracy is the idea and concept of *equality*. In European tradition of politics since the Greeks "democracy" has always been a form, or implementation of an idea of, equality. The two types of democracy, I suggest to distinguish, as I shall try to point it out, differ in the way they conceive of equality within the political community: the procedural concepts of democracy could be associated to *formal* equality, while the substantive or "justificatory" concept of democracy is affiliated to *substantive* equality. Moreover, the idea of equality connects very much the concepts of democracy to the justification of democracy, since undoubtedly equality is one of the strongest justifications of democracy. Besides, on a different level the idea equality in law ties the concept of democracy to the working, validity and binding force of the legal system.

The Concept of Democracy as a Procedure

The concept of "democracy" in the procedural sense denotes, of course, a kind of "procedure" as a condition of validity (or binding force) to every member of a political community of a decision. Thus, a "procedure" is a condition of validity or binding force of the decision to the community. In the following I shall examine only norm–(or law–)making decisions, i.e. the outcome of which is a valid and binding norm (or a rule of law), since this case is of foremost importance for the analysis of constitutional review and in a constitutional democratic state any decision is either itself a norm or bound to be at least authorized by a norm. It is no doubt true that in a modern political community formed by citizens of a state the only tool at the disposal of the state to make decisions binding all the citizens severally is legislation; the constitution is, seen from this point of view, is but a set of norms determining the *conditions of validity* (or binding force)[20] of those norms in the sense that the no norm is binding *unless* it was created by a specified procedure.

The key concept of procedural democracy is, most obviously, "procedure". Although (or perhaps just because) this term is used quite often in law and politics, it is not easy at all to define its meaning.[21] For my part I shall call

---

20 It is possible to distinguish between "validity" and "binding force" of a norm, but I shall use these terms as synonyms here.

21 Cf.: LUHMANN, N.: *Legitimation als Verfahren,* Neuwied, 1969, 11. stating that there is no general concept of "procedure" in legal science.

"procedure" a set of relationships between subject, agents etc. resulting in an obligation binding the participants of it too. Thus, in short, a procedure is decision-making the result of which binds the decision-makers. At the same time, it is not a requirement that the result be binding *exclusively* to the participants of the procedure; but its essential that it bind them; for example, in a judicial procedure the judgement does not "oblige" the court which made it, but nevertheless "binds" it, in the sense that the court has no power to change its own final decision. The concept of "procedure" proposed here is much broader than the one used in legal dogmatics or legal theory, since it includes any action (or conduct) leading to, or creating, an obligation. (The obligation should not be a *legal obligation*, though I shall examine only this case.) Accordingly, the conclusion of a contract or a making of a promise, for example, are also "procedure" in this sense, albeit they are usually not regarded as such in legal or even in ordinary language.

An essential feature of any procedure is that it consists of a series of actions (or, in a limiting case, a single action) *governed by rules*; I shall call the specific rules whose exclusive function is to regulate procedures "procedural rules". Their distinctive feature is that these rules are in an important sense *constitutive* for the procedure they govern: if these rules were missing, it would be impossible to conduct a procedure, since they determine what the procedure is and in particular the conditions of the binding (obligatory) force of the result of the procedure. Moreover, they tell us, when a procedure is at all has taken place. By the constitutive nature of the rules of procedure I mean approximately the same as Rawls or Searle meant in describing the nature of constitutive norms.[22] To sum up roughly their view, a rule is constitutive of a "practice" when a given action (say, writing an X on a paper, or pronouncing the words "I promise to pay £ 50 to Mr X") is not possible without the rule and, more importantly, at the same time the rule is *part of the action* itself. Norms of procedure not only define, they create the procedure. On the other hand, there is no "procedure" without rules. A further property of the rules of procedure follows from their constitutive nature: they could not be "obeyed" but only be "made use of", since the rules of procedure are not "obligatory" to anybody: they are preconditions for certain actions (like voting, promising, law-making etc.) but they could not disobeyed, but only not violated or not fulfilled. The rules of procedure, in other words, do not impose duties or obligations, but simply define courses of actions as conditions for producing certain effects.

---

22 RAWLS, J.: "Two Concepts of Rules" repr. In. Foot, Ph. (ed.): *Theories of Ethics*, Oxford, and SEARLE, J.: *Speech Acts*, 1969.

These rules can only be *followed,* but not, strictly speaking, "disobeyed".[23] Accordingly, the consequence of their violation (i.e. their non-following) is essentially *invalidity*: Actions not fulfilling the conditions defined in procedural rules simply *do not count* as an action corresponding to the rule; for instance, fiddling when one asked to vote in parliament does not count as a vote.[24]

A second essential characteristic of procedural rules is that they *ex hypothesi* do *not determine the outcome* of the procedure but only what counts as a valid outcome. This might be trivial, but still not without importance; so, for instance, the rules of parliamentary procedure do not define what kind of act adopted by the Parliament is acceptable, but only when it counts as an act of parliament. Exactly he same is true to the rules of judicial procedure too. Hence, the outcome of the procedure is always and of necessity contingent, that is to say, it has more than one valid (permitted) outcome. This condition is important, since it makes possible to separate exclude from the scope of procedures those which are outside controlled or faked, like pseudo-parliaments or show trials; at the same time it is not a matter of the empirical *predictability* of the outcome, since the outcome of a parliamentary voting may be fairly predictable and still a "procedure" in the proper sense. It is a necessary part of the rules of procedure that they should define the conditions of the final decision in the procedure, or, more exactly, they should determine the cases in which the procedure is terminated: there could be no infinite procedures. Such a rule is, for example, the rule of the counting the votes. It is of course possible that the substantive outcome of a procedure will depend on certain norms, like in the case of a judicial procedure, but they could not be procedural "rules".

Thus, procedural concepts of democracy are inherently normative because they always define certain norms, the acceptance and/or validity of which constitute a democracy. These norms are labelled by Norberto Bobbio as "rules of the game".[25] This metaphor of Bobbio reveals a significant property of the procedural rules of a democracy: they are like the rules of a game, they are presupposed (or accepted) *before* the playing of the game, sot that they are *logically prior* to the act of playing just as the rules of democracy are logically prior to the practice of democracy. Thus, it seems to be inevitable to admit the

---

23 See HART, H. L. A.: *The Concept of Law*, Second ed., Oxford, 1990.

24 It is possible that one might be under a duty to participate in a procedure on other grounds, e.g. the judge is obliged to participate in the judicial procedure.

25 BOBBIO, N.: *Il futuro della democrazia*, Torino, Einaudi, 1984, 4 ff. ("regole di gioco"). See also HABERMAS, J.: *Faktizität und Geltung*, Frankfurt a.M., 1992, 367 ff.

paradoxical inference: *the rules of democracy cannot be adapted democratically*, and consequently they are not, and could not be, *procedurally* democratic.[26] This paradox demonstrates that the justification of democratic rules themselves should be drawn from sources other than the procedure itself.

A more comprehensive (but still not exhaustive) definition of a "procedure", including democratic procedure, may contain several elements all of them specified by the rules of procedure, such as the

actors, participants of the procedure;
rules of procedure in *the narrow sense* (rules governing exclusively the relations among the participants/actors of the procedure), like the rules of order of an assembly;
rules of *competence* which determine the subject matter in which a procedure is allowed to decide, i.e. defines the legitimate scope of choices in the procedure;
rules of decision which define the terms of the validity and finality conditions of the decision (e.g. "2/3 majority" [of the actors]).

As far as the definition of *actors of the democratic procedure* is concerned, this is usually regarded as a key in the concept of democracy, If "democracy" is a procedure in which "everybody" participates on equal footing, there remains to define who is a member of the set of "everybody", and who is not. The discussion about the range and content of citizenship—e.g. the long struggle for general franchise—in many democracies shows that the question of the proper definition of actors is a democracy is far from being insignificant. In a constitutional democracy the definition of the actors of democratic procedure is equivalent of extent of the *demos*, the subject of democracy. Since modern democratic constitutions normally claim to be derived from (in the normative sense) from the sovereignty of the people, whatever that means, the constitutional norms defining the scope of the people, and all those supposed to be derived from them in particular the rules on the "rights of the people", are procedural norms. The constitutional principle of the "sovereignty of the people" is also a procedural norm, as Habermas pointed it out.[27] Even more

---

26 See on this paradox of democracy HOLMES, S.: "Pre-commitment and the paradox of democracy" (J. Elster and R. Slagstad eds.), *Constutionalism and Democracy*, Cambridge, 1988, 195 ff; see also MacCORMICK, N.: "Constitutionalism and Democracy", *Internationales Jahrbuch für Rechtsphilosophie und Gesetzgebung*, 1989. 17 ff.
27 HABERMAS: *Faktizität und Geltung*, 600 ff.

important for the working of democracies is to observe that the concept of *political representation* is a procedural concept, for all "really existing" democracies are, of course, essentially representative. The concept of political representation[28] is, in the light of my previous reasoning, clearly a rule of procedure. Political representation is a normative construct (a set of procedural norms) to the effect that given certain conditions—the validity of the electoral procedure and so forth—the acts of a specific organ of the state (Parliament, National Assembly etc.) *ought to* be regarded as if those acts were the acts of the electorate, who probably themselves represent the "people" as a larger whole. This proposition is true even in cases where it can be established that the empirical people would have decided differently. So, political representation is a complex norm of procedure.

The rules of political representation (and that of sovereignty even more) contain *norms of competence* although consist not exclusively of norms of competence. Here I shall examine only briefly the norms of competence which are, by the way, the most important type of norms of procedure in constitutions, given that the norms of competence define the set of choices—legitimate outcomes—assigned to a procedure. If for instance Parliament has no competence ("power") to ordain ϕ than making ϕ-ing obligatory is not an allowed outcome of the parliamentary procedure. This example reveals, by the way, that indirectly procedural norms are capable too to restrain substantively the outcome of a procedure. In the case of political representation (and its limiting case of sovereignty) this is also a essentially a norm competence. "Sovereignty" is a procedural rule (of competence) which gives theoretically unlimited competence to the organ having the "sovereignty competence", such, as e. g. the organ of the state (or the procedure) competent to modify the constitution. The rules of competence are closely related (and subordinated) to the rules that define the subject matter of the procedure, i.e. the permitted outcomes standing for choice which should remain within the competence assigned to the procedure, lest the outcome become invalid (i. e. not binding). In a democratic procedure, the general subject matter of the procedure should be a *public affair*, a matter that concerns the whole of the political community.[29]

---

28 See in particular PITKIN, H. F.: *The Concept of Representation*, Berkeley, 1967.

29 This is not *prima facie* a conceptual necessity. One important difference between the antique and the modern democracies is that the Greek did not recognise, or to a very limited extent, the division between public and private shpere of the citizens.

In political democracies the most characteristic *rule of decision,* without any doubt is *voting.*[30] Trivially, voting is a procedure of social choice which concerns a public affair and its outcome binds in principle jointly and severally the political community and its members. In the case of the market choice, the outcome of the market procedure is valid to the society, since its result, say the distribution of income and property resulting from the market procedure, is not opposable by any member of the community, except for its irregularility. It should be noted that voting in itself is not inherently (conceptually) democratic; there is hardly anything "democratic" in the voting of the shareholders of a trading company . Nonetheless, voting is necessary for a procedural democracy if it satisfies certain conditions. The most important of them is the scope of participants in the voting procedure, as discussed above. Another essential condition of a democratic voting procedure is the rule of *majority.* Majority rule is in fact a criterion of decision-making: it defines the actions and their properties the fulfilment of which creates a final and valid outcome, but not *what* the outcome should be. Since much of the democratic character of procedures depend on the character of voting, it is crucial to the understanding of procedural democracy. It is noteworthy that voting is ancillary to the basic procedural idea of democracy that is, to the postulate that a democratic procedure is a procedure in which the actors themselves decide. Thus a voting procedure is democratic if it is designed in a way that satisfies the following ideal postulate:

> the outcome of the procedure should the in the greatest possible conformity with the greatest number of the actors' choices if they were individually in the position to decide.

This postulate is countered by another one essential in constitutional democracies which require that the competence—the set of its possible outcomes—of democratic procedures ought to be restricted to social or political choices. Democratic procedures are applicable, from *a procedural point of view,* only if its possible outcomes are (at least in a constitutional democracy recognising liberal rights) by definition *indivisible,* since the scope of democratic decision-making should concern, in principle, the community as a whole, the sphere covered by of liberal rights—in particular individual liberties—being outside the competence of the democratic decision-making procedure. Therefore, ideally, in public affairs there is no "individual outcome"; but a given state of the polity (society, community)

---

30 See in particular DUMMETT, M.: *Voting Procedures*, Oxford, 1984.

is equally valid for each member of it.[31] For instance, if the outcome of the democratic voting procedure in Parliament is a law setting a speed limit on the road, it will be equally obligatory (or "valid"), of course, those who agree with it and for those who do not. Theoretically at least, the democratic procedure would be conceptually justified (falling within the concept of democratic procedure) if it touches upon the aggregated state of the society in which individual decisions are excluded or they are for some reason unacceptable. Majority voting is, then, a *tool* in a democratic procedure to approach the ideal case of democratic decision-making: the greatest possible satisfaction of the actors in terms of the reflection of their preferences in common decisions.

The purely procedural concept of democracy does not (and indeed cannot) recognise any substantial limitation of democratic decisions: if a decision is procedurally perfect (final), it is at the same time binding *independently of its content.* Thus, the binding force of the decision is based exclusively on correctness of the procedure followed. The most important difficulty with the procedural concept (and conceptions) of democracy is that no procedure can guarantee that its outcome will be (1) substantially correct but not even that (2) it will properly reflect the opinion of the participants. Substantial limitations of the outcome couched in terms of procedural rules e.g. is as limitation of competence of the procedurally democratic decision-maker are nevertheless possible: they determine the outcome only indirectly, since it is never true that the outcome will be contrary to the rules of competence. In fact, the concept of the "rules of procedure" in itself excludes the possibility of such conflict, since a rule of procedure must be neutral in its relation to the substantive outcome: a procedural rule conceptually unable to be in conflict with the result (outcome) of the procedure. Rules of competence, however, do not determine directly the outcome of the procedure but specify *the scope* of permitted outcomes but never one single outcome. As I argued earlier, any procedure includes at least one rule of competence which could consist in *unlimited* competence; such a procedure might be called "sovereign", since an unlimited procedure is similar to the concept of the sovereignty. In an unlimited procedure there could b y the way no distinction between "private" and "public" given that this distinction is a (negative) rule of competence that excludes certain matters from the competence of the democratic procedure. In addition, there could be only one sovereign procedure in any community, for,

---

31 In practice the question is often whether a subject matter, like abortion, is a *public affair at all.*

if there are more than one than they will at least limit each other and so will not be unlimited.

The scope of procedural rules in constitutional democracies may be interpreted more broadly, in such a way that at a least a part of constitutional rights are in fact rules of procedure. This is applies first of all to constitutional freedoms: they are in fact in an important sense procedural rules. Certainly, political freedoms may be reformulated and understood in procedural terms or are in an important sense truly procedural rules, because political liberties are rules determining the shape of political procedures in a constitutional democracy. Their importance is just this: the freedom of speech, probably the most prominent political liberty, is the most significant within the range of political freedoms since it renders the democratic (or political) *procedure* open to any member of the community.[32] A prominent representative of the procedural view of the freedom of speech is John Stuart Mill: in his famous defence of the freedom of opinion in his *On Liberty*,[33] he justifies free speech as the best possible *procedure* of discovery of the best possible decision. Second, free speech is certainly procedural in the sense that it does not allow, ideally, any distinction among the views according to their *content* and that no view expressed has a claim to be accepted by others. The right of to free speech is, trivially, a right to take part in the discussion—it is the right to argue, not the claim to win; the choice among the conflicting or mutually exclusive views is taken, if needed, on the ground of voting. The same applies to other political freedoms: freedom of association, for instance, is also as it is easy to discern a procedural freedom too: it guarantees the right to participate in public life to groups of individuals. Generally, if one admits that *argumentation is a procedure* it is possible to extend the concepts (or conceptions) of procedural democracy to the public reasoning in general and conceive public liberties as rights to participate in the democratic procedure *lato sensu*.

The principal problem with the procedural democratic conceptions might be formulated in the following way. Is there any guarantee (or could it exist) that a procedurally correct decision will be substantively correct as well? Of course, it is possible to *define* substantial correctness as a *necessary result* of the majority decision, like Robert Bork does[34] or to deny the distinction at all, but

---

32 Cf.: RAZ, J.: " Free Expression and Personal Identification" in Raz, *Ethics in the Public Domain*, Oxford, 1994, 131 ff.

33 Chapter II.

34 BORK, R.: "Neutral Principles and Some First Amendment Problems", *Indiana Law Journal* 47 (1971) 1, 30.

such methods beg, or at best avoid, the question. This I shall address a bit later, following the analysis of the substantive-justificatory concepts of democracy.

Democracy as justification

The other group of the concepts of democracy might be called "substantive", as the concepts belonging to this bundle of concepts conceive democracy as a property of norms, institutions, states of affairs or, perhaps better, as a norm to assess the correctness, acceptability etc. of them. "Correctness" or "being just" is, strictly speaking, not the quality (or property) of a norm, an institution etc. but their relation to another norm or to a value (provided one regards values as a reducible to norms).[35] Thus, speaking of "correctness" etc. of norms is a shorthand expression for their assessment according to a certain measure.

The distinction between the procedural/substantive concepts of democracy is ultimately grounded in the isolation of two interrelated aspects of any procedure, which is expressed very clearly by Eugenio Bulygin, dealing with judicial decisions: the term "judicial decision" according to Bulygin, has two meanings, one the decision as a series of actions (i.e. a procedure) and a second one its content.[36] Of course, Bulygin's distinction can be extended to any procedure and decision (which is itself a procedure); this is significant because usually we do not distinguish between the two meanings and use the term rather indiscriminately, causing confusion. Moreover, it is possible to speak of "justification" only in relation to the content of a decision, i.e. the outcome of the procedure. This argument, by the way, demonstrates the *primacy* of the procedural concept of democracy, due to the fact that the substantive-justificatory concepts, as we shall be later, are in an important sense parasitic upon the procedural concepts. Procedural concepts are presupposed by the justificatory concepts and conceptions, since the procedural rules *define* the decisions the content of which should or could be justified. The inverse does not exist: no justification will define a procedure.

The justificatory concept of democracy concentrate on the conditions determining the "democratic" character of norms, institutions, or (as in Rawls) the structure of a society. Certainly, the justificatory concept of democracy is

35 WRIGHT, Cf. G. H. von: *Varieties of Goodness*, London, 1962.

36 BULYGIN, E.: "On Legal Interpretation" *Archiv für Rechts-und Sozialphilosophie*, BH. 53. (1994).

close to a *democratic theory of justice.*[37] For this reason I shall examine the relationship between democracy and justification; or, to put it differently, is it reasonable to speak of specifically "democratic" justification methods. I shall argue that the democratic justification is equivalent to the *general acceptability* of a norm, decision or institution.[38] By "general acceptability" I mean the examination (in view of its justification) of a norm etc. by the demonstration that it would have been accepted or adhered to by any reasonable and well informed member of the political community concerned. The specifically "democratic" element in this concept consists in the extension of the criterion of hypothetical or construed assent to each member of the community. Moreover, the democratic nature of this criterion can be demonstrated by pointing out that the condition of general assent is an idealisation of the criteria inherent in the idea of democratic procedure which should have lead, in ideal conditions which never could obtain in reality, to a result generally acceptable. (This should apply to decisions involving bargaining, since even there could be a result ideally satisfactory to each person, or group, involved.) Viewed from this perspective, the substantive-justificatory concepts of democracy regard the result of the procedure rather than the procedure itself and try to define the criteria of the ideal outcome of the procedure (if this were possible).

The justificatory concepts (and conceptions) of democracy endeavour to determine the limits of procedural outcomes by going back to the pre-procedural state of a society and discover the limits of the outcomes any reasonable person should have set to democratic procedures before agreeing to play the procedural democratic game. So, in other words, the limits set at the pre-procedural state applies to the post-procedural one.[39] So the justificatory concepts of democracy are democratic in an important sense: they are also, and not less than the procedural concepts and conceptions, striving to achieve *equality* within a political community. The substantive concept of democracy attempts to accomplish this task by defining the limitations to the democratic outcomes. This is attained basically by the stipulation of norms serving to

---

37 For views considering "democracy" and "justice" as synonyms (or near synonyms) see WEINBERGER, O.: "Der normativistische Institutionalismus und die Theorie der Gerechtigkeit. Gerechtigkeit als Leitidee der Demokratie" *Internationales Jahrbuch für Rechtsphilosophie und Gesetzgebung*, 1989, 99 ff. And MÜLLER, J. P.: *Demokratische Gerechtigkeit*, Munich, 1992.

38 "Norm" is the central category here, because institutions, or even the Rawlsian "basic structure" are inconceivable without norms (if they are not themselves norms).

39 This is, of course, the method of John Rawls' "original position". RAWLS, J.: *A Theory of Justice*, Oxford, 1971.

control the outcome of the democratic procedures. These are in modern constitutional democracies usually constitutional limitations on the *contents* of procedurally correct decisions, mostly in the forms prohibition of laws of certain content—either specifically determined or through general postulates in form of constitutional rights such as life, property, personal freedom etc.—or by (relatively) content-neutral prohibitions such as the exclusion of bills of attainder or *ex post facto laws*. The most important limitation is, then, that the legislator is obliged constitutionally not to make norms not justifiable by the constitutional criterions of correctness/acceptability. They are "constitutional essentials" a Rawls called them recently.[40]

In the justificatory concept and conception of democracy constitutional rights function not as procedural devices breaking the way to correct decisions, but rather as measures of the justification of norms. In this conception the justification of the norms as outcomes of the legislative procedure is the use of substantive idea of "public reason" in the community.[41] The most important "constitutional essentials" are particular norms that define the principles as accepted starting points for the discussion on the substantive correctness of public decisions. These are "principles"—norms defining the contents and justificatory limits for other norms[42]—are indeed "essentials", or even more: constitutive, in any community. Their constitutive nature is explained by the insight that no community can exist without adopting common norms (or, if one prefers to say, values) they consider as determining the essential nature and identity of their community. Thus, no community can be based exclusively on procedures, if it wishes to be more than a system of peaceful toleration, like in international relations where the relationship of states among themselves is purely defined by procedures. But in human communities claiming exclusive and comprehensive authority over their members this is not sufficient: "One cannot take an oath on a procedure of modification" as Carl Schmitt pertinently remarked.[43] In short, substantive democratic principles define the distinctive-individual features of democratic communities, and since there are several value principle-systems which are mutually (at least in part) exclusive they should be determined in advance by the community preferably in its constitution. For instance, trivially enough, a community may not be governed

---

40 RAWLS, J.: *Political Liberalism*, New York, 1993, 137 ff 227 ff.

41 Cf.: RAWLS, J.: "The Idea of Public Reason" in *Political Liberalism*, 212 ff. The concept is itself of Kantian origin.

42 See DWORKIN, R.: *Taking Rights Seriously*, New York, 1977.

43 SCHMITT, C.: *Verfassungslehre*, Berlin, 1928.

at the same time by parliamentary or presidential government or it could not be monarchy and republic equally at once, although none of these forms is inherently unacceptable, still a substantive, and properly "constitutional" choice is inevitable among them.

The relationship between the two concepts

The relationship between procedural and justificatory has been touched upon earlier, when I pointed to a certain priority of the procedural concept of democracy. Now I examine briefly those ideas which purport to unite (rather than to combine) the two concepts of democracy, in particular the theories of "discursive democracy"[44] put forward in rather different versions e. g. by Ackerman and Habermas.[45] Their general tendency of argumentation is to establish that the two concepts of democracy are reducible to each other or yield the same result.

The main thesis of a unified theory of democracy should be that the democratic procedure (or at least one of them) will necessary, and in each case, produce the substantially best result.This might be, perhaps (or logically) true in ideal cases, for example in an ideal discourse situation. But in ideal situations of various kinds—like the "original position" or the "argumentation before a universal audience[46]"—there is no room, and could not be, for majority voting, because the these ideal situations are themselves normative constructs where conceptually only the unanimity rule is possible. (Conceptually because the unanimity rule necessarily applies in any case where the rationality is in question since there can be no two rationalities at this level of abstraction.)

Another theoretical approach claims that empirical democratic procedure necessarily leads to a substantially correct result. It is traceable back at least to Rousseau, viz. to his famous theory on the relationship of the *volonté générale* and *volonté de tous*:[47] that is the relationship between the empirical (procedural) and the rational will determining what the empirical will ought to

---

44 Generally DRYZEK, J.: *Discursive Democracy*, Cambridge, 1990.

45 ACKERMAN, B.: *Social Justice in a Liberal State*, New Haven, 1980; HABERMAS: *Faktizität und Geltung*, op. cit., and *Legitimationsprobleme im Spätkapitalismus*, Frankfurt, 1973; he developed his views in many publications elsewhere too.

46 RAWLS: *op. cit.*, and PERELMAN, Ch.: *Éléments d'une théorie de l'argumentation*, Paris, 1968., *Justice et Raison*, Bruxelles, 1963.

47 *Du contrat social* Livre II., Ch. III. (Halbwachs ed., 145.).

be.[48] The most radical formulation of the thesis that democratic procedures lead to correct result I know of is from Ottfried Höffe:

> If the Parliament is elected by the whole people, the constitution-making and law-making activity of the Parliament *by necessity* guarantees the liberty of the people, on the ground that everybody participates in the making of laws and on the other because nobody will decide against his own interest. Democracy will thus guarantee the minimum of force [Herrschaftszwang] and—in the positive sense—the maximum liberty for each citizen....

Democracy and human rights coincide[49]

One of the problems of this argument is that it is by far not clear what kind of "necessity" is claimed: either empirical or conceptual-logical. In the first case, if it is empirical claim, then it depends on empirical proof which is not easy to produce. If Hoffe's claim is logical-conceptual it hardly seems to realise the problem that except the case of a *petitio principii*—definition of their correctness of the result by the procedural regularity—substantive correctness could hardly be proved to follow with logical necessity from the concept of procedural regularity. Hoffe, of course, speak here only about the "freedom of the people" but it is clear that any legislation in fact constrains the freedom of the people.

The two concepts of democracy are, of course, interrelated. First, as argued above, some kind of procedural concept of democracy is presupposed by the justificatory-substantive concepts, since the justificatory concept is conceived invariably as a *critical* idea (of the procedural democracy). On the other hand, the substantive concept of democracy—just on the ground of its critical focus—ought to possess a certain precedence over procedural democracy, since it should be allowed to overrule or override, in a sense, the outcome of the democratic procedure. At any rate it will always claim to override if not legally, morally or politically, the outcome of democratic procedures and this by conceptual necessity: the substantive concepts and conceptions of democracy are made (by conceptual necessity) to control the result of procedural democracy.

---

48 See PLAMENATZ, J.: *Consent, Freedom and Political Obligation*, 2. ed. Oxford, 1968, 26 ff.

49 HOFFE, O.: "Die Menschenrechte als Legitimation und kritischer Maßstab der Demokratie" (J. Schwartdländer, ed.), *Menschenrechte und Demokratie*, Kehl/Strasbourg, 1981, 241., 259. (Italics added; my translation.)

Two Concepts of Constitutional Democracy and Two Justifications of Constitutional Review

I distinguished elsewhere between two concepts of constitution (and consequently two justifications of constitutional review):[50] the procedural, statute-like and the substantive or "Rawls" constitution. The procedural constitution is a set of procedures (as defined above) constitutionally defined, while the substantive (Rawls-type) constitutions aim at the definition of the just structure of society (or at least elements of it) in the constitution, so that their most important function is to define the principles by which the just basic structure of the community can be preserved. The two types of constitutions correspond to the two concepts of democracy distinguished above, so that one could contend that procedural democracy matches to the statute-type, procedural constitution while substantive democracy fits to the Rawls-type, substantive constitution. Accordingly, it is possible to construct two elementary groups of democratic constitutions: the first type of a democratic constitution sets up a procedural democracy and contains but (or primarily) the rules of democratic procedures, while the substantive constitution, if it is democratic, will establish a justificatory type constitutional system. Of course, both types of constitutions and the concepts of democracies are idealisations: save a few exceptional cases, most constitutional democracies combine the elements of procedural and substantive constitutions in variety of ways. Here too, the priority of the procedural constitution over the substantive element applies.

The connection between the justification of constitutional review and the constitutional democracies is as follows: there is a procedural and a substantive justification of constitutional review from democracy. This once again corresponds to the two fundamental types of constitutional review I recommended to distinguish: the procedural and the substantive. I will, then, distinguish between the weak and the strong justifications of constitutional review. The *weak* justification of the constitutional review from (or relative to) democracy is procedural: it is weak, because it justifies the constitutional review as a *corrective* of the democratic process; thus, it is based on the inescapable and unsurmountable weakness of the democratic procedure by its own measure which require correction. Furthermore, there are two sorts of weak justifications of the constitutional review: one based on the control over procedural rules and a second one which is capable to justify, at least indirectly, the (substantive) overriding of the result of a democratic procedure. In the second case the

50 BRAGYOVA, A.: *Az alkotmánybíráskodás elmélete*, Budapest, 1994.

"weak" nature of the justification is due to its secondary character: if the democratic procedure were itself complete and perfect, there would have been no justification for judicial review. The *strong* justification of constitutional review differs from the weak one since it does not derive the justification of judicial review from the *defences* of the democratic procedure: it claims to be itself "democratic" on its own right.

The weak (procedure-based) democratic justification of constitutional review is based on the following reasoning. In its simplest version the reason for constitutional review the necessity to uphold the procedural rules of the constitution.[51] Hence the constitutional court ensures the observance of the rules of democratic procedure, including the procedurally interpreted constitutional freedoms. The constitutional court has in this case no power to review a procedurally flawless legislative act: it does not scrutinise the *content* of the democratic decision but exclusively its *regularity* (in a very broad sense, it is true). Any procedurally impeccable norm is constitutional—it has full democratic credentials and consequently may not be challenged. Plainly, the scope of the procedure-based constitutional review depends on the concept of "procedural rules": if it is understood as broadly as to include (as I have suggested) all the norms of competence, than the procedural–democratic justification of constitutional review will allow a rather extensive constitutional review, however. In fact, the practical result may be quite similar to the effect of non-procedural justifications, but the procedure oriented justification of judicial review remains invariably conceived as *limitation of the democratic process*. For this reason the procedural justification of the constitutional review is essentially a theory of *judicial restraint*, recognising the priority of democratic procedures: any law may be unconstitutional only on the ground that the democratic procedure leading to its adoption was imperfect

An important corollary of the weak justification, used as background theory of constitutional review, is the prohibition to the courts to *legislate*, i.e. to replace their judgement with that of the procedurally democratic law-maker. For this reason a weak democratic justification of constitutional review does not justify a constitutional court to create legislative norms, not even to suggest a solution: it may say strictly "no", that is, to annul acts of the legislation. This philosophy is inherently procedural: it regards unconstitutional norms as procedurally flawed because they transgress a procedural rule, the

---

51 It is possible that a constitution contains substantive democratic norms, and still does not enforce but procedure-based constitutional review. In such a case the constitution were *legally* a procedural constitution, but *politically* substantive.

rules of competence defined in the constitution. Thus, in this approach an unconstitutional law is procedurally unconstitutional, since the legislator has, of course, no *competence* to make an unconstitutional law, thus unconstitutionally consists in violating the rules of competence. But, since constitutional competence to legislate confers a power of decision—a power to choose among alternative outcomes (i.e. possible norms)—to the legislative organ, this power, even if unduly exercised on occasion, invariably remains *its* power and not that of the court. No wonder that most theories advocating judicial restraint typically adopt a version of the weak justification of constitutional review allowing them to reproach excessive judicial activism in terms of democratic theory. Convinced and radical democrats usually distrust judicial review on the ground of its (procedurally) undemocratic character; Justice Felix Frankfurter expressed this idea in the following way: "democracy need not rely on the courts to save it from its own unwisdom".[52] But, it should be once again emphasized, procedural norms include the (procedurally interpreted) political and personal freedoms.

The weak justification of constitutional review regards the constitutional court as a *referee* in the sense of *an arbiter* whose exclusive task is to control the compliance with procedural rules just as a referee does: it has nothing to do with the result of the game, although, quite obviously, his decisions influence the outcome indirectly. The point in the procedural justification of constitutional review is just this; constitutional review guards the correctness of the democratic procedure, and does not decide the substance of the constitutional question. Generally speaking, the constitutional review upon this theory is conceived as a tool to assist the majority decision-making, or, better, to ensure that the majority decision be properly made, while the "property of decision-making" includes of course the freedom political discussion and the appropriate protection of minority rights too.[53]

---

52 *AFL* v. *American Sash and Door Co.*, 335 U.S. 538, 556 (1949).

53 The most influential procedure-based justification of judicial review in the United States is certainly the theory propounded by John Hart Ely in his *Democracy and Distrust*, New York, 1980. See also TRIBE, L.: "The Puzzling Persistence of Process-Based Constitutional Theories" *Yale Law Review* 89 (1990) 1063 ff. Cf. also CRAIG, P. P.: *Public Law and Democracy in the United Kingdom and in the United States*, Oxford, 1990, 94 ff, and PERRY, M.: *The Constitution, the Courts and the Human Rights*, New Haven, 1992. 78 ff.

Any procedure-based justification of judicial review accepts, however, the basic premises of procedural democracy, in particular majority rule.[54] The *strong* justifications of constitutional review differ from them exactly in this respect: they do not accept majority rule as decisive in any constitutional question. On the contrary, they regard procedural democracy as *one of the versions* of democracy, but *not* as its exclusive principle; thus it does not deny the necessity of procedural democracy, only its conclusiveness in every possible issue. There are several versions of non-procedural justifications of the judicial review; I shall here consider three of them, distancing gradually from the procedural concept.

The first is based on the *inherent limits* (or deficiencies) of democratic procedures, so that it is the best compatible with the procedural justification of judicial review. Starting point of this reasoning is the well known theorem, discovered in its simplest form in the 18th century,[55] that the voting procedures used in procedural democratic decision-making are necessarily imperfect in several respects. First, they do not necessarily reflect properly the preferences (choices) of the participants of the procedure. This is an inherent limitation in the sense that it proves that democratic procedures do not *necessarily* will produce the best result or the result best in conformity the "real" choice of the community. This in itself might justify substantive review of the decisions made in democratic procedures. Even if one accepts *arguendo*, the otherwise doubtful proposition that any majority decision properly reflecting the values ("preferences") of the members of the community is necessarily good, there will be always a great deal of doubt as to the quality of the outcome, still assuming its procedural correctness. Moreover, once again assuming the correctness of the decision-making procedure, it is always possible to manipu-

---

54 Of course, it is possible to protect minorities by procedural rules too: typically this is achieved by requirements of supermajority: this gives to numerical minorities a right to veto. But the value of this protection is more than doubtful since it protects the *number, not necessarily a "real" minority.* See on minority protection (against majority) the still classical essay of JELLINEK, G.: *Das Recht der Minoritäten*, Wien, 1898.

55 Usually Condorcet is credited with the discovery of it, though, it might be his elder contemporary Borda, too. See CONDORCET: *Mathématiques et société*, (ed. R. Rashed), Paris, 1974, 172 ff 183 ff. I have relied on several classical works in voting and social choice theory such as ARROW, K.: *Social Choice and Individual Values,* 1951, SEN, A.: *Social Welfare and Individual Values*, San Francisco, 1971, RIKER, W.: *Liberalism against Populism,* San Francisco, 1982., and also to DUMMETT, op. cit and BLACK, D.: *Theory and Committees and Elections*, Cambridge 1958. The technical details of these theorems are immaterial here, except, of course, their truth.

late the voting procedure in such way that the outcome can be defective or imperfect. If so, the constitution-maker might be well justified to exclude certain outcomes of democratic procedures *ab initio* as invalid regardless of the majority it accepts.

A second version of the strong justification of constitutional review is akin in some respect to the first one. It is based on the fact that political democracies are *representative* democracies, sometimes combined with some ingredients of direct democracy. Representative democracies are, by definition, derivative, in the sense that the democratic decision-making process in the representative assemblies is only indirectly can be regarded as democratic at all by virtue of a constitutionally authorised transfer of powers from the "people" to its representatives. Since the selection of the representatives is itself a voting procedure—with all the limitations briefly outlined above—the representativity of the assembly is certain not perfect. Still less guaranteed is its continuos representativity, as it were, in choices not being debated in the election process. One seriuos constraint is that the preferences expressed in the votes in selecting the representatives[56] are restricted on several counts: their range is rather limited and far from being comprehensive of all the possibilities open; furthermore, they could be manipulated seriously. As a result, the overwhelming majority of the preferences is left unarticulated in this procedure.

Thus, the argument from representative democracy is based on the unavoidable deficiencies of political representation as a variant of procedural democracy. Here too, the starting point of the reasoning is the inescapable imperfection of the procedure, which justifies certain safeguards against its outcome. In addition, in the case of representative democracy one may argue that since representation involves a *transfer of powers* from the original holder (the "people"), the transfer operated by the constitution may properly be a restricted one. There are two general techniques to do this, one procedural, the other substantive. First, certain types of decisions might be withheld from the competence of the representative procedure and reserved to the electorate (normally this is the case of the modification or amendment of the constitution itself). Second, the constitution may restrain, as a measure of precaution, substantively the content of the outcome adopted in the representative assembly. In this case the representatives are denied the right to choose according to their own judgement in matters defined by the constitution.

---

56 I do not examine here the complex problems connected with the choice of the optimal electoral system.

Both justificatory theories set out above, however, explain only the *possibility or necessity* of limitation of the democratic procedures, in terms of the democratic procedure, or at least remain within the ultimate assumptions of the procedurally oriented theories. This ultimate assumptions accepted, or at least not questioned, by the justifications analysed in preceding parts might be stated as follows:

> any perfectly democratic procedure will produce necessarily the best (most optimal, just etc.) outcome by the properties immanent in procedure.

The justification of the constitutional review I propose here is *not* based on this assumption, that is, it does not accept that any procedure can be more than more or less reliable aggregation or selection procedure among the choices, values etc. of the participants of the procedure. If they are irrational, unreasonable or deliberately wicked, the outcome will be accordingly irrational, unreasonable or wicked. This result is inevitable by purely procedural means; even the most perfect procedure cannot eliminate this opportunity. I do not conceive any possibility to avoid this conclusion.

If so, we must accept that the democratic procedure in its best form will never guarantee the substantive justification of its result[ing norm]. This is, I think, the groundwork of the theory of *constitutional democracy*. I shall argue that it is necessary to adopt a substantive concept of democracy for the completeness of a system of constitutional democracy. Historically the most important case of substantive limitation of (procedural)democracy is the protection of human (or, as I prefer to call them, constitutional) rights. The declaration of human rights in constitutions has been always based on the explicit or implicit idea that they are constraints on the majority decisions conceived as tools to control the "tyranny of the majority". The most influential theoretical basis of the control of the outcome of democratic procedures has been the social contract theories, although, it must be admitted, there are versions of it which might be called purely procedural;[57] but most of them are based on the idea that reasonable individuals will never renounce of certain right, that is will never agree to *any* result of a democratic procedure. Thus, constitutional rights are best regarded as *constitutional norms* limiting in advance the outcome of democratic legislative procedures. In fact, "constitutional rights" is a shorthand expression for *principles* (in the Dworkinian

57 This is the case of Hobbes and probably Rousseau.

sense);[58] they set out the constitutional norms serving as substantial limits to the content of procedurally democratic (legislative) decisions.

This substantive concept of constitutional democracy may also be a starting point to a full-fledged theory of democracy. It is "democratic" in the sense that it also defines the conditions of acceptability or consent of the members of community. But, contrary to procedural theories explaining the equal consent of the members of the community to the outcome of the democratic procedure in terms of their *consent* to the rules of procedure which entails the consent to the result, substantive theories aim at defining the consent by setting out the conditions of *acceptability* of the outcome. This dualism of consent as agreement and as acceptability is abundantly clear in the classic concept of the *statute* (Law) of the constitutional theory: on the one hand, the statute should originate from the democratic legislative procedure, on the other, however, it ought to be reasonable too.[59] Hence procedural-democratic legitimation, and the consent based on it, is not enough: a law be should be *rationally acceptable* too. That explains the requirement that laws should be *general*, i.e. reasonable and applied generally to each member of the community without distinction. The best democratic justification of this requirement is as follows: a statute should be reasonable in such a way that any *reasonable* citizen in the community would have decided exactly in the same way if he or she had the necessary time and information to the legislator had (or supposed to have). This conflict between the two types of democracy were called by Richard Wollheim "the paradox of democracy"; he points out that there are cases when a citizen of a democratic community might say "this is an obligatory decision" while her or she may be convinced that the same decision is unreasonable or simply bad.[60] This paradox—explained by Michael Walzer as a conflict between procedural and substantive justice[61]—is the clash between "consent" and "acceptance": although I consented to the democratic rules of procedure, I find its result (sometimes) unacceptable. Perhaps the most important task of the constitutional review is to resolve this kind of conflicts within the constitutional framework.

---

58 DWORKIN: *Taking Rights Seriously*, cit., "The Forum of Principle" in *A Matter of Principle*, 1985, 33 ff.

59 The classic work on this subject remains: JELLINEK, G.: *Gesetz und Verordnung*, Leipzig, 1887.

60 WOLLHEIM, R.: "A Paradox in the Theory of Democracy" in Laslett, P.—Runciman, W. G. (eds.:) *Philosphy, Politics and Society*, Second Series, London, 1962, 71 ff.

61 WALZER, M.: "Philosophy and Democracy" *Political Theory*, 10 (1981) 386.

The strongest substantive justification of constitutional review allows the constitutional court (at least in some cases) not only to declare void a law contrary to the constitution but to define *which are the laws compatible with the constitution.* The court, in this theory, has the power to say *positively* what is constitutional, not only to pronounce which is not. A weaker justification would certainly allow the constitutional court to declare void a law establishing "separate but equal" school facilities for blacks and whites, but it is only the substantive theory which explains why the court is justified to *prescribe* equal facilities in mixed schools, that is to offer a constitutional solution to the conflict.[62] In other words, the substantive theory justifies to some extent judicial activism. It is bale to define, on the other hand, the limits of this activism too. There are fields or aspects of legislation where the activism is justified in the following way. In any legislation there are two main components: one part of it might be called the "utilitarian" component, the other one "constitutional". The *utilitarian* element is, in principle a matter for the majority decision-making procedure and it is indifferent from the constitutional point of view, provided that the requirements of constitutional equality are respected and it has no connection with constitutional questions.[63] The *constitutional justification* of legislation is the judgement of the justifiability of the legislative decision on the ground of the substantive constitutional principles as defined in the constitution and interpreted by the court in the light of the best background theory. Thus the control of substantive justification of legislation through constitutional review reveals the court as an agent of the "public reason".[64] So, while there is nor ground to suggested that matters of utility—which take the great majority of questions decided by legislators—be overruled by constitutional review, there remains a domain where the constitutional justification of the democratic decisions must be submitted to scrutiny of the constitutional review.

The difference between weak and strong justification of constitutional review is well shown on the example of different scope and content of the principle of *constitutional equality.* Equality is fundamental, since democracy is the political form and implementation of equality. Hence it is quite natural that the two concepts of democracy entail different conceptions of constitutional equality. Procedural democracy entails *equality before the law*: it requires that the same norm, irrespective of its content, be applied in each case of the norm applies; accordingly, it demands that the rules of law should

---

62 I have in mind of course the famous *Brown* decision of the US Supreme Court of 1954.

63 This is a serious limitation, but I cannot pursue the matter further here.

64 See, once again, RAWLS: *"The Idea of Public Reason" cit.*

be formulated generally not allowing privileges (exceptions to generally formulated rules) to groups or individuals, but it does not demand that the norms of the legal system be justified in their content. Thus, formal equality dictates that any law democratically adopted be considered unconditionally valid and obligatory to every citizen without distinction. Clearly enough, formal equality is essentially a procedural equality, for its main criterion of equality is procedural: it is, expressed in other language, not the result but equal application of procedural rules—including, as argued above, the rules defining the conditions of validity and obligatory force of the outcome of the procedure—to each participant.[65]

On the other hand, the substantive equality demands that the laws be substantially justified in the sense of being *rationally-constitutionally acceptable;* this conception of equality demands *equal concern* to be expressed in the contents of the norm[66] to the interests and "dignity" of each citizen into consideration. In this interpretation equality means not simply non-discrimination, but it may well demand *reasonable distinction*; here equality consists in, expressed in a well-known formula, *equal respect*[67] to every member of the community. If a constitutional court adopts this view (or conception) of constitutional equality the control of the constitutionality of the legislation will amount to the control of its constitutional (and rational) justifiability.[68] This conception of constitutional equality presupposes equality before the law ("due

65 Classical in the 19th-20th century parliamentarism in France denied the possibility of the judicial review exactly on the ground that procedural democracy guarantees the best possible result. See e.g. DUGUIT, L.: *Traité de droit constitutionel,* 3rd ed., Tome II. Paris, 1928, 172 ff and CARRÉ DE MALBERG, R. : *La loi, expression de la volonté générale,* Paris, 1925; see also his *Contriubutions à la théorie générale de l'Etat,* Tomes I–II., Paris, 1920.

66 By the term "contents of the norm" I mean the conducts deontically qualified (prohibited, permitted etc.) I the norm.

67 See e.g. DWORKIN: *A Matter of Principle, cit.* and his *Taking Rights Seriously.*

68 N. Luhmann expressly identifies the general rule of equality within this requirement—obviously in view of the case law of the German Constitutional Court. See LUHMANN, N.: *Grundrechte als Institution,* Berlin, 1965. The philosophy of the German Constitutional Court has been heavily influenced in the respect by the writings of Gerhard Leibholz, who was a long time member of the court. See LEIBHOLZ, G.: *Die Gleichheit vor dem Gesetz,* Berlin, 1927.

process of law" and "equal protection of laws")[69] but its goes well beyond it: it demands content based constitutional justification of the norm.

Conclusion

In this paper I tried to demonstrate that there are two essentially different though interrelated democracy-based justifications of constitutional review, corresponding to the two types of concepts of "democracy" and the two types of constitutions. The weak democratic justification of constitutional review is based on the procedural concept of democracy in conjunction with the procedural idea of constitution; its main argument is, to recapitulate, that procedural democracy is based on constitutional rules and their observance is conceptually necessary for any procedural democracy. Further, still based on the concept of democratic procedure, it could be pointed out that the deficiencies inherent and in eliminable in democratic procedures require content based constraints on the outcome of the democratic procedure. The imperfections of the democratic procedure is basic to any content-based (strong) justification of the constitutional review, for, obviously, if democratic procedures were perfect an would guarantee in each case the best possible result, there were no room for any other kind of constitutional review, except the procedure-based one. But, since political democracies are inevitably imperfect on various counts, a combination of democratic procedures with content-based constitutional review will guarantee a more "democratic" result of the constitutional decision-making as a whole.

It should be pointed out, however, that any strong justification of constitutional review would be acceptable even in cases of a "perfect" democratic procedure, since it is based on an alternative (and not less acceptable) conception of democracy as a equality: on the conception of equal respect to each member of the community. This kind of equality could not be guaranteed by the best possible empirical democratic procedure; indeed it may be interpreted as a projection (or an approximate substitute) for an *ideally democratic procedure* which never obtains, where the participants are perfectly reasonable and neutral and the decisions are taken by unanimity (like in Rawls' *original position* or Habermas' ideal *discourse situation*). I do not argue that a consti-

---

69 It is worth to recall how different the interpretation of these clause has been in US constitutional history oscillating between the two conceptions of equality outlined above. See generally Pennock, J. R.—Chapman, J. (eds.): *Due Process: Nomos 18*, New York, 1977.

tutional review *is* an ideal discourse situation, but simply that it is closer to it than any democratic procedure even can be.

My final conclusion may well be trivial, but for this reason alone not necessarily unimportant. A constitutional democracy adopting constitutional review is, other conditions being equal, *more democratic* than a constitutional democracy without constitutional review. This proposition seems to be admitted rather widely (if not in the terms exposed above) but, the arguments from democracy remains the strongest possible argument against constitutional review, either in the form of pleading for its abolition or arguing in favour of a restrictive approach to it. In this essay I tried to undermine the theoretical foundations of those views.

ACTA JURIDICA HUNGARICA
1999 40 Nos 3–4, pp. 159–167

1216-2574 / 99 / USD 5.00

Attila HARMATHY

Comparative Law and Changes of the Law

This paper has been written in honour of Zoltán Péteri on the occasion of the celebration of his seventieth birthday. One of the main fields of his activity has been comparative law. Generations of students of the Faculty of Law of Eötvös University, Budapest, and since some years also of the Pázmány Catholic University, have listened to his lectures on legal theory and comparative law. Since the beginning of the post-graduate theoretical training at the Faculty of Law of Eötvös University he has given the foundation course on comparative law serving as a basis for all research work. Since many years he has been lecturing at the Faculté Internationale pour l'Enseignement de Droit Comparé, Strasbourg. Starting from the 1960s, when it became possible for Hungarian lawyers to participate in international scientific cooperation mainly through channels of comparative law, Zoltán Péteri has been careful organiser and active researcher presenting Hungarian contributions to international conferences and played an important role in organising the Xth International Congress of the International Academy of Comparative Law held in Budapest in 1978. It has been natural that he has been present among the Hungarian participants at all major international multilateral and bilateral conferences and his words have always been grounded on serious work and, consequently, listened to with interest. He is well known in the international scientific community on basis of his lectures, his papers and the books edited by him in foreign languages.

It is understandable, on basis of the above said, that the paper written on Professor Péteri's honour concerns comparative law. Taking into consideration the abundant literature on comparative law it is also understandable that the paper deals with only one of the numerous questions connected with comparative law. It is the role of comparative law in attempts to understand changes in law which have taken place during the last century.

1. One of the basic problems that everyone faces when dealing with comparative is law the understanding of the rationale of comparative law. I find Koschaker's statement particularly well formulated when he stressed that comparison must not be self-centred: "Droit comparer ne signifie pas cataloguer les droits étranger et les aligner comme les produits de civilisations étrangères et primitives dans les vitrines d'une musée éthnographique. Comparer c'est mettre en rapport, ce qui présume quelques points de vue dirigeants."[1]

The main idea and the objectives of the comparison are dependent on the interest of the scholar doing the work. In a general description of comparative law Max Rheinstein has pointed to the fact that interest in comparative law was first exhibited among philosophers and jurists, and later it was growing among sociologists and anthropologist. In the sphere of law the role of comparative law has been growing in jurisprudence.[2] Zoltán Péteri's works have been strengthening this line of development as his approach to comparative law has always been characterised by his interest in jurisprudence.

Different tendencies of comparative research have been developed. As it has been put by Kahn-Freund comparative law is the common name for a variety of methods of looking at law, and especially of looking at one's own law.[3] From the point of view of the present paper a useful categorisation of different tendencies has been made by Gutteridge according to whom there are works of descriptive comparative law, those of applied comparative law, and those of abstract or speculative comparative law.[4] There might be different opinions of

---

1 KOSCHAKER, P.: L'histoire du droit et le droit comparé surtout en Allemagne, in: Introduction à l'étude du droit comparé, Recueil d'études en l'honneur d'Édouard Lambert, Paris, 1938. vol. I. 276.

2 RHEINSTEIN, M.: *Gesammelte Schriften*, hrg. H. G. Leser, Tübingen, 1979. 241.

3 KAHN-FREUND, O.: Comparative Law as an Academic Subject, *The Law Quarterly Review*, 1966. 41.

4 GUTTERIDGE, H. C.: *Comparative Law*, Cambridge 2nd ed. 1949. (reprinted in 1971) 10.

the role and value of the work done according to these categories. It cannot be doubted, however, that comparative legal studies have performed valuable services in checking the results of legal theory.[5] Comparative studies are thus connected with theory of law and at the same time, by their nature, focus on changes. Comparative law and history of law are also close to each other in many respects.[6]

At a time when the lapse of time is present in such a spectacular way that the date changes from the years of 1900s to those of 2000s there is a special interest in trying to give an account what has happened during a given period of time and the evaluation needs some kind of comparison. In countries of Central and East Europe there are additional reasons for studying history as well experiences of the development of law in other countries. The transformation of the political, economic and legal systems require analyses of historical and comparative character for understanding better the present situation and for deciding what steps should be taken in the short and the long run, what way should be chosen.

The need for comparative analyses is even more evident if the complex nature of comparison is taken into consideration. Kahn-Freund has put it in a convincing way that when doing comparative research work it is evident that questions should be answered like what the reason of differences in methods, structures, traditions in the countries compared is, what social factors decisive in changes are, what kind of legal and non-legal control mechanisms in the given countries important role have, what the function of different legal instruments is, where the frontiers between law and non-law are.[7]

Several of the questions mentioned above can be found with several other authors in a different context as the topic discussed is not the comparative analysis but something else. The aim of the present paper is not to give an account of the opinions on comparative law but to hint at the relationship between the studies on legal changes and comparative law. Nevertheless, it seems necessary to refer to the fact that the above comprehensive and ambitious concept of comparative analysis is not an exception. Zweigert and Kötz in the basic book on comparative law have considered similar legal history, way of thinking, institutions, legal sources ideology as factors of decisive importance

5 LAWSON, F. H.: *The Comparison, Selected Essays*, Amsterdam–New York–Oxford, 1977. Vol. II. 59.

6 SACCO, R.: Legal Formants: A Dynamic Approach to Comparative Law, *The American Journal of Comparative Law*,1991. 24–25, 389.

7 KAHN-FREUND: (*supra* note 3) 45, 47, 51, 55–56.

from the point of view of forming categories of legal systems.[8] Merryman has underlined, also in connection with creating a category of the laws of different countries, the importance of historically conditioned common attitudes about the nature of law, about the role of law in the society and the polity, about the proper organisation and operation of a legal system, about the way law is made, applied, taught. He summarised his ideas saying that these factors under the name of legal tradition relate the legal system to the culture of which it is a partial expression.[9] The aim of comparing not only legal rules but factors, too, belonging to the general culture has increased in recent publications.[10]

In Hungary there is a tradition of applying the method of comparison, of doing comparative analysis but, under the special historical circumstances, the importance of comparative law has increased recently considerably. The danger is, however, that conditions for complex comparative research work as outlined above are not favourable.

2. In the second part of the twentieth century the trend of the development of the legal system has been discussed in most countries. The topics of discussion included problems having a more technical legal nature as well as policy issues and those which concern the legal system as a whole.

One of the problems coming to the forefront of the interest at national and at international level was the role of codification. Taking into consideration the differences existing between countries having codified legal system and countries without codes the problems was interesting from the point of view of comparative law, too. (In modern legislative work in general, and in codification particular the comparative work, of applied and basic character alike, has played considerable role since some time but it has been growing[11].) In some of the countries the question of codification was complicated by the fact that there were codes in force which were of high quality and influenced the law of

---

8 ZWEIGERT, K.–KÖTZ, H.: *Einführung in die Rechtsvergleichung*, Tübingen 3. Aufl. 1996. 67–71.

9 MERRYMAN, J. H.: *The Civil Law Tradition*, Stanford 2nd ed. 1985. 2.

10 BLANKENBURG, E.: Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany, *The American Journal of Comparative Law*, 1998. 4, 39–40, M. Van HOECKE, M. van and WARRINGTON, M.: Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law, *International and Comparative Law Quarterly*, 1998. 498.

11 See an overview HAMZA, G.: Az összehasonlító jogtudomány kibontakozásának útjai Európában (The Ways of Development of the Comparative Legal Studies in Europe), *Állam- és Jogtudomány*, 1996–1997, 275–295.

several other countries but they had been worked out long time ago and since that time there have been fundamental changes.

In France the work on the reform of the *Code civil* started in 1945 and at the first session of the Codification Committee the Minister of Justice has outlined three groups of questions where new rules were needed. There were solutions worked out by the courts and legal theory after the enactment of the *Code civil*, problems requiring new regulation irrespective of the social and economic development and problems of property law and the law of obligations which can be solved taking into consideration the social and economic conditions. From the very beginning the President of the Commission, Professor Julliot de la Morandière was of the opinion that the reform cannot be worked out without knowing the trend of the political and social development.[12] The work of the Commission ended without result because of the lack of the political will necessary for codification.[13] The German attempt to amend the Civil Code has ended with result either: in 1978 the Minister of Justice announced that the Ministry planned a refom, the work limited to amending the part on the Law of Obligations started in 1984 and its aim was to find solutions to problems observed in the practice, the draft was published in 1992.[14] According to available information it has not been discussed by the Parliament up to now.

The role of codification was questioned. Doubts were expressed by the topic of aging codification discussed at the conference of ministers of justice of European countries in 1980. The problems were formulated even in a more direct way at the eleventh Congress of the International Academy of Comparative Law held in 1982 where the question was whether codification was an outmoded form of legislation. Doubts seem not to have increased since that time, on the contrary, a new enthusiasm for codification can be observed. It is due to a great extent to the success of the Dutch Civil Code. Recently, the idea of a European Civil Code (unifying civil law rules of the member-states of the European Union) seems, however, to have a greater role.[15]

---

12 Travaux de la Commission de Réforme du Code civil, Année 1945–1946, Paris 1947. 21–22.

13 DE LA MORANDIÈRE, J.: La réforme du Code civil, Recueil Dalloz 1948. Chr. 120–121.

14 Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts, hrg. Bundesminister der Justiz, Köln, 1992. 14–15.

15 See on overview HONDIUS, E.: Towards a European Civil Code, in: *Towards a European Civil Code,* ed. Hartkamp, A.—Hesselink, M.—Hondius, E.—Joustra, C.—du Perron, E. The Hague—London—Boston 2nd ed. 1998. 3–19.

3. Although the idea of codification has not been denied and a new belief in the comprehensive, systematic legislation has grown there are some other signs which can observed at the same time and which warn us to be cautious about forming an opinion.

Very probably the Dutch Civil Code (put into force in 1992 resp. 1993) is considered to be the greatest result of the codification movement in Europe. There are several interesting new solutions in the Code which are to be studied when drafting a new Code or a part of it in any European country.

As to the general character of the codification two remarks are made. The first one concerns the main aim of codification. It has been stressed that the main aim was the inclusion of the solutions of the court practice into the Code, while the special statutes which had not been incorporated into the old code remained outside the new Code, too.[16] The German history of codification is very different from the Dutch one. Nevertheless, the neglect of special statutes may remind us to the German situation where the economic policy issues having a great importance were regulated outside the German Civil Code,[17] and the majority of the rules in the German Civil Code are purely technical.[18] On this background it is interesting to observe that one can hardly find detailed explanation of policy issues of the new Dutch Civil Code in the foreign language literature informing of important features of the Code. The second remark concerns the role of court practice. Hartkamp has clearly formulated the idea of the codification: a large amount of discretion has been granted to the courts to the develop the law where its provisions are silent and to derogate from specific provisions on contracts to avoid an unjust result. The Code has refrained from laying down a specific hierarchy among the various sources of law (statute, custom, equity), and thus, a statutory provision of mandatory character can fall into disuse and be neglected.[19] On this basis it can be said

16 HONDIUS, E.: Das Neue Niederländische Zivilgesetzbuch. Allgemeiner Teil, In: *Renaissance der Idee der Kodifikation*, hrg. F. Bydlinski–T. Mayer-Maly–J. W. Pichler, Wien–Köln–Weimar, 1991. 40–44,; WESSELS, B.: Civil Code Revision in the Netherlands: System, Contents and Future, *Netherlands International Law Review*, 1994. 174–175.

17 SCHUBERT, W.: Das Bürgerliche Gesetzbuch von 1896, in: *Kodifikation als Mittel der Politik*, hrg. H. Hofmeister, Wien–Graz–Köln, 1986. 17.

18 NÖRR, K. W.: A Symbiosis with Reserve: Social Market Economy and Legal Order in Germany 1948-1989, in: *Toward Comparative Law in the 21st Century*, Tokyo, 1998. 247.

19 HARTKAMP, A.: Judicial Discretion Under the New Civil Code of the Netherlands, *The American Journal of Comparative Law*, 1992. 568–569.

that the Dutch Code is somewhere midway between Continental laws and the Common Law.[20]

4. The debate on decodification and decreasing importance of codes is no more on the agenda. The victory of codification movement is, however, not final. The whole situation is far more complicated than it may seem at first sight. In Germany Zweigert and Puttfarken pointed to the fact that important political aims cannot be achieved by means of civil law codification, therefore, special statutes are worked out and they become more and more important.[21]

Although some years later Kötz could state that the opinions which were far more critical of the role of codification had not won the battle and in the practice of legislation a turn of the tide could be observed.[22] A foreign lawyer can hardly see hidden main tendencies in changes of the law of other countries. It is a fact, however, that the activity of legislation has not stopped. On the contrary, according to some recent indications it is increasing (according to the data published in 1996, the number of legislative projects brought into the German Federal Parliament during its tenth session was 612, and during the twelfth session it was 895).[23] The growing number of special statutes cannot create favourable conditions for maintaining the importance of the existing codes or for new codification.

In France the situation is similar. A so-called codification was going on since many years for consolidating legal rules of administrative law. In 1989 a new codification committee was organised and it has been working on systematisation and clarification of legal rules without changing its content.[24] The all the time increasing numbers of legal rules are frightening (the task of codification included about 8.000 statutes, 80.000 decrees and several hundred thousand circulars[25]). Guy Braibant, vice-president of the codification committee

---

20 HARTKAMP, A.: Das neue niederländische Bürgerliche Gesetzbuch aus europäischer Sicht, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 1993. 682.

21 ZWEIGERT, K.–PUTTFARKEN, H.-J.: Allgemeines und Besonderes zur Kodifikation, in: *Festschrift für Imre Zajtay,* hrg. R. H. Graveson–K. Kreuzer–A. Tunc, Tübingen, 1982. 578–579.

22 KÖTZ, H.: Taking Civil Codes Less Seriously, *The Modern Law Review*, 1987. 13.

23 MÜLLER-GRAFF, P-Ch.: The Quality of European and National Legislation, *Europäische Zeitschrift für Wirtschaftsrecht*, 1998. 328.

24 BRAIBANT, G.: Codifier: pourquoi? comment? *Revue française d'administration publique*, 1995. 128–131.

25 DRAGO, R.: La codification en droit administratif français et comparé, *Droits,* 1996. 99.

has recently suggested a fundamental change in the production of law.[26] Jean Carbonnier devoted a book to the topic of the inflationary production of law and in his opinion the phenomenon is the result of a system. The increasing number of legal rules can be understood taking into consideration the growing importance of public law and the voluntarist use of legal rules serving political aims.[27]

It has no reason to go on with the data of other countries as the phenomenon is similar. As a result of the changes which took place since the XIX. century, the number of legal rules have increased in an unprecedented way and consequently the structure of the legal system has changed influencing the position of the codes, too.

An additional remark to this topic is made only because of its Hungarian connection. The changes mentioned above had an effect on England, too and it was a lawyer of Hungarian origin, Dr. Andrew Martin who worked out a draft of a Law Reform Bill and the Law Commission Act of 1965 was based on this draft.[28] The Law Commission could not bring about a new situation either.

5. The changes in the legal system had important consequences in the relationship of the statutes and court practice, too. The different legal systems have their own concept of the role of courts. It is usual two speak of two main types of codification and legislation in general. In the so-called open system the legislator does not try to work out complete regulation and leaves free way to the judge for interpreting and adjusting, developing the rules. On the contrary, in the closed system the legislator aims at a complete regulation without leaving place to the judge for free interpretation. Political history had an important role in the decision which system was chosen. The Swiss solution was explained for example by the Swiss history.[29] The German system belonged to the second type of legislation. Under the changed conditions the court practice of the XX. century has slowly transformed the character of several civil law institutions[30]

---

26 BRAIBANT, G.: Penser le droit sous la V^e^ République: cohérence et codification, *Revue du Droit Publique*, 1998. 1777.

27 CARBONNIER, J.: *Droit et passion du droit sous la Ve République*, Paris 1996. 19.

28 CRETNEY, S. M.: The Law Commission: True Dawns and False Dawns, *The Modern Law Review*, 1996. 635.

29 MERZ, H.: Das Schweizerische Obligationenrecht von 1881, in: *Hundert Jahre Schweizerisches Obligationenrecht*, hrg. H. Peter–E. W. Stark–P. Tercier, Freiburg, 1982. 16–20.

30 WIEACKER, F.: *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft*, Karlsruhe, 1952. 18–20.

and the position of the court practice has changed, too.[31] In other countries the change has not been so important as the concept had been different.

The increased role of public law has been mentioned already. It is to be referred to at this point, too. Lawson has emphasized the change in the frontiers between public law and private law saying that earlier courts played a predominant role in developing private law and legislative bodies in developing public law, but now it is not easy to draw the line between public and private law.[32] It can be added that legislation is developing civil law, too and another important change is that public law is also developed by the courts.

6. The above short remarks on some elements of the changes reflect the transformation of the law of different countries in the twentieth century and reflect at the same time how important the comparative law is for understanding the transformation.

---

31 WIETHÖLTER, R.: Privatrecht als Gesellschaftstheorie? in: *Funktionswandel der Privatrechtsinstitutionen*, hrg. Baur, F.—Esser, J.—Kübler, F.—Steindorff, E. Mohr, Tübingen, 1974. 649.

32 LAWSON: *Comparison* (*supra* note 5), Vol. II. 161–162.

ACTA JURIDICA HUNGARICA
1999 40 Nos 3–4, pp. 169–194

1216-2574 / 99 / USD 5.00

Vanda LAMM

The Reform of the Nuclear Liability Regime

I started my career as a legal scholar in the Comparative Law Department of the Institute for Legal Studies headed by Professor Zoltán Péteri. Since that time I have worked closely together with Professor Péteri. Although my research interest has been quite different than his, I have always benefited from his advise and relied upon his judgement in many different questions. I also never ceased to admire his astute intellect as well his tact and diplomacy. The latter was in particular, often needed in our long collaboration in organizing scholarly conferences and cooperation with scholars of the most different countries, convictions, interests, habits, cultures and languages. I am pleased to pay tribute with this paper to Professor Péteri's seventhieth birthday.

The Chernobyl disaster of 1986 caused the Vienna Convention on Civil Liability for Nuclear Damage (hereafter: Vienna Convention), adopted in 1963 under the aegis of the International Atomic Energy Agency, to awaken from its sleep of Briar Rose. For over two decades there was little, if any, public concern, apart from that shown a segment of the professional world, with this instrument.[1] The reasons were several.

---

1 The revision of international nuclear liability conventions was on the agenda of the 1984 Symposium of Munich and the Nuclear InterJura'85. Cf. *Nuclear Third Party Liability and*

The 1963 Vienna Convention was adopted in 1963, three years after the 1960 Paris Convention on Third-Party Liability in the Field of Nuclear Energy, known as the Paris Convention, and that it governs issues of civil liability for nuclear damage on the same conceptual basis as does the Paris Convention.[2] The main difference between the two Conventions, other than those existing in their provisions, consists in that the Paris Convention had been signed by a group of States of the Organization for European Economic Cooperation and Development, whereas the Vienna Convention was intended to regulate the related issues on a world-wide scale. In this connection, however, the greatest problem was no doubt presented by the fact that by the time the Vienna Convention was concluded the said Paris Convention had existed between the States most affected by this complex of issues, notably between the highly industrialized Western European States.[3]

From the mind 1960s onwards, the two Conventions have followed rather different paths. During the 1960s and the 1970s the Paris Convention kept "developing", grew into a living system, with more and more States acceding and with the limit of liability raised on several occasions, and in 1963 the Brussels Convention Supplementary to the Paris Convention was adopted to provide additional compensation from public funds to supplement the compensation payable under the Paris Convention.[4] By contrast, the Vienna Convention did not even come into force for nearly 15 years, although it required ratification by as little as 5 States.[5] When after so many years the Vienna Convention finally came into force, certain of its provisions called for revision. Its dormancy is amply evidenced by the fact that only 11 States were parties to the Convention at the end of the 1980s.[6]

Insurance—Status and Prospects, Proceedings of the Symposium of Munich, 1984. (N. Pelzer ed.) Baden-Baden, 1986.

2 On the basic principles of nuclear civil liability conventions see TREVOR, J. P. H.: "Principles of civil liability for nuclear damage." In: *Nuclear Law for a Developing World.* IAEA, Vienna, 1968. 109–115. and STROHL, P.: "La Convention de 1971 relative a la responsabilité civile dans le domaine du transport maritime de matieres nucléaires", *Annuaire Francais de Droit International,* 1972. 755–760.

3 Both the Paris Convention and its Additional Protocol signed in Paris on 28 January 1964 entered into force on 1 April 1968.

4 On the Brussels Supplementary Convention see, LAGORGE, M.: "The Brussels Supplementary Convention and its Joint Intergovernmental Security Fund." In: *Nuclear Law for a Developing World, op. cit.* 143–148.

5 The Vienna Convention entered into force on 12 November 1977.

6 On the signatures, ratifications, etc. of the Vienna Convention see Document

However, the Chernobyl disaster of 1986 had shown that a nuclear accident was likely to cause enormous damage not only in the Installation State, but also thousands of kilometres away. After the Chernobyl disaster it appeared obvious that the dormant Vienna Convention might be an appropriate tool for settling claims of foreign victims in similar cases, and everyone came to realized the absolute necessity of adjusting the provisions of the Vienna Convention to the requirements raised by technological development over the past 25 years. It is know that after the Chernobyl accident the one-time Soviet Union refused to pay compensation to any foreign victim, and some people believed that if the Soviet Union had been a party to the Vienna Convention, the foreign victims would still have had a chance to receive some compensation. It is a separate matter, of course, that any amount of compensation eventually payable under the Vienna Convention would have been enough to satisfy but a minor, an almost ridiculous fraction of the claims in comparison with the extent of the accident.

Following the signature in 1988 of the Joint Protocol establishing a bridge between the Vienna and the Paris Conventions,[7] several fora of the International Atomic Energy Agency addressed the question of revising the Vienna Convention, and the necessity of doing so was stated in resolution GC (XXXII)/RES/491 of the Agency's General Conference on 23 September 1988, which emphasized that the existing civil liability regime "does not cover all liability issues that might arise in the event of a nuclear accident." Next year the Board of Governors by its decision adopted of 23 February 1989 established an open-ended Working Group "to study all aspects of liability for nuclear damage" and to "consider ways and means of complementing and strengthening the existing civil liability regime and consider also the question of international liability."[8] In an other decision of 21 February 1990 the Board of Governors dissolved the above mentioned Working Group and at the same time it established a new open-ended Standing Committee on Liability for Nuclear Damage with wide mandate empowering it to "consider international liability for nuclear damage, including international civil liability, international

NL/DC/INF.4. prepared by the IAEA to the Diplomatic Conference of 8–12 September 1997.

7 On the Joint Protocol see VON BUSEKIST, O.: "A bridge between two conventions on civil liability for nuclear damage: The Joint Protocol elating tot he Application of the Vienna Convention and the Paris Convention." In: *Nuclear Law Bulletin*, No. 43. June 1989.

8 IAEA document GOV/OR. 707. 13.

State liability, and the relationship between international civil and State liability".[9]

After more than 8 years of negotiations in the frame of the Standing Committee,[10] which had 17 sessions and several intersessional working group meetings, a Diplomatic Conference to revise the 1963 Vienna Convention took place at Vienna in 8-12 September 1997 and the delegates adopted two treaties, the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage (hereafter: Protocol)[11] and the Convention on Supplementary Compensation for Nuclear Damage.

In the first stage of the revision process the only goal was to amend certain provisions of the Vienna Convention. Later, in what might be called the second stage, the question was seriously raised of establishing a supplementary convention on additional funds to be provided by the international community of States. Most experts felt that the nuclear liability regime of the Vienna Convention as amended would really serve the interests of potential victims of nuclear incidents only if supported by an international supplementary fund which provides additional payment for compensation of nuclear damage supplementary to those provided by the operator. Thus the Standing Committee started to consider the establishment under the Vienna Convention of a mechanism for mobilizing additional funds for compensation of nuclear damage. During the negotiations it was held necessary to elaborate a separate treaty on such a supplementary fund, and, indeed, efforts were undertaken to draw up a relevant instrument concurrently with the revision of the Vienna Convention.

The outcome of the revision process of the Vienna Convention is a Protocol containing 24 articles, some of them being completely new provisions, others only revised the existing articles. Before describing and analysing the outcome of the revision of the Vienna Convention the following preliminary remarks should be made:

---

9 This decision of the Board was based on the second report of the Working Group which recommended that the Board revise the mandate of the Standing Committee and include the questions of international liability and the relationship between international and State liability. See IAEA NL/2/3.

10 In the work of the Standing Committee experts from more than 55 States took part, and the representatives of several international organizations were present as observers. The high quality of work of the IAEA Secretariat and the NEA expertise on liability issues largely contributed to the success of the negotiations.

11 See Consolidated Text of the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1968 as Amended by the Protocol of 12 September 1997 established by the IAEA Secretariat. GC(41)INF/13/Add.1.

a) The provisions of the Protocol can be divided into three main groups. Some of the new and revised articles deal with matters of substance, and, we may add, with matters of great importance indeed. Other amendments contain rules of a basically procedural nature, which afford facilities to victims in enforcing their claims for compensation. The third category of amendments in fact affect no new issues, either substantive or procedural, and essentially serve to refine existing provisions of the Convention or to bring other provisions of the Convention into line with the newly incorporated rules.

b) As regards the articles dealing with matters of substance, it should be stressed that the revision did not affect the basic concept of the Vienna Convention, although attempts in that direction were also made during the negotiations in the Standing Committee, particularly in the early stage. I refer to efforts to have the basically civil liability regime of the Vienna Convention replaced by State liability.

c) There is no doubt that the revision clarified numerous provision of the Vienna Convention, for an effective liability regime can only work if a considerable part of nuclear liability issues are uniformly regulated by the national legislation of Contracting Parties. Nevertheless, the revised Vienna Convention continues to leave certain matters to the national laws, and, despite significant efforts at unification of laws as reflected in the Convention, a large part of questions relating to compensation for damage remains controlled by the domestic law of the Installation State or of the law of the competent court.

I. Civil liability, or State liability?

The nuclear liability conventions currently in force govern liability in respect of third parties on the basis of civil law, with the regulation conceptually based on the analogy of liability for activities involving increased[12] danger under the national laws of States.

In the first stage of the negotiation in the Standing Committee crucial to further advance was the debate about the need to devise a regime of State liability that was to replace the civil liability regime of the Convention.

The experts raised a number of theoretical and practical arguments for and against introduction of a State liability regime. An in-depth analysis of these

12 Cf. DE LA FAYETTE, L.: "Toward a New Regime of State Responsibility for Nuclear Activities." In: *Nuclear Law Bulletin*, No. 50. And LOPUSKI, J.: *Liability for Nuclear Damage*, National Atomic Energy Agency, Warsaw, 1993.

arguments would go far beyond the scope of this paper. Those arguing in favour of State liability referred to the Chernobyl disaster, claiming that only the financial resources available to the State could be sufficient to compensate victims of an accident of such a scale. Some authors in the pertinent literature and several experts to the Vienna negotiations referred to State liability in respect of space activities as providing an example very similar to matters of liability for nuclear damage and stated that the related international treaties provide for State liability. The final outcome of the discussions was a decision to retain the conceptual basis of the Vienna Convention and to uphold its civil liability regime. However, and that is a great improvement of the Vienna Convention, the Protocol expressly provides on compensation from public funds (see section VI. below).

II. Geographical scope of the Vienna Convention

The 1963 Vienna Convention is silent on its geographical scope, and pursuant to the general rules of international law, which are clearly laid down in Article 29. of the 1969 Vienna Convention on the Law of Treaties,[13] the Convention applies to damage occurring in the territory of a State party to the instrument and on board of aircraft registered in that State and on the ships flying its flag.

The Protocol adds a new article on the Convention's geographical scope (Article I.A, of the revised Vienna Convention), which, on the one hand, determines the rules relative to the Convention's geographical scope and, on the other extends its geographical application. Article 3. of the Protocol states as a general rule that "this Convention shall apply to nuclear damage wherever suffered" (para. 1.). This essentially means that the Convention may, at least in principle, be applied to nuclear damage suffered anywhere in the world, even to damages occurring in the territory or territorial waters (internal waters, territorial sea, exclusive economic zone, continental shelf) of a non-Contracting State. Nevertheless, the Protocol allows certain exceptions from the said general rule, permitting the Installation State to exclude, by legislation and under specific circumstances, the application of the Convention in the territory of a non-Contracting State or in respect to damage occurring in a maritime zone established by such State in accordance with the international law of the sea

13 Article 29 of the 1969 Vienna Convention on the Law of Treaties says that "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

(para. 2.). Any exclusion may apply only in respect to a non-Contracting State which has a nuclear installation in its territory or in any maritime zone on the one hand and does afford equivalent reciprocal benefits on the other (para. 3.). The Protocol here refers to the principle of reciprocity,[14] and as a consequence, the application of the Vienna Convention *may in no way be excluded in respect of non-nuclear States*, and in case of a nuclear incident a non-Contracting non-nuclear State or its nationals or legal persons under its jurisdiction are entitled to compensation on an equal footing with nationals of Contracting States.

It should be noted that application of the aforesaid provision on exclusion in respect of a nuclear State on the basis of lack of reciprocity may in practice give rise to problems, since the existence of reciprocity can always be established on the basis of some practice between States, and, given the fortunately rather rare occurrence of nuclear incidents, cases are in fact infrequent in which a nuclear State is likely to apply this provision in respect of another nuclear State. In theory, such a case may occur when damage is suffered in a successor State of the one-time Soviet Union, and a State party to the revised Vienna Convention tries to evade compensating damages suffered in the territory of the former Soviet Union by invoking the Soviet refusal to pay compensation to foreign victims after the Chernobyl disaster.

III. Concept of nuclear damage

The greatest change effected by the Protocol to amend the Vienna Convention is perhaps in the concept of nuclear damage.

Well before the Chernobyl disaster, professional circles had been fully aware that the definition of nuclear damage given by the 1963 Vienna Convention was too narrow or incomplete, because the Convention did not even refer to certain forms of damage (e.g. environmental damage or costs of preventive measures). The 1963 Vienna Convention made compensation for any nuclear damage other than loss of life, personal injury, and loss of or damage to property subject exclusively to the law of the court having jurisdiction. In other words, victims could not expect compensation for any other damage except when compensation was allowed by the law of the State of the competent court.

During the revision of the Vienna Convention it became completely clear that the definition of nuclear damage could not be treated with such a

---

14 On the principle of reciprocity see, DECAUX, E.: *La réciprocité en droit international.* Paris, 1980. 129–159.

highprofile touch, because domestic laws show rather great differences in the interpretation of, e.g., loss of profit or economic loss. If, on the other hand, there can be so significant differences between the domestic laws of States in the definition of nuclear damage, such differences may in practice operate to produce situations in which compensation to victims of nuclear damage tends to depend in no small measure on the location of the occurrence of damage or on the interpretation of nuclear damage by the law of the competent court. This in turn will but ultimately increase the no insignificant differences already existing between victims of different nuclear incidents.

The definition of nuclear damage is, from a certain aspect, a key provision of the Vienna Convention. The point here is that the entire nuclear liability regime rests on limited liability amounts, namely on the principle that, regardless of the number of victims and the size of damage, the amount of compensation, however great, payable by the operator or from public funds is a specified sum after all. (Indeed, such is the case even in States under the national law of which the operator's liability is unlimited, as is otherwise suggested by Article 9.2 of the Protocol to be discussed at a later stage.) Therefore, the inclusion of certain forms of environmental damage or indirect damage in the concept of nuclear damage is bound to enlarge the number of victims, direct or indirect, of a given nuclear incident. In the event of a large nuclear incident causing enormous damage, this in turn necessarily puts individual victims in a more unfavourable positions, since the more the victims the smaller their chance of receiving full compensation.

Almost from the beginning of the discussions to revise the Vienna Convention, the Standing Committee agreed on the need to broaden the concept of nuclear damage and, to include certain forms of environmental damage, costs of preventive measures and consequential losses in the definition of that term.[15]

The revision produced a rather detailed definition of nuclear damage in Article 2.2. of the Protocol[16] which really gives an almost exhaustive listing of the possible types of damage[17] and, what is particularly important, it is

---

15 Cf. RUSTAND, H.: "Updating the concept of damage, particularly as regards environmental damage and preventive measures, in the context of the ongoing negotiations on the revision of the Vienna Convention." In: *Nuclear Accidents, Liabilities and Guaranties, op. cit.* 218–238.

16 Article I.(k) of the revised Vienna Convention.

17 This notion of "damage" is much more detailed than the notions of damage included in recent treaties on on liability for environmental damage. Cf. Article I.(6), (7) of the 1992 London Convention on Civil Liability for Oil Pollution Damage, and Article 2(7), (8), (9) of the 1993 Lugano Convention on Civil Laibility for Damage Resulting from Activities

only the *extent* of damage, in respect of damages, other than loss of life, personal injury, and loss of or damage to property, that it renders subject to the law of the competent court. By so doing the Protocol has considerably restricted, but not fully eliminated, the significance of the law of the competent court, for, if the legislation of the competent court fails to recognize certain economic loss, victims of a nuclear incident can hardly expect compensation for such damage in a given case.

In addition to loss of life, personal injury, and loss of life or damage to property, which are already covered by the 1963 Vienna Convention, the Protocol clearly includes in the definition of nuclear damage such other loss as is incurred as a result of a significant impairment of the environment and the costs of certain preventive measures or measures to minimize damage taken under specific circumstances. Accordingly, "nuclear damage" also means:

a) further "economic loss" incurred above loss of life, personal injury, loss of or damage to property, provided that the loss is incurred by a victim who can claim in respect of such loss or damage;

b) the costs of measures of reinstatement of significantly impaired environment, if such measures are actually taken or to be taken, and insofar as not included in the category of 'economic loss';

c) loss of income, also related to the environment, deriving from an economic interest in any use or enjoyment of the significantly impaired environment, insofar as not covered by the preceding paragraph (such use of the environment should be taken to mean use for business purposes in the first place);

d) costs of preventive measures and consequential losses caused by such measures. It should be noted on this point that, owing to the widened scope of the definition of 'nuclear incident' introduced in Article I.1.(1.) of the Vienna Convention,[18] nuclear damage may also be deemed to be caused by the costs of preventive measures taken before the occurrence of the incident if there is to remove a grave and imminent threat of causing damage, and according to an additional sentence added at the Diplomatic Conference, provided they were fund under the law of the competent court to be appropriate and proportionate having regard to all the circumstances.

e) any other economic loss, other than any caused by the impairment of the environment, if permitted by the general civil liability law of the competent

---

Dangerous to the Environment.

18 Article 2.3 of the Protocol provides that "Nuclear incident means any occurrence or series of occurrences having the same origin which causes nuclear damage or, but only with respect to preventive measures, creates a grave and imminent threat of causing such damage."

court. This element of damage is likewise mentioned by the Protocol in a general clause.

The redefinition by the Protocol of nuclear damage is clearly reflective of an intention to ensure as full compensation as possible to victims of nuclear damage. As it virtually covers the most different types of damage, the Protocol has essentially developed civil liability for nuclear damage in the direction of the fullest measure of compensation in an attempt to break with the implied principle that victims of a nuclear incident cannot expect to receive full compensation.

Furthermore, the Protocol in Article 2.4 gives very precise definitions of "measures of reinstatement", "preventive measures" and "reasonable measures", which must (i) be reasonable; (ii) be approved by the competent authorities of the State where the measures were taken (the national law of the State where the damage suffered must determine who is entitled to take such measures); and (iii) aim to reinstate or restore damaged or destroyed components of the environment or to introduce, where reasonable, the equivalents of these components into the environment. "Preventive measures" are likewise subject to previous approval by the competent authorities of the State. As for "reasonable measures", a further criterion for them to constitute nuclear damage is that they must[19] be found under the law of the competent court to be appropriate and proportionate having regard to all the circumstances.

---

19 Article 2.4 of the Protocol adds among others these new paragraphs to Article I of the Vienna Convention:

"(m) 'Measures of reinstatement' means any reasonable measures which have been approved by the competent authorities of the State where the measures were taken, and which aim to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment. The law of the State where the damage is suffered shall determine who is entitled to take such measures.

(n) 'Preventive measures' means any reasonable measures taken by any person after a nuclear incident has occured to prevent or minimize damage referred to in sub-paragraph (k)(i) to (v) or (vii), subject to any approval of the competent authorities required by the law of the State where measures were taken.

(o) 'Reasonable measures' means measures which are found under the law of the competent court to be appropriate and proportionate having regard to all the circumstances, for example

(i) the nature and extent of the damage incurred or, in the case of preventive measures, the nature and extent of the risk of such damage,

(ii) the extent to which, at the time they are taken, such measures are likely to be effective, and

(iii) relevant scientific and technical expertise."

It can be stated, therefore, that the Protocol has considerably broadened the definition of nuclear damage and has taken a definitely important step towards unification in this respect of the legislation of States Parties. There is no doubt that the Protocol would have created a more clear-cut situation by giving a uniform, all-embracing definition of nuclear damage in respect to all States Parties to the amended Vienna Convention. However, considering the differences existing between the national laws of States in this field, one cannot but recognize that the Protocol is in touch with reality when it upholds the principle that the extent of damage should ultimately be determined by the law of the competent court. At any rate, this rather precise enumeration of the types of damage can be seen as a significant improvement of the Vienna Convention, since in effect it clearly calls the attention of both legislators and practising lawyers to the need for the various types of nuclear damage listed in the Protocol to be taken into account when they occur. Essentially, it gives a model or pattern to be followed by States not having legislation containing similar provisions.

IV. Nuclear installations covered by the Convention

The 1963 Vienna Convention was silent whether it covers all nuclear installations or only those used for certain peaceful purposes. It was only possible on the basis of interpretation *a contrario* to state that the Convention was not applicable to nuclear damages resulting from military installations.[20] The Standing Committee wanted to create a "clear" situation in this respect as well, and, already at its first meeting acting upon proposals by several delegates, it tried to amend the Vienna Convention in the sense that it should cover military installations as well. This proved to be a rather delicate issue and brought to light quite a few political and legal problems concerning the extensions of the application of the Convention to nuclear installations used for non-peaceful purposes, especially the problem of damage arising in connection with those nuclear installations which were not under the control of the territorial State. For a while, a compromise solution was sought to bridge over this difficulty by allowing individual States to declare that military installations on their territory are not covered, under special circumstances present, and till the 16th session of the Standing Committee the draft protocol contained a provision

20 According to the Preamble of the Vienna Convention "The Contracting Parties, having recognized the desirability of establishing some minimum standards to provide financial protection against damages resulting from certain peaceful uses of nuclear energy."

stating that the "Convention shall apply to all nuclear installations, whether used for peaceful purposes or not."[21] Later, in the last stage of negotiations, the Standing Committee realized the related difficulties of and rejected the extension of the application of the Vienna Convention to nuclear installations used for non-peaceful purposes. The Protocol finally succeeded in clarifying the situation by adding a new Article I.B. clearly stating that "This Convention shall not apply to nuclear installations used for non-peaceful purposes."

V. Exoneration

Article 6.1 of the Protocol amended the provisions of the Vienna Convention on exoneration from liability and formulated definitely stricter rules in two aspects. On the one hand, the Protocol repealed "a gerave natural disaster of an exceptional character" as a ground for exoneration, which, even under Article IV.3. of the 1963 Vienna Convention, had operated as such only insofar as the law of the Installation State contained no contrary provision in this respect. It means that, if a grave natural disaster was no ground for exoneration under the domestic law of the Installation State, it could not serve as one under the Vienna Conventions either. On the other hand, the regulation became stricter also in that the other events (act of armed conflict, hostilities, civil war or insurrection) do not exonerate the operator from liability except on proving that the nuclear damage is directly due to such events. The earlier regulation did not require such proof by the operator.

Other amendments of the same Article IV. increased the liability amount for damages to the means of transport upon which the nuclear material involved was at the time of the nuclear incident, and made a clear situation by excluding damages to other nuclear installations, including those under construction, operating on the same site, and also any property on the same site used in connection with any such installation.[22]

---

21 Cf. SCNL/16/INF.3.

22 The revised Article IV. 5 and 6 reads as follow:

"5. The operator shall not be liable under this Convention for nuclear damage

a) to the nuclear installation itself and any other nuclear installation, including a nuclear installation under construction, on the site where that installation is located, and

b) to any property on that same site which is used or to be used in connection with any such installation.

6. Compensation for damage caused to the means of transport upon which the nuclear material involved was at the time of the nuclear incident shall not have the effect of reducing

VI. Liability amount

Perhaps the most important other amendment of the Vienna Convention by the Protocol is the increase in liability amounts, which can be explained by the fact that one of the main motives of revising the Vienna Convention was precisely the consideration that the 5 million dollar limit as the lowest amount at which the liability of the operator may be established become unrealistically low in view of the extent of damage that might result an eventual nuclear incident.

It should be remembered that all the amendments of the Vienna Convention mentioned above, in particular the extension of the geographical scope of the Convention or of the concept of nuclear damage entails a larger number of victims of nuclear incidents, and, as a consequence, there will be more victims to share one and the same amount.

The problem of increasing the amount of liability was lengthy discussed in the Standing Committee, and as a result according to the revised Article V. of the Vienna Convention[23] the legislation of the Installation State may limit the operator's liability for any one nuclear incident to not less than 300 million SDRs. [This also means that in future the limits of liability amounts for nuclear damage will be fixed, not in US dollars, but in Special Drawing Rights (SDR) used as the unit of account defined by the International Monetary Fund].[24] The operator's liability amount may be lower than this, but may in no case be less than 150 million SDRs, which naturally means that the upper limit of the operator's liability may be a higher amount. If, under the national law of the Installation State, the upper limit of the operator's liability is lower than 300 million SDRs, the differential between the upper limit and the 300 million SDRs must be secured from public funds.

The provisions for a phasing-in mechanism were included in Article V.1.(c) of the Vienna Convention on the motion of some States coping with economic difficulties. It allows a transitional period of 15 years from the date of entry into force of the Protocol, and during the phasing-in period the minimum limit of liability of an operator for nuclear damage occurring during that period may be 100 million SDRs. The new provision makes it possible to the Installation State to limit the operator's liability to an amount less than 100 million SDRs

---

the liability of the operator in respect of other damage to an amount less than either 150 million SDRs, or any higher amount established by the legislation of a Contracting Party, or an amount established pursuant to sub-paragraph (c) of paragraph 1 of Article V."

23 Article 7.2 of the Protocol.

24 Cf. Article I.1.(p) of the revised Vienna Convention.

within the transitional period, provided that the difference between that lesser amount and the 100 million SDRs is secured from public funds.

No doubt that non-inclusion of the provisions on the aforesaid transitional period would have been a solution more favorable to victims of an eventual nuclear incident. One should not overlook the fact, however, that the 300 million SDRs liability amount established by the Protocol is to high for some States on the one hand, and the amount of liability will be much higher, over 40 times the previous amount, even in this transitional period. Many believe that the phasing-in mechanism do a great deal to promote accession by more States to the Protocol to Amend the Vienna Convention.

VII. Financial Security

Since at the time the Vienna Convention was adopted one hardly anticipated that the internal law of any State would provide for the operator's unlimited liability, little attention was paid to the question of reconciling cases of unlimited liability with the Convention's provisions fixing the amount of financial security. This problem was settled by Article 9.1 of the Protocol, which adds to Article VII. of the Vienna Convention a sentence providing that where the liability of the operator is unlimited, the Installation State shall ensure that the operator's financial security shall not be less than 300 millions SDRs.

VIII. Amendment of liability amount

The article on the adjustment of liability amounts under a relatively simplified procedure in view of inflation and other factors is a new Article V.D of the Vienna Convention. This "simplified" procedure is in fact a rather complicated multi-tier mechanism. Its main advantage lies in leaving scope for raising the liability amount without the need for the traditional time-consuming procedure generally followed for amendment of treaties.

The procedure governed by Article 7.2 of the Protocol is this: a meeting of the Contracting Parties shall be convened by the Director-General of IAEA on the proposal of one-third of the States party to the revised Vienna Convention to amend the limits of liability; amendments shall be adopted by a two-thirds majority, provided that at least one-half of the Contracting Parties are present and voting; any amendment adopted shall be notified by the Director-General of IAEA to all Contracting Parties and shall be considered accepted at the end

of a period of 18 months after it has been notified, provided that at least one-third of the Contracting Parties have communicated to the Director-General that they accept the amendment; an amendment accepted under this procedure shall enter into force 12 months after its acceptance for those Contracting Parties which have accepted it.

This simplified procedure undoubtedly makes it possible for the amounts of liability to be amended by a two-thirds majority of the Contracting Parties present and voting, provided that one-half of the Parties are present. In point of fact, however, this can only be regarded as a concrete proposal for amendment and in no way impinges on the interests of the other States party to the Convention. It should be stressed that the increased amount applies only to those States which have expressly accepted it and, even in that case, 12 months after acceptance. The period of 12 months may, inter alia, enable a State accepting the amended liability amount to prepare for fulfilment of its resultant obligations to adopt the required national laws and regulations, enable the operators to make contracts of insurance for higher amounts, etc. If the regulation is seen under this approach, the question also arises whether the said 12 month period is really sufficient for a State to prepare for fulfilment of its obligations resulting from the acceptance of a considerably higher amount of liability.

Of course, States may happen to disagree with an amended liability amount. This possibility is also contemplated by the Protocol when it spells out that if, within a period of 18 months from the date of notification by the Director-General of IAEA, an amendment has not been accepted, the amendment shall be considered rejected. According to Article V.D.6 a State which becomes party to the Vienna Convention after the entry into force of an amendment adopted under the simplified procedure shall be considered bound by the liability amount so amended only if it has failed to express a different intention can be viewed as a rule serving as a guarantee in respect to any increased amount of liability. In other words, a State acceding to the Vienna Convention at a later date may exclude the application of a probably higher liability amount as amended under a "simplified" procedure.

IX. Time limit for submission of claims

The time limit for submission of claims for nuclear damages was similarly affected by the revision of the Vienna Convention, with Article 8.1, 8.2 and 8.3 of the Protocol differentiating between various types of damage and omitting the rules on special prescription period with respect to lost, stolen,

jettisoned or abandoned nuclear materials. The Vienna Convention originally established a prescription period of 10 years for nuclear damage, specifying a period of 20 years only for nuclear damage caused by lost or stolen, etc. nuclear materials. The Protocol recognized that personal injury caused by radioactive contamination might not become manifest for some time after exposure occurred and accordingly its new regulation establishes a longer period of 30 years from the date of the nuclear incident for actions of compensation of loss of life and personal injury, while retaining the 10-year prescription period for all other types of damage. As it was already mentioned, the special period of prescription with respect to lost and stolen nuclear material was repealed, so in future it will be irrelevant whether or not the nuclear material causing a nuclear incident was under the operator's control at the time of the incident.

It should be noted that the 10-year prescription period is much longer than that established by national laws of numerous States for damage resulting from certain ultra hazardous activities, and it practically allows for the fact that damage caused by radioactive contamination to the flora and fauna, livestock, etc. becomes evident many years after exposure. The revised Article VI. of the Vienna Convention appears to be sufficiently flexible to address problems of such nature and leaves it up to the legislation of the competent court to regulate related matters.

The discovery rule or the so-called subjective prescription period was likewise modified. Whereas under Article VI. 3. of the 1963 Vienna Convention "the law of the competent court may establish a period of extinction or prescription not less than 3 years from the date on which the person suffering damage had knowledge of the damage and the operator liable", the revised Article provides that an action for compensation *shall be brought within 3 years* from the date on which the person suffering damage had knowledge or ought to have had knowledge of the damage and the operator liable. It was upheld the rule that not even the subjective prescription period of 3 years may exceed beyond the aforementioned periods of 10 and 30 years or a longer period of extinction or prescription established by the national law of the Installation State.

The extension of the prescription or extinction period may inevitably give rise to certain practical problems, notably the question of financial coverage for claims of compensation lodged for loss of life or personal injury decades after the occurrence of a nuclear incident. Since according to the national legislation of most States the amount of liability for nuclear damages is a specific amount, this may in practice convey the suggestion that certain portion of the liability

amount available, to be allocated to compensation for claims of loss of life or personal injury lodged by victims decades after an incident. Article 8. 1 (c) of the Protocol was intended to eliminate similar solutions by providing that actions for compensation which, pursuant to the extended period of prescription or extinction noted above, are brought after a period of 10 years from the date of the nuclear incident shall in no case affect the rights of compensation of any person who has brought an action against the operator before the expiry of that period.

The new regulation definitely keeps it in view that any extension of the prescription or extinction period either by the Protocol or by the law of the Installation State makes sense only if the operator's liability is covered, to the extent of the liability amount, by insurance or other financial security, including State guarantee, for such longer period. It is with attention to this that Article 8. 1 (b), of the Protocol provides the following: "If, however, under the law of the Installation State, the liability of the operator is covered by insurance or other financial security including State funds for a longer period, the law of the competent court may provide that rights of compensation against the operator shall only be extinguished after such a longer period which shall not exceed the period for which his liability is so covered under the law of the Installation State."

It is clear that the Protocol definitely, increased the role of insurers or their burdens, since, on the one hand, the new rules require insurers to satisfy claims to the extent of a higher amount because the revised Vienna Convention has considerably enlarged the minimum liability amount to be fixed for operators, and, on the other hand, insurers will, pursuant to the provisions extending the prescription periods, have to satisfy claims not only to the extent of a higher amount, but also for a longer period of time.[25] As a discussion of this question would go far beyond the scope of this paper, I would rather confine myself to emphasizing the need to rely in such cases on the solidarity of the society and the national and international community, it being clear that these victims should, regardless of whether or not they are covered by legislative provisions, receive compensation from public funds in cases when due to the progress of time the operators liability is not covered by insurance.

25 On this question see, WARREN, G. C.: "Vienna Convention revision: a review of the exercise and insurance implications in the provisions under discussion." In: *Nuclear Law Bulletin,* No. 55. June 1995.

X. Non-discrimination between victims

Article III. of the Vienna Convention prohibiting any discrimination between victims suffering nuclear damage was amended by Article 15. of the Protocol,[26] the result being that in certain extreme cases, rather rare in practice, some foreign victims may be excluded from the compensation provided by the Convention. Derogation from the non-discrimination principle is allowed by the Protocol within very narrow limits. Accordingly, discrimination may only be practised (a) in respect of amounts in excess of the operator's liability, namely it may affect compensation from public funds only; and (b) in respect of nuclear damage suffered in the territory or any maritime zone of a State which has a nuclear installation in such territory, to the extent that it does not afford reciprocal benefits to the Installation State. This latter restriction makes clear that such discrimination is not allowed in respect to victims of non-nuclear States. For that matter, the underlying motive of this article is similar to that of the article on the geographical scope of the Convention.

In point of fact the new Article XIII. 2. of the Convention is understandable, for what we have here, too, is that compensation from public funds should not be paid to victims whose State ensures no compensation under similar circumstances. Still, an approach that innocent victims of nuclear damage should receive no compensation because their State once failed to comply with its obligations under similar circumstances raises the question of how to reconcile it with the principle of improving the situation of victims and with humanitarian considerations, but this is a separate matter which to discuss would go far beyond the scope of the present paper.

XI. Priorities given to certain victims

During the revision of the Vienna Convention the view was almost commonly held that victims claiming compensation for loss of life, or personal injury

---

26 Article XIII. 2.of the revised Vienna Convention (Article 15 of the Protocol) reads as follow:
"Notwithstanding paragraph 1 of this Article, insofar as compensation for nuclear damage is in excess of 150 million SDRs, the legislation of the Installation State may derogate from the provisions of this Convention with respect to nuclear damage suffered in the territory, or i9n any maritime zone established in accordance with the international law of the sea, of another State which at the time of the incident, has a. nuclear installation in such territory, to the extent that it does not afford reciprocal benefits of an equivalent amount."

should be brought into a more favourable position and priority should be given to those claims. This intention is reflected not only in the aforementioned rule on the period of prescription or extinction extended to 30 years, but also in the provision amending Article VIII. of the Vienna Convention on the nature, form and extent of compensation.

Article 10. of the Protocol clearly states that "priority in the distribution of the compensation shall be given to claims in respect of loss of life or personal injury". This provision accords priority only to those claims of compensation for loss of life and personal injury which were submitted within 10 years from the date of a nuclear incident, that is to say that the priority rule is inapplicable to claims raised beyond the 10 years period. Moreover, the priority rule applies to cases where the damage to be compensated exceeds or is likely to exceed the maximum amount of liability made available pursuant to Article V.1. It may be noted that the extension of the priority rule to the whole period of prescription or extinction would entail the danger of attempts being made to withhold a part of the liability amount on the ground that personal injuries would become evident at a later period of time. Obviously enough, this would not serve the interests of victims who bring actions for compensation within 10 years from the date of a nuclear incident, for they could only expect a reduced amount of compensation, because of personal injury or death manifesting at a much later time. Thus, in the interest of all victims, it appears much more equitable to give priority to claims in respect of personal injury or loss of life, but only for a certain specified period.

In reality, it is naturally rather difficult to make any specification as to how to prioritize claims for compensation in respect of a certain group of victims. Precisely for this reason, it appeared to be a wise solution to preserve the relevant provision of the Vienna Convention, which states that, "Subject to the provisions this Convention, the nature, form and extent of compensation, as well as the equitable distribution thereof, shall be governed by the law of the competent court" (Article VIII.1), that is to say that the rules concerning priorities given for claims of compensation in respect of loss of live or personal injury is for the law of the competent court to decide.

XII. Jurisdictional provisions

The revision of the Vienna Convention witnessed a rather sharp debate on the question of jurisdiction for claims of nuclear damage practically until the adoption of the Protocol at the Diplomatic Conference. Interestingly, the debate

addressed not so much the question of jurisdiction in general as rather one instance thereof, notably the occurrence of nuclear incidents in an exclusive economic zone of a Contracting Party. The debate focused on problems of the law of the sea associated with the fact that issues relating to exclusive economic zones (EEZ) were not precisely regulated by the 1982 Convention on the Law of the Sea, since that Convention gives costal States jurisdiction with regard to the preservation of the maritime environment in its EEZ, however, to what degree a State would be able to exercise this jurisdiction is still a matter of controversy.[27] States favoring inclusion in the Protocol of jurisdictional provisions on exclusive economic zones advanced the main argument that, according to Article 56. 1. (b) ii) of the 1982 UN Convention on the Law of the Sea the coastal States have jurisdiction with regard to the preservation of the marine environment, that if nuclear damage occurred in such a zone, damage would be suffered chiefly by the natural resources for which they bear responsibility under maritime law. This argument is otherwise supported by the fact that cases are actually very frequent of carriage of nuclear material in exclusive economic zones.

The provisions on jurisdiction were finalized only at the Diplomatic Conference and the outcome is a rather complicated paragraph broking with the general rule, characteristic of nuclear liability conventions, that jurisdiction over actions for compensation lies with the Installation State. Under Article XI. 1. bis. of the revised Vienna Convention "When nuclear incident occurs within the area of the exclusive economic zone of a Contracting Party or, if such a zone has not established, in an area not exceeding the limits of an exclusive economic zone, were one to be established, jurisdiction over actions concerning nuclear damage from that nuclear incident shall, for the purposes of this Convention, lie only with the courts of that Party." Provided that there is a notification by that Contracting Party to the Depository of such area prior to the nuclear incident. In order to avoid any misunderstanding concerning the law of the sea, the same paragraph adds that "Nothing in this paragraph shall be interpreted as permitting the exercise of jurisdiction in a manner which is contrary of the international law of the sea, including the United Nations Convention on the Law of the Sea."

There is an other new paragraph in Article XI. on jurisdiction, which incontestably serves the interest of potential victims and facilitates the equitable distribution of compensation funds, that paragraph provides that the Contracting

---

27 Cf. ATTARD, D.: *The exclusive economic zone in international law.* Oxford, 1987. 94–106.

Parties shall ensure that only a single juridical forum has jurisdiction in relation to any one nuclear incident.

XIII. Actions for compensation

The addition to the provisions on jurisdiction of the Convention a new Article XI. A. concerning actions for compensation is highly important and protects the interests of potential victims as it allows States to bring actions on behalf of its citizens and other victims who have suffered nuclear damage and have their domicile or residence in its territory. This provision was inspired by the fact that the litigation in a foreign forum may subject the victims to undue inconveniences. It should be noted, that it is very important for cases of industrial accidents when there could be thousands of victims to decide in advance who have the right to represent the victims,[28]
e.g. after the Bhopal catastrophe of 2 December 1984, one of the greatest industrial accident of all time, one primary issue was whether India had the right to represents the victims.

The article in question, which is a procedural innovation of the Protocol to Amend the Vienna Convention, accords to victims a kind of protection rather special in terms of legal nature. That protection differs from traditional diplomatic protection since the protection is not being subject to exhaustion of local remedies and the damage to victims not being caused by a foreign State. Therefore, to this extent, protection is closer in nature to consular protection, but, at the same time, it also differs from it chiefly in that protection in this case is accorded not to a persons staying abroad. Since the paragraph accords protection on an equal footing with nationals, to those foreigners who are permanent residents of the particular State, this does not rule out the possibility for a victim, if there are victims in several States, for example, to rely on action and protection by both the State of his nationality and the State of his domicile, or residence.

The last paragraph of the new Article XI. A. is dealing with claims by subrogation or assignment and states that those claims should be also admitted by the competent court.

---

28 Cf. FREEDMAN, W.: *Foreign Plaintiffs in Product Liability Actions.* The Defense of Forum Non Conveniens. 1988. 135.

XIV. Involvement of public funds in compensation of nuclear damages

One of the greatest novelty of the Protocol is that it expressly provides on compensation from public funds for nuclear damage. It should be added that the compensation from public funds occurs only if a State Party decides to exempt an operator for up to half of his liability (during the fazing-in period even for a greater portion), and in those cases the Contracting Party must make public funds available to make the total amount up to at least the sums mentioned in Article V.1. To counterbalance the above mentioned provisions the Protocol incorporated certain guarantees to protect public funds.

Article 4. of the Protocol can be said to contain such a new provision, added to Article II. of the Vienna Convention, under which the Installation State may limit the liability amounts payable from public funds in cases where several operators are jointly and severally liable. This amendment is intended to ensure that, although several operators are liable for nuclear damage, only one payment is made in respect of the incident itself.

Article 7.2 of the Protocol inserts a new Article V.C in the Vienna Convention providing on cases when the competent court is not that of the Installation State.[29] Again the protection of public funds appears here since the Installation State is naturally required to reimburse to the State of the competent court all payments made from public funds. According to the Protocol, the States concerned shall agree on the procedure for reimbursement. Another new provision quite logically allows the Installation State to intervene in proceedings and to participate in any settlement concerning compensation.

A similar provision, added to Article X. of the Vienna Convention, extends a right of recourse to the Installation State insofar as it has provided public funds for purposes of compensation.

In point of fact, Article 15. of the Protocol mentioned earlier similarly restricts compensation from public funds, protecting them by allowing derogation from the non-discrimination principle in certain cases.

---

29 Article V. C.

"1. If courts having jurisdiction are those of a Contracting Party other than the Installation State, the public funds required under sub-paragraphs (b) and (c) of paragraph 1 of Article V. and under paragraph 1 of Article VII, as well as interest and costs awarded by a court, may be made available by the first-named Contracting Party. The Installation State shall reimburse to the other Contracting Party any such sums paid."

XV. Dispute settlement

The Vienna Convention originally contained no provision on dispute settlement[30] Therefore, almost from the very beginning of the discussions in the Standing Committee the experts generally agreed on the need for the Convention to be supplemented in this respect. There were discussed a variety of rather detailed proposals for the settlement of disputes, including setting up a separate international tribunal or a claims commission, and even a plan was drawn up for a separate Annex to the Vienna Convention to settle matters relating to the aforementioned tribunal.[31]

Of the many proposals, a rather low-key one was incorporated into Article 17. of the Protocol. The core and substance of the new dispute settlement mechanism (Article XX.A of the revised Vienna Convention) devised by it is this: in the event of a dispute between State Parties to the Vienna Convention concerning the interpretation or application of the Convention "the parties to the dispute shall consult with a view to the settlement of the dispute by negotiation or by any other peaceful means acceptable to them"; if a dispute cannot be settled within 6 months from the request for consultation, any party may submit the dispute to arbitration or refer it to the International Court of Justice; where a dispute is submitted to arbitration and the parties to the dispute are unable to agree on the organization of the arbitration any party may request the President of the International Court of Justice or the Secretary-General of the United Nations to appoint one or more arbitrators. It should be noted that in this paragraph the Protocol refers to the disagreement in organization of the arbitration, which it could be a disagreement not only on the composition of the arbitral court, but on the rules of procedures as well. However, the Protocol points only to the first mentioned difference of opinion by stating that, in cases of conflicting requests by the parties to the dispute, the request to the Secretary-General of the United Nations shall have priority. For that matter, the Contracting Parties are not under obligation to accept the dispute settlement mechanism provided by the Protocol, and when ratifying, accepting, etc. of the Convention, any of them may declare that it does not consider itself bound by either or both of the dispute settlement procedures. Such declarations may of course be withdrawn at any time, the consequence

30 There is an Optional Protocol Concerning the Compulsory Settlement of Disputes appended to the Vienna Convention concluded at the same day as the Vienna Convention, however, that Protocol never entered into force.

31 Cf. SCNL Third Session, Note by the Secretariat, 13–16.

being that the article governing dispute settlement are not to be regarded as valid in the relationship of the State making such a declaration to the rest of the Contracting Parties.

XVI. Textual adjustments

The Protocol contains some provisions which are simply textual adjustments to the Vienna Convention. Mention may be made of the following paragraphs.

1) Article 7.2 of the Protocol, which simply reworded the relevant article of the Vienna Convention that the costs and interest awarded by courts in actions for compensation of nuclear damage shall not be chargeable against the liability amounts fixed by the Convention, namely that such costs and interest shall be payable in addition to those amounts, can definitely be regarded as a minor refinement of wording.

2) The new version of Article XII. of the Vienna Convention on recognition and enforcement of judgements can similarly be regarded as nothing but a revised wording of the relevant provisions.

3) Article 2.1 of the Protocol, which revised Article I. (j) of the Vienna Convention defining "nuclear installation" to empower the IAEA Board of Governors to include, from time to time, certain facilities resulting from technological development in the category of nuclear installation can be conceived as a comparatively minor amendment, meaning that the Board practically may from time to time determine the scope of facilities covered by the definition of "nuclear installation".

4) Again, Article 16. of the Protocol affecting Article XVIII. of the Vienna Convention which governs the relationship of the Vienna Convention as *lex specialis* to international law as *lex generalis*, can be viewed as more like a minor amendment refining the existing text, and, unlike the earlier text, the revised wording refers not only to rights, but also to obligations under international law, which shall not be affected by the provisions of the Convention.

5) Another amendment of no great importance, relating to carriage of nuclear material, affects Article III. of the Vienna Convention and allows the Installation State to exclude the liable operator's obligation to provide the carrier with a certificate, in respect of carriage of nuclear material within that State, issued by the insurer and other financial guarantor.

XVII. Peaceful coexistence of two Vienna Conventions

As it was already mentioned, technically the Vienna Convention was revised by the adoption of the Protocol to amend the instrument, and according to Article 19. of the Protocol "A State which is Party to this Protocol but not to the 1963 Vienna Convention shall be bound by the provisions of that Convention as amended by this Protocol in relation to other States Parties hereto, and failing an expression of a different intention by that State at the time of deposit of an instrument ... shall be bound by the provisions of the 1963 Vienna Convention in relation to States which are only Parties thereto." It should be noted that this solution has created a special situation, because after the entry into force of the Protocol[32] there will be living together or operating in practice "two" Vienna Conventions, notably the Convention's original text of 1963 and its new version as amended by the Protocol.

After the Protocol has come into force, a State may only accede to the amended version, but in the *inter se* relations of the States party to the "old" Vienna Convention the provisions of that Convention will be in force in respect of them until such time as they have acceded to the new Protocol. This rather complicated situation is nevertheless understandable and is fully in accord with Article 40. of the 1969 Vienna Convention on the Law of Treaties, which provides on amendment of multilateral treaties.

* * *

In 1989 the negotiations on the revision of the Vienna Convention had started with the aim to strengthen the existing nuclear liability regime and to improve the situation of potential victims of nuclear accidents. The Protocol to Amend the Vienna Convention serves that purpose and it reflects a good compromise since it is the outcome of a negotiation process in which the experts of nuclear States and of non-nuclear States as well as the Contacting Parties and the Non-Contracting Parties to the 1963 Vienna Convention were very active. That affords some assurance that the compromise solution reached is acceptable to all States participating in the elaboration of the Protocol. All this holds out the hope that, and this is perhaps what matters most, the Protocol will enter into force within a relatively short period of time.

---

32 According to Article 21 "This Protocol shall enter into force three months after the date of deposit of the fifth instrument of ratification, acceptance and approval."

Now that the Vienna Convention has been revised it is to be expected that, on the one hand, there will be accessions to the revised Vienna Convention by further States, chiefly those which have so far steered clear of its liability regime precisely because of its insufficient regulation and that, on the other hand, the present States Parties to the Vienna Convention will ratify the Protocol and accede to it, thereby causing the 1963 version of the Vienna Convention to lose effect sooner or later.

ACTA JURIDICA HUNGARICA
1999 40 Nos 3–4, pp. 195–212

1216-2574 / 99 / USD 5.00

Péter PACZOLAY

Theory or Science of Politics: Ambiguities of American Political Thought

A personal note: In the fall semester of 1978 at the Law School of the Eötvös Loránd University of Budapest I attended the class of Professor Péteri on the so-called "Theory of the State". During that seminar he introduced me systematically to the basic questions of not only that discipline but to those of political science, too. Since then I have been studying the same subject, and for years we were lecturing on the same department. Professor Péteri has been well-known among students at least for three reasons: they appreciate his deep and wide-ranging knowledge and his comparative method; he has a unique ability to explain to students the even most abstract theories in a clear, intelligible way; and he has been just but severe at the exams. The present paper is a modest attempt to sum up certain aspects of a subject to which Professor Péteri has devoted much time both in research and in teaching.

The far best study on the history of American political science is Bernard Crick's book, titled *"The American Science of Politics"*.[1] The author introduces his investigation into the subject with the following observation: "The study of politics in the United States is something in size, content and method unique in

1 CRICK, B.: *The American Science of Politics*. Berkeley and Los Angeles, 1959.

Western intellectual history."[2] The book correctly emphasizes the paradoxical ambiguity of the ambitious goal of American political thought: the linkage of science and politics. An outstanding figure of the American political science, who arrived to the United States from Florence, Italy, Giovanni Sartori devoted an entire book to the difficult relation of science and politics. Sartori warns us of the great tension between the abstractness of science and the everyday commonness of political action and ideologies.[3] In the present short outline of the rich and really unique history of American political thought I attempt at to sum up the great steps of this history. This is the history how American intellectuals tried to elevate thinking and speculating about politics to the rank of *science:* and by science has been meant the objectivity of natural sciences, the utilization of scientific and quantitative research methods in the study of politics. This attempt has created a persistent tension between the desired science of politics and the theory of politics as a value-oriented, normative, all-embracing, philosophical approach to the study of the entirety of political phenomena.

The Intellectual Origins and the Birth of American Political Thought: "The Divine Science of Politics"

In its first phase American political philosophy faced a solemn but grandiose task: founding a new political order embodied in the Constitution. The Founding Fathers of the American Republic explicitly had spoken of a "science of politics", as Alexander Hamilton in the Ninth Paper of *The Federalist*,[4] or with the frequently used words of John Adams: "the divine science of politics". Science of politics is a rather ancient expression of European intellectual history, invented already in the XIII. century during the translation of Aristotle's work. This Latin *scientia politica* had been turned into science of politics. Obviously this political science at that times had different meanings; it referred both to a rather speculative, rational way of thinking, and to a practical knowledge of governmental action.

The American science of politics already in the early times was committed to the latter approach. The aim of the Founding Fathers was to create a working political order. The early years of the Republic created a rather unique oppor-

2 Id., p. xi.

3 SARTORI, G.: *La politica. Logica e metodo in scienze sociali.* Milano, 1980. 44.

4 "The science of politics, however, like most other sciences, has received great improvement." Hamilton, Madison, Jay, *The Federalist Papers.* Ed. Clinton Rossiter, 1961, 72.

opportunity for the practical implementation of political theories. The two great European thinkers who influenced this process most had been an Englishman: John Locke, and a Frenchman: Montesquieu. Locke's *Two Treatises on Government* (1690) had a great impact on Americans for the praise of liberty including the right to resistance. It also suggested them that America, resembling the idea of natural sociability of men in Locke's book, was founded on the principles of nature.[5] John Adams, later second president of the United States, in an essay written in 1776 and widely discussed among members of the Continental Congress, quotes the names of Englishmen like Sidney, Harrington, Locke, Milton:

"The wretched condition of this country, however, for ten or fifteen years past, has frequently reminded me of their principles and reasonings. They will convince any candid mind, that there is no good government but what is republican. That the only valuable part of the British constitution is so; because the very definition of a republic is 'an empire of laws, and not of men.'"[6]

The principle of "government by laws" stemmed from an ancient idea first formulated by Aristotle. It became a basic principle of the American Republic[7], defined also as "constitutional government".

As for the other great source of inspiration, Montesquieu's Spirit of the Laws, out of the countless references the most famous is perhaps the Forty-seventh Paper of The Federalist by another future president of the United States, James Madison. Discussing the question of the separation of powers, Madison wrote:

"The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind."[8]

The Founding Fathers did not satisfy themselves by the creative adaptation of political ideas, and the creation of genuinely new political institutions. They planned also by the means of education prepare apt men to the task of governmental work. Washington several times urged the introduction of politics and government to the university education; we must confess that his efforts

---

5 POCOCK, J. G. A.: *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition*. Princeton, 1975. 527.

6 *Great American Political Thinkers* (ed. Bernard E. Brown), New York, Vol. 1., 167–168.

7 SANDOZ, E.: *A Government of Laws. Political Theory, Religion, and the American Founding*. 1990. 228–231.

8 *Great American Political Thinkers, op. cit.* Vol. 1., 242–243.

remained unsuccessful. Nevertheless, it may be surprising to quote the title of an academic disputation at Harvard University as soon as in 1788: "Is it more necessary in a Republic than in any other form of government that young men should be instructed in political science?"[9]

The first, undoubtedly glorious period of the American "science of politics" contributed to the development of political thought enormously by applying axioms and principles of political philosophy to the needs of government and politics. They did not formulated abstract axioms, but framed workable institutions. Political science had meaning for them as statesmanship, statecraft, practical wisdom. They could achieve, indeed, a constitutional system that had never existed before. They implemented and made to work the theories of separation of powers, federalism, checks and balances, they invented judicial review: in brief, Americans succeeded in making democracy work.

The Expansion of Education Under German Influence

Despite the fascinating beginnings of a practically oriented but normative and theoretical science of politics at the early years of the Republic, political theory in most of the XIX. century was far from being original and significant. The most common explanation for this decline hints at the altered historical circumstances. XIX. century Americans lacked the great challenges faced by their ancestors. The constitutional framework had been set by the outstanding theoretical and practical skill of the Founding Fathers, and it worked well. It helped to survive the Union even during such a great crisis as the Civil War. The famous historian, Henry Steel Commager argued:

"Most Americans ... rightly assumed that the bankruptcy of political theory was a product of the prosperity of political practice. As long as the institutions established by the Fathers and the principles expounded by Jefferson worked well, there was no felt need for theoretical justification: success was its own justification."[10]

Not surprisingly, the presumably most original thinker of the century was a Southerner, John C. Calhoun, who before the Civil War made serious efforts to justify the claims of the Southern states, and to establish a new constitutional order for the Confederation. His ideas on the different meanings of majority

---

9 CRICK: *op. cit.* 5.

10 COMMAGER, H. S.: *The American Mind. An Interpretation of American Thought and Character since the 1880's.* New Haven–London, 1950. 311.

explored a basic problem of all democracies; he distinguished between the numerical majority, and the concurrent majority, the latter taking into regard the different and conflicting interest of the entire community.[11]

However, two tendencies can be outlined that contributed to the development of American political science, and slowly prepared the way to the emergence of the scientific approach of the political phenomena. The two correlative trends were the growing influence of German political philosophy, and the introduction of political studies to the university curriculum.

Foreign influence on XIX. century American political analysis is by far not limited to German scholars. The most original and comprehensive examination of American democracy of the period is to be found in the work of a Frenchman, Alexis de Tocqueville.[12] One has to remark that the observations of De Tocqueville were not very welcomed in the United States. The first German scholar who had an outstanding influence on American political studies was Francis Lieber. He was a Prussian, imprisoned in his country for his liberal and nationalist sentiments, who fled to America in 1827. For twenty years he taught in South Carolina. Finally, in 1858 he was appointed to a newly established Chair at Columbia College. This privilege was due to his book on *"Civil Liberty and Self Government"*. The work was published in 1853, and gained him considerable reputation. Lieber tried to elevate political science to the rank of an autonomous discipline. He renamed his Chair at Columbia from the suggested "History and Political Economy" to "History and Political Science". The title of his Inaugural Address at Columbia was "History and Political Science, Necessary Studies in Free Countries". He pointed out the great mission of political studies in preparing students for the tasks destined them by their country.[13] Actually, the real influence was exercised by German historiography, more than any other discipline.

The road opened by Lieber after the Civil War led to a considerable expansion of both college and university education of political science, and of the German influence. The today scarcely remembered, in their day important partisans of political science were educated in Germany (Charles Eliot — President of Harvard in 1869, Daniel Coit Gilman, Andrew White — first President of Cornell). Out of these Herrn Doktoren the most famous was undoubtedly John William Burgess. He succeeded Lieber at Columbia and in

---

11 CALHOUN, J. C.: A Disquisition on Government (1850), *Great American Political Thinkers, op. cit.* Vol. 1., 23.

12 TOCQUEVILLE, A. de: *Democracy in America* (ed. J. P. Mayer), New York, 1835.

13 CRICK: *op. cit.* 15–18.

1880 organized there the first School of Political Science of the country. (The second major university teaching political science was Johns Hopkins in Baltimore.) At both universities, under Continental influence, the historical-comparative method prevailed. E. A. Freeman's maxim "History is past Politics and Politics present History" became quite an official motto at Johns Hopkins, and this was similarly characteristic of Columbia, too.[14] As an organizer, Burgess can be considered as the real founder of political science. However, he had not too much intellectual influence at all.[15] The main reason was that, despite the impact of German learning, American thought could never absorb and accept that central role of the State that was contributed to it in Germany.

In Germany, State stood definitely above society, sovereignty was regarded an overwhelming and unquestionable power. The concept of State formed the core of the German understanding of political phenomena. American theorists rejected this central role of the State. In general, English preferred "government" to "state", and translated the German *Staat* into government.[16] Thus, Burgess's definition of sovereignty as "original, absolute, unlimited, universal power over the individual subject and all associations of subjects"[17] was just the opposite of American perception of politics and society. This was based on individualism and on the role of voluntary associations. The influence of German science was ended definitely by World War One: during the war the scientific approaches of the enemy became discredited, too. Nevertheless, during World War Two another wave of German political scientists and constitutional scholars arrived to the United States escaping from Fascism. The list of German emigrants, political scientists, or social scientists and philosophers who had a considerable impact on political science, too, include such famous names as Hanna Arendt, Karl Deutsch, Carl-Joachim Friedrich, Hans Morgenthau, Leo Strauss, Hans Kelsen. This gave a last significant impulse to American political science.

However, as I am going to illustrate it with a few examples later on, empirical political science has always kept on the agenda the criticism and refusal of the concept of the State.

---

14 WALDO, D.: "Political Science: Tradition, Discipline, Profession, Science, Enterprise", in: Fred I. Greenstein and Nelson W. Polsby, *Handbook of Political Science*, Vol. I., Political Science: Scope and Theory. Reading (Mass.) etc., 1975. 29.

15 CRICK: *op. cit.* 31.

16 SARTORI, G.: *Social Science Concepts*. Beverly Hills, 1984. 19.

17 Quoted in CRICK: *op. cit.* 31.

Progressivism and Realism

At the end of the XIX. century two magic words spread around the new American political science departments and schools: Progress and Science (with capital letters). The two great social (first and definitely not political) thinkers were William Graham Sumner and Herbert Spencer. Both of them were also interesting because they tried to oppose a factor against State, so they contributed to the anti-statism of American social thought. Spencer, that very influential English import, taught to Americans, among others, that

— progress and evolution have the force of laws of nature in society, similar to biology or mechanical sciences, and

— State, or government must not encroach upon the natural laws of this well ordered social system. The title of his most famous book, *Man versus State*, is revealing in this sense.

From this moment on laws pertaining to and regulating society were looked at as if they had been under the control of natural laws. This perception, mainly after the fall of the reputation of German historiography, became a main factor in American political science, too. Social sciences became ruled by the unquestionable paradigm of a social-Darwinist concept of evolution (or progress), derived mainly from biology. Generally, the representatives and leaders of this new movement believed that research methods applied effectively in natural sciences like physics and biology would lead political science toward the discovery of true knowledge.

It is difficult to quote a more adequate observation of this change that the words of Harry Elmer Barnes from 1919. Barnes emphasized that to the school of contemporary political theory "the State appears not as some metaphysical 'ethical being' or as a purely legalistic entity emitting the commands of a determinate superior but as a purely natural product of social evolution".[18] This sentence reveals us some remarkable features of the new social scientific approach. First, it turns against two basic features of German historiography and political philosophy that previously deeply influenced American understanding of politics: namely the Hegelian concept of the State as a superior metaphysical being, and the concept of sovereignty as a purely legalistic entity enforcing the commands of a superior. Secondly, it highlighted the new trend in understanding social phenomena, for which the State (as all social institutions in general) appears as a "purely natural product of social evolution".

---

18 Quoted in CRICK: *op. cit.* 49.

William Graham Sumner, professor of Political and Social Sciences at Yale College (since 1872), with a similar intensity turned against the State. His main concern was the protection of individual liberty against any intervention by the State.

Merriam: the Genuine Political Science

This change in the approach to political science can be considered as a clear sign of a process that is rightly called the Americanization of political science. This was present in the decline of the historical-comparative method, as well as in the rejection of the central concerns of European (Continental) political theory: namely state, sovereignty and law.[19] Historical, theoretical and philosophical approaches to these three subjects were mingled together in political science.

The objectives of political science—still basically under German influence—were focusing on research competence and on graduate training. Nevertheless, the definitely more practically oriented French example *(École Libre des Sciences Politiques)* gained also influence in educating for purposes of public service. After all, political science education at those times aimed at to train the leadership, for government service, and citizenship education.[20] But political science was rarely taught on separate political science departments; they were usually combined with other disciplines, such as history, economics or sociology.

Another decisive step in the formation of American political science occurred in 1903. The American Political Science Association was formed that year.

We can assume that at the eve of World War I political science in the United States was not clearly differentiated from other social sciences and professions. It played different roles in academic and extrascientific field: research, higher education, training for public service, and active participation in political life.

The interwar period can be characterized by the gradually diminishing role of history and theory. Nevertheless political theory, and a theory firmly based on past masters and the history of ideas, produced considerable results (Charles McIlwain, *The Growth of Political Thought in the West*, 1932, George Sabine,

19 WALDO: *op. cit.* 30.
20 WALDO: *op. cit.* 34.

A History of Political Theory, 1937). On the other side, quantitative methods gained ground, and became widely used in different investigations. The pioneering study in this field was Stuart A. Rice's *Quantitative Methods in Politics* (1928). Quantitative methods were to replace values. Rice demanded:

"If social science is really to become a science, it must separate itself from religious and ethical endeavor and from all other efforts to set up values or ends of any sort."[21]

But the really new age of American political thought, or, let us put in this way, the beginning of the "real science of politics" should be linked to the name of Charles Merriam. "As Lieber and Burgess had established political science as an academic discipline, so Merriam, more than any other, established it as a social science."[22] Not only his studies, but also his life is symbolically representing the fate of political science in the twentieth-century America. His education was closely linked to the history of political ideas; he took his doctorate in 1900 under William Dunning who was Professor of History at Columbia, and whose basic work was *A History of Political Theories: Ancient and Medieval*, published in 1902. Merriam himself published several books on the history of political theory following the tradition of his teacher (*American Political Theories*, 1903; *American Political Ideas: 1865-1917*, 1920; *A History of Political Theories: Recent Times*, with Harry Elmer Barnes, 1924.). Merriam joined the faculty of the University of Chicago, thus became a colleague of the famous pragmatist philosopher, John Dewey. He was actively involved into politics in Chicago, but he refused to accept important Federal positions.

Despite his several works on political theory, he rejected the "traditional approach to politics". He made big efforts to create institutional framework for social science research. He was promoter in the founding of the Social Science Research Council, The Committee on Political Research, or the National Conference on the Science of Politics. Two excerpts from his reports to these organizations plainly reveal his objectives in replacing political theory with a scientific approach to politics:

"Is politics making use of all the advances in human intelligence which the social and natural sciences have brought into the world in the last few generations? Astronomy, chemistry, physics, biology, and, in later days, psychology, have made rapid progress...

Those who have been following the work of the committee on political research cannot escape the conclusion that the great need of this hour is the

---

21 RICE, S.: *Quantitative Methods in Politics*, New York, 1928. 17.

22 CRICK: *op. cit.* 135.

development of a scientific technique and methodology for political science."[23]

Let us take into consideration that Merriam's efforts were not inspired by purely scientific motivations. World War I had a previously unimaginable impact on Americans in general, and especially on American liberals who understood that the great war marked the end of the classic era of liberalism. Merriam believed that the easily vulnerable liberalism should have been fortified by the power of science, otherwise the sinister forces, "jungle politics" would prevail.

"The world will not put new wine into old bottles, politically or otherwise. Jungle politics and laboratory science are incompatible, and they cannot live in the same world. The jungle will seize and use the laboratory, as in the last great war, when the propagandist conscripted the physicist; or the laboratory will master the jungle of human nature and turn its vast, seeming futility to the higher uses of mankind."[24]

These words are taken from Merriam's *New Aspects of Politics*. This book that can be considered as a program of the new, "genuine" political science was published in 1925. It emphasized the necessity of new scientific, mostly quantitative methods of inquiry, and thoroughly discusses the relation of political science to other disciplines as biology, psychology, sociology. He argued in favor of the co-ordination of Medicine, Psychiatry, Psychology and Political Science. He became the founder of the Chicago School of Politics, devoted to the ideals of liberal democracy, of Progress, of quantitative models of science. His work had anticipated Behavioral Sciences that have remained the leading paradigm of American political science. He educated a great generation of political scientists, mostly the leaders of the later behavioral movement. Nevertheless, the fate of Merriam revealed also in a quite tragic manner the ambiguity of American political science. He had to witness not only the overwhelming victory of his ideas, but also the tragedy of this approach. His ideals, Science and Progress, his tireless search for an adequate scientific methodology did not prove to be enough to stop certain political tendencies. The growing influence of Fascism let him return to a more traditional type of political speculation and philosophy (*Systematic Politics*, 1945).

---

23 *American Political Science Review* XVI (May 1922) 317, and *American Political Science Review* XVIII (Feb. 1924) 119. Both quoted by CRICK: *op. cit.* 138.

24 MERRIAM, Ch. E.: *New Aspects of Politics*, Chicago, 1925. 247.

The Behavioral Movement

After World War II the road opened by Merriam led to a successful end: the behavioral movement renewed the idea of taking the natural sciences as a model for political science. The subject of such a science was the observable behavior that, in their understanding, could be objectively studied. This stress on the technological side of political science was motivated by several historical, theoretical, technical, and pragmatic reasons. The New Deal, the second great war, the victory over fascism, the emergence of cold war formed the special historical circumstances. Logical positivism took over the place of pragmatism: it emphasized the separation and difference of fact and value. Technological development, especially the quick spread of computer technics, provided never seen and appropriate means for scientific inquire (survey technics, data processing, etc). Finally, pragmatical considerations urged political scientists to remain in race with other social sciences, and popularize themselves. It took nearly two decades until the behavioral movement gained an indisputably dominating position within all aspects of American political science, from the university departments to the Association. The basic presumptions of the movement were: application of proper scientific methods of research, focus on observable behavior that have political significance, careful gathering of data, use of statistical-quantitative methodology in explaining the data, generalizations from the data in order of explanation, prediction ad control.[25]

Harold Lasswell is considered as the genuine behavioralist, and consequently political scientist of the postwar period. Lasswell is, indeed, not only one of the greatest but also a paradigmatic figure of American political science. He graduated at the University of Chicago, and also studied in London, Geneva, Paris, and Berlin. He contributed to the development of political science in different fields, with studies on power relations, on relation of person, personality and politics, on the role of elites. In his influential book published in 1936, *Politics: Who Gets What, When, How*, he investigated the ways of distribution of power in society. Lasswell is also a preeminent representative of the psychological approach to politics. He was concerned with the natural desire of men for power. He saw in seeking for power the sublimation of personal frustration.

---

25 WALDO: *op. cit.* 60.

The vast and highly appreciated works of Lasswell tried to combine empirical verification with theoretical concepts. In 1952 he formulated his methodological position as follows:

"Theorizing, about politics, is not to be confused with metaphysical speculation in terms of abstractions hopelessly removed from empirical observation and control. Such speculation characterized the German *Staatslehre* tradition so influential at the turn of the century." Thus he condemns mere speculation, and by the same token attacks the enemy that at that could be considered already traditional, namely theorizing with the concept of State. Lasswell continues: "But this standpoint is not to be confused, on the other hand, with 'brute empiricism'—the gathering of 'facts' without a corresponding elaboration of hypotheses".[26] Nevertheless, Lasswell methodologically drew clear distinction between political science and political theory. His ideal of science of politics was "positivism in its widest sense".[27]

The behavioral movement became the mainstream of American political science in the 1950s. It tried to renew political science by the help of methods of natural sciences, and by the ideal of pure science. Its main methodical renovation was the wide-spread and successful use of quantitative and systematic methods. In the meantime, behavioralism aimed at conceptualizing the empirical findings. Theory should have become empirically oriented instead of sinking into useless philosophical speculations. Thus the sophisticated empirical technics could make possible to discover the laws of human behavior.

The characteristic figure of this period was David Easton. His *"The Political System"* was, as its subtitle states, "an inquiry into the state of political science". The starting point of the thorough analysis was that "a major source of the shortcomings in political science lies in the failure to clarify the true relationship between facts and political theory and the vital role of theory in this partnership."[28] Easton contributed the poor conditions of American political science to the failure to address itself directly to the search for valid and useful generalizations about political life. "For the necessary task of developing verifiable theory, it has substituted the accumulation of facts and the premature application of this information to practical situations."[29]

The other, even sharper criticism was directed against what Easton calls "modern political theory". His main problem with the name political theory

---

26 KAPLAN, A.—LASSWELL, H.: *Power and Society*, London, 1952, x.

27 CRICK: *op. cit.* 201.

28 EASTON, D.: *The Political System.* New York, 1953. 4.

29 EASTON: *op. cit.* 37.

was that political theory had an exclusive interest in philosophical problems, and it was equated with moral and value theory. Easton devoted long chapters to the decline of political theory into historicism. "Political theory today is interested primarily in the history of ideas. This preoccupation with problems of history, rather than with problems of reflection about the desirability of alternative goals, is that gives contemporary research in political theory its special significance."[30] His main targets were three scholars of the history of ideas (mentioned above in this article), Dunning, McIlwain and Sabine. "They have been learning what others have said and meant; they have not been approaching this material with the purpose of learning how to express and clarify their own values." Instead of the limited scopes of historicism, "history would be a means for informing the inquirer of alternative moral outlooks with the hope that this would aid him in construction of his own political synthesis or image of a good political life."[31]

Easton suggested in his influential 1953 study to replace the traditional distinction between fact-gathering and value theory by a political theory that consisted of four major kinds of propositions: factual, moral, applied, and theoretical. He concluded, that the attainment of reliable knowledge about political life depended upon the development of the kind of analytical tool that he called a conceptual framework.[32]

It is well-known the triumphal march of conceptual framework throughout the social sciences in the 60s. In political science it included, according to the vision of Easton, among others the common sense idea of political life, the authoritative allocation of values for a society, orientation toward policy activities.[33] Easton did not miss the occasion to reveal the weaknesses of the concept of the State.[34] He advised to avoid the word State because of the confusion and variety of its meanings. Thus he became part of the process that Passerin d'Entréves charactarized as "the disruption of the notion of the State".[35] After the Marxist and non-Marxist revival of the concept of the State

---

30 EASTON: *op. cit.* 236. The chapter on "The Decline of Modern Political Theory" was first published earlier in the *Journal of Politics* 13 (February 1951).

31 EASTON: *op. cit.* 237.

32 EASTON: *op. cit.* 310–317.

33 EASTON: *op. cit.* 125–148.

34 EASTON: *op. cit.* 106–113.

35 D'Entréves 59. He draws attention to the "interesting and striking" parallel between American political science and the Italian philosopher Benedetto Croce. CROCE: in his *Elementi di Politica* concluded that the very word State was misleading and should be shunned by the student of politics. Id. 65.

in the 1970s Easton reaffirmed his earlier position on the issue in his essay published in the journal *Political Theory* with the title "The political system besieged by the State".[36]

Organizations, Publications and Fields of American Political Science

Before we turn our attention to the tendencies of the last decades, it is worth to give a look to the organization of political science in the United States.

The American Political Science Association at the end of World War II had approximately 3300 members; this has grown close to 20 000. The number of political science departments at universities and colleges is around 1500. Several regional political science associations were established, mostly publishing their own periodicals. Political scientist participate in great numbers in public affairs by consulting, aiding in campaigns, making public addresses, or running for office.

As for the classification of the different branches or subdisciplines of political science, there is no generally accepted solution. A rather common categorization distinguished the following fields:[37]

1. Normative and descriptive theory that includes history of ideas, normative political philosophy as well as descriptive political theory and political science methodology.
2. Comparative government and politics,
3. International politics, organizations and law. Both fields are considered very dynamically developing disciplines.

American politics:

4. Legislative affairs,
5. Parties and pressure groups,
6. Public opinion, voting, and elections,
7. Presidency,
8. Organization and administration,
9. State governments,
10. Judicial affairs,
11. Public law and jurisprudence,
12. Public policy analysis (health, education, welfare).

---

36 *Political Theory*, 9 (1981), 303–325.

37 WALDO: *op. cit.* 83–95.

I would like to draw the attention to the place given to political theory in this classification: it is considered a branch within political science. Developments in the 1980s and 1990s led to a different understanding of political theory as a discipline alienated from (empirical) political science.

According to a survey, political scientists indicate as their primary work activity mostly teaching. The second most frequent occupation is management or administration. Research and development stands on the third place, while other registered activities include consulting, forecasting, reporting.[38]

The Post-behavioral Revolution and the State of Art

Paradoxically, it was Easton himself who launched the call for post-behavioral political science in 1969.[39] This revolution can be considered as the admission of the methodological failure of the empirically oriented conceptual framework. Easton now urged political scientist to pay more attention to their responsibility toward the public policy problems and applied social science. The result was the growing popularity of "policy studies" that intended to combine the normative (preferred policies) and the scientific (inquiring how policy is made). The great expectation were not fulfilled: the integration of empirical policy researches and conceptual and normative insights remained exceptional, mainly in studies on democratic theory and rational choice theory.

Paradoxically, when in 1987 at a conference Easton summed up the past and present of American political science, his final words after an overview of the developments of post-behavioralist political science were quite disappointed: because of the variety of the different directions it was difficult to draw general conclusions regarding the state of the art.[40]

Despite the earlier victory of scientific philosophy and methodology the basic ambiguity of political science has not come to an end: in the last two decades political theory has had a great revival that Sartori calls the "Return of Grand Theory".[41] More and more political scientists join the more or less organized

---

38 WALDO: *op. cit.* 105.

39 "The new revolution in political science". *American Political Science Review*, 68 (1969), 1051–1061.

40 EASTON: "La scienza politica negli Stati Uniti. Passato e presente." *Fra scienza e professione. Saggi sullo sviluppo della scienza politica.* Milano, 1991. 169–190.

41 *The Return of Grand Theory in the Human Sciences*, ed. Quentin Skinner, Cambridge, 1985.

dissenters who consciously profess their "postbehavioralism". They criticize the dominant behavioral movement because under their influence political science became too narrowly defined, morally insensitive, it is not concerned with values of justice, freedom, equality, the concentration on scientific methodology deprived political science of its imaginative and creative character.[42] An important element of this change was the great influence of Thomas Kuhn's *The Structure of Scientific Revolutions* (1962) that questioned that the scientific development would be a gradual accumulation of knowledge and understanding, it depends rather on the existing paradigm. This explanation fostered the efforts to attack the ideological presuppositions of the scientific method of social sciences.[43]

Behavioralism, following especially Easton's critique of the history of political theory, excluded the discipline from political science in their sense. As a response, historians of political thought, generally sharply criticized the behavioralist approach, and they looked at it as a decline. In their view the decline of political theory was a consequence of the "purely" empirical scientific method of political science and the neglect of traditional concerns of political theory. Historians of political theory in their counterattacks emphasized that the study of political thought of the past was important also for understanding modern political problems. They condemned the attempt of modern political scientists to separate fact from value as an impossibility. Behavioralism for them was a false and truncated approach that neglected the wisdom of the past, itself a symptom of the decline of political theory.[44]

The controversy between mainstream political science and the history of political theory led to a growing gap between them, that resulted separation of history of political theory from other disciplines of political theory. The time spent by political theorists in this sort of "reservation" strengthened their autonomy, and indirectly helped the revival of the study of the history of political theory.

The 1970s led to an escalation of theorizing on politics but in a form more open in at least two senses. First, the reemerging political theory is interdisciplinary, closely connected to philosophy, history, analytical moral philosophy, legal theory, game theory, rational choice theory, etc.

---

42 WALDO: *op. cit.* 114.

43 This was noted also by EASTON: "La scienza politica negli Stati Uniti. Passato e presente." *op. cit.* 179.

44 For a thorough discussion of the controversy, see GUNNELL, J. G. *Political Theory: Tradition and Interpretation.* Cambridge (Mass.), 1979, 4–11.

Secondly, political theory is a multi-national discipline with an on-going dialogue among Anglo-American, German, French, etc. scholars. Political theory in this sense is not only simple a subfield of political science, as the above-cited classification would suggest but the more general discourse of an interdisciplinary and multi-national intellectual community.

Nevertheless, the relation of political science and political theory has remained controversial in the American arena. John Gunnell pointed out three main features of this relation:[45]

— first, the separation—or divorce—of political science and political theory,
— secondly, the dispersion of issues and concerns,
— thirdly, the alienation of political theory from real political life.

Gunnell predicted the continuation of these three features through the next decades. In his survey on political theory in the 1980s, William Galston verified the predictions.[46] Political theorists continued to disengage themselves from empirical political science. The dispersion also continued; this is called by Galston the proliferation of theoretical genres during the past decade. In the bibliography attached to his survey, he took into consideration the following subjects: feminist thought; democratic theory; utilitarianism; community—republicanism—virtue; civil society; socialism—Marxism; liberalism; liberal neutrality; liberal justice—equality of opportunity; and the Nietzschean—postmodern controversy. And the list could be continued.

As for Gunnell's third prediction, concerning alienation, Galston is more cautious. He rightly observes that the standard for engagement with "real politics" is hardly self-evident. "The distance between theory and practice cannot be measured as the crow flies".[47] Political theory is located between philosophy and politics. Theory must stand at some distance from the practice of politics.

Present-day American political science is reflecting the historical ambiguity or bipolarity between a search for the genuine methodologically backed science and the belief in a value-oriented, creative theory. The positive feature of the last two decades was the rejuvenation of political theory, including the history of political

45 "Political theory: the evolution of a subfield". *Between Philosophy and Politics: the Alienation of Political Theory.* Amherst (Mass.) 1986, ch. 1.

46 GALSTON, W.: "Political Theory in the 1990s, Perplexity amidst Diversity." (Paper presented at a Wilson Center panel session on *"Recent Trends in Political Theory"*, in Washington DC, on March 2, 1992). The following references are to this manuscript.

47 GALSTON: *op. cit.* 14.

theory.[48] The shortage of the changes is that the new integration has become more hopeless. At the end of the 1990s, both political science and political theory are divided in very complex subfields, and are developing as self-contended, autonomous disciplines. This autonomy is primarily strengthened and secured by the institutional background (university departments, journals, researches) and by the growing internationalization of the academic community. But independence and self-sufficiency works definitely against integration of the two great fields. Therefore it is not a great risk that in the next decade the gap between political science and political theory will not diminish considerably.

48 It is enough to refer to the outstanding works of Dunn, Pocock, or Skinner.

ACTA JURIDICA HUNGARICA
1999 40 Nos 3–4 pp. 213–235

1216-2574 / 99 / USD 5.00

Csaba VARGA

Autonomy and Instrumentality of Law

in a Superstructural Perspective

A paper to express the author's tribute to Professor ZOLTÁN PÉTERI, one of the influential organisers, scholars and teachers, who had a pioneering role to revitalize the ethos of the laws' comparison as a key methodological option for theoretical legal research in Hungary, a major success especially at those long periods of times when Muscovite-inspired socialism ruled the country with unreflected suspicion and antagonism toward ideas and methodologies not genuinely inherent in Marxism. The way in which Professor Péteri approached basic—or, properly speaking, eternal—problems of law, especially ones relating to issues of local legal tradition, law and values, general principles of law, natural law, and fundamental rights, at a time when in response to the 1956 Revolt in Hungary oppression pervaded everyday life, has had to remain a disciplinary pattern of intellectual reaction, combining reservation with standards set, to the present author who has happened to work in close relationship to him for more than thirty-five years at the Sections of Comparative Law, respectively Philosophy of Law, of the Institute for Legal Studies of the Hungarian Academy of Sciences, and has in the recent years faced the job to erect, in active co-operation with him, a new scheme for legal education and scholarship in theoretical subjects in law under post-communist conditions, by founding and operating the Philosophy of Law Institute at the Pázmány Péter Catholic University of Hungary.

Concepts may also have strange fate. This is even more true if the concepts are placed into different functions while maintaining the appearance of conceptual identity, thereby tearing them out from the functions they were initially meant to fulfil, and planting them into an environment alien to their true nature, where their actual determinations can no longer prevail—if not turn upside-down. Well, if some concepts have to cope with such a fate, then they can surely meet the requirements arising from roles alien to their nature only apparently, more causing controversy than helping clarification within the medium they are placed in. We can defeat latent dysfunctions only by making them manifest at first. Similarly, we can clarify conceptual relations only after their original meanings and functions are disclosed in their original context.

If we inquire about the teachings of *Marx*ism—attempting to circumscribe what *Friedrich Engels* called the materialist conception of history[1]—, the response will surely rely on the categories of basis and superstructure, and formulate the conclusions that *Karl Marx* arrived at after decades of research. These two categories, however, initially being the concise fitting metaphorical formulations of a scholarly presupposition, started to walk their own independent way already in *Marx*'s time. This presupposition, driving the scientific inquiry, that is, a working hypothesis, has first advanced into a scholarly proposition taken as an axomatic statement sufficient in and of itself, and then into a doctrine, that is, the system of such fundamental propositions. This obviously implied complete change of functions. Since, whatever was the starting point now became the final conclusion. In consequence, their apparently concrete deduction is no longer a proof, because of being of one single chance as an illustration to something of a truth. Such a treatment of concepts naturally went along theoretical rigidification, with the consequence of further concepts being channelled to forced paths. When a theory infiltrated with such concepts intends to remain consistent with itself, these forced paths radiate in a chain-like reaction, pervading the entire theory, ultimately only to lead to the deformation of the whole theory. This unavoidably brings full conceptual uncertainty forth.

---

1 ENGELS, F.: "Karl Marx: 'Zur Kritik der politischen Ökonomie'" [1859] in MARX, K.—ENGELS, F.: *Ausgewählte Schriften* I (Moscow: Verlag für Fremdsprachige Literatur 1951), 343: "materialistiche Auffassung der Geschichte"; or MARX, K.: *Die Deutsche Ideologie* [1845–46] in his *Der historische Materialismus* Die Frühschriften, hrsg. S. Landshut und J. P. Mayer, II (Leipzig, Kröner, 1952), 10 [Kröner Tauschenausgabe 92]: "Wir kennen nur eine einzige Wissenschaft, die Wissenschaft der Geschichte."

Considering that law is primarily a superstructural phenomenon for *Marx*ian thinking tradition, the philosophical evaluation of the categories of basis and superstructure may, for long periods of times, directly influence the philosophical explanation of law in the orbit of *Marx*ism as well. On the other hand, however fundamental the conception of law as a superstructural component in *Marx*ist legal theory may seem in principle, the uncertainty inherent in its theoretical content just grows, and the silence of criticism is about to transform into the criticism of silence.

An acceptable clarification would again presume the cultivation of *Marx*ist philosophy at the level of modern[2] and post-modern[3] times and the repeated analyses in all fields with the theoretical aim at returning to the origins of *Marx*'s methodological thinking—in short, this would presuppose what *George Lukács* called the renaissance of *Marx*ism. In absence of this, legal theory must, if at all, at least clarify for what reasons and in what ways did its concept on its own subject change, and what methodological presuppositions and theoretical results the expounding of law through the use of the categories of basis and superstructure have.

In the following, after that in an earlier treatment of the subject the original meaning and functions of the categories of basis and superstructure were reconstructed and their deformations and distorting effects on the theoretical understanding of law through its rigidification into sheer doctrinairism were traced down,[4] in the following I shall attempt (1) to survey some current issues

---

2 For a comprehensive survey accompanied by the overall assessment of the theoretical contribution of *Marx*ism to legal studies, cf. *Marxian Legal Theory* ed. and introd. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney, Dartmouth & New York, New York University Press, 1993) xxvii + 530 [The International Library of Essays in Law & Legal Theory, Schools 9]. For a report on the current state of legal theorising in the region, cf. VARGA, Cs.: "Jogtudományunk az ezredvégen" [with abstract "Legal Scholarship at the Threshold of a New Millennium", 347–349] in *Iustum, aequum, salutare* Emlékkönyv Zlinszky János tiszteletére, ed. Gábor Bánrévy, Gábor Jobbágyi, Csaba Varga (Budapest [Osiris] 1998), 298–314 [A Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Karának könyvei 1], forthcoming in English in *Rechtstheorie* Beiheft, ed. Werner Krawietz and Csaba Varga (Berlin, Duncker & Humblot, 2000).

3 For the chances of *Marx*ism to continuation in the region, cf., e.g., VARGA, Cs.: *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest [Akaprint] 1995), particularly at chs. on No-law and Rule of Law, 19 et seq. and 156 et seq., respectively [Philosophiae Iuris].

4 Cf. VARGA, Cs.: "A jog mint felépítmény: Adalékok az alap–felépítmény kategóriapár történetéhez" [Law as superstructure: A contribution to the history of the pair of categories basis and superstructure] *Magyar Filozófiai Szemle* XXX (1986) 1–2, 35 et seq.

of philosophical interpretation in relation to these categories, and (II) to outline some potential advantages and theoretical content when these categories are applied in and to legal theorising.

I. A relational category

As almost usual with this specific tradition of thinking, the categories of basis and superstructure have played an ideological role attached to varying political practices all through the one and a half centuries of their development. This explains why the categories of basis and superstructure have become core issues for historical materialism cultivated as a political practice itself; categories in case of which classification and labelling as superstructure imply consequences that do not require any further inquiry.

The reconstruction of their genuine meaning, balanced so that they can at the same time display the optimum of both messagefulness and justifiability in theory, is a task yet to be fulfilled, if at all—its final results having only been temptatively advanced as hints within the renaissance of *Marx*ism as outlined by *George Lukács*'s posthumous Social Ontology—and bears a double task within it. It firstly implies the reconstruction of *Marx*'s system of ideas by returning to the identificaton of the methodological insights formulated in his oeuvre. Secondly, it requires the analysis of the past periods with prejudices, presuppositions and also the entire mentality characteristic of *Marx*, which obviously will result in new analyses and evaluations in accordance with present-day requirements towards old examinations.

The philosophical literature, under the push of the last decades of "actually existing socialism" in Hungary to return back to *Marx*'s own methodological considerations, first and foremost emphasised the relative character of the categories of basis and superstructure. Thus, basis and superstructure are not intelligible categories in and of themselves, but "as correlative categories, they give expression to the undetachable nature, objective in reality, of the relationship between two sides".[5] They do not serve for the "inventorisation" of social reality, since they are merely dedicated to characterising phenomena, already circumscribed in other ways, from one given perspective: to express the "correlation and relationship" of heterogeneous totalities to one another.[6] For

5 RÓNAI, R.: *Alap és felépítmény* [Basis and superstructure], Budapest, 1973, 23.

6 KALLÓS, M.—ROTH, E.: *A társadalmi rendszer* [Social system], Bukarest, Politikai Könyvkiadó, 1978, 156.

this reason, they do not have "autonomous and independent meanings", hence we ought to speak rather of the category of "relationship between basis and superstructure" instead that of "basis and superstructure".[7] On the other hand, it is not necessarily a neglectable consideration that these metaphorical and illustrative[8] expressions have once been borrowed from architecture.[9] Recognising the metaphorical origin, however, is not decisive in and of itself. It can only become decisive insofar as we place the expression into its original contextual environment. In such a case it becomes conspicuous that *Marx* actually did not exclude the relative autonomy of the superstructure (neither actually did he confirm it),[10] that is, there is a difference between *Marx*'s concrete inquiries and the theoretical generalisations concerning the issue of whether or not the effects of basis and superstructure are bilateral or mutual.[11]

The last period of philosophysing in terms of *Marx*ism in Hungary before the fall of the imposed regime of communism—as opposed to earlier periods, that is, ones of *Stalin*ist simplification, which had accepted the superstructure only as the class-homogeneous formation of a basis bearing class-contents—, stated unambiguously that superstructure is multi-layered also from a class perspective.[12] However strange it may seem, it still does not claim more than what *Antonio Gramsci* formulated half-a-century ago: "By basis and superstructure forming a »historical block«, the complex, contradictory and heterogeneous totality of superstructure is the reflection of the totality of social relations of production."[13] The circumstance that *Gramsci* speaks of superstructures in plural in relationship to a given basis, is self-evident once we apply the concept of superstructure as a generic term from the beginning. It provides also a sensitive hint suggesting that superstructure can only exist as opposed to the basis. Namely, superstructure reconciles such heterogeneous

---

7 BAUMAN, Z.: *Általános szociológia* [General sociology] [Zarys marksistowskiej teorii spoleczentswa, Warsaw, PWN 1964], Budapest, Kossuth, 1967, 117.

8 BAUMAN: *op. cit.*, 116–117.

9 KALLÓS–ROTH: *op. cit.*, 156.

10 MAKEPEACE, R. W.: *Marxist Ideology and Soviet Criminal Law*, London and Totowa, New Jersey: Croom Helm, and Barnes and Noble 1980, 20.

11 PHILLIPS, P.: *Marx and Engels on Law and Laws*, Oxford, Robertson, 1980, 201.

12 KÁRPÁTI, S.: *A társadalom gazdasági alapja és felépítménye* [The economic basis and superstructure of a society], Budapest, 1982, 8–10 and 9; Rónai, 21.

13 GRAMSCI, A.: [Philosophical and historical problems, para. on Basis and superstructure] from his 'Il materialismo storico e la filosofia di Benedetto Croce' in his *Opere* 2, 8th ed. (Rome, 1966) [Quaderni del carcere I], trans. in *Filozófiai írások* [Papers in philosophy], Budapest, Kossuth, 1970, 94.

phenomena that represent a kind of commonness only in one single respect: as totalities, they have particular relations to the group of social phenomena indicated as their basis.

May I note that such a characterisation of superstructure excludes from the very start any other perspective from playing a role in the qualification of any phenomena as superstructure. The acceptable conceptual minimum is such as set by *Lukács*'s Ontology as a requirement for all components of social existence, that is, to appear in a form exerting social influence whatsoever. Therefore, within this sphere, the actual influence will hardly limit the quality of superstructure, even if it is not to be felt in too wide of a range and not so much determinant for other superstructures and their basis as any one might consider typical in other cases. Consequently, it may be a major rhetorical or terminological success, yet it is not justified and does not have any theoretical content whatsoever, if the superstructure were degraded into a "substructure" in case of a phenomenon which one considers to have lesser social influence than what may have benn initially hoped for.[14]

Conceiving of basis and superstructure as relational categories explains why a minimum of influence is already sufficient, or the historically concretely defined grade, character and quality of this minimum may make it suitable to surface in relation to basis and superstructure. The conceptual minimum aims at drawing external boundaries, therefore it does by far not limit the truth of the fact that the sole content of these relational categories is the connection of various areas, a fact which is precisely—and exclusively—manifest in their mutual influence.

If we say, using the language of *Lukács*'s Ontology, that social existence is such an irreversibly advancing process in which the mutual influence characteristic of the respective complexities takes place, then it becomes evident that basis and superstructure are just the area in which such mutual influence is manifested, this being equivalent to the social existence from the perspective of *Lukács*'s Ontology. Whereas if the relative category receives its meaning from the fact of mutual influence and from the incessant motion manifest in the dynamism thereof, then it will be confusing, moreover, plainly misleading if, when describing superstructure, we suggest stand-still staticism or immobile objectivity expressed in form of states of rest, and not of dynamic functioning. This is typical for exemplificative definitions,[15] which present the

14 E.g., HERMANN, I.: in *Élet és Irodalom* (26 January 1980), 4.

15 E.g., ERDÉLYI, L.: "Alap és felépítmény" [Basis and superstructure] in *Történelmi materializmus* [Historical materialism], Budapest, Kossuth, 1980, 95.

superstructure more as an anatomical cross-section than an organism living by actually exerting influence (reminiscent of *Lukács*'s characterisation of mechanical materialism, according to which, after all, vulgar materialism uses patterns taken from a quasi-religious world-view in the form of metaphors of some active "creator", on the one hand, and passive "creatures", on the other).[16]

Regardless of what criteria we set for such phenomena, their real presence and importance will only be seen in the motion and dynamism of the phenomena in question. This is clearly shown by *Lukács*'s analysis of class-character and ideology. For there can be no set boundaries, as humans take part in social struggles with their entire intellects, and for this very reason, any affirmation or negation of a statement is defined from the perspective of classes. Thus, no boundaries can be drawn where an ideology ends and something else starts—since the quality which would underlie such a disctinction "is not inherent in the abstract statement itself".[17] Response to such questions can always be revealed from the actual motion of the phenomenon and the historically concrete process of the course of how it will finally get defined. Of course, this is not a novel recognition but the sheer application of *Marx*'s methodological idea. It is also a fundamental principle of *Lukács*'s Ontology, according to which social existence, similar to other types of existence, is process-like, manifest in its irreversible advancement.

Emphasising the dynamic nature of superstructure excludes the possibility to conceive of it as a passive medium with respect to the basis, in which "the former defines the latter in an absolute manner, »by the force of the laws of nature«".[18] Basis and superstructure are by no means opposable to one another on grounds of some sort of exclusivity, and also their treatment as relative categories is merely raisable upon the basis of their inseparability accepted priorly. "Basis and superstructure as correlative categories express the relationship between two sides objectively inseparable in reality."[19] This referes to the

---

16 LUKÁCS, Gy.: *A társadalmi lét ontológiájáról* [Zur Ontologie des gesellschaftlichen Seins] III [Prolegomena: Prinzipienfragen einer heute möglich gewordenen Ontologie], Budapest, Magvető, 1976, 350 et seq.

17 HOLZ, H.-H., KOFLER, L.—ABENDROTH, W.: *Conversations with Lukács*, ed. Theo Pinkus, London, Merlin, 1974, 43–44.

18 LUKÁCS: III, 349. ["die absolute »naturgesetzliche« Determiniertheit" *Prolegomena*, 520 in the last MS in German, typed with autoraph corrections, in Lukács Archives and Library of the Hungarian Academy of Sciences.]

19 RÓNAI: *op. cit.*, 23.

limits of the metaphor of "basis" and "superstructure", to the fact that their meaning borrowed from architecture cannot be transferred to furher areas.[20]

In its architectural use, the basis does not bear an independent function, its function being only statical, that is, subordinated and merely instrumental one. It is designed to support the superstructure and to facilitate its self-realisation. In regard of the relationship between economics and other spheres, it is precisely the instrumental role of the latter that is relavant. The economic sphere bears relatively independent functions and values, and these were absolutised by the *Stalin*ist conception, attaching a teleology borrowed from such a quasi-religious world-view to the process of history. At the same time, in architecture, the creation of basis and superstructure is a process following a strict succession, which, even if being irreversible, is still breakable at any moment. If this occurs, the construct will not be finished, yet it will be complete according to the level and measure of its readiness at any given time. Well, it was this notion of succession and previous foundation which led philosophical thought into a dead-end, when, instead of starting from unseparable intertwinement, it presumed that a basis can be created in and of itself, which itself will create a suitable superstructure for its own service.

When speaking of the relationship between basis and superstructure, we have already established that raising these problems can only be done as the issue of total interrelations between totalities, being reasonable exclusively as the relationship between unseparable sides. How their relationship is apprehensible within this range is a fundamental question of *Marx*ist philosophy, yet adequately not formulated to this day. We could see from the very beginning how subtle, and striving to unravel multiple interrelations, the answers outlined by *Marx* were when analysing socio-economic relations at early times; how and why these formulations on the system of relations later became one-sided in the generalisations by the classics of *Marx*ism; how the further simplification and usage leading to theoretical distorsion eventually convinced *Engels* to reconstruct this system of relations in his late letters also on the plane of theoretical generalisation in its actual complexity; and, finally, how it almost turned into mechanical determinism in the *Stalin*ist theory[21]—first of all for the reason to justify the voluntaristic political practice, by drawing it into the mist of an almost automatically self-fulfilling necessity.

In Hungary, beginning with the '80s (and practically ending by about the early '90s), after such antecedents, the philosophy of *Marx*ism searched for

---

20 KALLÓS–ROTH: *op. cit.*, 160.

21 Cf. VARGA: (1986), particularly at paras. 1–2.

points of references to correct the distortions incurred in the previous era and to reconstruct *Marx*'s methodological ideas. The attempts were manifold indeed. In the present paper, I can only present but a few characteristic examples, worth of even to-day's philosophical reflection from a methodological perspective.

One of the approaches seeked the modern formulation of the (after all) determinant role of the economy by comparing and reformulating the relevant stances taken by the classics of *Marx*ism in this matter. "What we do not acknowledge is that ideas and opinions may have a development independent of the economic conditions. Ideas always originate on grounds of certain economic conditions—that is, the economic basis—, but after being born they react upon this basis, influence its development and play an active social role."[22] This approach clearly shows the efforts at eliminating the relics of the mechanical deterministic approach and to show the interrelations manifest in the social existence in their dialectic interaction. Thanks to its subtleness, this formulation is hardly refutable, it is still questionable as a complete response, because it suggests that a system of economic conditions (as a kind of basis) could apparently be created alone, without any interaction with some sort of a superstructure, that is, as if something mutually exclusive could exist before and after in the course of the development of basis and superstructure.

Another approach tried to provide an answer through the help of the *Lenin*ist theory of reflection. According to this, the basis of reference is the establishment of that "[t]he superstructure reflects the economic basis." The actual meaning soon came to light after the key-notion had been interpreted: "We call reflection the phenomenon when the processes within one given system have an impact upon another system."[23] The notion of reflection thus defined is by far not problem-free. It helps the survival of the trend of ideas which, during the development of *Marx*ism in the 20th century, placed the epistemological approach more and more exclusively and distortingly before the ontologial one, and which exerted a strongly negative influence on *Lukács* when writing his Ontology.[24] It is true, however, that we cannot speak of

---

22 KÁRPÁTI: *op. cit.*, 16.

23 KALLÓS–ROTH: *op. cit.*, 162.

24 Cf., e.g., with my own efforts since the time of VARGA, Cs.: *The Place of Law in Lukács' World Concept*, Budapest, Akadémiai Kiadó, 1985 [reprint 1998]) 193, which was already qualified by one of its reviewers, namely, the editor of Lukács's works in German, as an early formulation of autopoietical theory. See BENSELER, F.: in *Zeitschrift für Rechtssoziologie* 8, 1987. 2, 302–304. For the understanding of autopoiesis in an ontological

notional distortion in this case, as the definition we quoted of reflection ascribes both epistemological and ontological importance to this notion, but once providing that 'reflection' becomes a mere synonym of 'exerting influence', it will necessarily lose its particularity and its quality to embody an independent category. On the other hand, it is also problematic if both expressions of 'reflection' and 'reaction' presume a previously existent agent, which could be born sufficiently in and of itself in order to enter into contact with other factors only later. This is to say that response through the help of the reflection-theory obscures exactly the most important factor in the relationship of basis and superstructure, namely the fact that this is a relationship between aspects that originally have developed together, mutually and bidirectionally from the earliest points of their development.

Finally, there was an attempt which tried to provide answers based on *Lukács*'s Ontology in opposition to the simplifications rigidified into prejudices within *Marx*ism. Accordingly, "essentially we can distinguish two kinds of mutual aspects within the total interrelations of social complexity: mutual conditioning, on the one hand, and boundness to conditions, on the other, in case of the latter one moment irreversibly preconditioning the other." The first type of correlation is—in *Lukács*'s terminology—characterised by the predominance of one moment, and the other, by ontological priority. Well, according to the conclusion, exclusively the latter can be the case with regard to the economy, since "[t]here was a period in history when the economy functioned without legal regulation, and even today there are numerous areas and relations of economic life which lack legal ordering."[25] The efforts of the author of the quote in this case aimed at disproving the prejudice that wanted to express relationships between law and economy, and economy and other sectors, respectively, in the form of relationship between contents and forms. This attempt was fully successful, moreover, *Lukács*'s standpoint too is unambiguous: "form and content ever and always, in the individual subject, complex, process, etc., determine together and only together its specificity, its being as it is [*gerade-so-sein*] (inluding generality). Bu it is for this very reason impossible that in the determination of real and separate complexes to one

---

reconstruction of apparently epistemological (or, properly speaking, epistemology-bound) processes in law, cf. VARGA, Cs.: *Theory of the Judicial Process* The Establishment of Facts, Budapest, Akadémiai Kiadó, 1995. vii + 249.

25 PESCHKA, V.: "Ideologische Vorurteile über das Verhältnis zwischen Wirtschaft und Recht", *Acta Juridica Academiae Scientiae Hungaricae*, 1989, 3–4, 259–274.

another, the one should figure as content, and the other as form."[26] My doubts arise in relation to the fact whether or not any distinction of the two types of mutual aspects derives from this. This is a decisive question, and the answers to it are hard to offer because they would presume a philosophically consistent and thought-through re-examination of the multi-directional reasonings in *Lukács*'s Ontology.

In past decades that had preceded the already achieved "after-*Marx*ism" period, however, philosophy in Hungary had not made any serious step toward seizing one of the century's most significant *Marx*ist attempts. Thus, everything an outsider may say can be nothing more ambitious than the expression of own personal meditations. Accordingly, *Lukács* did indeed speak of ontological priority, but he had to do so independently of the merits of the question. For once he adopted *Nikolai Hartmann*'s principle on the ontological construction of structures to build the ontology of complexes on grounds of distinction between the respective modes of existence, he could not avoid to raise the issue of ontological priority for that the separation of the respective spheres of existence was done. This does not necessarily imply that there are such comprehensive complexities within the given spheres of existence, about which the ontological [*seinhaftige*] statement is intelligible: "One of them can exist without the other, without the opposite being the case."[27]

It will be the task of the still wanted *Lukács*-philology to clarify these conceptual interrelations. In any case, it is a fact that ontological priority and the predominance of the role played by any one side within this relationship was formulated with contradictory inconsistence on the pages of *Lukács*'s Social Ontology. Ontological priority is, on the one hand, the characterisation of a situation when one phenomenon can exist without another, but the latter cannot without the former; and, on the other hand, it is the characteristic of one given side within an interaction that (as the predominant moment) ultimately exerts the last and decisive influence. *Lukács* mentions ontological priority first when speaking of the distinction between the organic, anorganic, as well as social, modes of existence. Later he mentions it with regard to the relationship between being and consciousness, only to immediately make clear their relationship (again as ontological priority) with respect to basis and superstructure.[28] He subtly states that *Marx* "does not reduce the world of

---

26 LUKÁCS: I. 409. [LUKÁCS: G.: *Marx's Basic Ontological Principles* trans. David Fernbach, London, Merlin, 1978, 151.]

27 LUKÁCS: I, 307. [LUKÁCS: *Marx's..., op. cit.* 31.]

28 LUKÁCS: I, 147.

consciousness with its forms and contents directly to the economic structure, but rather relates it to the totality of social existence"; but he does so as if forgetting that "the totality of social existence" is rather inconceivable without "the world of consciousness with its forms and contents".[29] The situation is rather similar when he emphasises that "the ontological priority of production, as a predominant moment, prevails everywhere", and he does not see any inconsistency in recording it through the next sentence that the relationship between production and consumption "stands very close to the reflexive determinations discussed with regards to *Hegel*".[30] Ontological priority becomes the synonym of predominance manifest in the interaction when *Lukács* discusses the relations between material and "purely" mental processes in relation to production: "The more socialised a society is, the more unseparably intertwined—in the material production—the two processes are. Nobody denies their ontological differences, but the primary ontological fact of their effects in the field of social existence is that they unseparably co-exist [...]. Issues of primacy can only be raised reasonably when the unseparable co-existence is recognised in the analysis of this group of phenomena."[31] Finally, we can also find examples for the ways in which actual ontological priority slips into a medium where mere interactions prevail: "From the ontological priority of one mode of existence does by no means derive that this is evaluated positively or negatively from the perspective of some sort of a hierarchy of values. It is only about the bare establishment of the fact that the biological reproduction of life forms the existential basis of all manifestations of life, and that the former is ontologically possible without the latter, but not the other way round. The true opposition, as applied to this simple fact, does not derive from the fact itself, but from its specific nature realised within social existence, from the continuous socialisation of biological-human existence, as a result of which, with time, an entire complexity has taken shape from the ontogenetical reproduction within social existence, and this is the economic sector. The more socialised the human activities are, which, after all, serve to fulfil the demands

---

29 LUKÁCS: I, 307. [LUKÁCS: *Marx's...*, *op. cit.*, 32.]

30 LUKÁCS: I, 331.

31 LUKÁCS: III, 352. ["Je mehr die Gesellschaft sich vergesellschaftet, desto untrennbarer sind beide Prozesse, gerade in der materiellen Produktion, ineinander verschlungen. Ihre ontologischen Verschiedenheiten werden damit natürlich nicht geleugnet. Aber das primär ontologische Faktum ihres Wirkens im Bereich des gesellschaftlichen Seins (und ausser dessen Bereich gibt es weder etwas Geistiges, noch von teleologischen Setzungen in Gang gebrachte materielle Prozesse) ist ihre untrennbare Koexistenz." *Prolegomena*, 525.]

set by the human biological-ontogenetical reproduction, the stronger the mental resistance is to recognise the primacy of the economic sector over the others."[32] As much as it is unambiguous that the biological reproduction of life has ontological priority in the sense that it forms the basis of all other manifestations of life, so much is the least evident that the economic sector—in the socialised forms of its development, or even at a primitive stage—could be born and function without the development of cognition, the concomitant formation of the complexities designed for the institutionalisation of regulation and order, and without interaction with these. Speaking of large and comprehensive complexes, for instance, the function of social regulation can surely be fulfilled not only by a given partial complex recognised as distinctively legal. It can be done as well by spontaneous forms (which *Lukács* already regarded as quasi-legal) that ensure, even in case of a simple co-operation (as, e.g., the first Robinsonian act of labour), "the most precise regulation of the obligations of the participants on basis of the concrete labour-process and the division of labour arising from it (beaters and hunters in hunting)".[33] Thus, in this very context the question is entirely irrelevant what other complexities form the elements and functions which, surpassing the bare factual sphere of relations of production, are indispensable for the functioning of the economy. There is but one important fact, namely, that for the sake of their own reproduction, humans need to form and operate numerous other functions beyond production, which they cannot give up. At the same time, the self-reproducing human has a crucial role in the formation and operation of such functions.

Returning to the answers concerning the relationship between basis and superstructure, we can establish that all these answers were in fact reductionist, as they tried to originate the superstructure from the economic basis. Therefore, if we accept the fact of their unseparable existence as a point of reference, then the only thing we can examine within their relationship as basis and superstructure is the dynamism of their interaction—being aware that "the basic fact of materialist dialectics is that there is no real interaction (no real reflection determination) without a predominant moment".[34]

The previous development can hardly claim to have clarified the relationship between ontological priority and the predominant moment inherent in the interaction, either by adopting *Lukács*'s use of notions or by pointing beyond

32 LUKÁCS: II, 237.
33 LUKÁCS: II, 208 et seq.
34 LUKÁCS: I, 333. [LUKÁCS: *Marx's..., op. cit.*, 63.]

it. It is adequate only for raising doubts about the mutually excluding senses of the uses of these notions by sheding light upon their contradictory applications in *Lukács*'s oeuvre. It does not propose anything with regard to the provability of their meanings according to *Lukács*'s strict definition (ontological priority as the possibility of the existence of phenomenon not preconditioned by the existence of another phenomenon, and the predominant moment as the ultimate determining role exercised by one side within mutually preconditioning interactions), and, providing that they are provable, whether they are provable as categories opposed to one another or merely in some different correlation. In the light of our initial question regarding the relationship between basis and superstructure, we can still establish that social existence is a complexity composed of further complexities already at the primitive stages of its development, the existence of which being manifest in its irreversibly progressing processual nature—in the form of interactions within which the complex chain of mediations and juxtapositions does not follow unilinear determinations, as everything that mediates (in a given direction) is itself mediated (in another direction). In *Lukács*'s Ontology, it is the category of socialisation that marks the increasingly prevailing tendency of development, manifest in the increasing internal complexity of social existence, in the assertion of the particularities of its relatively independent components, and in the gradual coming to prominence of purely social determinations. In consequence, in the network of mutual correlations, the purely "material" and the purely "ideal", or the "economic" and other aspects—more comprehensively: the "basis" and the "superstructure"—cannot be separated from one another in a manner of the former being able to exist without the latter. This only holds for the greater comprehensive aspects of social existence (that is, for its functions and complexes), and not for the specific forms thereof, as religion, art, politics, law, or state, developing and differentating themselves from one another in a given phase of social development. At the same time, it holds for both that, taken as processes, they are irreversible. (*Lukács*'s example relies on the quote taken from *Marx*'s *Grundrisse*: "Man is a *zoon politicon* in the strictest sense of the word, he is not only a social animal, but an animal which can isolate only within society.")[35] This is to say that once social existence has developed, the practical defiance of any of its forms can only be conceived

35 "Der Mensch ist im wörtlichsten Sinn ein ζωον_πολιτικον, nicht nur ein geselliges Tier, sondern ein Tier, das nur in der Gesellschaft sich vereinzeln kann." MARX, K.: *Grundrisse der Kritik der politischen Ökonomie* (Rohentwurf) 1857–1858, Berlin, Dietz, 1953, 6 [Marx-Engels-Lenin-Institute-Moskau]. Quoted also by Lukács II, 280.

as the realisation of one given concrete form of sociality. (Thus I can establish the absence of state, law, religion, or art, defined in one or another way, but this will not alter the necessity and factuality of that some form fulfils, or helps the completion of, the integration of society and the regulation of its fundamental conditions, as well as the transcendental and aesthetic self-expression of human beings.)

Lukács does not furnish a convincing answer on how the ultimate definition in any given interaction prevails and in what concrete way(s) it does. Nevertheless, he often states on the plane of principles that this does not take place in a mechanical way, neither in a necessarily and directly causal way. On the other hand, remaining true to the genuinely *Marx*ian tradition, he seeks to present the theory of social action built upon alternative possibilities of decision through the empirical presentation of historical examples and concrete case-analyses, a theory in which from multiple mediation and juxtaposition (from the range of mobility of the alternative possibilities of decision, always given in their concrete uniqueness, but on a socially general plane, in every case having well-defined boundaries and drives) the actual decisions derive, pointing in a certain direction of development. Hence, in the process of social determination, it is by far not simply external factors—force, interest, etc.—that have a role, but this very concrete process of self-determination will actually take place through the mediation of social total determination in the recognition of the alternatives of decision, their circumscription, as well as in the evolvement and self-assertion of the qualities of human personality in the background (also preconditioned by the actual social total process). The variety of the factors of influence is well explained by *Lukács*: "Whatever may be the immediate relations of pure power, the fact remains that the men who represent these or who are subjected to them are men who have to reproduce their own life under definite concrete conditions, who accordingly possess definite aptitudes, skills, abilities, etc., and who can only behave and adapt accordingly. So if a new distribution of the population takes place from extra-economic power relations, then this is never independent of the economic inheritance of the past developments, and a double settlement of the future economic relations necessarily arises from an interaction between the human groups who are stratified in this way."[36] Thus, whatever we called the predominant moment of the interactions prevails only through largely indirect channels—not always reconstructible by exact means. For this very reason, it can by no means be the task of *Marx*ist philosophy to flatten these complex phenomena into abstract

36 LUKÁCS: I, 335. [LUKÁCS: *Marx's...*, *op. cit.*, 65.]

principles, and to apply them deductively and simplifyingly to the various fields of human cognition. Its task is rather to investigate the concrete ways of their interaction—those mediations that lead to the ultimate determination within, and also to the emergence of the particular autonomy of, the examined field—by placing these areas into the actually prevailing social totality and unravelling their particular dialectic.

The mutuality, from the very start, of the relationship between basis and superstructure is enough to explain why *Marx*ism uses the categories of basis and superstructure within this mutuality as relative categories marking the predominant side. If we go further in the analysis of the complexity of this definition, and free their relationship of the remnants of teleology and of the wishful thinking to read any superior goals into it, furthermore, if we recognise in *Lukács*'s Ontology the attempt at fulfilment of the old need not to rigidify the presentiments in philosophy into doctrines and apply them insensibly on reality, but to forge our own notions and tools from them to support our genuinely open inquiries, then we will also realise why *Lukács* did not undertake the continuation of the philosophical tradition inherent in the categories of basis and superstructure in his great synthetical work, crowning his oeuvre, and why he only referred to them critically, instead of using them in his own reasoning.

I believe that this behaviour conceals a hidden stance, namely, the act of having returned to the original *Marx*ist tradition. By this I mean the methodological stance taken by *Marx* in his *Grundrisse*: the analysis of concrete correlations should always be done within the concrete set of categories of the given correlations. The categories of basis and superstructure should only be made use of in the simplifying and summarising characterisation of one given side or aspect of certain correlations. *Lukács* expressed himself in his own system of categories, in the language of the ontology of social complexes, with a previously unknown accuracy, and without actually scrutinising the *Grundrisse* or using methods of figurative description, reminiscent of *Marx*.

From the numerous relationships between basis and superstructure, the following recognitions were of primary interest for *Lukács*:

(1) The various sides of social existence—thus, especially, the phenomena embodied by the categories of basis and superstructure—are in a relationship in which they mutually precondition one another. This is to say that once they are historically born and have unravelled their particularities, they have become such strong elements of social existence that no reasonable abstraction is any longer conceivable in relation to them.

(2) This mutual preconditioning is characterised by the uninterrupted process of interactions, which becomes so complex with social progress

advancing that the ultimately determining side, that is, one playing the predominant role, can only prevail through multiple mediations.

(3) The various complexities taking part in the process gradually develop their particularities with social progress advancing, thereby increasingly re-asserting their relative separation and autonomy. Consequently, the truth will become more and more transparent (in a way to unravel further particularities) that "each complex bears the characteristic that allows it to react to the drives generated by the general motions of the social existence in economy in its own particular way".[37]

(4) This will make the reaction by other social partial complexes not only particular (due to their structure and functioning), but it also implies that their own past (with all the eventualities included) plays a determinant role in shaping their aspects.[38] The fact that the past continuously builds into the present is of an ontological nature, which we can only establish by subsequently reconstructing its concrete form, without being able to alter, in the name of any superior teleology, the ways and value-criteria of the selection one once made from the past. Thus, we can hardly state that "every concrete social superstructure integrates only those from its historical antecedents that correspond with its own basis in their content",[39] unless we presume the existence of a superior guardian providing some rationality for the process itself. Certain possibilities of errors, distortions arising from the ideological way of thinking, and direct receptions and influences owing to impotence, and so on, may all be inherent in the experience of the past and in the actual process of the selection made from it. The fact that the various abilities, experience, ways of reaction, styles of action, moreover, the memory of the already experienced past, are all to build indestructibly in the social existence, inspired *Lukács* to strongly emphasise that restoration is possible only when mechanically objectified conditions are meant, it being entirely excluded in respect of social processes.[40] Under given specific conditions, however, it is by for not excluded in point of principle for inadequate answers and solutions of the past to serve as building stones for the future, or eventually to become determining factors thereof.

And at this point the author stops with his conclusions.

---

37 LUKÁCS: II, 252.
38. LUKÁCS: II, 189.
39 ERDÉLYI: *op. cit.*, 99.
40 LUKÁCS: III, 115.

All these notwithstanding, I still think that it would be unreasonable an expectation to prove any correlation between the categories of basis and superstructure in *Lukács*'s oeuvre, or to expound it philosophically in a way excessive to the above level. One of the reasons for this is that *Lukács* has created a general theory within the ontology of social complexes, without having drawn the outlines of the theories concerning its individual fields (or complexities) beforehand. Thus, as opposed to the methodological pattern followed by *Marx*, who always started mental constructions to erect from the bottom (searching for an answer to the historical problems of his time in the analysis of economic conditions, and, through continuous feedback to the concrete experience, arrived to such conclusions that presented history as the one of class struggles and indicated the fundamental driving force of history in the economic sphere), *Lukács* drew his constructions from the top, as if having inspired from previously established mental constructs, sometimes in a way clearly reminiscent of deductive thinking patterns. So, as opposed to the path *Marx* as a thinker followed, whose science-theoretical ideals and history-philosophical recognitions were formed through a series of economic analyses dealing with the most minute details in his works ranging from *A Contribution to the Critique of the Political Economy* to *The Capital*, and the shortened and simplifying summaries and generalisations always relied on actual analyses; well, in case of *Lukács*, the line between the scholar and the ideologist is by far not this easy to draw. The areas, far from the political and economic, which stood in the centre of *Lukács*'s professional interest—and I mean literature and aesthetics here—, relied on certain preferences and prejudices ever in work in his entire oeuvre, showing normative and preconceived judgement from the very start. At the same time, *Lukács* naturally accepts the fundamental principle of *Marx*ism on the primacy of the economic sphere, when analysing the mutual conditioning and influence between the various complexities. Thus, what the *Grundrisse* speaks of as the determination "in the last resort" is neither expounded nor explained by the definition given by *Lukács* on the "predominant moment" in a mutual relationship. This means that he treated the actual question arising in the relationship between basis and superstructure as answered, without giving an explanation, except to its acceptance as the ontological characteristic of the social existence itself. He regarded this as the axiomatic principle of a system of thoughts. And a principle as such can only be asserted within deductive reasoning, yet this is not the kind of category which could be used for a genuine in-depth investigation.

II. The law's understanding

The *Marx*ist tradition, expressing relations within society through the categories of basis and superstructure, is so strong world-wide and especially in the Central and Eastern European region that legal theory must unavoidably face dealing with the conception of law taken as superstructure. The traditional paths of this conception—or the eventually inherited forced paths—are already so beaten that an outside viewer may sense the *Marx*ist concept of law as if necessarily leading to some sort of a "general quasi-economic theory of determinism".[41] It is a fact that in our region one of the core issues of all basic treatises within legal theory until these very days has been either the relationship between law and economics (in *Marx*ism proper), or the theoretical explanation of how legal systems belonging to different social-economic formations can exert influence upon one another (in late periods of *Marx*ism, when philosophysing on the senses and hows of legal development[42] patterned by *Alan Watson* came to form an agenda[43]). It is also a fact that it would be an adequate task for *Marx*ist jurisprudence (only provided that it can at all outlive the fall of "actually existing socialisms" in the Central and Eastern European region) to finally conduct historical research: to examine by comparative means, relying on concrete historical material, the development of the respective solutions of statutory regulations and judicial decisions, as well as the line and logic of this development. The analysis of various legal institutions would provide additional information to be able to answer the question of what the "ultimately" determinant role by the economy can at all mean in the legal sphere.

Being able to explain the contradictory relationship between law and economics, on the one hand, and the effects of different legal systems upon one

---

41 ERH-SOON TAY, A.—KAMENKA, E.: "Marxism-Leninism and the Heritability of Law", *Review of Socialist Law*, VI, 1980, 3, 268.

42 For general overviews of inter-cultural influences in legal development, cf. *Comparative Legal Cultures* ed. and introd. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney, Dartmouth & New York, New York University Press 1992) xxiv + 614 [The International Library of Essays in Law & Legal Theory, Series ed. Tom D. Campbell, Legal Cultures 1] and *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland, Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney, Dartmouth, 1996. xviii + 567 [Tempus Textbook Series on European Law and European Legal Cultures I].

43 The topic was introduced by Csaba Varga's review paper on Transplantation of Laws, or Borrowing as the Universal Factor of Legal Development [in Hungarian] in *Állam- és Jogtudomány* XXIII (1980) 2, 286–298.

another, on the other, requires in the first place the theoretical clarification of the concept of law as a superstructure, by making it properly differentiated and general.

As to its differentiation, by the end of the '60s, socialist legal theory, keeping a distance from the last defenders of the *Stalin*ist dogma on the total discontinuity between differing types of law,[44] arrived at the conclusion that law is actually dichotonomous, being formed of both social and normative contents.[45] This point of view was approached from various directions. Some started from the thesis that law is reflection of reality, thus seeing the mirror of reality in direct (social) contents that must be transformed into indirect (normative) contents to be able to express it as law, and thereby also to serve processes of legal influence.[46] Other started from the dialectics of means and ends. These latter argued that law can achieve the fulfilment of its function only through its own technical-legal functions.[47] Both the above arguments contained some elements of truth, but I still believe that neither of them provided sufficient explanation, because they conceived of law as the total of statutory and judicial instruments, and of the legal superstructure as static, being the mere set of legal enactments (either objectified as, or declared to embody, the law).

As far as the general nature of the notion of legal superstructure is concerned, theory has just recently got to a point being able to recognise that qualities regarding the entire superstructure cannot be referred and related to,

---

44 E.g., ARLT, R.—LUNGWITZ, W.: "Die Entwicklung des sozialistischen Rechts und die bürgerliche Traditionen", *Staat und Recht*, 1963/5.

45 E.g., PESCHKA, V.: *Jogforrás és jogalkotás* [Sources of law and law-making], Budapest, Akadémiai Kiadó, 1965, ch. IV, para. 1; Victor Dongoroz 'Dreptul penal socialist al tarii noastre: Raportul dintre continutul normativ si continutul social-politic al dreptului penal din Republica Socialista Romanin' *Studii si cercetari juridice* 1965/3; NASCHITZ, A. M.: '"Le problème du droit naturel" à la lumière de la philosophie marxiste du droit' *Revue roumaine des Sciences sociales: Série de Sciences juridiques* X (1966) 1, para. III; SZOTÁCZKI, M.: *A jog lényege* [The essence of law] (Budapest, Közgazdasági és Jogi Kiadó, 1970, ch. IV, para. 2; Neno Nenovski *Priemstvenosta v pravoto* [Continuity in law] (Sofia, Nauka i Izkustvo, 1975), ch. V.

46 Particularly at PESCHKA: *Jogforrás és jogalkotás. op. cit.*

47 Particularly at NENOVSKI; *op. cit.* In socialist legal theory, the basic reference is usually provided by the paper, of primordial importance at its time, of Traian Ionescu et BARASCH, E. A.: "Les constantes du droit: Droit et logique", *Revue roumaine des Sciences sociales: Série de Sciences juridiques*, VIII, 1964, 2, stating "the continuity of logic" in law (143) through the separation of "the essence to be realised" (as goal) and "the technique of realisation" (as instrument).

or deduced from, the individual components of a given superstructure. Thus, a formulation that claims that "[t]he superstructural nature of the legal part of the superstructure cannot be considered as a disunity of individual statutory rules, neither can the statutory rules be weighed independently, taken in their uniqueness. The role of the superstructure concerns the entirety and the concrete generality of a given social phenomenon"[48]—well, such a formulation does not resolve the basic dilemma or show the way out of it. It merely substantiates the fact that the quality of superstructure is born from certain objectivations: partly the enacted rules and partly the official institutions of the law.

Drawing conclusions from the legal-philosophical perspective elaborated within *Lukács*'s Social Ontology,[49] we might arrive at rather far-reaching results, new also in their methodological outlook and theoretical approach. Accordingly, law

(1) is an irreversible process-like phenomenon from an ontological point of view. Its motion is defined primarily by its place taken in the total social complex, and, within this—through various socio-political and other kinds of mediations—, its relationship to the sphere of economy.

(2) The motion within the total social complex displays, at the level of the given individual partial complexes, a continuously reproducing dialectic unity between stability and change.

(3) From an ontological perspective, the social existence of the complex of law can be reduced to its actually exerting social influence. (Thus, the current Hungarian law is not only the sum of the statutory provisions in force, not merely the judicial organisation with its personal and institutional machinery, but the sum of these two in its actual operation, influencing social life and forming one of the factors thereof.) The same is not necessarily to be said, in the direct sense of actually exerting social influence, of each fundamental component, form of objectivation, or internal rule.

(4) Therefore, there is and there can be no equivalence between the law as a functioning agent and the law as actual functioning—that is, between law taken as a store of technical instruments (the organisational-institutional background of the mechanism of exerting influence, i.e., legal provisions and the machinery dedicated to their enactment and enforcement), on the one hand, and law taken as the fulfilment of its functions (its actual motion

48 SZABÓ, I.: *Les fondements de la théorie du droit,* Budapest, Akadémiai Kiadó, 1973.
49 Cf. VARGA: *The Place of Law in Lukács' World Concept. op. cit.* ch. VI.

and social effect, i.e., the actual form which it takes in the practical life of society), on the other.

(5) The past at any given time is real for the present in so much as we draw from it. Thus, human progress—with regard to the available store of technical instruments as well—manifests itself rather in the placement of old elements into new context and influencing mechanisms than in the formation and use of quite new elements.[50]

(6) From this derives that we can by no means leave the instrumental character of law out of consideration. At the same time, we must discuss with the same emphasis the various kinds of sociological and moral, economic and political components of the instrumental use of law, and the issue of adequacy between the goals to be achieved through law and the applied instruments.

(7) From an ontological perspective, law is a unified phenomenon for two reasons, its internal complexity notwithstanding. For its forms of objectification can only be assessed through their actual operation and action (on the one hand), in the same way as their internal principles, instrumental values and structurual complexity (independently of how much they are historically concretely well-defined without any alternative to appear on the scene) may gain exclusively ontological significance through their actual operation and realisation (on the other). That is, whatever boundaries the law's internal order draws between the respective processes of law-making and law-applying, only those implemented in actual social practice will prevail in fact so as to be sensed ontologically.

(8) This also implies that the dialectic of stability and change can be caught in action only within the totality of the legal complex. For this very reason we cannot claim the exclusive trigger of change to be legislation (officially institutionalised for this very purpose)—that is, the enactment of law according to a procedure and in a form prescribed by previously enactments—, and its exclusive medium to be law-application (officially institutionalised for this very purpose)—that is, the establishment and enforcement of the legal consequences of a given action according to a procedure and in a form prescribed by previous enactments. On the final analysis, the motion at any given time of the social total complex and the

---

50 According to Naschitz, "human factor", and according to Nenovski (ch. VII–VIII), "social existence", as well as the "sociological phenomenon of social control in all social formations", are the moments for establishments with differing traditions to necessarily arrive at common or, at least, similar solutions while legal problem-solving.

internal complexity of the legal part-complex (its tradition, structural complexity and relative weight, as well as its internal strength to function and exert a socially desirable influence through the fulfilment of its own enacted rules of the game) will define the way in which the legal complex reacts to the external challenges of continuity and change.

In the domain of law as a field that operates a formal store of means in accordance with formalised procedural patterns, response by any one social partial complex to the challenges by any other complexes, that is, the way of its reacting, is mostly achieved through the manipulating operation of its already available set of means, instead of either individually generating or formally changing any such means. In its ontological reconstruction, however, the unceasing process of manipulation presupposes, and also results in, the unceasing process of transforming the actual characters—that is, the social significance and meaning—of the relevant instruments taken from the available store of means.[51]

51 For the ways in which the law's complexity reproduces itself while responding variably to socially felt changing needs, cf. VARGA, Cs.: *Paradigms of Legal Thinking,* Budapest, Akadémiai Kiadó, 1999, vii + 279, particularly at chs. V–VII [Philosophiae Iuris] and, as a collection of supplementary papers by the author, *A jog mint folyamat* [Law as process] Budapest, Osiris, 1999, 430 [Osiris-könyvtár: Jog].

BIBLIOGRAPHY
of *Zoltán Péteri*

BOOKS

Állam- és jogelmélet [Theory of state and law] (co-auth. György ANTALFFY—Kálmán KULCSÁR—Vilmos PESCHKA—Mihály SAMU—Imre SZABÓ—Mihály SZOTÁCZKI —László SZTODOLNIK—Tibor VAS), Egyetemi jegyzet. [Univ. Lecture notes] 1956/57. tanév 1–2. félév. Budapest, Felsőoktatási Jegyzetellátó Vállalat, 1957, 256 p. (ELTE Állam- és Jogtudományi Kar) Idem 1958, 1960.

Études en droit comparé — Essays in Comparative Law (ed.), Budapest, Akadémiai Kiadó, 1966. 283 p.

Droit hongrois — droit comparé (ed.), Budapest, Akadémiai Kiadó, 1970. 356 p.

The Comparison of Law — La comparaison de droit. Selected Essays for the 9th International Congress of Comparative Law (ed.), Budapest, Akadémiai Kiadó, 1974. 323 p.

A Socialist Approach to Comparative Law (co-ed. with Imre SZABÓ), Budapest, Akadémiai Kiadó—Leyden, Sijthoff, 1977. 235 p.

Comparative Law (co-ed. with Imre SZABÓ), Budapest, Akadémiai Kiadó, 1978. 438 p.

General Reports to the 10th International Congress of Comparative Law — Rapports généraux au 10e Congrès International de Droit Comparé [Budapest, 23–27 August, 1978.] (co-ed. with Vanda LAMM), Budapest, Akadémiai Kiadó, 1981. 1048 p.

Legal Development and Comparative Law — Évolution du droit et droit comparé. 1982. Selected Essays for the 11th International Congress of Comparative Law (co-ed. with Vanda LAMM), Budapest, Akadémiai Kiadó, 1982. 365 p.

The Role of Nonlegal Norms in Law. General Report [to the] 11th International Congress of Comparative Law. Caracas-Venezuela 29 August–5 September 1982. Budapest, n.pr. 1982. 49 p.

Legal Theory—Comparative Law. Studies in honour of Imre SZABÓ (ed.), Budapest, Akadémiai Kiadó, 1984. 463 p.

Legal Development and Comparative Law – Évolution du droit et droit comparé. 1986. Selected Essays for the 12th International Congress of Comparative Law. [Sidney–Melbourne, 18–27 August, 1986.] (co-ed. with Vanda LAMM), Budapest, Akadémiai Kiadó, 1986. 329 p.

Természetjog – államtudomány. Eszmetörténet, rendszer- és módszertani alapok. [Natural right—political science. History of ideas, systemic and methodical foundations.] Budapest, Szent István Társulat [Bibliotheca Facultatis Iuris et Politicarum Universitatis Catholical de Petro Pázmány nominatae Budapest], 1997. 61 p.

Legal problems of transition in Hungary. Hungarian National Reports submitted to the Fifteenth International Congress of Comparative Law (ed.), MTA Állam- és Jogtudományi Intézete, Közlemények (Working Papers), No. 11. Budapest, 1998. 138 p.

ARTICLES

A szocialista törvényesség kérdései a szovjet sajtó tükrében. [Some questions of socialist legality in the mirror of the Soviet press.] Állam és Igazgatás, 1955. Vol. 7. 733–737 pp.

A szakszervezetek szerepéről a Magyar Tanácsköztársaság állami mechanizmusában. [On the role of trade unions in the state mechanism of the Hungarian Soviet Republic.] Jogtudományi Közlöny, 1955. Vol. 10. 136–150 pp.

A jogfogalom néhány kérdése a szovjet jogtudományban. [Some questions of the concept of law in the Soviet legal sciences.] Állam- és Jogtudományi Intézet Értesítője, 1958. Vol. 1. 304–314 pp.

Ucsasztie vengerszkih jurisztov v prazdnovanii 40-oj godovscsinü Vengerszkoj Szovetszkoj Reszpubliki. [The role of Hungarian jurists in the celebration of the 40th anniversary of the Hungarian Soviet Republic.] Acta Juridica Academiae Scientiarum Hungaricae, 1959. Vol. 1. 492–498 pp.

Gustav Radbruch és a relativista jogfilozófia néhány kérdése. [Gustav Radbruch and some questions of the relativist legal philosophy.] MTA Állam- és Jogtudományi Intézet Értesítője, 1959. Vol. 2. 183–221 pp.

A Rule of Law fogalmának kérdéséhez. [On the problem of the concept of the Rule of Law.] MTA Állam- és Jogtudományi Intézet Értesítője, 1960. Vol. 3. 202–232 pp.

Az államforma fogalmáról. [On the concept of the form of government.] MTA Állam- és Jogtudományi Intézet Értesítője, 1961. Vol. 4. 291–322 p.

Az úgynevezett „jóléti állam"-ról. [On the so-called welfare state.] Állam és Igazgatás, 1961. Vol. 11. 504–519 pp.

A szocialista jog nevelő szerepe. [The educational role of the socialist law.] Valóság, 1961. Vol. 4. 100–103 pp.

A szocialista állam- és jogelmélet néhány kérdése. [Some questions of the theory of state and law.] Állam és Igazgatás, 1962. Vol. 12. 330–343 pp.

Az „újjáéledt" természetjog néhány jogelméleti kérdése a második világháboru után. [Some legal theoretical questions of the „revived" natural law after World War II.] Állam- és Jogtudomány, 1962. Vol. 5. 469–505 pp.

The nature of the general principles of law. 43–59. In: Studies in jurisprudence for the sixth International Congress of Comparative Law (ed.), The Jurisprudential Committee of the Hungarian Academy of Sciences. Budapest, Akadémiai Kiadó, 1962. 147 p.

Pszichológiai elemek a mai polgári államtudományban. [Psychological elements in the bourgeois political science of today.] Állam- és Jogtudomány, 1964. Vol. 7. No. 3. 469–478 pp.

La science politique bourgeoise et la théorie marxiste-léniniste du droit. Acta Juridica Academiae Scientiarum Hungaricae, 1964. Vol. 6. 221–255 pp.

Burzsoá politika-tudomány és marxista-leninista államelmélet. [The Bourgeois science of politics and the Marxist-Leninist theory of state.] Állam- és Jogtudomány, 1964. Vol. 7. 59–87 pp.

Tudományos konferencia az állam- és jogtudományok módszertani kérdéseiről. [Scientific conference on the methodological problems of the state and legal studies.] Jogtudományi Közlöny, 1964. Vol. 19. 178–187 pp.

Az állampolgári jogok és a természetjogi elmélet. [Citizen's rights and the natural law theory.] 91–146. In: Az állampolgárok alapjogai és alapkötelességei (ed.: József HALÁSZ), Budapest, Akadémiai Kiadó, 1965. 630 p.

Az állampolgári jogok és a természetjogi elmélet. [Citizens' rights and the theory of natural law.] 91–146. In: Állampolgárok alapjogai és kötelességei (ed.: József HALÁSZ–István KOVÁCS–Imre SZABÓ), MTA Állam- és Jogtudományi Intézete — Akadémiai Kiadó, Budapest, 1965. 635 p.

Az államok osztályozásának néhány kérdése a szocialista államelméletben. [Some questions of the classification of states in the socialist theory of the state.] Állam és Igazgatás, 1965. Vol. 15. 411–427 pp.

Citizens' rights and the natural law theory. 83–119. In: Socialist Concept of Human Rights (ed.: József HALÁSZ), Budapest, 1966. 309 p.

Die Staatstheorie des Dualismus. 111–118. In: Die Freiheitsrechte und die Staatstheorien im Zeitalter des Dualismus. Budapest, Tankönyvkiadó, 1966. 158 p. (Studia juridica auctoritate Universitatis Pécs publicata, 48.)

Les premières journées juridiques franco-hongroises. (Budapest, du 12 à 14 décembre, 1966.) Acta Juridica Academiae Scientiarum Hungaricae, 1967. Vol. 9. 425–430 pp.

Einige grundlegende Probleme der politischen Wissenschaft. Beiträge zur Theorie des sozialistischen Staates und Rechts. Leipzig, 1967. No.4. 8–21 pp.

Z cinnosti Ustavu Státu a Práva Madarskej Akadémie Vied v oblasti porovnavacieho práva. [Activity of the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences in the field of comparative law.] Právny Obzor, Bratislava, 1968. 634–639 pp.

Az Állam- és Jogtudományi Intézet sokszorosított kiadványairól. [Mimeographic publications of the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences.] Állam- és Jogtudomány, 1968. Vol. 11. 614–618 pp.

Einleitung. 1–14. In: Aktuelle Probleme der marxistisch-leninistischen Staats- und Rechtstheorie. Material der Konferenz der Staats- und Rechtstheoretiker der europäischen sozialistischen Länder, Budapest, 7–9. Dez. 1967. Budapest, Institut für Staats- und Rechtswissenschaft der Ungarischen Akademie der Wissenschaften, 1968. 327 p.

Einige Fragen der relativen Selbständigkeit der sozialistischen Staatstheorie. 67–88. In: Aktuelle Probleme der marxistisch-leninistischen Staats- und Rechtstheorie. Material

der Konferenz der Staats- und Rechtstheoretiker der europäischen sozialistischen Länder, Budapest, 7–9. Dez. 1967. Budapest, Institut für Staats- und Rechtswissenschaft der Ungarischen Akademie der Wissenschaften, 1968. 327 p.

A társadalmiság kérdései a jogösszehasonlításban. [Some aspects of the sociological approach in comparative law.] Állam- és Jogtudomány, 1970. Vol. 13. 230–248 pp.

"Trends in legal learning" [Hungary]. International Social Science Journal, Paris, 1970, No. 3. 434–442 pp.

Eighth Congress of the Académie Internationale de Droit Comparé. (Pescara, 29. août.–5. sept. 1970.) Acta Juridica Academiae Scientiarum Hungaricae, 1971. Vol. 13. 240–245 pp.

Az Állam- és Jogtudományi Intézet 1970 évi munkájáról. [On the work of the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences in the year 1970.] Állam- és Jogtudomány, 1971. Vol. 14. 401–404 pp.

The jubilee celebrations of the Faculté Internationale pour l'Enseignement du Droit Comparé. [Strasbourg, 30 March–3 April 1971.] Acta Juridica Academiae Scientiarum Hungaricae, 1971, Vol. 13. 439–443 pp.

Az összehasonlító módszer alkalmazásának elméleti kérdései az állami jelenségek körében. [Des questions de l'application de la méthode comparative dans la sphère des phénomènes étatiques.] Állam- és Jogtudomány, 1973. Vol. 16. 173–206 pp.

Új törekvések a jogállam-eszme körül. [New efforts around the theory of the Rule of Law.] Jogtudományi Közlöny, 1973. Vol. 30. 309–316 pp.

Nemzetközi összehasonlító jogi kerekasztal-értekezlet a jogintézmények társadalmi funkciójáról (co-auth. with Attila HARMATHY) (Budapest, 1972. szept. 6–9.), [International round-table conference in comparative law on the social function of legal institutions.] Állam- és Jogtudomány, 1973. Vol. 16. 319–325 pp.

A polgári jogállam-eszme újabb koncepciójáról. [On the new conception of the bourgeoise concept of the rule of law.] In: Békés egymás mellett élés — ideológiai harc. Budapest, Kossuth K. 1974. 221 p.

Megjegyzések a szocialista államelmélet államforma-fogalmához. [Some remarks to the concept of the form of government in the socialist theory of state.] Jogtudományi Közlöny, 1974. Vol. 31. 133–140 pp.

A jogösszehasonlítás kezdetei az angol jogtudományban. [The beginning of comparative law in the English legal sciences.] Állam- és Jogtudomány, 1975. Vol. 18. 393–414 pp.

Célok és módszerek a jogösszehasonlításban. [Goals and methods of legal comparison.] Állam- és Jogtudomány, 1975. Vol. 18. 58–72 pp.

Rechtsvergleichung und Erforschung objektiver Gesetze des Rechts. 122–126. In: Rechtswissenschaft und objektive Gesetze der Gesellschaft. Leipzig, 1977.

Az értékek objektív megalapozásának kérdései a szocialista jogelméletben. [The problems of grounding of values objectively conforming to the socialist theory of law.] Állam és Jogtudomány, Budapest, Vol. 21. 433–437 pp.

A jogösszehasonlítás elméleti kérdései a szovjet jogtudományban. [Theoretical questions of the comparison of laws in Soviet jurisprudence.] Állam- és Jogtudomány, 1978. Vol. 21. 263–276 pp.

Adalékok a „belső" jogösszehasonlítás kérdéseihez. [Contributions to the questions of the „internal" comparison of laws.] Jogtudományi Közlöny, 1979. Vol. 34. 676–682. pp.

Die Perspektiven der Rechtsvergleichung. Acta Juridica Academiae Scientiarum Hungaricae, 1981. Vol. 23. 177–186 pp.

Überlegungen bezüglich des Systems der rechtlichen Regelung im Sozialismus. 97–104. In: Rechtstheoretische Probleme des Sytems der rechtlichen Regelung im Sozialismus. Hrsg. Karl-Marx-Universität, Leipzig, Sektion Rechtswissenschaft. Leipzig, 1981. (Schriftenreihe Methodologie der marxistischen-leninistischen Rechtswissenschaft 9.)

Jogalkotási modellek. [The models of law-making.] 95–105. In: A jogalkotás jogpolitikai elveiről. (Ed. Elemér NIGRINY), Budapest, Igazságügyi Minisztérium, 1983, 187 p.

Le droit comparé et la théorie socialist de droit. 317–345. In: Legal Theory—Comparative Law. Studies in honour of Professor Imre Szabó. Ed.: Zoltán PÉTERI, Budapest, Akadémiai Kiadó, 1984. 463 p.

Egy szocialista összehasonlító jogelmélet felé. [Towards a socialist „comparative legal theory".] Jogtudományi Közlöny, 1985. Vol. 40. 176–182 pp.

Questions of comparative analysis of the general principles of law. Acta Juridica Academiae Scientiarum Hungaricae, 1986. Vol. 28. 45–55 pp.

The socialist state: changes in its economic and political functions. A Hungarian view. 157–174. In: State in social transformation. Budapest, 1986.

Juridical inflation and development of norms. 99–114. In: Droit constitutionnel hongroise. Budapest, 1987.

Doctrine as a source of the international unification of law. 11–34. In: Legal Development and Comparative Law — Evolution du droit et droit comparé. 1986. Selected Essays for the 12th International Congress of Comparative Law. [Sidney–Melbourne, Aug. 18–27, 1986.] (Ed.: Zoltán PÉTERI–Vanda LAMM), Budapest, Akadémiai Kiadó, 1986. 329 p.

Az emberi jogok a történelemben. [Human rights in history.] 21–48. In: Emberi jogok hazánkban. Budapest, ELTE Jogi Toábbképző Intézet, 1988. 385 p.

Az emberi és állampolgári jogok történetéhez. [To the history of human and civil rights.] Jogtudományi Közlöny, 1988. Vol. 43. 647–655 pp.

A jogállamiságról. [On the Rule of Law.] Magyar Tudomány, 1989, 724–735 pp.

Perspectives for a socialist axiology of law. 96–105. In: Rechtskultur–Denkkultur. (Eds.: E. MOCK–Cs. VARGA), Stuttgart, 1989.

Protection of ethnic and religious minorities. Institut International des Droits de l'Homme: Recueil des Cours, Strasbourg, 1989. 1–35 pp.

La modernisation et le droit socialiste hongrois. 25–32. In: La modernisation du droit. Académie Serbe des Sciences et des Arts, Beograd, 1990.

Major turning points in the history of human rights in Hungary. 32–46. In: Human Rights in Today's Hungary. Mezon, Budapest, 1990.

Änderungen in der Konzeption der Grundrechte in Ungarn. 180–183. In: BÖNNINGER, K.–WAGNER, I.–van WISSEN, G. (hrsg.).: Menschenrechte in unserer Zeit. Kluwer–Deventer, 1990.

The Declaration of the Rights of Men and Citizen and the Hungarian Constitution. Acta Juridica Hungarica, 1991. Vol. 33. 57–73 pp.

Tradiciók és emberi jogok Magyarországon. [Traditions and human rights in Hungary.] Acta Humana, 1991. 32–47 pp.

Anmerkugen zur parlamentarischen Gesetzgebung in Ungarn. 29–35. In: Gesetzgebungsverfahren un Gesetzesqualität. Wien, 1992.

Vergleichende und historische Aspekte der Rechtsstaatlichkeit und Verfassungsgerichtsbarkeit in Ungarn. 37–49. In: Problems of Constitutional Development. (Ed.: Attila RÁCZ), Budapest, Akadémiai Kiadó, 1993. 222 p.

Problems of regionalism: the Hungarian case. 51–64. In: Towards a Unified Europe. MTA Állam- és Jogtudományi Intézete, Közlemények No. 7. (Working Papers) Budapest, 1994. 101 p.

Constitutional changes in present-day Hungary. 22–26. In: Democrazia alla prova. Scuola Santa Orsola, Napoli, 1994.

Jogállamiság és az alkotmány: eszmetörténeti kérdések. [The Rule of Law and the constitution: theoretical and historical questions.] Állam- és Jogtudomány, 1996. Vol. 36. 213–268 pp.

Constitution-making in Hungary. Acta Juridica Hungarica, 1996. Vol. 36. 149–161 pp.

Problems of regionalism in Hungary. Acta Juridica Hungarica, 1995/96. Vol. 37. 315–321 pp.

Megjegyzések egy új jogbölcseleti kiadványsorozatról. [Remarks on a new series of publications in legal theory.] Állam- és Jogtudomány, 1995/96. Vol. 37. 189–197 pp.

Az államok rendszerezése. [The classification of states.] In: Államelmélet, 1997. 94–21 pp.

Jogösszehasonlítás és jogelmélet. [Comparison of laws and legal theory.] 265–283. In: Jogbölcseleti előadások — Prudentia Juris 11. (Ed.: Miklós SZABÓ), Miskolc, Bíbor K. 1998. 309 p.

Általános jogelvek, értékek és jogcsaládok a jogalkalmazók felelősségéről. [General principles of law, values and families of law on the responsibility of law-makers.] 232–241. In: Iustum, Sequum, Salutare: Emlékkönyv Zlinszky János tiszteletére. (Ed.: Gábor BÁNRÉVY—Gábor JOBBÁGYI—Csaba VARGA). Budapest, Pázmány Péter Katolikus Egyetem, 1998. 348 p.

Systems mixing and in transition: import and export of legal models. 31–47 pp. In: Legal problems of transition in Hungary. Hungarian National Report submitted to the Fifteenth International Congress of Comparative Law. MTA Állam- és Jogtudományi Intézete. Közlemények No. 11. (Working Papers), Budapest, 1998. 138 p.

BOOK REVIEWS

Néhány észrevétel Verdross: Völkerrecht [2. Aufl. Wien, Springer, 1950. 508 p.] című művével kapcsolatban. (co-auth with Géza HERCZEGH) [Remarks on „Verdross: Völkerrecht, Wien 1950.] Jogtudományi Közlöny, 1953. Vol. 8. 402–407 pp.

Kecsek'jan, Sz. F.: Arisztotelesz tanítása az államról és a jogról. [Aristoteles on state and law.] Moszkva, Leningrád. Izd. Akad. Nauk. SZSZSZR. 1947. 220 p. In: Szovjetjogi cikkgyűjtemény, Budapest, 1953. Vol. 3. 335–344 p.

A Szegedi Tudományegyetem Állam- és Jogtudományi Karának Évkönyve. [The Yearbook of the Legal Faculty of the University of Sciences in Szeged. Ed.: Emil SCHULTHEISZ], Jogtudományi Közlöny, 1954. Vol. 9. 505–506 pp.

Kareva, M. P.-Fedkin, G. I.: A szovjet állam és jog alapjai [Basis of the Soviet state and law.] Moszkva, Goszjurizdat, 1953. 490 p. Szovjetjogi cikkgyűjtemény, 1954. Vol. 4. 476–480. pp.

Formen und Bedeutung der Gesetzlichkeit als einer Methode in der Führung des Klassenkampfes. Berlin, VEB Deutscher Zentralverlag, 1953. Cikkgyűjtemény a külföldi jogi irodalom köréből, 1955. Vol. 5. 556–560 pp.

Az állam- és jogelmélet vitás kérdései a szovjet jogtudományban. Vita. [Debate on the questions of state and law in the Soviet legal sciences.] Cikkgyűjtemény a külföldi jogi irodalom köréből, 1956. Vol. 6. 41–44 pp.

Szabó Imre: A burzsoá állam- és jogbölcselet Magyarországon c. könyvének megvitatása. [Debate on The bourgeoise theory of state and law.] Jogtudományi Közlöny, 1956. Vol. 11. 254–256. pp.

Halász Pál [ed.]: Tanulmányok a Magyar Tanácsköztársaság államáról és jogáról. [Studies on the state and law of the Hungarian Soviet Republic.] Jogtudományi Közlöny, 1956. Vol. 11. 501–511. pp.

Szabó Imre: A burzsoá állam- és jogbölcselet Magyarországon. [The bourgeois theory of state and law in Hungary.] Budapest, Akadémiai Kiadó, 1955. Acta Juridica Academiae Scientiarum Hungaricae, 1959. Vol. 1. 161–181. pp.

A Magyar Tanácsköztársaság állama és joga. [The law and state of the Hungarian Soviet Republic.] Ed.: Sarlós Márton. Budapest, Akadémiai Kiadó, 1959. 359 p. In: Jogtudományi Közlöny, 1960. Vol. 16. 169–174 p.

Peschka Vilmos: A jogviszonyelmélet alapvető kérdései. [The basic questions of the theory of legal relations.] Budapest, Közgazdasági és Jogi Kiadó, 1960. 219 p. In: Állam- és Jogtudományi Intézet Értesítője, 1961. Vol. 4. 265–273 p.

Antalffy György: Állam és alkotmány az athéni demokráciában. [The State and the Constitution in democratic Athens.] Budapest, Közgazdasági és Jogi Kiadó, 1962. 298 p. In: Magyar Jog, Budapest, 1962. Vol. 9. 184–186 p.

Antalffy György—Halász Pál: Társadalom, állam, jog. [Society, state, law.] Budapest, Közgazdasági Kiadó, 1963. 458 p. In: Jogtudományi Közlöny, Budapest, 1963. Vol. 18. 358–359. p.

ACTA JURIDICA HUNGARICA, Vol. 40

CONTENTS

STUDIES

BOOK REVIEW

PRINTED IN HUNGARY

Akaprint, Budapest

HUNGARIAN ACADEMY OF SCIENCES

ACTA JURIDICA HUNGARICA

HUNGARIAN JOURNAL OF LEGAL STUDIES

AUTHORS:

Vilmos PESCHKA, Member of the Hungarian Academy of Sciences, Institute for Legal Studies of the Hungarian Academy of Sciences, Budapest

András BRAGYOVA, Senior Research Fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, Budapest

Attila HARMATHY, Member of the Hungarian Academy of Sciences, Justice of the Constitutional Court of the Republic of Hungary, Budapest

Vanda LAMM, Professor of Law, Director of the Institute for Legal Studies of the Hungarian Academy of Sciences, Budapest

Péter PACZOLAY, Professor of Law, Secretary General of the Constitutional Court of the Republic of Hungary, Budapest

Csaba VARGA, Professor of Law, Institute for Legal Studies of the Hungarian Academy of Sciences, Budapest

HU ISSN 1216-2574