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ANDRÁS SAJÓ*

Pluralism in Post-Communist Law

Abstract. This paper discusses problems related to the incorporation of constitutional rule of law into a pluralistic legal system, primarily in post-communist Hungary. Normative pluralism was characteristic of state socialism. Is this pluralism going to shape the emerging constitution-driven law of post-communism? The paper concludes that although constitutional universalism brought a new dimension to law and in principle has helped to promote the centrality of law in the competitive world of normative orderings, it may in the long run remain an elitist tool, fundamentally ignored or circumvented by sub-legal forms of social interaction.

Keywords: constitutional law, legal pluralism, post-communist law, post-modernity

Although post-communist societies increasingly differ from each other, the case of Hungary is sufficient to highlight a normative problem of legal pluralism, which could be best described as the problem of insufficient centrality of formal law in post-communist normative orders.[1] "Universal" constitutionalism with its specific value system is best understood as a significant attempt to secure a prime position for state law. This paper points to certain immanent and social variables which limit the chances of success for creating constitutional control over law and society.

Part 1 of the paper discusses certain methodological problems of normative pluralism and the place of constitution-driven law within it. Part 2 deals with legal pluralism under state socialism. Part 3 reviews the role of universal constitutionalism in shaping a normative order of government with a new legitimacy after the collapse of socialism and its social limits. Part 4 is an analysis of various forms of legal pluralism (internal and external) and the

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[1] Although they all started with a rather rudimentary legal-administrative normative system inherited from the Soviet regime, their social, cultural, economic, and other differences (as well as history and geography) make the post Soviet Empire countries different. The applicability of the Hungarian experience is certainly greater in Poland than in Russia, not to speak of Albania or Tadjikistan. Nevertheless, given the global importance of Russia, in certain contexts I *will* refer to Russia, at least to show how different the problem of pluralism can be in various countries.

relevance of the constitutional legal system to the competition of normative orders. The paper concludes that although constitutional universalism brought a new dimension to law and in principle has helped to promote the centrality of law in the competitive world of normative orderings, it may in the long run remain an elite tool, fundamentally ignored or circumvented by sub-legal forms of social interaction.

1. Pluralism and Post-communist law

Given the multiplicity of meanings attributed to legal pluralism it is important to clarify the implications of the term as applied to post-communist law. Certain connotations of the term were developed in reference to different socio-legal realities, which do not apply in Eastern Europe. (In other words, I find legal pluralism to be a strictly contextual phenomenon.) Roderick A. Macdonald's summary of the pluralist approach claims that the relations of the various elements are relative and hence they differ from one social setting to another:

"The legal pluralist acknowledges and seeks out certain elements of inter-normative relationships. The implicit is more important than the explicit. [...] The inter-relationship of normative regimes can never be a relationship of hierarchy, close-integration and vertical discipline. The legal pluralist imagines a process of mutual construction of a normative regime[...]. There can be no exogenous standards of fairness, justness and conformity that are not first filtered through the plural normative understandings of the regimes constructed and deployed by interacting parties."[2]

I am not denying that there are certain social circumstances where there can never be a relationship of hierarchy among the normative regimes. However, it seems to me that the model that best describes Eastern Europe at the moment is one where "official law" does play a central role and competing partial normative regimes are always determined in their relationship (e.g. parasitism, manipulation, distortion, etc.) to official state law. As Karl Marx argued in a different context there is always a specific dominant form of production, which determines the place of other coexisting forms of production. Likewise, in contemporary societies in transition, notwithstanding post-

[2] Macdonald, R. A.: Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism. *Arizona Journal of International and Comparative Law* 15 (1998): 69, 89–90. Macdonald here refers to Webber, J.: Rapports de force, rapports de justice: La genese d'une communauté normative entre colonisateurs at colonises. In: *Le Droit soluble: Contributions quebecoises* à *l'étude de l'internormativite* (ed. Belley, J. G.). 1996. 113.

modernist claims, it is state law (with all its internal pluralism) that directly and indirectly determines the place of other unofficial legal systems, and to a lesser extent that of other normative systems.

Modern law was reintroduced in Hungary under the guidance of "universal constitutionalism". This resulted in considerable inefficiencies. The normative structure and supervisory capacity of constitutionalized state law is not a guarantee for setting a social agenda, nor for the actual steering of social life, and its institutions (family, race relations) or other spheres of life (e.g. business).

The tensions that exist among the elements of the pluralistic legal system are partly related to the post-modern nature of state law. "If, as a conception of social organization, modernism was primarily about rationalism, universalism, certainty and order, post-modernism seems to be about empiricism, particularism, indeterminacy and disorder".[3] Obviously, these post-modern features of indeterminacy might allow the existence of competing normative systems. The particularity of post-communist law is that it was imposed as if it could actually provide the values and efficiency of modern law. The indeterminacy that was already built into the law of Western countries, which served as the model in the legal transposition, was not acknowledged in the East. It is no wonder that post-communist state law appears to have been unable to reflect the basic characteristics assumed to be the cornerstones of modernity (as listed above). In the early years of the democratic transition there was a strong emphasis on the universal dimension of the constitution, human rights, and the rule of law as a *par excellence* project of enlightenment. In reality, the law that was transposed from the "West" and then transformed and formulated increasingly at the local level was indeterminate and porous, enabling more and more local plural normative subsystems to resurface, continue to exist or be created. Transferred "modern" law contributed to the malfunctioning of the social system, to the undermining of the legitimacy of the rule of law, and to diminishing the interest in and enthusiasm for the effort to enforce the new legal system. The indeterminacy of post-modern law in post-communism enabled the operation of normative regimes that are predominantly dependent on or related to the official law. This plurality (under the guidance of the official law) enabled the *local* domination of criminal or corrupt individuals, without providing to social relations some kind non-alienation or intimacy. Some post-modernists claim that post-modern plural polymorph law can actually provide such communal values instead of rights.[4] The co-operation

[3] *Ibid.* 72.

[4] Ironically, the spontaneous orders of post-modernism were also promised by Hayek's minimalist rule of law.

that emerged in the distorted and parallel legal systems is hierarchical in nature or at least enables temporary dominance. One of the major shortcomings of both the official law and the competing normative systems is that at the moment neither is able to offer long term fixed relations.

The more we move away in time from the collapse of state-socialism in the Soviet Empire the less appropriate it is to use the term "post-communist" with regard to the respective new legal systems to have emerged. The legal systems are increasingly departing from their common Soviet origins. From the socio-legal perspective, which looks at law within the social system, the emerging legal systems are increasingly differentiated. Despite developing out of it, the post-communist legal system is not determined by the Soviet legal system. Even to a lesser extent was the Soviet political system and Soviet social model responsible for determining the future of the many societies formed on the former territory of the Empire. This is partly because despite the unifying umbrella of state socialism these societies were always rather different from one another.

Nevertheless, there is still a good enough reason to discuss the problem of pluralism in the East Central European legal systems, notwithstanding that they have increasingly less in common (except for the insufficiency of human resources and a sufficient social aptitude to follow closely the Western legal model that these countries imposed on themselves in the transition). This reason is clearly a normative one and is based on the following: Modern law—due to its formal qualities—represents (at least in principle and at varying social costs) a number of social and normative values such as predictability, security, impartiality, equality, and perhaps even a sense of justice. It also contributes to the establishment and functioning of the market. Modern law has a function of creating social order and—again, at a considerable social cost—it offers a kind of social peace. The centerpiece of a modern legal system founded on the rule of law is the constitution. Modern constitutions are not only tools for achieving social cohesion within a state governed by law but also offer a blueprint to circumventing governmental abuse of power. Further, they may satisfy the Kelsenian need for positivism by providing a solid hierarchy of norms and they offer a mechanism to implement the hierarchy through constitutional adjudication.

Only pompous lawyers—but no sociologist of law—could be naive or corrupt or perhaps blind enough to overlook the fact that restraints imposed by modern law on governmental oppression are at best limited. Certain forms of social domination are perhaps more civilized because of certain legal forms. These legal forms help to disguise milder cases of dominance or structural oppression by the state or other social agencies, institutions, groups, and

structures. Still, the rule of law may have a socially beneficial effect in transitional societies if it successfully penetrates into and permeates all normative structures in society, or at least if it becomes an efficient model for all normative systems developed around state law. It *is* important to have a normative system that at least has the ambition to envelope all of society and which at least promises to provide—and in certain regards actually provides—particular solutions to social conflicts and aspirations that are not arbitrary in nature. To the extent that this system can effectively limit the power of government, it will indicate or signal that power can be limited honestly and credibly.

Hence the special importance of the problem of pluralism in post-communist law. It is in this context that this article intends to determine the extent to which the values of modern law as expressed in the constitution and constitutional law actually exist in the law on the books and in the law in action. The paper also makes an attempt to show how state law permeates other normative structures which apply to the very same relations state law intends to govern, and I also try to locate the spheres which are outside of state law's reach, and to identify their various competing normative structures. In other words, even if some level of legal pluralism is likely inevitable, the normative issue for post-communist law is the examination of the extent to which the law of the state (that claims to be the depository of universal constitutional values) can maintain a central role for itself. The problem of the social impact of state law is further complicated by the constitutional mandate and mission of government and official law. After all, for reasons of legitimacy, the state tends to represent itself and its actions as being mandated or sanctioned by the constitution.

The state—which is inevitably a major social player—generates a whole agenda for itself in the name of carrying out the goals of the constitution. As a result, state enacted and enforced law has a special and often central role in modern and post-modern societies. This is not to say that the law is monolithic and thus is the only normative system determining social action. State law is just one of the various competing normative orders. It is a relatively recent phenomenon that centralized state law became the dominant normative order, or at least that it could make such a claim. In many countries state law at the level of legal theory and constitutional law was held sovereign, i.e. not only supreme but exclusive too, from an official perspective. This supremacy was never complete however, as one can already see in Max Weber's complaints about the particularist corporative order recreated at the advent of the 20th century.

Even the modern formal-rational legal system itself is subject to *internal pluralism*, as there are competing legal subsystems within it. These subsystems,

like for example the various branches of law in continental systems or the parallel enactments of competing state bodies (including branches of power and competing public administrations), are never fully harmonized, even though modern law tries to develop intellectual (substantive) and procedural means to resolve or at least control such conflicts. Internal pluralism refers to different phenomena. State law is composed of culturally different traditions and is generated by competing decision-making bodies, and to an extent these subsystems continue to resist attempts at normative and social homogenization. Note for example that even in England—a country that is seen by many as the model country for the rule of law—prisons had been beyond the reach of external judicial control until very recently. Today legal homogeneity attempts to extend judicial review to even these areas previously off-limit, but the limits of judicial and constitutional review in Hungary also designate the current limits of homogenization.

It is also important to understand the notion of pluralism from the social actor's perspective as well. Citizens have multiple—and to some extent conflicting—legal statuses. This plurality is of course partly the consequence of the existing multiplicity of competing roles of the individual who exists in a complex society. The applicability of a certain set of rules depends on the qualification of one's legal status. The alien (migrant) who spends six months at the same detention center first as an illegal entrant, then as an asylum seeker, then, after positive review as a non-resident alien, and finally as a resident alien notices enormous differences in treatment.

Legal pluralism is often used to refer to the relationship of normative orders. It is undeniable that quite often a system of norms not created or enforced by the state prevails over state law. There are important pockets of non-modernized sectors in modern societies with their own partial normative systems. It is, however, misleading to call all these normative systems as "legal" or "law". In most of the actual cases the problem of state law is simply that it has to compete with many other forms of normative regulation. State law, and constitution driven law in particular, are often inefficient not only because of a lack of resources to guarantee that they can perform their declared function, but also because of the official value system they tend to impose on social organizations and institutions. On the other hand, the concepts of non-state-law tend to disregard the characteristics of modern law, those characteristics, which make formal and general law so important for modernity. In this context constitutional *universalia* are both formal (e.g. elements of the rule of law) and substantive (equality, rights). Constitutionalism is an attempt to structure government through checks and balances. From a societal perspective this means the

exclusion of certain means for particular social groups in their attempts to access state power.

Only some of the normative orders that compete in contemporary society have features which make them similar to state law. A normative system may compete with official law in a number of ways. Some of these competing systems show considerable similarity to law in their structure (e.g. in terms of generality, sanctions etc.) If normative systems use similar or interfering codes and signals, then the issue of coordination and primacy comes up. It is in this context that the social primacy of state law within legal pluralism becomes relevant. Successful competitors with official law dispose of one of the basic characteristics of state law, namely reliance on the use of coercion (sometimes including official enforcement), and the generality and abstractness of rules. Non-state law may rely on legitimization related to its creation. Modern state norms are very often democratically legitimized—i.e. they are *creations*—while alternative systems have their roots in traditions and/or are supported by common practice. But even in non-state (unofficial) normative systems the beginning of the existence of the norms predate decision and action, and thus societal actors are aware of these norms by default. More or less systematically they cover entire areas of social life and they are enforced partly by the use of force, partly by communal sanctions. As such these competing normative systems challenge the constitutional order which insists on the domestic applicability of its universal values and arrangements.

To the extent that local normative systems are pre-modern or post-modern in their particularism, there is a potential conflict with the modernity components of the "universalist" constitution. Actual constitutions and constitution-generated systems of norms depart from the alleged "universalism" both in the East and in the West. Some of the most obvious examples of constitutional concessions which create exceptions to universal principles of constitutionalism are the accommodations made for religious institutions or the institutionalization of the concept of the state of emergency. The acceptance of special personal, religious or ethnic legal regimes in the constitution allows for hidden adjustments in the legal system. This latter development is, however, very controversial as it may result in the extension of constitutional control to uncharted spheres of social interaction and hence may lead to new conflicts and previously unforeseen irrelevance.

The concept of legal pluralism results in a paradigm change in legal thinking. This is directed against positivist concepts of law which are based on sovereignty and exclusivity. This positivism was reinforced by the "constitutionalization" of law. Constitutionalization as one of the latest developments

of legal "universalism" means that all branches of law are destined to be subject to an increased level of constitutional review, and in addition their internal value system and even their reasoning is intended to be governed by the constitution. These trends allegedly increase homogeneity within law. The claim that these trends represent universal tendencies and even universal values adds to the legitimacy of the constitution and correspondingly to that of law because it indicates that the system meets international standards.[5]

Even if one admits the polycentricity of law one ought to take a position regarding the place of state law. The constitutional legal system has a distinguished place among the competing or coexisting normative systems. A constitutionally reinforced positive legal system has distinct roles in the shaping of the social order. The penetration of constitutional *universalia* into a legal system has contradictory consequences. Constitutional universalism does have a potential to homogenize the legal system, e.g. it extends the scope of the rights language and juridification. However, at the same time it causes new value conflicts and new institutional conflicts.

A universal value system may be imposed on existing subsystems of social action in such a way that this results in new conflicts. This might be aggravated by the institutional conflicts within the legal system: legal actors too have their own interests which might be jeopardized by universal constitutional imperialism. Hence the conflict between constitutional and other courts, hence the reluctance of ordinary judges to look at the constitution.

The constitutionalization of law is inherently a source of conflict both within and outside the legal system. At the same time it can be quite successful in creating rationally or judicially manageable frameworks for social and political conflicts. Constitutionalization may also help to increase the degree of social inclusion of certain marginal groups (at least at a symbolic level). But in cases where constitutional "resolutions"[6] did cause the legal system to be more inclusive and thus managed to defuse social conflict, constitutional juridification also increased law's social presence. Law exercises a certain mental control vis-à-vis other normative systems, even if it does not always succeed in determining human behavior. Pre- and post-modern social thinking will conflict with the universalistic logic of formal law made of general commands. It should be added

[5] The universalism of recognition and the competition among sources of normative recognition is an important dimension of legitimacy and conflict among normative systems. See Sajó, A.: Rights in Post-Communism. In: *Western Rights? Post-Communist Applications* (ed.: Sajó, A.). Deventer, 1996.

[6] The term was used by Timothy Garton Ash to describe the odd combination of revolution and reform that characterized the dismantling state-socialism.

that the contribution of modern constitutions to modern law is ambiguous. Certain values that are part of contemporary constitutionalism in some of its forms—namely welfare rights—may undermine the formal qualities of modern law to the extent that they enable material justice and (often quite arbitrary) state intervention in spheres of private life.

What is the result of the attempts of competing normative systems to minimize the influence of modern law? Do they result in the perpetuation of pre-modern structures or in a perpetual disorder of mutually exclusive competitive orders? Even where community-made or tribal normative systems prevail, or where state law is not implemented for one reason or another, new normative structures emerge and begin to function without necessarily being in open conflict with official law. New social practices are intended to hide non-state law from the state, or, alternatively to gain the state's recognition. Self-regulation as privilege is often conceded and there are many informal guarantees that the state will never monitor, take into consideration, or will turn a blind eye to whatever is happening behind its back.

2. The nature of legal pluralism in state-socialist Hungary

Pre-communist Hungary had few democratic traditions yet it was nonetheless a country with considerable official respect for the rule of law. Its legal system was under the influence of Germany but it also had considerable peculiarities due to its feudal customary law and the institutionalization of a strong independent judiciary in the Austro-Hungarian Empire. Given the demographic predominance of the peasantry within the society it is not surprising that peasant folklore survived as a competing normative system, recognized to a small extent even by the courts. Further, it was part of peasant mentality to avoid coming into contact with the law and evade it to the fullest extent possible without challenging it outright.

Under the communists the legal system copied Soviet models to a great extent. However, the more refined qualities of the pre-socialist legal structure did not disappear without a trace, although the legal system was rudimentary and allowed for nearly unlimited discretion and delegation of authority. Despite all of this, there was still a real need for some consistency and predictability, at least in order to run the public bureaucracy, even in a system where important decisions were taken at secret communist party meetings. For example, beginning with the Sixties the law stated that citizens may receive an exit visa to the West once every three years, as long as such visa would not violate the

"public interest". The meaning of the term "public interest" was not specified in the law and judicial review of these decisions were not available. Nonetheless, the law mandated a 60 day deadline for the application to be processed. The conditions of applying and those of a refusal were promulgated in a norm accessible to the general public, although the source itself was a relatively low level administrative decree, which was easy to amend.[7]

Legal pluralism existed as part of "socialist cohabitation", a *modus vivendi* of the middle classes that emerged under Communist Party Secretary General János Kádár from the late 1960's. The pragmatic party leadership realized, at least to some extent, that the officially declared Soviet values and goals, if vigorously enforced in private affairs, will run into considerable social resistance, which by that time the regime was more keen on trying to avoid. So it offered certain informal compromises leading to the tolerance of private entrepreneurship—however limited in scope—among others. As part of the same attitude of compromise the Hungarian authorities required only a limited active endorsement of the regime, although organizational loyalty remained a crucial prerequisite of social advancement within the system.

At the same time, and partly irrespective of this soft attitude of the Communist Party, the individual and her few remaining personal communities (workplace relations, extended family) tried to develop creative forms and networks of cooperation that disregarded the official normative order. Although the state tried to penetrate private relations and control them—thereby undermining the social grass roots of independent normative orders—it was part of the communist strategy of domination that parallel normative orders were able to develop, in the shadow of the official yet uncertain law.

There were two important hurdles to the emergence of these parallel normative systems. One, they could not exist in open defiance of the official normative system and two, they could not become interrelated at the level of social interaction or even at the level of public opinion on a national scale. At the shop level in the factories the workers followed their own normative expectations with the complicity of the foreman or even the director (as to work safety, hourly norm, work intensity, (lack of) productivity, (lack of) efficiency in the use of raw materials, distribution of assets, income, changing/altering of product line, etc.). However, they always did so by creating sufficient paperwork to demonstrate that they observed the official norms and the expectations of the command economy. Further, it was crucial that the disguised

[7] In 1987 the Act on lawmaking was enacted. According to the Act rights and other important matters were to be regulated by acts of parliament which then meant mostly an act of the Presidium (law-decree).

normative order remain hidden from other similarly situated actors. The regime would not tolerate the existence of a shared local experience if that attempted to emerge as a public phenomenon of some scale. By keeping the local experience hidden the authorities were not forced to confront and acknowledge the *de facto* existence of parallel norms.

Generated by economic scarcity a partially correlated structure of sub-legal (and to an extent illegal) local normative ordering, a kind of informal protocol of transactions, developed within the sphere of daily life. Scarcity of resources and their uneven distribution based on demonstration of loyalty led to the development of a system of exchange that included the bartering of anything ranging from common goods to administrative favoritism, thereby leading to a state of affairs bordering on the notion of systemic corruption. People were aware that they were committing an act of bribery in order to get a bed in a preferred hospital, or have access to certain consumer goods in short supply, or perhaps in the process of obtaining some favors (in ways that were not necessarily legally prohibited but certainly questionable by the "moral standards" of the state) when dealing with an official of the public administration, but all the while they maintained a peculiar sense of schizophrenia which allowed these illegalities and immoralities to be understood as "normal".[8] So, once again, with institutional and even organizational complicity of the authorities, there were parallel normative systems, partly in violation of the official law, yet at the same time enabling the functioning of the system from the perspective of practicality.

Compared to the legal system of the Soviet Union the primitive legal system of Hungary satisfied the requirements of hierarchy and predictability, a formal feature which the Slavic and Central Asian Republics located on the former Soviet territory could not master until this very day. On the other hand "socialist legality" failed to create a legal system which would have punished those who abused power to the detriment of their fellow citizens. The legal system also failed in establishing its own credibility with regard to the accountability of those holding power (including the use of force by the police). The legal system was only one of the many components of a society wide system of inter-dependency which also included many unwritten rules. Instead of recognizing legally enforceable rights, those who were loyal received favors. This contributed to the gradual emergence of keeping society dependent of the state, including the dependence of parallel non-state normative systems on the clemency and mercy of the state legal system. For example, state controlled farmers' cooperatives increasingly participated in industrial activities, an activity that was

[8] Sajó, A.: Hungarian victims' reaction to crime. *Research Review*. 1989. 1. 97–102.

not officially fully permitted, but could continue to prosper as long as some influential socialist "boss" provided political protection resulting in non-interference by police and other authorities.

3. The system emerging after the collapse of state socialism: resources of constitutionalism

In all the post-Soviet countries of Europe the formation of the new non-communist regimes was carried out in the name of Westernization. It was especially the case with the creation of a rule-of-law legal and governmental system. The negation of the previous regime was understood—at least in the first years of the transition—as the adoption or even return to Western law and respective legal institutions. This was a legitimate goal even in the case of rampantly nationalist regimes because even these had to demarcate themselves from the inherently corrupt previous regime. Nothing seemed more credible than the adoption of those forms and institutions of government which were vehemently opposed and denounced by the communist regimes. Furthermore, in some countries there was a genuine popular discontent with the lawless oppression of the past regime. While the early legislation and constitution-making of the Nineties was essentially a rapid wholesale importation of Western laws and legal principles, the process was plagued by many misinterpretations, deliberate distortions, and a general lack of systematic implementation. The process was inevitably slowed down more and more, partly because of costs and social irrelevancy, and partly because of the increased ability to formally articulate locally emerging initiatives specific to the unique circumstances of a particular country. This genuine development was often formulated in the shape of nationalist ideology, erroneously referring to national legal traditions which, in reality, were actually often Soviet and bureaucratic traditions in origin. Such resistance to change helped to preserve the *status quo ante*.

Nevertheless, there were countries like Hungary with markets wide open to international investment, as they truly depended on foreign investment and thus could not afford economic isolation. As for the political sphere, political groups were not dependent on the monopolization of political power. This meant that the legal system continued to develop along Western lines (primarily following German models and increasingly those of the European Union as well). The drive to Westernize the legal system was also fueled by the commonly held position pronouncing the importance of entering the camp of the West institutionally, by way of joining NATO and the European Union. Western

recognition continued to play a major role in legitimating the democratically elected or established political power. Perhaps the inferiority complex of the new leaders rooted in their lack of sufficient understanding and knowledge of the Western world contributed to such needs for legitimacy. These factors might also have been supplemented by the actual dependency on foreign investors of both the country and the citizens from the very beginning.[9]

In a number of areas the current character of the legal system is reminiscent of a somewhat simplified, yet relatively modern Western European system, at least as far as the law on the books is concerned. Notwithstanding some deliberate distortions, today there are effectively functioning institutions safeguarding the implementation of an impressive new body of law. Most of the usual guarantees of independence are in place. The civil service sector is subject to law, and offers a secure long-term professional carrier opportunity. Closely related to this phenomenon is the tendency which has seen the number of lawyers on the bar increase tenfold and accordingly the number of law students admitted to university is almost one magnitude higher than the numbers registered in 1988. The Hungarian Constitutional Court initiated a vigorous campaign to protect and even to create fundamental rights. The attempts of the Constitutional Court were met by the formal acquiescence of the government. Still, even at this moment there are more than a dozen constitutional omissions which have not been remedied by the legislative branch, notwithstanding the (sometimes repeated) condemnation of the Court. Very slowly—and in a most controversial way—constitutional values and rules (including the "universalism" of the ECHR) do penetrate into the jurisprudence of lower level courts.

Nevertheless, there is growing discontent with the functioning of the legal system, and anecdotal evidence (amplified by the press and "law and order" politicians) indicates that the system is malfunctioning or that it is socially irrelevant, partly because of the efficiency limiting consequences of the rule of law. It is true that law can no longer be used as a cynical tool of monopolistic oppression. Nonetheless, it promotes the domination of the political power holders, enabling them to gain and protect personal advantages. The formalities of the rule of law helped the elite to steal the state and later to keep the booty. People believe that there is rampant corruption and that the laws are written in a way that favors the powerful, including those members of the nomenclature who managed to transform their social networking capital into power and property. Tax evasion is wide spread and systematic, and employment is often unreported in order to avoid the otherwise excessive social security contributions, and many

[9] In Hungary even the racist party leaders expect legitimacy from being pictured in the company of Le Pen.

contracts of sale or services are not formalized at all or are finessed. The law offers limited protection against police abuse, neither does it provide safety on the streets against crime. The overall performance of law enforcement agencies is considered to be poor and the authority of the police is much less respected than in most Western European countries. At the same time most people do not expect to get meaningful protection of their property and contractual rights from courts and public administration. Private enforcement of contracts (debt-collection, including abusive enforcement) is on the rise. Consumers are less protected than ever, at least the consumer protection inspectorate thinks so when reporting that in retail trade at least half or as much as 60 per cent of products sold are defective or substandard (smaller actual weight, no warranty, poor quality, etc.). In particular those in a weaker social position expect no protection from the courts and the administrative system. Rather, they continue to perceive themselves not as rights-holders but as dependent clients of the state.

The "rule of law", one of the fixations of the Hungarian Constitutional Court and of the emerging political and economic elite, has some perhaps unintended consequences. For example, former communists never actually had to wake up on a day of reckoning as a result of the insistence on the rule of law and personality rights, thus holding responsible former communists and secret service agents for their actions in the past has been halted, while personal dossiers of these former agents of the regime remained under the exclusive management of the government in power until at least 2003. Along the same line (i.e. rule of law), questionable privatization contracts with implicit advantages to the new owner remain in force, and other privatization and bank consolidation deals based on explicit favoritism, corruption, and embezzlement remain off limits.

4. Parallel normative systems

a) Continued illegal normative systems within the legal system (the "norm-making" power of scarce resources)

Under state socialism it was one of the preconditions of social cohabitation that no sphere—except for, to a limited extent, family relations—could claim relative independence or autonomy from the state. It is in this respect that civil society was in any way meaningful to the individual. The desire to be part of civil society simply indicated a need for spheres immune from aggressively inquisitive state oversight.

Today, the extent to which social subsystems and various spheres of social activity have gained independence from the state and the viability of their respective normative orders still remains to be seen. It is clear that in sectors where market conditions have prevailed the former scarcity based normative systems have also disappeared. Today, trivial as it may sound, no shopper is going to have to bribe a salesperson to buy a pair of blue jeans at the store. By the same token, the conduct of the salesperson is determined by the ever changing rules of the labor market and the rules set by the store management itself. However, contrast is most apparent where the state continues to be the provider of services without adequate resources, for example, in health care and education. There, scarcity prevails. This means that traditional normative structures of normalized illegality remain in place unchanged, including the necessity (on both the side of the provider and the recipient of services) of rampant corruption in exchange for rightful services or illegal favors. In these scenarios, obviously, patterns developed earlier are carried over and continue to be useful. Consequently, corruption becomes increasingly normalized with the unintended effect that it may become a model of operation even in those areas that are not affected by the scarcity of resources.

The schizophrenia of legal consciousness remains a constant, while in the meantime a highly problematic solution emerges. Cynicism seems to be the universal answer and the way out of this conundrum: it is not even perceived as immoral to be on the recipient end of and participate in cultures of corruption. This tendency may well end up undermining the legitimacy of the new constitutional democracies.[10] In a way even the rule of law may contribute to shortage and scarcity and hence create new opportunities for corruption. The recent history of the land register is a telling example. Land records became crucial documents in the privatization process. The workload of the administrative agencies responsible for maintaining and updating the records increased dramatically. The state's monopoly of registration resulted in excessive delays which were not acceptable to the participants of the rapid privatization process. As a result, lawyers and other actors increasingly performed the role of the middleman in greasing the hands of the administrators in order to get expedited processing and increasingly even for falsifying the records of the land register. Immense administrative delays also lead to the evolution of a new industry operating on the currency of small favors and bribery. Volunteer experts would offer their services for adequate compensation to process requests at the speed of light.

[10] See Sajó, A.: Corruption, Clintelism, and the Future of the Constitutional State in Eastern Europe. 7 *East European Constitutional Review* 2, 1998. 37.

b) Forms of internal pluralism

There is still enormous dependency on the state, and not only in the economy (70–80 per cent of which is privatized) but in all spheres of private and communal life as well. Religious exercise, non-governmental activities, local self-governments, pensions and culture all depend on a politicized central government. Until recently even broadcasting had been a state monopoly. In Hungary such dependency is "constitutionalized" in the sense that both the government and the Constitutional Court find the active promotion of constitutional welfare rights the obligation of the state.

The towering all-encompassing presence of the state, a fact of life inherited from state-socialism is, however, over. It seems to have been replaced by mutual dependence between civil society and the state, or more specifically between a clientele of service recipients and government bureaucracies. In theory, codependence of the public and private institutions is likely to lead to some kind of domination of either one or the other. Here an entirely new phenomenon emerges: the interdependent private spheres try to take over the state (see "state capture"[11]) and determine its law.

In this struggle two predominant strategies seem to have emerged so far: (a) increasingly ambitious attempts to lobby the legislature that a private ordering of a particular segment of life be blessed as general norm *(termination of pluralism in favor of particularism)*, and (b) private and non-governmental structures pressure the state to allow their own private ordering to prevail and exist "undisturbed" or even receive state sanctioning and enforcement *(exclusive private ordering)*.[12]

In reality, of course, these are well known developments in neo-corporate formations. The surprising development in Hungary is that here relatively weak corporate formations are successful. In Hungary about 12 per cent of the population is actively practicing religion (many of them follow non-mainstream religions), although nominally 70 per cent of the population considers itself of "Christian origin". In the past nine years, despite the lack of popular enthusiasm or demand for it, the politically compromised (collaborationist) leaderships of

[11] See for example Hellman, J.–Kaufmann, D.: Confronting the Challenge of State Capture in Transition Economies. *Finance and Development*, September 2001, Vol. 38, 3.

[12] A classic, non-post-communist example is commercial arbitration. Max Weber considered it as a reaction of business interests to the formal, anti-business rationality of state law. According to Weber arbitration is a necessity even where the private law of the state embodied market rationality, because bureaucracy and judges are unable to understand market considerations.

the traditional churches have been receiving rather generous financial support both from the socialist and the conservative governments. The ownership rights of buildings formerly belonging to the traditional ("historic") churches were returned even in cases where there were no religious personnel to make use of them. Also, there is another tendency in moving public education closer to religion in the form of financial support to church operated schools.

Similar examples of private ordering sanctioned by the state are numerous. A weak and barely legitimate trade union movement got control of social security funds[13] which were de-etatized and transferred to trade union controlled self-governments. All sorts of chambers of commerce have been created by legislation with public supervisory and disciplinary duties in areas where the professionals' interests clearly prevail over consumers' without proper oversight (i.e. trade chamber, medical chamber, the bar). Legislation has also been passed to create public foundations to perform government tasks (services) with (financial) resources transferred from the government, but without continued governmental supervision, intervention or personal accountability incorporated into the system. The bylaws of such NGOs are not subject to government approval since that would go against the ideal of creating a civil society independent of the powers that be. Quite often the boards of these public foundations are comprised of former civil servants who previously had been in charge of the very same functions, but for much lower compensation and under stricter conflict of interest rules than what is the norm at these foundations. Privatization of the state implies a private ordering that is partly immune to the normative expectations of the legal system. In Hungary, the problem is fortunately only that of scope, while in Russia, for example, private normative orders have been known to undermine central coordination. In Russia not only do the various regions and cities tend to follow their own particular legal order,[14] but even larger factories and industrial conglomerates disregard central and other legal norms and follow their own normative structures as to workplace safety, taxation, salary, contractual relations, etc.

One does not even have to believe that contemporary law is fundamentally post-modern in nature (i.e. inconclusive, not well defined) to recognize that modern legal systems may contain competing normative structures, although

[13] Repealed by the first law passed by the newly elected conservative government in 1998.

[14] For example, in some Russian Republics the legislation, by failing to legislate on private land ownership, successfully disregarded that the federal constitution expressly provides for the right to private property on land. The political leadership in these republics continues to manage land and forest as state property.

admittedly with relatively settled rules or formulas for resolving possible conflicts. It is in this context that the allegedly homogeneous[15] constitutional system attempts to colonize other spheres of law and it is through these constitutionalized legal branches that it attempts to introduce other institutions and interactive structures into a constitutionally devised homogeneous order.[16]

c) External legal pluralism
i) non-inclusion

The above mentioned interdependencies of the private normative structures and law reveal a typical tension. Other normative structures simply disregard or challenge state law, and hence in that case there is not even a chance for the rule of law and values of legal modernity to prevail.

First of all, so long as there are non-integrated communities in society there will be separate and segregated quasi legal systems. State-socialism intended to atomize its subjects and tended to include all members of society in its general network of supervision. In part these conscious and systematic attempts of atomization were due to a fear of autonomy of any sort, including autonomy of communities. Hence—at least in Hungary—very few groups managed to maintain their own self-supporting norms. The most significant example of this norm protection could be observed in the Romani (Gypsy) community, which quickly regained some of its earlier (although distorted) customs after the end of state dominance. Such increased reliance on a parallel system of norms is partly the result of increased segregation that followed the massive lay-offs after the collapse of communism, affecting disproportionately the Roma. Clan-based normative systems became vital for survival of the segregated Roma with the growing marginalization and prejudice that followed the collapse of state socialism turning increasing numbers of Roma into social outcasts. Suddenly, thousands of people[17] found themselves excluded from state supported social

[15] Of course, the constitution itself is a source of institutional (inter-branch) and value conflicts.

[16] These phenomena are known in Germany as third party effect (*Drittwirkung*). Similar trends emerged in *New York Times v. Sullivan.*

[17] There are probably 400–600,000 Roma in Hungary, although at least a third of them fully integrated into the lower working classes, and another perhaps 20–30 per cent not living in segregated communities. The isolation is more visible in Romania, where the Gypsies were hardly ever settled and where their number at least a couple of millions. Here, obviously the parallel legal system is more visible and widespread, among others because there their customs were never corrupted to the extent they were in Hungary due to the partial social integration.

networks because of segregation. The Roma could not rely on state law as a system of protection as this was increasingly denied of them. Other similar factors of growing alienation from official law include the application of legal rules which were harmful to Roma or were applied in a prejudicial way, such as relating to the due process guarantees of criminal procedures.[18] Needless to say the functioning of a so-called culturally based legal pluralism is significantly more critical in multiethnic societies where ethnicity is also a designator of competing cultures. This was the case of Albanians in Yugoslavia and Macedonia, and of many Muslim and nomadic communities in Russia.

There are other examples of differentiated life-forms which tend to disregard the state without confronting it. There is of course a known sphere outside or above the law. The wealthy can afford to pay (or avoid) all the fines imposed by a weak state and conduct a life of their own disregarding the law. The wealthy are ready to pay the parking and speeding tickets, if unavoidable, and pay the penalties for building villas without a building permit where zoning regulations may be in place in order to protect an environmentally sensitive area. Or better, they use their enormous resources (financial and social) to delay enforcement, or bribe officials if it is cheaper than paying penalties. If pressured, they usually find an even weaker state to repatriate to.

ii) legal orders attempting to take over the state legal order (the "criminalization of the state")

The most important normative order competing with, challenging, and in certain countries endangering official law is the law of criminal (illegal) organizations. Sometimes these are systems of rules generated within large organizations which were created by or with complicity of the government, such as oil and gas companies. Extraction, refining, and export-import are usually licensed monopolies. These activities—often being of a criminal nature themselves—generate further criminality as the profits move into other explicitly illegal forms of investments (drug and arms). The people involved in these large sectors are operating by a set of relatively simple rules which apply to their entire conduct. People who get involved in this world usually do so without the possibility of opting out at a later time.

[18] It is not the subject of the present paper to decide whether the Roma-official law conflicts are increasing because of the growing Roma-"White" conflict, or the conflict is growing because of the cultural differences among the two normative systems. This is a multi-cultural conflict which could not manifest itself under socialism as socialism oppressed all diversity, and also destroyed Roma culture through superficial integration.

A second major area where the government's legal involvement is critical in many regards is banking. In this sector, at least in Hungary, the direct involvement of organized crime with the ownership structure (although the oil industry does need banks for money transfers, that is, laundering purposes) is believed to be marginal. The law used to allow privileges, such as lack of stringent regulation of the writing off of bad debt, legalized forms of self-dealing, etc. In exchange the management of banks which were dependent on state bail outs were ready to finance government initiatives. No-interest loans were offered to government people. In this example the borderline between state law and bank generated (but officially sanctioned) practices that have the power to transform the entire national economic landscape becomes impossible to locate. The self-regulation of the banking sector partly operates as a private regulatory system that is sanctioned by government. Banking laws, like in more advanced market economies, are written to a great extent by the banking community. Further, the official regulation creates and enables a private system which has more practical influence on everyday life than direct governmental regulation itself. Banking law, or rather the law of the banks, is the result of hidden yet formally completely legalized interaction with state law, or at least with official figures in charge.

In both cases (oil and banks) official law helps to legitimize immoral and by ordinary standards very often illegal corporate behavior which then has the enormous power to shape the fundamental social and economic structures within emerging market economies. It is within this interaction, above all, where the formal structures of modern law fail to exert the much needed positive impact they are designed to bring to society. Ultimately, state law may in fact fail to properly shape elementary forms of social interaction based on equality, trust and reliance, and perhaps even a sense of justice.

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Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law

*(Developments and Experience of Postmodernity in Canada)***

Abstract. A scale of globalisation is witnessed in the present case study as exemplified by (1) the transformation of the role of precedents; (2) the multicultural and multifactorial search for a common solution instead of any law-based administration of justice; (3) dissolving definition by and conclusion from the law in the name of a legal socio-positivist approach; accompanied with (4) some new prerogatives acquired by courts through a) unfolding statutory provisions through principles in judicial actualisation, (b) constitutionalisation of issues, as well as c) the Supreme Court imposing upon the nation as its supreme moral authority. In both cases, the main point is to re-consider the law's normative material in a way somewhat released from nationally positivated self-restriction when searching for a kind of trans-national cultural community. By gradually eliminating the law's substantivity, legal self-identity is mostly preserved in a rather procedural sense.

Keywords: civil law, common law, precedents, constitutionalisation, legal positivism, proceduralisation

Canada has not been treated well by legal comparatists up to the present day. Compendious works like the mapping of the legal world *by René David, Rudolf B. Schlesinger* or, from among present-day authors, by, e.g., *Michael Bogdan*,[1]

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[1] David, R.: *Les grands systèmes de droit contemporaines* (Droit comparé), Paris, 1964. 630 pp. [Précis Dalloz]; Schlesinger, R. B.–Baade, H. W.–Damaska, M. R.–Herzog, P. E.: *Comparative Law*. Cases–Text–Materials, 5th ed. [1950], Mineola, N. Y., 1988. liii + 923

do not, apart from a few commonplaces, devote much attention to it either. In textbooks, Canada is usually characterised—perhaps to even further emphasise the peripheric or downright provincial role attributed to it anyway—by some simple stereotypes according to which the largest part of the area, once developed under British influence, unified later on in a federation, while Quebec could retain its French law from 1663 until today. Its geographical location neighbouring the United States has all along—and mainly from post-World War II-years (first of all in foreign policy and government administration, but sensible in the tone of scholarly and journalistic literature as well)—served as a motive to emphasise its sovereignty; albeit, for obvious reasons, it can scarcely (and increasingly less) withdraw itself from the dominant influence of the adjacent superpower in aspects as philosophical orientation, artistic taste, legal patterns and other segments of life.[2] Nowadays, Canada excels in both high living standard and openly professed multiculturalism as one of the most self-confident leading powers of the world.

Its law has indeed developed in a periphery. The English-speaking parts of the one-time dominion followed the usual development of a British colonial empire until the recent past, in both decision-making tradition and partial codification.[3] The French-speaking part, Quebec, has retained French law irrespective of the fact that France renounced its sovereignty already centuries ago. The overall legal continuity was interrupted only by the systematic codification achieved by *Napoleon* in France. This explains why the necessity of resuming legal contacts was formulated as the reason for preparing and promulgating a *Code civil de Québec* (1866), 62 years after the issuance of *Code Napoléon*. The preamble reads as follows: "the old laws still in force in Lower

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[University Casebook Series]; Bogdan, M.: *Comparative Law*. Dewenter, 1994. 245 pp. The classical work of Schnitzler, A. F.—*Vergleichende Rechtslehre*. Basel, 1955. xii + 497—is genuinely outstanding in giving at least a rough outline (207–208) of the foundations and directions Canada's law has taken throughout history.

[2] Having stayed in Quebec enjoying the hospitality of Professor Melkevik just at the time of the terrorist attack on September 11, 2001, against New York and other US-towns (about to leave for Montreal and then for Toronto), I was confronted with the fact that almost all important settlements (thus, the residence of the great majority of population) are situated in the frontier zone directly bordering on the United States (from West to East, Vancouver, Brandon, Fort William, Hamilton, Toronto, Ottawa, Montreal and Quebec, while others, like Calgary, Regina and Winnipeg, are not farther from the border than a few hundred kilometres either). Canada's population, about the same in size as that of Hungary, can find a living only in this extremely narrow zone of the territory ninety times as large as Hungary. At the same time, any event and news beyond the strictly local sphere is naturally related to the United States or mediated through its channels.

[3] E.g., Criminal Code (1883).

Canada are no longer re-printed or commented upon in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them."[4]

Of course, trying to give any rough outline involves the risk of covering up details–whereas theoretical dilemmas and structural features can mostly be understood precisely from these. The most important feature of the legal map of the territory and population of Canada is that the Quebec Act (1774)[5] maintains the French heritage in property and civil rights, while the English tradition is followed in constitutional, administrative and criminal law. In addition, English testamentary and land law are extended over English settlements and settlers. In general, it provides for English law in commercial lawsuits and evidence, and it introduces jury in civil cases.[6] Altogether, the French law of Lower Canada has been mixed from the beginning, in contrast to the English law of Upper Canada: "Quebec enjoys »une dualité de droit commun« and even, more structurally, a »bi-systemic legal system«."[7] It is no mere chance that, when having travelled to North America and visited courts in Quebec, *Alexis de Tocqueville* was astonished at the vast variety of languages and traditions used in jurisdiction. (In addition, we may add, he found the French language used there very old-sounding and outdated as regards both pronunciation and

[4] Cf., e.g., Baudouin, L.: Les apports du Code civil de Québec. In: *Canadian Jurisprudence*. The Civil Law and Common Law in Canada (ed.: McWhinney, E.), Toronto, 1958. 71–89.

[5] 14 Geo. III, chap. 83.

[6] I do not deal here with the legal status of the Indian aborigines (including their one-time customary law and their present claims), which is becoming topical in Canadian political and social public speech and also doctrinal and practical jurisprudence. For a few theoretical indications, see, from Melkevik, B.: Question identitaire, le droit et la philosophie juridique libérale: Réflexion sur le fond du droit autochtone canadien. *Cahiers d'études constitutionelles et politiques de Montpellier* (1995), No. 1, 23–37, The First Nation and Quebec: Identity and Law, Self-affirmation and Self-determination at Crossroads. In: *Globalization in America*. A Geographical Approach (dir. Barbosa, J. S.), Québec, 1997, 95–111 and 246, as well as Aboriginal Legal Cultures. In: *The Philosophy of Law*. An Encyclopedia (ed.: Gray, Ch. B.), New York–London, 1999. 1–4. [Garland Reference Library and the Humanities 1743], all reprinted in Melkevik, B.: *Réflexions sur la philosophie du droit*. Québec, 2000, part on 'Identité et Droit', 35–87; and, as practical overviews, also *Delgamuukw*. The Supreme Court of Canada on Aboriginal Title (comm. Persky, S.), Vancouver, British Columbia, 1998. vi + 137 pp., Isaac, Th.: *Aboriginal Law*. Cases, Text, Materials and Commentary [1995] 2nd ed., Saskatoon, Sask. 1999. xxx + 610 pp. and Macklem, P.: *Indigenous Difference and the Constitution of Canada*. Toronto, 2001. x + 334.

[7] Glenn, H. P.: Quebec: Mixité and Monism. In: *Studies in Legal Systems*. Mixed and Mixing (ed. Örücü, E.–Attwooll, E.–Coyle, S.), The Hague, 5, the first part-quotation by Pigeon, L.-P.: *Rédaction et interprétation des lois*, Québec, 2nd ed. (1978), 50.

intonation.[8]) Well, it was the co-existence of these two great cultures that generated, shortly after World War I, the need for Canada to show its own singularity by expressing its independent nationhood in and by the law, thereby contributing, at least with a symbolic force, to a French-Canadian identity too.[9]

This natural desire for self-determination began to bring its fruits by the times around World War II. For instance, in the early 1940s, one reported about a growing "prejudice, commencing in the law schools and extending to the courtrooms, against the use of American authorities and texts."[10] Then, in a few decades, the demand emerged towards "Canadian judges developing Canadian law to meet Canadian needs".[11] This era coincided in francophone Canada with the period of ambitions for separation also in law, but reflected an overall awakening of Canada in every respect. Genuine professors with scholarly attitudes, sometimes distinguished and committed to academic career, started to appear in law schools, gradually replacing practising judges and lawyers having usually shuttled between their offices and the university. They already embody a new style, scholarly methodology and theoretical sensitivity, able to bring about magisterial works. This way soon trends and schools emerge to compete with each other; an independent doctrine is formed as developed from the own legal staff; and, from this time on, no longer only law claims to embody the nation but also legal scholarship enters the scene to become widely acknowledged as an integral part of Canadian public thought, intellectual life and internationally acclaimed performance.[12]

The processes–resultants and impacts—are intertwined. What might have once seemed to be one of the causes of a peripheral situation, is about to indicate today general (further)developmental directions (perspectives and availabilities)—perhaps not yet in a way obvious for us, as the entire Central and Eastern European region is in a flux of constant forming—of universal (or at least global) (world)trends. I mean here a kind of inherent lack of originality as one of the

[8] de Tocqueville, A.: *Oeuvres complètes*. Voyages en Sicile et aux États Unis, t. 5, vol. 1, 2[e] éd. Mayer, J.-P., Paris, 1957. 212–213.

[9] "C'est par sa façon d'exprimer le Droit qu'une nation manifeste en partie son originalité"—writes Perrault, A. [*Pour la défense de nos lois françaises*, Montréal, 1919), 8] as a programme.

[10] In: *Canadian Bar Review* 21 (1943), 57.

[11] Read, H.: The Judicial Process in Common Law Canada. *Canadian Bar Review* 37 (1959), 268.

[12] As a case study, see, e.g., Normand, S.: Tradition et modernité à la Faculté de droit de l'Université Laval de 1945 à 1965. In: *Aux frontières du juridique*. Études interdisciplinaires sur les transformations du droit (dir. Belley, J.-G.–Issalys, P.), Québec, 1993., 137–183. Cf. also Melkevik, B.: La philosophie du droit au Québec: développements récents. In: Melkevik, B.: *Réflexions sur la philosophie du droit*. 177–192.

features of Canada, deeply rooted in and conditioned by its past. Of course, in itself this is but the outcome of historical *donnés* which—amidst Canada's early by-British and by-French development—did not require or promote own solutions to be attained. Although those remote Canadian re-formulations of English and French technicalities may have been faint replicas in law, in their new medium they were exposed to interact in a depth never experienced by the proud and legally *chauvin* isolationisms of 19th to 20th century England and France (sharing maybe one single experience in common, their old disdain towards the Germans). What I mean here is the mixing and irreversible intermingling of these laws,[13] which, due to the latter's co-existence and co-operation with the knowledge resulting therefrom, offers unprecedented experience entitling Canadian lawyers to develop a well-founded self-confidence indeed. For such an added and cumulative knowledge can hardly be gained otherwise. Notwithstanding, the pluralism of the parts mixed in themselves does not inevitably imply the pluralism of the entire structure.[14] Accordingly,

> "mixed jurisdictions may function as monist jurisdictions. The original sources of law may be disparate in character, yet monist, state institutions may already have largely completed the task of transfiguration into a single, national, systemic structure of law."[15]

The process of interaction may have also been accelerated by the unprecedentedly enviable fact that the education of both Common Law and Civil Law within the same faculties and offering separate degrees began some decades ago, and now also common law is taught in French and vice versa.[16] Traditions mixed appear also in scholarship with an enhanced interest in both intra- and extra-Canadian comparison of laws. A development like this is not simply the result of some practical decision. Whether we think of the experience (and crucial theoretical message) of the mutual (un)*translatability* of legal texts

[13] Cf., e.g., Tancelin, M.: Comment un droit peut-il être mixte? In: *Le domaine et l'interprétaton du Code Civil du Bas Canada* (dir. Walton, F. P.), Toronto, 1980. 1–32.

[14] See, first of all, Rouland, N.: Les droits mixtes et les théories du pluralisme juridique. In: *La formation du droit national dans les pays de droit mixte.* Aix-en-Provence, 1989. 41–55, especially 42, quoted by Glenn: 'Quebec', 1.

[15] *Ibid.*

[16] At present, parallel degrees in Civil Law and Common Law can be earned at McGill University (Montreal) and the University of Ottawa; the Universities of Ottawa and Moncton offer common law programmes in French, while McGill University offers civil law in English. Other faculties provide a variety of student exchange programmes, and the federal government arranges for inter-Canadian comparative legal studies organised every summer.

within the European Union[17] or of their *commensurability* at the intersection of diverging legal cultures,[18] evidently both refer to the hermeneutic significance of the symptom "I interpret your culture through mine" (symbolised by the figurative expression of "missionaries in the boat")[19] and, thereby, to the fact that, beyond sheer textuality, law is primordially an expression of culture.[20] Accordingly, the use of another language is not simply an issue of translation (or communication technique) but the choice of another culture, that is, an issue of doing interpretation (re-interpretation) in another—inevitably different—medium.

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Developments in present-day Canada are of a special interest for us first of all because they, with the interaction of two leading European traditions in law, highlight mutual influences with the perspective of convergence (which, in view of the unificatory civil law codification decided by the European Union, has raised the topicality of *rapprochement* of Common Law and Civil Law and, within it, the need for reconsidering the controversy *Savigny* and *Thibaut* had in 18th-century Germany[21]), and also outline the potentials of development (or of possible deformation) in the light of the Canadian experiment with experiences lived through. Here I recall again, as the indication of a kind of belated development, the specific feature of the Canadian past which I referred to earlier as a mere followance of external patterns under peripheric conditions, accompanied by a lack of self-reliance. For around the mid-20th century, this state of mind was replaced by self-building and self-determination set as a new objective. Unbalancedness, swinging into opposites and neophytism may accompany the process. Provincial imitation is replaced by autonomous

[17] Cf., e.g., de Groot, G. R.: Recht, Rechtssprache und Rechtssystem: Betrachtungen über die Problematik der Übersetzung juristischer Texte. *Terminologie et traduction* 3 (1991), 279–312 [abridged transl. In: *European Legal Cultures* (ed.: Gessner, W.–Hoeland, A.–Varga, Cs.), Aldershot, Brookfield USA, Singapore, Sydney, 1996, para 20, 115–120 {Tempus Textbook Series on European Law and European Legal Cultures I}].

[18] Cf., e.g., from Glenn, H. P.: Commensurabilité et traduisibilité. In: Actes du Colloque "Harmonisation et dissonance: Langues et droit au Canada et en Europe (mai 1999)" published as a double issue in *Revue de la common law* 3 (2000) 1–2, 53–66. and Are Legal Traditions Incommensurable? *The American Journal of Comparative Law* XLIX (Winter 2001) 1, 133–146.

[19] Cf. Cohn, B. S.: Anthropology and History: The State of the Play. *Comparative Studies in Society and History*, 22 (1980), 199.

[20] Cf., from the author: *Lectures on the Paradigms of Legal Thinking*. Budapest, 1999. vii + 279 [Philosophiae Iuris].

[21] Cf., e.g., from the author: Codification à l'aune du troisème miéllénaire. In: *Mélange offert au Professeur Paul Amselek*. Strasbourg, 2003. [in press].

construction. At the same time, Canada's economic safety coupled with relative political tranquillity and constitutional stability encourages to kinds of experimentation which could by far not be available elsewhere (because of imperial dimensions or the want of reserves). Moreover, situations brought about by chance or provoked by empty slogans may come about due to in-experience. Needless to say that the final balance will be drawn up by the people of Canada. However, for the external observer, all this schemes a path for the future. For everything in move in Canada develops in line with dominant ideas of our age, mainstream but also self-fulfilling.[22]

In this overview, I undertake to analyse (1) the change in the role precedents play in judicial process; (2) the transformation of law-application into a collective, multicultural and multifactorial search for finding a practical solution, assessable by inter-national standards; (3) the practical trends of dissolving the law both in common law and civil law jurisprudence; and, finally, (4) the new prerogatives acquired by courts for their own procedure, such as a) the unfolding of principles from the statutory provisions, themselves taken as mere guide-marks for the courts, b) the critical filtering of the entire legal system according to the Charters' human rights by deducing legal solutions directly from the constitution and, in conclusion, c) the courts becoming an ultimate ethical forum in debated moral issues as well.

1. The transformation of the role of precedents

Our thinking may prove to be ahistorical whether or not we realise it. In average cases, we tend to take any event as a preliminary by presuming the present to be given with frameworks consolidated, and try to analyse and understand anything that merely precedes it, by forcing it into a straitjacket often alien and external to it, thereby also distorting it. In our present-day legal thought, we tend to consider the body of common law and the entire English legal tradition as a normative material differing from continental law mostly in methodological elaboration, albeit the substantiation (substantivisation) of the decisional patterns of English law, developing mainly from the adaptation of forms of action and formulated mostly through procedural forms, is only a product of initiatives

[22] One of my vital Canadian sources has been the oeuvre of Glenn, H. P.: *Legal Traditions of the World*. Sustainable Diversity in Law, Oxford, 2000. xxiv + 371, a universal overview, based upon the generalising re-consideration of his observations built on comparisons focussing on Canada.

taken in the 19th century and not earlier.[23] Moreover, as a result of historical reconstruction, we may even declare that practically every feature that had once caused the tradition of common law to divert from civil law development has by now disappeared from behind the reality of this law over the past one and a half centuries. To wit, there are no forms of action in England any more; the institution of jury has in the meantime declined; those few ambulant justices once wandering all through the kingdom have in the meantime been replaced by a judicial moloch with an army of judges; the decisive judicial role of the first and last instance declaring what in the case the law is has disappeared from this machinery of an enormous hierarchical complexity; the number of cases to be heard by a judge has increased sky-high, with litigation having grown to massive proportions; the one-time exceptionality of judicial adjudication has been degraded into a mere state-provided servicing, and, with the solemnity of justice reduced to mere routine, judicature has transformed into case-managing-adjudication, fulfilled as a task to be administered obligatorily; substantive law defining the legal status of behaviours shadows already the once dominant procedural approach; and the exclusivity of jurisdiction exercised by a handful of elect men is challenged by the inclusion of women and all types of careers recruited from fellow-citizens of various colours and cultural backgrounds, eligible by mere professional qualification (and 'learned' only in this respect).[24] Even according to the self-portraying of common law, all this has resulted in a change of character so that from now on nothing else can identify common law than some vague "habit of thought".[25] In the light of our post-modern and cosmically extended universal expectations of the rule of law's service-providing state and law, it may seem almost bizarre to recall in historical contrast that even some centuries ago, the judge was not to decide out of duty but occasionally at times when he felt he should indeed do so, because he found the parties' conflict mature and balanced enough in legal positions that he might esteem his decision was needed indeed for the dispute to end. That means that, in those earlier times, the parties were expected to co-operate in reaching a situation somewhat cleared and balanced.[26]

The unification of the judicial system in 19th century England had a series of impacts pointing beyond simple institutional rationalisation. In conclusion, also

[23] Glenn, H. P.: La civilisation de la common law. *Revue internationale de Droit comparé*, 45 (1993) 3, 559–575.

[24] Cf., e.g., Glenn, H. P.: The Common Law in Canada. *The Canadian Bar Review* (June 1995), 261–292.

[25] Lord Oliver of Aylmerton: Requiem for the Common Law. *The Australian Law Journal* 67 (1993), 686.

[26] Baker, J. H.: English Law and the Renaissance. *Cambridge Law Journal*, 44 (1985), 58.

the one-time identity of common law was done away with, as precisely the rivalling of judicial fora (referring to varying normative sources according to differing traditions) had until then defined the identity of English law, across more then half a millennium. For the Equity, the Admiralty and the ecclesiastical law had equally received and channelled civil law impacts so that ideas by *Cujas, Pothier* and other (mainly French) lawyers could freely stream into English law. True, 19th-century England did block this abundant source by the said re-organisation of the judiciary. All this notwithstanding, common law concepts and institutions could be further fertilised by the English interest in German pandectism during the same century.[27]

As to the law's structure, *Blackstone* was of the opinion that "human laws are only declaratory of, and act in subordination to (divine law and natural law)".[28] In fact, the unthinkable dream of a judge making law (i.e., the term 'judge-made law') was only invented by *Jeremy Bentham*—in 1860.[29] Anyway, the formal system of precedents with the principle of *stare decisis* developed and solidified around the same time. Judicial law-making has become overtly transparent due to the growing resort to the method of distinguishing, while courts got accustomed to following earlier and superior decisions. All this presumed a renewing approach. For "Cases (...) could not be rules to be followed and were hence examples of the type of reasoning which had thus far prevailed (...). Since cases only exemplified arguments, there was no closure of sources".[30]

As known, in England in 1966, the House of Lords had absolved itself from the compulsory compliance with its own earlier decisions.[31] This soon resulted—through the Court of Appeal's seventeen justices proceeding in panels—in what we can now call the practical desuetude of earlier decisions. (This same change of direction led to similar absolutions with the Supreme Court of Canada and, gradually, with all courts of the provincial Courts of Appeal.) All this amounts to an inevitable change in the law's overall operation.

[27] E.g., Glenn: The Common Law..., 278. Both the rich continental collection of classical law libraries (especially of the Inns in London or the Bodleian at Oxford) and *John Austin*'s recurrent visits to Bonn and Berlin may be remembered here.

[28] *The Sovereignty of the Law* Selections from Blackstone's Commentaries on the Laws of England (ed.: Jones, G.), University of Toronto Press, Toronto, 1973. 51, note 31.

[29] Evans, J.: Change in the Doctrine of Precedent during the Nineteenth Century. In: *Precedent in Law* (ed.: L. Goldstein), Oxford, 1987.

[30] Postema, G. J.: Roots of our Notion of Precedent. In: *Precedent in Law*, 22. In a similar sense, see also Lobban, M.: *The Common Law and English Jurisprudence* 1760–1860. Oxford–New York, 1991. and Lieberman, D.: *The Province of Legislation Determined.* Legal Theory in Eighteenth-Century Britain Cambridge University Press, Cambridge–New York, 1989.

[31] 'Practice Statement (Judicial Precedent)' *Weekly Law Reports* 1 (1966), 1234, as well as *All England Reports* 3 (1966), 77.

From now on, one has to recognise that decision-making based upon the pondering of principles is replaced by a "discretionary dispute resolution with a low level of predictability",[32] in which no component can be more than "relaxed" and "flexible".[33] The internal order of common law countries comes increasingly close to what we have learned so far about their mutually fertilising interconnections, taking over solutions from each other with persuasive force.[34] At the same time, "Citation of single cases has been replaced by search and citation methods which batch or group large numbers of cases, as indicating the drift of decisional law."[35] Accordingly, also syllogisms of law-application are substituted by "statistical syllogism".[36]

Any theoretical formulation of the doctrine of precedent implies the dual chance of an *ex post facto* arrangement with retroactive effect (as an *a posteriori* manifestation or declaration of the law)[37] and—in want of any clear formalisability, due to which "Judges (...) proceeded on the basis of law they felt they could reasonably articulate, through a »careful working out of shared understandings of common practices«."[38]—of social interests being weighed in the recourse to distinguishing. Or, the chance of the law and order getting transformed into an open-ending play of social mediation has become actual and acute.

All this results in a new doctrine of case law with the radical renewal of the regulation ideal as well. Accordingly, "The announced rule of a precedent should be applied and extended to new cases if the rule substantially satisfies the standard of social congruence".[39] This way, Talmudic tradition comes back into the tradition of common law with its distrust in logic and theoretical generali-

[32] Glenn: The Common Law..., 269–270.

[33] Curtis, G.: Stare Decisis at Common Law in Canada. *University of British Columbia Law Review* 12 (1978), 8 and, similarly, Friedmann, W.: Stare Decisis at Common Law and under the Civil Code of Quebec. *Canadian Bar Review* 31 (1953), 723 et seq.

[34] According to Hodgins, J. A.: The Authority of English Decisions. *Canadian Bar Review* 1 (1923), 470 et seq., especially 483, borrowing of ideas could always take place in case the reasoning was applicable conclusively. K. MacKenzie's formulation—'Back to the Future: The Common Law and the Charter' *Advocate* 51 (1993), 930—is even more laconic on the decline of precedent, more rapid in Canada than in England.

[35] Glenn: The Common Law..., 270.

[36] Glenn, H. P.: Sur l'impossibilité d'un principe de stare decisis. *Revue de la recherche juridique / Droit prospectif,* XVIII (1993) 4, No. 55. 1073–1081, especially 1081.

[37] Gray, J. Ch.: *The Nature and Sources of the Law* [1921] 2nd. ed., New York, 1948. 168 et seq. and 174 et seq. For a more detailed exposition, see, from the author: Ex post facto regulation. In: *The Philosophy of law.* An Encyclopedia (ed.: Gray), 274–276.

[38] Postema: *op. cit.* 31.

[39] Eisenberg, M.: *The Nature of the Common Law.* Cambridge, 1988. 154, note 75.

sation for moral choices, by considering both thesis and antithesis suitable to embody the word of living God.[40] Ultimately, the question 'Is the Common Law Law?' arises. For—as the response holds[41]—

> "Common law rules are a strange breed. They can be modified at the moment of application to the case at hand, and their modification depends upon the background of social propositions. If (...) a doctrinal proposition should be enforced or extended when and only when it is congruent with the relevant social propositions, and a doctrinal proposition should be discarded or reformulated when it lacks such congruence, then the doctrinal proposition seems to be no more than a rule of thumb."

2. The transformation of law-application into a collective, multicultural and multifactorial search for a practical solution

The principle of *stare decisis* has never been accepted in Quebec, although the Canadian legal development has always remained open to borrow, especially English and French law. This is the reason why it seldom tried to either formalise or close down its normative sources. Typically, not even the first Quebec Civil Code (1866) did abrogate the previous law and did prohibit reference to former decisions as sources of the law. Or, it generously left in force from pre-code law anything not in simple repetition of codal wording or incompatible with codal provisions, with the effect that "the codification of the Quebec laws seems rather like a half-measure, typical of compromise."[42] For it is to be remembered that demarcation lines between "us" and "them" have always been alien to Canadian tradition. Just as no "formal »adoption«" was known there, eventual borrowings were not regarded as "radically »foreign« laws" either, since, pragmatically, all "they represent living law which may be useful in the practical process of dispute resolution."[43]

[40] Stone, S. L.: In Pursuit of the Counter-text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory. *Harvard Law Review* 106 (1993), 813 et seq., especially 828, and, as built into the philosophical understanding of legal argumentation, cf., from the author: *Lectures* ..., 93, note 120.

[41] Schauer, F.: Is the Common Law Law? *California Law Review* 77 (1989), 455–471, quotation on 467.

[42] *Code civil de Québec*, Art. 2712, and the quotation by Tancelin, M. A.: Introduction. In: Walton, F. P.: *The Scope and Interpretation of the Civil Code of Lower Canada* (new ed. Tancelin, M. A.), Toronto, 1980. 27.

[43] Glenn, H. P.: Persuasive Authority. *McGill Law Journal* 32 (1987) 2, 289.

As if learned from the admonitions of the Institutions of Gaius that peoples are governed both by law which is particular to them and by law which is common to humanity,[44] anyway, the normative bases referred to in judicial decisions witness a rather open and international auditorium. A recent analysis of jurisprudence shows the following proportion of citations

at the Supreme Court of Canada[45]

to decision		**to doctrine**	
domestic	367	domestic	63
British	110	British	29
American	045	American	24
Australian–Asian	014	French	09
French	002	Australian–Asian	07
other	004	other	02
foreign	**175 (32,3%)**	**foreign**	**71 (53%)**
foreign altogether			**36,4 %**

in Quebec[46]

to local decision	129
to French author	117
to common law decision	079
to local author	029
to French decision	025
to common law author	013
to foreign decisions altogether	**44,64%**
to foreign authors altogether	**81,76%**
to foreign sources altogether	**234 (59,7%)**

[44] "*Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur*" in *Inst.* Gaius 1.1.

[45] *Supreme Court Reports* 1 (1985), 296. According to another survey, the frequency of citation of foreign decisions or laws at the Supreme Court of Canada amounts to 24,2–32,7% of all the references as compared to other Canadian sources, and as compared to foreign ones (typically reference to United States sources in public law, to French ones in cases of Quebec and, in other cases, mostly to German and Israeli ones), 18,9–21,8% of all the references. Cf. Glenn, H. P.: The Use of Comparative Law by Common Law Courts in Canada. In: *The Use of Comparative Law by Courts* (ed.: Drobnig, U.–van Erp, S.), Dordrecht, 1999., 59–78, especially 68.

[46] Jobin, P.-G.: Les réactions de la doctrine à la création du droit civil québécois par les juges: les débuts d'une affaire de famille. *Les Cahiers de Droit* 21 (1980), 257–275, especially 270.

All this means that references to foreign authors are more frequent in all Canada and significantly more frequent in Quebec, than to domestic, resp. local ones; reference to foreign decisions is made in one third, resp. two fifths of all references; altogether, reference to foreign sources is made in one-third, resp. three fifths of all references; and finally, in Quebec, the frequency of references to foreign decisions is higher by 38,2%, and that to foreign authors by 54,26%, than in Canada at large.[47]

Well, at the level of call-words, we may encounter globalised multi-culturalism perfected. Interestingly enough, something more is also at stake for a comparative historical investigation of legal traditions. Repeated experience is the case, reminding us that European legal development came about through continuous (doctrinal and judicial) re-interpretation of traditions in *jus commune* rather than from oeuvres created in original construction.[48] Or, also great (English, French, German or American) legal cultures—serving usually as standards for us—are in the final analysis nothing but products of trans-national learning and mutual borrowing.[49]

Common law as a historical accumulation of precedents is process-like by definition: "common law is a developing system in the sense that there is a continuing process of development and exposition of rules."[50] For this very reason,

> "the search for law is too important for any potential external source to be eliminated *a priori*. The law is never definitively given; it is always to be sought, in the endlessly original process of resolution of individual disputes through law."[51]

The feeling of insecurity, the renouncement of any search for law, the wish for agreement and legitimation from any source at any price add to the above, as

[47] There is a remarkable contrast here with the United States, asserting itself as open and multicultural, where the frequency of citations in one state from another is about 10%, whereas from an authority outside the USA is scarcely 1% [Merryman, J.: Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970. *California Law Review* 50 (1977), 394–400], or downright unheard of (0%). In its own past, however, this ratio was 25,7% in 1850 and 1% in 1950 [Manz, W.: The Citation Practices of the New York Court of Appeals, 1850–1993. *Buffalo Law Review* 43 (1995), 153].

[48] Cf. primordially Coing, H.: *Handbuch des Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* I, München, 1973.

[49] Glenn: Persuasive Authority, 263.

[50] Jackett, W. R.: Foundations of Canadian Law in History and Theory. In: *Contemporary Problems of Public Law in Canada* (ed.: Lang, O. E.), Toronto, 1968. 29.

[51] *Ibid.*, 293.

if inherent scepticism were to be overcome by a rush for substitute to safety. After all, the judge "feels much safer if he can rely on foreign jurisprudential continuity instead of own sources gained exclusively from the text".[52]

All in all, new call-words take indeed the lead: *diversity, pluralism and concurrence*—as much in law as in other fields.[53] We can be sure that they are fulfilled. According to figures, for instance, the safe, foreseeable and calculable civil law excels in both client circulation and the queuing for justice administered, as well as in mass-scale litigation. Spectacular and frivolous lawsuits are more typical in the Anglo–American world—filed out of individual rivalry (sometimes represented by gender-, colour- or culture-specific groups), of mutual ambition to suppress, to revenge or profit-seeking or business interest (e.g., in divorce, for real or alleged discrimination, sexual harassment, medical malpractice, or in liability for harms caused by products, etc.)—, albeit all this is, due to the complexity of procedure and the costs of lawyer's fees, only available to those in middle-class with balanced financial backgrounds. Anyway, the number of judges per 100 000 inhabitants is[54]

in Germany	26
in France	11
in Canada	08
in England	01,9

The data are not only relevant for employment statistics: they speak of the extent of actual workload and institutional significance as well.

Accordingly, the litigation habit developed in early modern common law (with the social exceptionality of a judicial event) is continued. Moreover, from the comparative numerical data of the caseload *per annum* of supreme courts—

Canada	**Supreme Court**	100–150 cases heard
France	*Cour de cassation*	28 000 decided cases

[52] Baudouin, J.-L. : Le Code civil québécois: crise de croissance ou crise de vieillesse. *Canadian Bar Review* 44 (1966), 406.

[53] Cf., e.g., Villa, V.: *La science du droit.* Bruxelles–Paris, 1990. 209 pp. (La pensée juridique moderne). In Canada, due to inclination towards experiment, differing from the US at any price and concentrating in cities, all this can turn into a remarkable driving force. Cf., for the symbolic resonance of the concurrence of pluralist diversity in Canadian philosophical life, Melillo, R.: *Ka-Kanata.* Pluralismo filosofico, I–II, S. Michele di Serino. 1990. 165 + 306 pp.

[54] Glenn, H. P.: La Cour Suprême du Canada et la tradition du droit civil. *The Canadian Bar Review* (March–June 2001), 151–170, especially 161.

—, it is revealed that two hundreds to two hundreds and fifty times less cases are tried in Canada yearly as against, say, the mass-scale caseload in France.[55]

3. Practical trends of dissolving the law

The possibility of a judge becoming his own master by complementing legal considerations with social assessment is inherent in the doctrine of precedent. Taking, for instance, the *dworkin*ian approach, the differentiation between principles and rules and, thereby, the establishment by principles of the relevance of rules[56] involve already the mixing of purely legal aspects with external axiological and social considerations.[57]

This is a complete change in the law's nature, running against the one-time *justinian* creed, according to which judication has to be based upon not the example but the law.[58] Now, a conviction according to which it is "closer to the truth to regard the law as a continuing process of attempting to solve the problems of a changing society, than as a set of rules"[59], becomes the deontological corner-stone of the judging profession. Also a self-reassuring thought appears to persuade the sceptics that all this may conform even better with the claims of participatory democracy than legal positivism, based upon the alleged sovereignty of law. This concept is post-modern, worthy of our brave, new world indeed:

> "Law is less precise but more communal and there are more possibilities of persuasion and adherence to law, and eventually of eliminating it. Decisions are less conclusive, other sources may later prevail, and broader forms of agreement become possible, tolerant of differences now seen as minor and perhaps transient."[60]

[55] *Ibid.*, 154. This comparison does not take account of the mass of unsettled cases, the number of which has grown by 200.000 in France in one single decade. Tailhades, E.: *La modernisation de la justice*. Rapport au Premier Ministre, Paris, 1985. 36.

[56] Dworkin, R. M.: The Model of Rules. *University of Chicago Law Review* 35 (1967), 14 et seq. [reprint: Is Law a System of Rules? In: *The Philosophy of Law* (ed.: Dworkin, R. M.), Oxford, 1977. 38–65].

[57] Precisely, 'questions of law' themselves cannot be anything else than products of an abstraction taken out of a merely analytical interest. Cf., from the author: *Theory of the Judicial Process*. The Establishment of Facts. Budapest, 1995. vii + 249.

[58] Justinianus (*C*.7.45.13): "*non exemplis sed legibus iudicandum est*".

[59] Waddams, S. M.: *Introduction to the Study of Law*. Toronto, 1979. 5.

[60] Glenn: Persuasive Authority. 297 and 298.

From now on, old patterns of institutional development enter again the scene. Once the dam breaks, what used to be merely phenomenal becomes essential and what was just symptomatic transforms into a programmatic vision about the future, forming in the womb of society now. Anyway, this aspiration is descriptively formulated, yet fulfils a justificatory function, leaving behind any limiting and disciplining framework as an outdated obstacle. The claim for innovation is also formulated as a theoretical claim:

> "Modern societies have been [...] oriented towards the rationalization of autonomous fields of social practice, they have raised the problem of the unity of social action to the level of a formal, universalizing and abstract law, and have understood law as the deduction of an ideal of justice characterized by individual freedom. The indeterminate nature of this idea of justice, namely the impossibility of deducing some concrete content from a principle, has generated a crisis of the power to make law and brought about inductive and pragmatic procedures for recognizing the rights claimed in social conflicts by various categories of actors."[61]

Well, we may freely meditate on the sense of such and similar theses reminiscent of the leftist Utopian radicalism of Critical Legal Studies, nevertheless, it is a fact that they are neither exceptional nor unique any longer. What they betoken are real alterations in actual practice and factual arrangement. They ascertain, for instance, on a theoretical level that

> "Two paths of legal development may be envisioned. One involves shifting the centre of the legal system away from legislation towards a limited set of fluid principles and concepts. The other implies re-emphasizing legislation as the centre of the system, while rolling back the legislative tide and reactivating the symbolic meaning of legislation—especially through the development of new forms of civic involvement in the legislative process."[62]

Thus, once the dam breaks, a further recognition (mixed with some neophyte haste and hypocrisy) is added to it: of course, all this is true, quite to the extent

[61] Gagné, G.: Les transformations du droit dans la problématique de la transition à la postmodernité. *Les Cahiers de Droit* 33 (septembre 1992) 3, 701–733 and in: *Aux frontières du juridique*. 221–253, abstract, 221.

[62] Issalys, P.: La loi dans le droit: tradition, critique et transformation. *Les Cahiers de Droit* 33 (septembre 1992) 3, 665–699 and in: *Aux frontières juridiques*. 185–219, abstract, 186.

that this has never been otherwise either in civil law[63] or in codification.[64] One may have been wrong in the past but now one is certainly right.

As the Canadian justice *La Forest* declared in a recent case, "The legal system of every society faces essentially the same problems and solves these problems by quite different means, though often with similar results".[65] Well, it is precisely the diversity of both the paths of procedure and the instruments applied, the sources invoked and the kinds of reasoning resorted to, from among which the result of the choice actually done today proves to be quite open-ending, which may signal the advent of a new era.

Though in theoretical veil, it is now declared with brutal openness that "it is no longer the legislator with whom the interpreter conducts a dialogue but the authorities; namely, the opinions of other learned justices: judges and especially famous justices".[66] Actually, hereby, both the subjects and the play, topic, purpose and stake of a legal process, as well as the invoked arguments and the function of the entire judiciary are changed over. "All the World's a Courtroom"—they shout not quite unfoundedly, heralding a new millennium. At once a methodology builds upon the apparent description, explaining that

> "The court does not proceed in a purely deductive manner, because the available sources or principles are not always clear and complete enough to permit deduction. This is wherefrom the dialogical and transnational character of civil law arises. The process is not inductive either, because no simple multiplication of instances or potential examples is able to lead to *justification* by foundations provided for the resolution of the affair before the court. Otherwise, among these extra-frontier sources, the court does not cite only judicial decisions. It also has recourse to authors expressing opinions and developing principles, just as to laws and codes. If this method should be qualified, it can be described as analogical,

[63] "Law is prior to the law (...) law is not entirely included in the law" Rémy, Ph.: Éloge de l'exégese. *Revue de la Recherche Juridique / Droit prospectif* VII (1982), 261. — "Law is variable and diffuse. It is a material to be explored and not to be created." Mouly, C.: La doctrine, source d'unification internationale du droit. *Revue internationale du Droit comparé* 38 (1986), 364. — "law is prior to legal rule and overflows it everywhere" Varaut, J.-M.: Le droit commun de l'Europe. *Gazette du Palais* (19–20 September 1986), Doct., 9. — "Law is not some kind of construction, but a reality to be explored" Atias, Ch.: Une crise de légitimité seconde' *Droits* 4 (1986), 32. — "There is no one today to declare [confirming the words of *Montesquieu*] that the judge is nothing else but »the mouth of the law« [...] the judge sets up his own barriers for himself." Rigaux, F.: *La loi des juges*. Paris, 1997. 65 and 247.

[64] [1977] 2 *R.C.S.* 67, à la p. 76.

[65] *Rahey v. The Queen* [1987] 1 S.C.R. 598, at 319.

[66] Rémy: *op. cit.* 260.

> first of all. By means of this method, one searches for links and common elements between the problem to be resolved and the model proposed, whatever the institutional source of the latter. (...) The legitimacy of the court's decision depends on the legitimacy of the decision's sources; enlarging these, the range of legitimate decisions is enlarged."[67]

Thereby we seem arrive from common law tradition (having once originated in Europe) at a peculiar compound of some Anglo–American Europe. A new kind of logic is to correspond to this. In its terms,

> "The dialogical principle means that two or more various kinds of »logic« are combined into unity in a complex (mutually complementing, concurring and antagonistic) manner without duality being lost in this unity."[68]

One has to note here that duality may have an additional meaning in relation to the specific case of Canada, as it is clearly shown in the Canadian characterisation of methodological novelty: "the jurisprudence of Quebec, especially in civil affairs, departs from the model of judicial syllogism, in order to practice the discursive and descriptive reasoning, characteristic of common law."[69] This is what was recently announced in Canada with a simultaneously reconstructive and normative claim, as a legal theory of post-modernism, called *legal socio-positivism.*[70] The scholarly motive of elevating all this into theoretical heights is neutral in itself: apparently it results from the merely sociologically inspired approach to and specification of the concept of law,[71] however, by extending its subject, it also turns the entire conception inside out. Namely, law is not a kind of normativity any longer but a mere fact or, more precisely, an aggregate of

[67] Glenn: La Cour Suprême du Canada..., 169. Cf. also Abrahamson, S.–Fischer, M. J.: All the World's a Courtroom: Judging in the New Millennium. *Hofstra Law Review* 26 (1997), 273 et seq.

[68] Morin, E.: *Penser l'Europe.* Paris, 1987. 28. Quotation by Glenn, H. P.: Harmonization of Private Law Rules between Civil and Common Law Jurisdictions. In: Académie internationale de droit comparé: *Rapports généraux.* XIII[e] Congrès International, Montréal, 1990. Cowansville, Qué, I.C, 79–95, 89, note 29.

[69] Melkevik, B.: Penser le droit québécois entre culture et positivisme: Quelques considérations critiques. In: *Transformation de la culture juridique québecoise* (dir. Melkevik, B.) Québec, 1998. 9–21, especially 15.

[70] *Ibid.*, passim.

[71] Rottleuthner, H.: Le concept sociologique de droit. *Revue interdisciplinaire d'Études juridiques* (1992), No. 29, 67–84.

facts regarded as legal.[72] Or, law embodies a kind of polycentrism by its "inter-normativity" that mediates—through its network of many actors—between law and the axiologism of extra-legal (social, economic, ethical, etc.) norm-systems invokeable.[73] Otherwise speaking, it is a duality, a compound of "law as *a socially constructed* fact" and "law as a specifically *normative* fact".[74] As hoped for, this is already on the way to dissolve the law's separation, distinction and specificity. Its ideologists are about to take sides. Accordingly,

> "We prefer a more integrated approach, one in which law also takes part in exercising power and especially state power, and which also allows for the constitution and reproduction of social relations and institutions, moreover, within certain limits, their transformation as well, so that law serves as a system of justification in the exercise of power, consequently also as a point of reference in the contestation of power (out of which the revindication of »rights« may arise)."[75]

4. Some new prerogatives acquired by courts

The specific ambition of the Supreme Court of Canada was to unify common and civil law in the first half-century of its operation, which it has, however, recently renounced, probably for lack of better results than the ones achieved until now.[76] It has assumed new ones instead, and some of these indicate new shades of judicial function with particular prerogatives. In the following, we shall pay special attention to them, because they use (or misuse) the authority provided by the law when they actually draw from extra-legal sources, the fact notwithstanding that they demand indisputable authority for themselves, like the one due to decisions taken in law.

a) *Unfolding in principles the statutory provisions.* The new *Code civil de Québec* (January 1, 1994), awaited and prepared for long (wasting the masterly,

[72] Melkevik: *ibid.*

[73] See, e.g., *Entre droit et technique.* Enjeux normatifs et sociaux (dir. Cőté, R.–Rocher, G.), Montréal, 1994.

[74] Lajoie, A.: Avant-propos. In: Lajoie, A.–Brisson, J. M.–Normand, S.–Bissonnette, A.: *Le status juridique des peuples autochtones au Québec et le pluralisme.* Cowansville, 1996.

[75] Laperrière, R.: À la recherche de la science juridique. In: *Le droit dans tous ses états.* La question du droit au Québec, 1970–1987. Montréal, 1987. 515–526, quotation on 524.

[76] Glenn, H. P.: Le droit comparé et la Cour suprême du Canada. In: *Mélanges Louis-Philippe Pigeon.* Ottawa, 1989. 197.

albeit belated commentary of the old code[77] as mere bogus paper), actually anticipated the dawn of the new era. Sharply opposed to classical tradition—as set forth by the president of the office devoted to the old code's revision[78]—, it was from the very beginning drafted as "temporal, relative, variable, consecrating (...) a certain manner of thought, a certain manner of life, at a given time in the history of a people"; moreover—as announced also before the code entered into force—, the period for which it was foreseen, might prove even surprisingly short.[79]

Its drafters aimed at the consolidation of jurisprudential developments since the earlier code as *de lege lata* addenda, on the one hand, and its codificational integration with newly formulated *de lege ferenda* doctrinal ideas, on the other. At the same time, also some balancing and value- and interest-representing function was also assumed. After all, the first internationally acclaimed performance of post-modern codification has halted halfway,[80] by codifying without making the law rigid.

Nonetheless, this may perhaps offer a model for the private law codification launched by the European Union as well. It seems anyway as if the Canadian codifyer were aware of the fact that what was achieved was hardly more than the reconstruction of the dilemmas and conditions of mid-18th-century Europe, undertaking also tasks normally performed through judicial processes.

This is why the outstanding Canadian comparatist could proudly declare—not denying the need for continuous national legal development either—that, back in his time,

> "*Savigny* may have been right (...) but (...) codification may not be the obstacle to this process that *Savigny* saw it to be (...: for) contemporary codes may not represent the type of code that *Savigny* and others had in mind."[81]

[77] *Quebec Civil Law.* An Introducton to Quebec Private Law (ed.: Brierley, J. E. C.–Macdonald, R. A.) Toronto, 1993. lviii + 728 pp.

[78] Crépeau. P. A.: Les lendemains de la réforme du Code civil. *Canadian Bar Review* 59 (1981), 625 et seq., quotation on 626–627.

[79] Gaudet, S.: La doctrine et le Code civil du Québec. In: *Le nouveau Code civil.* Interprétation et application (1993), 223–240.

[80] Cf. note 36.

[81] Glenn, H. P.: The Grounding of Codification. *University of California Davis Law Review* 31 (Spring 1998) 3, 765–782, especially 782.

b) *Constitutionalisation of issues.* The way of procedure developed in the United States[82] has already penetrated Hungary and the Central and Eastern European region as well. In Canada, it was the constitutional review to be carried out by the Supreme Court to implement the Canadian Charter of Rights and Freedoms (1982) that gave an opportunity to this. The chance was taken by the courts with "enthusiasm"; moreover, in the hope of extending the scope of civil liberties, they were soon to cover private law cases as well.[83] However, the mere prospect of statutory provisions being put aside so that ordinary courts can directly apply principles of charters in their own interpretation, has amounted to a change of legal practice as well. "Conflicts of interests now tend to be framed as conflicts of rights, and the Court is expected to adjudicate."[84]

This development encounters both criticism and fears of the politicisation of judicature—as the book-title *The Charter Revolution and the Court Party* may illustrate this[85]—: after all, practice has already proven that "the Charter serves merely as a blank cheque in the hands of the judges".[86] The criticism is reminiscent of the indignation against the Supreme Court of the United States, actually re-writing the Constitution with no specific authorisation.[87]

[82] The subjection of the decisions of state judges (as state-acts) to the Bills of Rights took a start half a century ago [*Shelley v. Kraemer*, 334 U.S. 1 (1948)], growingly covering the field of state private law with regard to the elected nature of judicial office [*New York Times v. Sullivan*, 376 U.S. 254 (1964)].

[83] Hogg, P. W.: The Law-making Role of the Supreme Court of Canada: Rapporteur's Synthesis. *The Canadian Bar Review* (March–June 2001), 171–180, especially 172. The moderate degree of even an explosive "enthusiasm" in a well-balanced state—in contrast with the almost infantile self-asserting fury of the Constitutional Court activism in Hungary in the first nine years since its inception—appears from the fact that a total of 64 statutory provisions (not complete laws!) were struck down in as many as 18 years, in addition to a much larger number of governmental actions by police officers or government officials. Cf. Monahan, P. J.: The Supreme Court of Canada in the 21st century. In: *ibid.*, 374, note 2.

[84] *Ibid.*, 179.

[85] E.g., Morton, F. L.–Knopff, R.: *The Charter Revolution and the Court Party*. Peterborough, 2000.—"The rule of the Charter is accompanied by the hyper-juridicisation of social relations" J.-F. Gaudrealt-DesBiens : Les Chartes des Droits et Libertés comme loups dans la bergerie du positivisme? Quelques hypothèses sur l'impact de la culture des droits sur la culture juridique québécoise. In: *Transformation de la culture juridique québécoise*. 83–119, quotation on 108. Cf. also Bégin. L.: Le Québec de la Charte Canadienne des Droits et Libertés et la critique de la politisation du juridique. In: *ibid.*, 153–165.

[86] Mandel, M.: *La Charte des droits et libertés et la judiciarisation du politique au Canada.* Montréal, 1996. 107.

[87] Cf. chiefly Bork, R. H.: *The Tempting of America.* The Political Seduction of the Law. New York–London, 1990. xiv + 432 and *Slouching towards Gomorrah.* Modern Liberalism and American Decline. New York, 1997. xiv + 382 {reconsidered by the author in 'Önmagát

Press cuttings are also thought-provoking. One of them, entitled *Supreme Self-restraint*, reads as follows:

> "Canadians have been outraged as the courts have used the Charter to tweak or abolish dozens of laws, including the abortion law, the Lord's Day Act, restrictions on pornography and voluntary school prayer, and laws that kept incompetents from fighting fires".[88]

Such and similar examples of criticism are finally followed by remarks from the United States, according to which this is but the order of values of some self-appointed individuals imposed upon the community, without having ever been confirmed by any democratic voting procedure. For instance, according to the article *Out-of-control Judges Threat to Rule of Law*,

> "Instead of upholding the law as defined by precedents and legislative enactments, judges now routinely change the rules of law to accord with their own personal political preferences."[89]

Imposing values upon the community by the mere force of judicial authority, only supported by a narrow intellectual elite but without any democratic assessment, may easily end in counter-effects. For the politicising of judicature may prompt democratic voters with legitimately elected legislative and executive institutions to react, by treating the judiciary with its partisan views in a genuinely politicised way, as a political institution. The obvious danger of this was already formulated by some propheting justices.

> "Only judicial independence will suffer if we continue to push the constitutional envelope as we have over the past 20 years. An overridden public will in time, demand, and will earn, direct input into the selection of their judges as they do with their legislative representatives. There will be renewed calls for a supplementary process wherein their judges'

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felemelő ember? Korunk racionalizmusának dilemmái' [Man, elevating himself? Dilemmas of rationalism in our age]. In: *Sodródó emberiség* [Mankind adrift: on the work of Nándor Várkonyi »The Fifth Man«] (ed. Katalin Mezey). Budapest, 2000. 71–76.]

[88] Supreme Self-restraint. *National Post* (April 7, 2000), A19.

[89] Leishman, R.: Out-of-control Judges Threat to Rule of Law. *London Free Press* (May 12, 2000).

> performance, even the continuance of their employment (as it will be characterized) can be periodically reviewed."[90]

c) *The Supreme Court as the nation's supreme moral authority.* It has been observed during the last decade that the Supreme Court of Canada is not only willing to rely on authorial opinions but, besides widely using legal doctrine, it also growingly draws from mostly mainstream philosophical considerations as normative foundations.[91] Thereby it inevitably takes a stand on political and moral philosophical issues as a partisan forum, for, in fact,

> "The Supreme Court has, since 1982, taken a one-sidedly praetorian position in favour of liberal philosophy and ideology, which is a break with formerly prevalent pluralism. What we can see is thus an attachment to one single philosophy [of, e.g., *John Stuart Mill, Dworkin* or *Rawls*, as the author of the quotation adds—Cs. V.], with any other aspect ruled out at the same time."[92]

Obviously, no one has entitled the Supreme Court to elevate itself to ethical heights using nothing but its competence of decision.[93] The circumstance itself that in most debated topical questions dividing society (like euthanasia, abortion or in vitro fertilisation), it declares itself to be the highest forum of indubitable authority,[94] implies—despite any short-term effects and actual influences— the long run threat for the Supreme Court itself to make its own position sensibly undefendable and vulnerable.

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[90] Justice A. McClung in *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595 (Alta. C.A.), paras. 23–63, para. 56. For all three examples from press-cuttings, see Hughes, P.: Judicial Independence: Contemporary Pressures and Appropriate Responses. *The Canadian Bar Review* (March–June 2001), 181–208, especially 201, notes 71–72. It is to be remarked that The International Bar Association Code of Minimum Standards of Judicial Independence itself does by far not exclude the responsibility of each judge to be borne before the community as running against judicial independence: "It should be recognized that judicial independence does not render the judges free from public accountability [...]." *The International Bar Association Code of Minimum Standards of Judicial Independence*, Section 33.

[91] Brunelle, Ch.: L'interprétation des droits constitutionnels par recours aux philosophes. *La Revue du Barreau* 50 (mars–avril 1990) 2, 370.

[92] Melkevik: *La philosophie du droit...* 180.

[93] Cf., e.g., Légault, G. A.: La fonction éthique des juges de la Cour suprême du Canada. *Ethica* 1989/1, 95–109 and LeBel, L.: L'éthique et le droit dans l'administration de la justice (ou le juge fait-il la morale?). *Cahiers de recherche éthique* 1991/16, 159–169.

[94] Melkevik: *op. cit.* 186.

The scale of globalisation witnessed in Canada, target of the present case study, is not at all unfamiliar in the European Union either, especially not after the decision was taken a decade ago to prepare a codification of private law, common at least in basic principles. In both cases, the main point is to re-consider the law's normative material in a way somewhat released from nationally positivated self-restriction when searching for a kind of trans-national cultural community. By gradually eliminating the law's substantivity, legal self-identity is mostly preserved in a rather procedural sense. Naturally, all this involves a change in the concept of, approach to and even traditional techniques in law, eventually also leading to a change of character with consequences and perspectives utterly unforeseeable in details for the time being.

Although by far not as a sine qua non, yet globalisation may nevertheless issue in "sustainable development" to be accompanied by the preservation of some kind of "sustainable diversity", in the form of the increasing reciprocal action of all great legal cultures and traditions of the human kind with the mutual utilisation of shared sources for inspiration.[95]

[95] These trends are traceable already in Glenn: *Legal Traditions...*, ch. 10: Reconciling Legal Traditions: Sustainable Diversity in Law, pp. 318 et seq. as well as in his Vers un droit comparé intégré? *Revue internationale de Droit comparé* 51 (1999) 4, 841–852 and Comparative Law and Legal Practice: On Removing the Borders. *Tulane Law Review* 75 (2001) 4, 977–1002.

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Reciprocity and the Compulsory Jurisdiction of the International Court of Justice

Abstract. The paper analyses the role and importance of the principle of reciprocity in the optional clause system of the International Court of Justice. After a short description of the Statute provisions on reciprocity of the two International Courts the author deals with the stipulation of reciprocity in declarations accepting the compulsory jurisdiction of the Court. The main part of the paper is devoted to the legal practice of the two International Courts on the matters of reciprocity. As a conclusion the author says that, by virtue of the principle of reciprocity, reservations to the acceptances of compulsory jurisdiction tend, in practice, to make their effect felt more often than not, precisely against the State or States making a reservation.

Keywords: International Court of Justice, compulsory jurisdiction, optional clause, reciprocity

International law is permeated, perhaps more profoundly than any other branch of law, with reciprocity in the sense that rights must be coupled with certain obligations in relations between States and that there must be some sort of correspondence between rights enjoyed and obligations assumed,[1] first of all because law is made by equal States, which, in creating law, are well aware of the need to assume certain obligations in exchange for their rights, and conversely. This thesis in international law holds true not only for law-making, but also for the application and enforcement of law. There is no doubt that the principle of reciprocity is most clearly manifested in the law of contracts, however, as will be seen in the following discussion, it is also a basic element of the system of compulsory jurisdiction of the International Court of Justice.

The International Court of Justice, being the principal judicial organ of the United Nations under Article 92 of its Charter, has jurisdiction only with the consent of the parties. Dealing with the case of the *Minority Schools of Upper*

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[1] For more detail, see Virally, M.: *Le principe de réciprocité dans le droit international contemporaire*. Recueil des Cours, 1967, Vol. III. 1969. A. W. Sijthoff—Leyden, 5–101.

Silesia in the interwar period, the Permanent Court of International Justice formulated this thesis in the following terms: "The jurisdiction of the Court depends on the will of the parties."[2] This same thesis was expressed in the case of *Eastern Karelia* to the effect that no single State can be compelled to submit its disputes with other States to mediation or arbitration or any other procedure for peaceful settlement unless it has consented thereto.[3] Later this principle was also reaffirmed by the International Court of Justice in several cases.

Under Article 36 of the Statute, the parties may express their consent to the Court's jurisdiction, in addition to other means,[4] by a declaration of submission to or acceptance of compulsory jurisdiction made by reliance on the so-called optional clause as referred to in paragraph 2 of Article 36. In relations between States that have made unilateral declarations of acceptance under the optional clause, a special system comes into effect whereby a State party to that system may refer to the International Court of Justice its dispute with another State party to that system by filing a unilateral application without the prior consent of the opponent State.

1. Statute provisions on reciprocity

Reciprocity is covered by Article 36, paragraphs 2 and 3, of the Statute of the Court reading: "The States to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court..." (para. 2) and "The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time" (para. 3). At first sight, however clear these provisions appear to be, one can detect some confusion[5] concerning the relationship between paragraphs 2 and 3 of Article 36. This is likely due to the

[2] PCIJ Series A. No. 15.22.

[3] PCIJ Series, B. No. 5. 27.

[4] Other means may include the agreement of the parties to submit an already existing dispute to the Court, or the so called compromissory clause of an international agreement providing that disputes arising between them of the kind envisaged in the compromissory clause, shall or may be submitted to the Court.

[5] In a similar sense, see Thirlway, H. W: A.: *The Reciprocity in the Jurisdiction of the International Court.* Netherlands Yearbook of International Law, 1984, 98; Shabtai, R.: *The Law and Practice of the International Court.* A. W. Sijthoff—Leyden, 1963, 384; Shihata, I. F. I.: *The Power of the International Court to Determine its Own Jurisdiction.* Martinus Nijhoff—The Hague, 1965. 147.

fact that while both paragraphs cover reciprocity, they refer to different aspects thereof.

Paragraph 2 of Article 36 is unambiguously clear about what is in reality a specificity of the entire regime of the optional clause, namely that it is a network of additional obligations and additional rights as between certain groups of States party to the Statute. In the *Anglo-Iranian Oil Company Case* Judge McNair described the optional clause as being *contracting in* rather than contracting out in nature.[6] This regime operates only in the inter se relations of States that have made declarations of acceptance of compulsory jurisdiction, and not in respect of all States party to the Statute. Professor Waldock, in his study on the optional clause, describes all this as the lack of "some basic mutuality" between States having made declarations of acceptance and those having made none. The declaring States are continuously liable to be brought before the Court at any time,[7] however, States not making such declarations cannot be sued before the Court unless and until they choose to initiate proceedings before the Court as plaintiff and make declaration under the optional clause.[8]

As noted earlier, paragraph 3 of Article 36 refers to reciprocity in connection with the content of declarations of acceptance, in which reciprocity may be stipulated by States. It is this paragraph of the Statute that forms the legal basis of the practice of States to make restrictions or reservations to their declarations of acceptance, placing limitations as to persons, subject-matters or periods of time on the obligations they have assumed concerning the Court's compulsory jurisdiction.

The explanation for the Statute referring twice to the principle of reciprocity is offered by the documents preparatory to the drafting of the Statute, and the double reference can, in all likelihood, be attributed to the proposals of the Brazilian jurist Fernandez, a member of the 1920 Committee of Jurists. Fernandez thought that States were free to accept the Court's jurisdiction on condition or unconditionally. He saw one such condition in reciprocity in respect of certain States or in respect of a certain number of States, including certain denominated States. The Brazilian expert argued that it is impossible for a State to accept the Court's compulsory jurisdiction without knowing the States with which it is to undertake such an obligation. Regarding Fernandez, Thirlway comes to the conclusion that the Brazilian jurist's draft sought to

[6] ICJ Reports, 1952. 116.

[7] At least in principle, as will be discussed later.

[8] Waldock, C. H. M.: *Decline of the Optional Clause*. The British Yearbook of International Law. 1955–1956. 280.

allow States to choose those with which they are able to establish a compulsory jurisdiction relationship obligating them to submit their disputes to international adjudication.[9] At any rate, it was under the influence of Fernandez's proposals that the section saying that "the declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Member States, or for a certain time" was inserted in the Statute of the Permanent Court of International Justice. To our knowledge, the possibility for the "choice of partners" as originally suggested by Fernandez was used by only one State, namely Brazil, which in 1920 included in its declaration of acceptance a formula under which the declaration was to be effective "as soon as it has likewise been recognized as such by two at least of the Powers permanently represented on the Council of the League of Nations". Waldock's statement that paragraph 3 of Article 36 refers in fact not to reciprocity is essentially in harmony with Fernandez's concept. According to the prominent British jurist, what we have here is a provision authorizing States to accept compulsory jurisdiction for a definite period of time and on condition that the Court's compulsory jurisdiction is also accepted by a certain number of States or by specified States. Thus, Waldock argues this is not a real "condition of reciprocity", but one that a declaration will not become effective until the Court's compulsory jurisdiction has been accepted by a certain number of States or by certain specified States.[10]

As is provided by paragraph 2 of Article 36., a State recognizes the Court's compulsory jurisdiction in respect of States "assuming the same obligation". Here it is most likely that the framers of the optional clause had in mind cases in which a State accepts the Court's jurisdiction in respect of only some of the four categories of disputes enumerated in paragraph 2.[11] However, what happened in practice instead, was that States, by attaching reservations to their declarations of acceptance, did not exclude categories (a), (b), (c) or (d) of disputes, but, by naming precisely or less precisely formulated conditions as to

[9] Thirlway: *op. cit.* 103–104.

[10] Waldock: *op. cit.* 255.

[11] Under para. 2 of Art. 36, States may recognize as compulsory the jurisdiction of the Court in all or any of the classes of legal disputes concerning

"a) the interpretation of a treaty;

b) any question of international law;

c) the existence of any fact which, if established, would constitute a breach of an international obligation;

d) the nature or extent of the reparation to be made for the breach of an international obligation".

time, persons or subject-matters, they limited the scope of the obligations they undertook in respect of the Court's compulsory jurisdiction.

Emmanuel Decaux writes that the original idea was confined to the reciprocity of acceptance, namely States making declarations of acceptance, and did not imply any sort of full reciprocity comprising reservations and conditions.[12] According to the said author, paragraph 2 of Article 36 allows for two extreme concepts: minimum reciprocity is satisfied by both parties adhering to the system of the optional clause, whereas maximum reciprocity requires the parties to make identical declarations of acceptance. Where making reservations is not allowed, this distinction would be superfluous as States could make identical declarations only.[13]

Obviously, neither of these two concepts is acceptable. The minimum reciprocity disregards the wide diversity of declarations flowing from the many reservations attached to them, while the maximum reciprocity actually rules out the application of reciprocity as no two identical declarations of acceptance exist.[14] Herbert Briggs stresses that any concept to the effect of "accepting the same obligation" presupposes that identical declarations or corresponding reservations leads to the nullification of the system of compulsory jurisdiction under Article 36 paragraph 2 of the Statute, because States have wide discretionary powers to unilaterally determine the conditions for accepting the Court's compulsory jurisdiction.[15] Taking the passage "accepting the same obligation" literally would imply that the system of compulsory jurisdiction would only operate in relations between States having made completely identical declarations, but would not operate with respect to the other States.[16] Thus, the passage "accepting the same obligation" does not mean that "exactly or even broadly the same obligation of compulsory jurisdiction must have been accepted by each State," but requires complete reciprocity in the operation of compulsory jurisdiction between two States which have accepted the obligation in different terms.[17]

[12] Decaux, E.: *La réciprocité en droit international.* Librairie Générale de Droit et de Jurisprudence, Paris, 1980. 85.

[13] *Ibid.* 87.

[14] *Ibid.* 87–88.

[15] Briggs, H. V.: *Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice. Recueil des Cours*, 1958. 242.

[16] In a similar sense, see Briggs: *op. cit.* 242–243.

[17] Waldock: *op. cit.* 257–258.

2. Stipulation of reciprocity in declarations of acceptance

A closer look at the declarations of acceptance made since the early 1920s reveals that stipulation of reciprocity, in most different formulations, can be found in most declarations of acceptance. There are declarations which refer to Article 36 of the Statute concerning reciprocity, using the phrases: "on condition of reciprocity"; "subject to reciprocity"; "subject exclusively to reciprocity"; or, "on the basis of absolute reciprocity". Also known is the phrasing that the instrument creates an obligation in respect of "States making identical declarations" or of "States accepting the same obligation", which is naturally equivalent to the aforesaid express stipulations of reciprocity. Declarations are frequent which contain the formula "in relation to any other State accepting the same obligation, that is to say on condition of reciprocity"; such a formula is termed by Briggs as the "double formula of reciprocity".[18] On the other hand, some declarations of acceptance contain no reference to reciprocity, meaning that the declaring States recognized the Court's compulsory jurisdiction without providing for reciprocity.

Regarding the inclusion of reciprocity in declarations of acceptance, the question automatically arises whether reciprocity applies to all declarations of acceptance and to the situation when a State makes no reference to, or expressly excludes, reciprocity in its declaration of acceptance.[19] This question seems proper if only for the reason that, according to some authors, there is nothing to prohibit States from accepting the Court's compulsory jurisdiction without stipulating reciprocity. The view that distinction can be made between declarations of acceptance unconditionally and on condition of reciprocity is associated in the pertinent literature with Guiliano Enriques during the inter-war years and with Hambro among other authors in later times.[20] According to Enriques, declarations of acceptance made with the reference to reciprocity imply acceptance of obligations of only States having made identical declarations, whereas declarations made without refering to reciprocity apply, in the absence of a contrary provision, simply to obligations assumed in

[18] Briggs: *op. cit.* 238.

[19] *Ibid.* 238–239; Thirlway: *op. cit.* 107.

[20] On the basis of paragraph 3 of Article 36 of the Statute, Hambro deems it conceivable for a State to accept the Court's jurisdiction unconditionally, which leads to the conclusion that such a State accepts the Court's jurisdiction without the reciprocity clause. He adds, however, that this cannot be supposed to be the case. HAMBRO, E.: *The Jurisdiction of the International Court of Justice.* Recueil des Cours, 1950, I. 184–185.

respect of States having ratified the Statute.[21] It calls for no further explanation that, based on this view, the States having made declarations of the latter form would assume rather far-reaching obligations, for they would in fact accept the Court's compulsory jurisdiction in respect of all States party to the Statute. In connection with such declarations, Bertrand Maus writes that, in the absence of will expressed to that effect, such declarations cannot be construed to imply an obligation wider that expressed in the clause itself.[22]

Concerning Enriques's view, Thirlway points out that the author practically overlooks the reference to "reciprocity", which is a kind of *communis error*, contained in a declaration referring to paragraph 2 of Article 36, and that the possibility of excluding reciprocity is only given in respect of paragraph 3, which, however, covers a different sort of reciprocity.[23]

The concept that reciprocity is neither a discretionary condition nor a reservation, but constitutes the basis of the system following from Article 36 of the Statute, can be considered to be the view of the majority in the pertinent literature.[24] Reciprocity is a fundamental provision of the Statute applicable to all declarations of acceptance, including that of a State having unconditionally accepted the Court's compulsory jurisdiction.[25] This is supported by the practice of the two Courts, which purports the statement that "reciprocity" has always been interpreted as applying to all declarations of acceptance of compulsory jurisdiction. For that matter, practice over more than eight decades has shown that, as is asserted by Shabtai Rosenne, "(T)he real problem which has faced the Court has never been whether or why reciprocity exists and within the framework of the compulsory jurisdiction, but how it affects the Court's jurisdiction in the concrete case."[26]

[21] Enriques, G.: *L'acceptation sans réciprocié de la jurisdiction obligatoire de la Cour Permamente de Justice*. RDILC, 1932. 845.

[22] Maus, B.: *Les réserves dans les déclarations d'acceptation de la jurisdiction obligatoire de la Cour International de Justice*. Librairie E. Droz, Genève, Librairie Minard, Paris, 1959. 100.

[23] Thirlway: *op. cit.* 107–108.

[24] Decaux: *op. cit.* 80.

[25] In a similar sense, see Waldock: *op. cit.* 255; Briggs: *op. cit.* 242; and Anand, R. P. *Compulsory Jurisdiction of the International Court of Justice*. Asia Publishing House, New York, 1961. 160.

[26] Rosenne: *op. cit.* 385.

3. Limits of reciprocity under the practice of the two Courts

Practice of the Permanent Court of international Justice

In the legal practice of the two International Courts, the question of reciprocity has emerged in a number of cases, with both the parties, the Court and the pertinent literature not infrequently offering differing interpretations of this principle. The problem concerning the interpretation of reciprocity results from the fact that in 1920 the framers of the Statute did not consider how reciprocity would really operate with respect to reservations, so the will of the lawmakers provides no guidance in this matter.[27] It is not accidental that Rosenne points to contradictions in the views of both the Permanent Court of International Justice and the contemporary literature on the subject of reciprocity.[28]

In the jurisprudence of the Permanent Court of International Justice, the case of the *Phosphates in Morocco* was the first occasion to consider the question of reciprocity. In the proceedings initiated by Italy against France, which was as a result of measures by Moroccan authorities described by the applicant as "the monopolization of Moroccan phosphates", attention should be directed to, for the purpose of the present discussion, the French preliminary objection invoking the reservation to the French declaration of acceptance, which excluded the retroactive effect of the declaration. According to the reservation, the Court's compulsory jurisdiction existed in respect of any disputes arising after the ratification of the present declaration, (i. e. after 25 April 1931—V. L.) with regard to situations and facts subsequent to this ratification.[29] On the basis of reciprocity, France claimed that the exclusion of the retroactive effect in relations between the two States—albeit the Italian declaration contained no reservation concerning earlier facts and situations—was effective as from the date of ratification of the Italian Court's jurisdiction to exist in relations between the two States in respect of only disputes arising on the basis of facts and situations subsequent to 7 September 1931.[30] Decaux considers that the said objection of France not only involved reciprocity, but actually transplanted the French reservation into

[27] Thirlway: *op. cit.*112.

[28] Rosenne: *op. cit.*384.

[29] In that case the applicant State based the Court's jurisdiction on the declarations of acceptance by the two States.

[30] *Phosphates of Morocco,* in: Hudson, M.: *World Court Report.* Washington, Carnegie Endowment for International Peace. Vol. IV. 315.

the Italian declaration,[31] and that France invoked against Italy a pseudo-reservation embodied in the Italian declaration.[32] For its part, the Court stated that "(T)his (the Italian—V. L.) declaration does not contain the limitation that appears in the French declaration concerning the situations or facts with regard to which the dispute arose; nevertheless, as a consequence of the condition of reciprocity stipulated in paragraph 2 of Article 36 of the Statute of this Court, it is recognized that this limitation holds good as between the Parties".[33] However, the Court did not consider the question whether the restriction excluding the retroactive effect should operate in that particular case from the date of ratification of the Italian or the French declaration, as the Court held that "(T)he date preferred by one or other of the Governments would not in any way modify the conclusions which the Court has reached. It does not therefore feel called upon to express an opinion on that point."[34] In reality, therefore, the Court recognized the application of reciprocity to the reservations to the declarations of acceptance by the two States, but did not clarify the consequences ensuing there from. In that case, no special problem was caused by this course of the Court, since there was an interval of a few months between the dates of the deposit of the two declarations of acceptance. However, one can easily imagine a case in which the date accepted by the Court could have been of supreme importance.

Similarly, in the *Electricity Company of Sofia Case* between Belgium and Bulgaria, the Court was confronted with a reservation excluding the retroactive effect of the declarations. In that case, it was on the basis of reciprocity that Bulgaria—which recognized the Court's jurisdiction in respect of States accepting the same obligation but "unconditionally"—invoked the reservation to the declaration of acceptance by the applicant State, Belgium; the declaration was ratified on the 10th of March, 1926, and the reservation was to the effect that the declaration applied to any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification. The Court stressed that "(A)lthough this limitation does not appear in the Bulgarian Government's own declaration, it is common ground that, in consequence of the condition of reciprocity laid down in paragraph 2 of Article 36 of the Court's Statute and repeated in the Belgian declaration, it is applicable as between the Parties".[35]

[31] Decaux: *op. cit.* 90.
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.* 322.
[35] *Electricity Company of Sofia and Bulgaria.* In: Hudson: *op. cit.* Vol. IV. 408.

Dealing with this decision, Alexandrov writes that the Court expressly and irrevocably recognized that reciprocity applies to reservations ratione temporis. Hence, it was necessary to determine two dates: the date of exclusion of the retroactive effect, on the one hand, and the critical date of emergence of the dispute, on the other.[36]

Despite their apparent similarity, the two cases considered by the Permanent Court of International Justice are different. In the *Phosphates of Morocco* case the respondent State actually contested the Court's jurisdiction on the basis of the reservation to its own declaration and not on the basis of reciprocity. It was a case of genuine reciprocity when that State wanted to have the date of exclusion of the retroactive effect counted from the deposit, not of its own declaration of acceptance, but that of the applicant State, yet that matter was not decided by the Court. On the other hand, in the case of the Electricity Company of Sofia, the reservation excluding the retroactive effect was contained in the declaration of acceptance of the applicant State, however, it was invoked by the respondent State on the basis of reciprocity, but such reciprocity was not recognized by the Court.

Practice of the International Court of Justice

The question of reciprocity has also been considered by the International Court of Justice in several cases.

Chronologically, mention should be made first of the *Anglo-Iranian Oil Company Case*, which was submitted by the United Kingdom against Iran. In that case, the respondent State invoked the reservation contained in its own declaration of acceptance and excluded the retroactive effect of the declaration.[37] In its judgement on the preliminary objections the Court emphasized that "(B)y these Declarations jurisidiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it. As the Iranian Declaration is more limited in scope than the United Kingdom Declaration,

[36] Alexandrov, S. A.: *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice.* Martinus Nijhoff Publishers, Dordrecht (Boston) London, 1995. 43.

[37] By the terms of this reservation, the declaration did not apply to disputes arising after its ratification in respect of situations and facts relating directly or indirectly to the application of treaties or conventions accepted and ratified by Persia after the ratification of that declaration. The dispute between the parties concerned the question of whether the reservation was operative in respect of the application only of treaties and conventions accepted by Iran after the ratification of the declaration or of treaties and conventions accepted by Iran at any time.

it is the Iranian Declaration on which the Court must base itself. This is the common ground between the Parties".[38] This statement regarding such "coincidence" has been repeatedly invoked by the Court, most recently in the case of *Land and Maritime Boundary* between Cameroon and Nigeria at the end of the 1990s.[39] In connection with the *Anglo-Iranian Oil Company Case*, Briggs notes that, since the respondent State was invoking the reservation to its own declaration as a bar to jurisdiction, there was no need for the reference to reciprocity, and it is likely that the Court and its President addressed that point "as an elucidation provided by the Court on a question argued at some length by the Parties in the pleadings."[40]

Perhaps of greatest interest to reciprocity is the *Norwegian Loans Case* between France and Norway, which involved application, on the basis of reciprocity, of a subjective reservation of domestic jurisdiction. The declaration of acceptance made by France as the applicant State incorporated a reservation under which the declaration did not apply to disputes "relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic". The Norwegian declaration of acceptance contained no such limitation, but, in its first preliminary objection, Norway contended that the International Court did not have jurisdiction in that case because by virtue of the declarations accepting the compulsory jurisdiction the Court's jurisdiction extended to legal disputes failing within one of the four categories enumerated in paragraph 2 of Article 36 of the Statute, while the subject-matter of the dispute as stated in the French application related to the national law of Norway. In the second part of the objection, Norway relied on the principle of reciprocity in referring to the reservation to the French declaration of acceptance, under which "(T)his declaration does not apply to differences relating to matters, which are essentially within the national jurisdiction as understood by the Governments of the French Republic".[41]

For its part, the International Court of Justice stated that "in the present case the jurisdiction of the Court depends upon the Declarations made by the Parties in accordance with article 36, paragraph 2, of the Statute on condition

[38] ICJ Reports, 1952. 103.

[39] ICJ Reports, 1998. 298.

[40] Briggs: *op. cit.* 253.

[41] The second preliminary objection of Norway also referred to reciprocity *ratione temporis*, claiming that the Court was without jurisdiction because, under the French declaration of acceptance of compulsory jurisdiction, the Court had jurisdiction in respect only of disputes relating to facts and situations subsequent to the ratification of the declaration. This question was not, however, considered by the Court.

of reciprocity; and that, since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it. A comparison between the two Declarations shows that the French Declaration accepts the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation".[42] Referring to the statements of its predecessor in the *Phosphates of Morocco Case* and the *Electricity Company of Sofia Case*, as well as to its own findings in the *Anglo-Iranian Oil Company Case*, the International Court of Justice stressed that "(I)n accordance with the condition of reciprocity to which acceptance of the compulsory jurisdiction is made subject in both Declarations and which is provided for in Article 36, paragraph 3, of the Statute, Norway, equally with France, is entitled to except from the compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction".[43]

In the literature on international law, the Court's judgement rendered in the *Norwegian Loans Case* prompted a large share of criticism, first of all because the Court had in fact sidestepped the question of how far subjective reservations of domestic jurisdiction were admissible and valid in respect of national jurisdiction and, instead of deciding that question, it just stated the lack of its jurisdiction on the basis of reciprocity. In its judgement, the Court did not deal with the validity of the reservations, and the majority of the judges took the position that—since the validity of the reservation was not contested by the parties—the Court was faced with a restriction that was deemed by both disputants to express their common will regarding the competence of the Court, and the Court " ... gives effect to the reservation as it stands and as the parties recognize it".[44]

In connection with reciprocity, Decaux writes that it would have been possible to consider two concepts of reciprocity in this case. The first is an objective one, under which France has no discretionary power by virtue of its reservation invoking national jurisdiction, but is bound by good faith. As the matters relating to loans do not pertain to the French internal law, they cannot be incorporated in the Norwegian internal law on the basis of reciprocity.[45] By contrast, under the subjective concept, the position of France is less important:

[42] ICJ Reports, 1957. 23.
[43] ICJ Reports, 1957. 24.
[44] ICJ Reports, 1957. 27.
[45] Decaux: *op. cit.* 97.

the law operating between the two parties is constituted not by the content of the French reservation, but by the Oslo Government's interpretation thereof in terms as if the reservation had been made by Norway. However, the author claims that this was not expressed by Norway, but by the Court's judgement in its stead.[46] Rather than consider the positions of France and Norway on international bonds, the Court based itself on the assumption that the determination of matters falling within national jurisdiction was subjective and that the parties' declarations were sufficient and fell outside the scope of consideration by the Court.[47]

Thirlway likewise holds that, with respect to the scope of reciprocity, the Court went rather far in the *Norwegian Loans Case* when it had not simply "written" into the Norwegian declaration the reservation expressed in the French declaration of acceptance, but had also adapted it to its new environment in the sense that it had turned the matters understood by the French Government to be within national jurisdiction into ones understood by the Norwegian Government to fall within national jurisdiction.[48]

In connection with the cited passage of the Court's decision in the *Norwegian Loans Case*, Briggs raises the question why, in relation to the condition of reciprocity contained in the declarations, the Court referred to paragraph 3, and not to paragraph 2, of Article 36, although the issue sometimes emerged that reciprocity was not an absolute condition of Article 36 of the Statute, because paragraph 3 thereof permits declarations of acceptance to be made unconditionally or on condition of reciprocity.[49] For that matter, in its earlier judgements, the Court argued that Statutory condition of reciprocity contained in paragraph 2 of Article 36, as it also appeared from the Court's opinion on the Norwegian loans. Therefore, Briggs is of the view that the reference to paragraph 3 instead of paragraph 2 is thus probably an error.[50] On the other hand, Renata Szafarz's conclusion is that the reference in this case to paragraph 3 instead of paragraph 2 is to a certain degree inconsistent with the Court's earlier decisions, but may also justify the inclusion in declarations of the condition of reciprocity regardless of the fact that reciprocity is covered by Article 36, paragraph 2, of the Statute.[51] The

[46] *Ibid.* 98.
[47] *Ibid.* 97.
[48] Thirlway: *op. cit.* 115.
[49] Briggs: *op. cit.* 255.
[50] *Ibid.* 256.
[51] Szafarz, R.: The compulsory jurisdiction of the International Court of Justice. Martinus Nijhoff Publishers. Dordrecht—Boston—London. 1993. 45.

Polish international jurist stresses further that reservation in this case has undergone a significant transformation, as the principle of reciprocity enabled Norway to invoke the reservation, and invoke it not in its original form, notably in its applicability to France, but in a modified form to allow its content to be applied to Norway. She adds that the effects of reservations in the declarations of acceptance differ essentially in this respect from the reservations attached to international treaties and that the effects of the principle of reciprocity has much more far-reaching implications for reservations contained in declarations of acceptance.[52]

Alexandrov takes a more understanding attitude towards the Court and writes that—since in the French view it is not sure that whether the class of disputes which could be determined by France belonging to its domestic jurisdiction would not necessarily coincide with those understood by another State to fall within domestic jurisdiction "(T)he only way to apply reciprocity was to allow Norway to exclude the same category of disputes as regards Norway."[53]

Despite the criticisms the International Court has faced for its decision in the *Norwegian Loans Case*, one should acknowledge that the Court did not have much choice in terms of ways to pronounce itself, for if it had decided that subjective reservations of domestic jurisdiction were either admissible or inconsistent with the Statute, its decision would have been bound to produce harmful effects on the system of the Court's compulsory jurisdiction.[54] To avoid such pernicious consequences, the Court came to a decision by widening the scope of the reciprocity principle to an undoubtedly significant measure, thus also creating a good opportunity to demonstrate the backlash effect of subjective reservations of domestic jurisdiction.

Shortly after the judgement rendered in the case of *Certain Norwegian Loans* the International Court had to decide again on the question of reciprocity in two cases.

The first, examined by the Court, was the *Interhandel Case* between Switzerland and the United States regarding the restitution by the United States of the assets of the Société internationale pour participants industrielles et commerciales S.A. (Interhandel). Within the time-limit fixed for the filing of

[52] *Ibid.* 45.

[53] Alexandrov: *op. cit.* 82.

[54] On this point see the present author's work: *A Connally-fenntartás és a Nemzetközi Bíróság kötelező joghatósági rendszere* (The Conally Reservation and the System of the Compulsory Jurisdiction of the International Court of Justice). *Állam- és Jogtudomány*, 1987–88. 449–553.

the Counter-Memorial, the United States filed four preliminary objections. Of interest to our subject is the second objection, in which the United States contested the Court's jurisdiction by contending that the dispute had arisen before Switzerland's declaration of acceptance of compulsory jurisdiction became binding, i.e. the 28th of July, 1948. Referring to what had been stated by the Court in the *Anglo-Iranian Oil Company Case*, namely that declarations should coincide in conferring jurisdiction; the Washington Administration argued that since the United States' declaration of acceptance contained a clause limiting the Court's jurisdiction to disputes "hereafter arising", while the Swiss declaration contained no such clause, but the principle of reciprocity required that, between the United States Switzerland, the Court's jurisdiction be limited to disputes arising after the 28th of July, 1948, the date the Swiss declaration came into force. The Court rejected that objection and pointed out the following: "Reciprocity in the case of declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own declaration but which the other Party has expressed in its declaration... Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends (my emphasis—V. L.). It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own declaration".[55]

In the *Interhandel Case*, the United States sought a double application of reciprocity, as is pointed out by Briggs.[56] Decaux wrote: double application of reciprocity, which, as against its single application securing the equality of the parties, is virtually conducive to inequality, and here with this case is a Swiss (non-existent) reservation excluding the retroactive effect and conferring advantage to the United States only.[57] However, by rejecting the American stand, the Court created a clear situation, defining the limits of reciprocity and blocking the way to potential abuse of double reciprocity.[58]

From the point of view of restrictions laid down in declarations of acceptance, the Court, in dealing with the *Interhandel Case*, faced a similar situation to that in the *Phosphates of Morocco Case*. Unlike its predecessor, however, the Court examined the question thoroughly clearly determining the aforementioned limitations on the application of reciprocity.

[55] ICJ Reports, 1959. 23.
[56] Briggs: *op. cit.* 248.
[57] Decaux: *op. cit.* 104.
[58] *Ibid.* 106.

The question of reciprocity was considered by the International Court of Justice in the greatest detail in the *Case concerning the Right of Passage over Indian Territory*. These proceedings were initiated by Portugal against India on the ground that the Delhi Government denied passage through Indian territory between the Portuguese enclaves. A specific feature of this case is that Portugal filed an application against India a few days after the deposit of its declaration accepting the compulsory jurisdiction of the Court; the Portuguese declaration was dated the 19th of December, 1955, and the Lisbon Government submitted its application on the 22nd of December, 1955. In response, India filed six preliminary objections, several of which related to the question of reciprocity.

In the first preliminary objection, India took exception to the third condition contained in the Portuguese declaration, under which Portugal has the right, by making at any time a notification to the Secretary-General of the United Nations to the effect of withdrawing from the compulsory jurisdiction any matter. The Indian Government contended that the said clause of the Portuguese declaration enabled Lisbon to withdraw, by a simple notification made at any time, from the Court's jurisdiction on any matter which has been submitted to it prior to such notification. India claimed that the said condition was incompatible with the principle and notion of the compulsory jurisdiction of the Court as established in Article 36 of the Statute, it introduced an element of uncertainty regarding the obligations of the declaring State; and it was contrary to the principle of reciprocity. The Court held that the said condition caused no uncertainty and did not contradict the basic principle of reciprocity underlying the optional clause, since any such reservation, by virtue precisely of the principle of reciprocity, was to become automatically operative against it in relation to other signatories of the optional clause.[59] The Court likened reservations concerning the right to modify declarations with immediate effect to clauses concerning the right of denunciation by simple notification with immediate effect, stating that there is no essential difference between the situations created by these clauses, with regard to the degree of certainty, and the third condition of the Portuguese declaration which leaves open the possibility of a partial denunciation.[60] In connection with modification of declarations, the Court pointed out that "when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective declarations".[61]

[59] ICJ Reports, 1957. 144.
[60] *Ibid.* 143–144.
[61] *Ibid.* 143.

In its second preliminary objection, the Government of India invoked reciprocity, contending that the filing of the Portuguese application violated the principle of "equality, mutuality and reciprocity" generally recognized in connection with declarations of accepting the compulsory jurisdiction. Portugal filed its application as little as three days after its declaration of acceptance, leaving insufficient time for the Secretary-General of the United Nations, in compliance with Article 36 paragraph 4 of the Statute, to transmit copies of the Portuguese declaration, before the filing of the application, to the other parties to the Statute, including India among other States. The first argument of the Court was that "(T)he principle of reciprocity forms part of the system of the optional clause by virtue of the express terms both of Article 36 of the Statute and of most declarations of acceptance, including that of India. The Court has repeatedly affirmed and applied that principle in relation to its own jurisdiction. It did so, in particular, in the case of *Certain Norwegian Loans* (ICJ Reports, 1957, pp. 22—24) where it recalled its previous practice on the subject. However, it is clear that the notions of reciprocity and equality are not abstract conceptions. They must be related to some provision of the Statute or of the declarations".[62] The second part of the Court's answer was that, in addition to the deposit of declarations of acceptance with the Secretary-General, the Statute contained no further requirement, such as a certain interval between the deposit of the declaration and the filing of the application. At every moment the declaring State is to "expect that an Application may be filed against it before the Court by a new declaring State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance".[63] The Court concluded that the filing of the Portuguese application was in no way against Article 36 and did not violate any right of India under the Statute or the declaration of acceptance.[64]

The fourth Indian preliminary objection was closely related to the second. In it, the Government of India contended that, since it had had no knowledge of the Portuguese declaration before Portugal filed its application, it had been unable to avail itself, on the basis of reciprocity, of the third Portuguese condition and to exclude from the jurisdiction of the Court the dispute which was the subject-matter of the Portuguese application. In connection with the objection the Court practically repeated its above finding and stressed that the manner of filing the Portuguese application did not, in respect of the third Portuguese

[62] *Ibid.* 143.
[63] *Ibid.* 146.
[64] *Ibid.* 147.

condition, violate the rights under Article 36 of the Statute concerning reciprocity in such a way as to constitute an abuse of the optional clause.[65]

On the basis of the documents presented to the Court and of what the representatives of India stated before the Court, the position of India on reciprocity can be summarized as this: the Statute covers general and continuous reciprocity between two Statutes, and applies to the relations between them from the beginning of the relations established under the optional clause up to the date of termination of the respective declarations.[66] Contrary to this, the Court held that "it is not the date of deposit of a new Declaration which constitutes the crucial date for purposes of the jurisdictional requirement of reciprocity, but the date on which an Application is filed".[67]

Dealing with the position of the Court, Decaux states that, in effect, it would have been possible to interpret reciprocity in a wider and a narrower sense. According to the wider interpretation, maintained by India, reciprocity generally applies to all obligations and rights deriving from declarations made under the optional clause. On the other hand, according to the narrower interpretation appearing in the Court's decision, the determinant factor concerning the reciprocal rights and obligations of the parties is the time the proceedings are instigated.[68]

During the 1980s, new problems emerged concerning the application of reciprocity in the *Case concerning Military and Paramilitary Actions in and against Nicaragua.*

In the case submitted by Nicaragua against the United States, one of the most important points of controversy between the parties arose out of the fact that three days before Nicaragua filed its application the United States, by a Note to the International Court, had modified its declaration of 1946 to exclude from the Court's jurisdiction certain disputes relating to Central America.[69] The United States declaration of acceptance originally fixed six months' notice for the termination of the declaration. Nicaragua's declaration contained no such restriction. The United States claimed it had modified its declaration of

[65] *Ibid.* 147–148.

[66] Briggs: *op.cit.* 258–259.

[67] *Ibid.* 262–263.

[68] Decaux: 102.

[69] Under the terms of the United States notification of the 6th of April, 1984, the 1948 American declaration of acceptance "shall not apply to disputes with any Central American State or arising out of or related events in Central America... Notwithstanding the terms of the aforesaid declaration (i. e. the declaration of acceptance of 1946), this proviso shall take effect immediately and shall remain in force for two years...".

1946 by its 1984 notification, so the Court was without jurisdiction on the 9th of April, 1984, the date at which Nicaragua filed its application. The Washington Administration invoked reciprocity in an effort to render its 1984 notification immediately effective. That argument sought to ensure that since Nicaraguan declaration, being indefinite in duration, is subject to a right of immediate termination, without previous notice by Nicaragua, the United States declaration could also be terminated with immediate effect by virtue of the principle of reciprocity regardless of the six months' notice proviso in the United States declaration. The Court refused to accept the American argument and emphasized that "(T)he maintenance in force of the United States Declaration for six months after notice of termination is a positive undertaking, flowing from the time-limit clause, but the Nicaraguan Declaration contains no express restriction at all. It is therefore clear that the United States is not in a position to invoke reciprocity as basis for its action in making the 1984 notification which purported to modify the content of the 1946 Declaration. On the contrary it is Nicaragua that can invoke the six month's notice against the United States—not of course on the basis of reciprocity, but because it is an undertaking which is an integral part of the instrument that contains it."[70] The Court explained that "(T)he notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration, whatever its scope, limitations or conditions."[71] In other words, the Court held that the six months' notice formed an integral part of the American declaration of acceptance and constituted a condition which must be taken into account regardless of whether it related to the termination or the modification of the declaration.

The Nicaraguan case provoked, if for no other reason than its political relevance, a great deal of discussion in the pertinent literature. The Court's findings about reciprocity and the limits thereof were consistent with the view, as expounded in the majority of writings published before the Nicaraguan case, that reciprocity cannot be applied to the formal conditions, duration, extinction declarations, etc.[72] For the matter, a few members of the Court, including, e.g., Sir Robert Jenning, in his separate opinion given in the Nicaraguan case, relied precisely on reciprocity, among other things, for criticizing the

[70] ICJ Reports, 1984. 419.
[71] *Ibid.* 419.
[72] Cf. Szafarz: 45–46. Of course, there are also views different from this.

judgement, observing that the reservations by which one of the parties can withdraw or alter a declaration with immediate effect produces an inequality and lack of reciprocity between the parties.[73]

In relation to the Nicaraguan case, mention should be made of Spain's declaration of acceptance of 1990, which extended the principle of reciprocity to the conditions for termination of the declaration. The Madrid Government, most certainly guided by an endeavour to avoid a situation similar to that in which the United States found itself, fixed six months' notification of the withdrawal of its declaration, "however, in respect of those States which in their respective declarations have established a shorter period of time between the notification of the withdrawal of their declaration and its becoming effective, the withdrawal of the Spanish declaration shall become effective after such that shorter period."[74] Thus, Spain intended to apply reciprocity to the withdrawal of the declaration. Up to now, that condition as laid down in the Spanish declaration has not been applied in practice, but, at any rate, it would be of interest to know the position of the Court on that condition, as it is contrary to what the Court stated in the Nicaraguan case.[75]

4. Consequences of reciprocity

Application of reciprocity to the system of the optional clause and to declarations of accepting the compulsory jurisdiction entails various consequences, of which one can highlight but a few now.

a) As noted earlier, the reference to reciprocity in paragraph 3 of Article 36 was incorporated in the Statute based on the proposal of Fernandez. At the time, by the inclusion of reciprocity, Fernandez sought to ensure that States knew exactly which were the States, in respect of which, they had assumed obligations concerning the compulsory judicial settlement of disputes. Thus, by doing so, the Brazilian jurist wanted to eliminate certain elements of uncertainty. At that time, however, no one thought that there was another implication of reciprocity which, as is pointed out by Rosenne, operates to have the extent of jurisdiction crystallized and determined in a concrete case.[76] All this means that so long as a concrete legal dispute is not submitted to

[73] ICJ Reports, 1984. 548.

[74] See the last paragraph of the Spanish declaration of acceptance dated the 15th of October, 1990.

[75] Szafarz: *op. cit.* 46.

[76] Rosenne: *op. cit.* 387.

the Court, there are specific elements of uncertainty actually accompanying the obligations of States under the optional clause and that it is only in principle that the Court's jurisdiction exists in respect of disputes covered by declarations of acceptance. No State is in a position to know in advance which dispute will in practice be actually subject to the Court's jurisdiction and no State can be absolutely certain that the Court's jurisdiction will really extend to a particular dispute covered by its declaration of acceptance, for, in the last analysis, the Court's jurisdiction always depends on the specific dispute or on whether a particular dispute is within the scope of the declaration of the given party and that of the opponent State. It could occur that a State has recognized the compulsory jurisdiction of the Court in respect of a rather wide range of international disputes, but this notwithstanding the Court may in practice deal with a much narrower range of international conflicts of the State concerned by reason of the fact that the other disputant State has, or States have, accepted the compulsory jurisdiction of the Court in respect of a much more limited scope of disputes.

This was expressed by the Court in the Nicaraguan case by saying: "(T)he coincidence or interrelation of those obligations thus remain in a state of flux until the moment of the filing of an application instituting proceedings, The Court has than to ascertain whether, at that moment, the two States accepted "the same obligations" in relation to the subject-matter of the proceedings".[77] If the system of obligations established by the optional clause is broken down to the bilateral level, one can practically find no two identical scopes of reciprocal obligations, and the extent of obligations assumed by each declaring State in respect of the other States party to the optional clause system is essentially different.

b) Most authors in the pertinent literature agree that the inclusion of reciprocity in the Statute is intended to ensure equality of the parties—the elementary requirement of justice—before the Court.[78] In Waldock's view, the optional clause ensures exactly the same rights and obligations for all States (i. e. those which have made declarations accepting compulsory jurisdiction—V. L.). He further argues that equality, mutuality and reciprocity are principles underlying the system of the optional clause. In order to ensure the equality of the parties to the fullest extent, reciprocity has also been applied to the limitations and reservations attached to declarations of acceptance. This has gone the length of entitling the States, which have recognized the Court's jurisdiction unconditionally, to avail themselves of the benefits of reservations

[77] ICJ Reports, 1984. 420–421.
[78] Briggs: *op. cit.* 245.

to declarations of acceptance by the adverse party. "The result is that application of the condition of reciprocity tends to equalize Declarations made with or without reservations."[79] In other words, a State making its declaration of acceptance without reservations or with some specific reservations recognizes the Court's compulsory jurisdiction in all other matters not affected by the reservations. This means that it has made an offer to the other States party to the optional clause system to the effect that it can be sued before the Court in any other matter. If a dispute is brought before the Court, and the declaration of acceptance of the applicant State contains reservations, the possibility exists for the respondent State to avail itself of the benefits of reciprocity and to invoke, if it so wishes, the reservations contained in the applicant State's declaration of acceptance. It is precisely the principle of equality of the parties that sets a limit of reliance upon the reservation contained in the declaration of the adverse party on the basis of reciprocity, and, as is also exemplified by the *Interhandel Case*, the application of double reciprocity was rejected by the Court through reliance on the principle of equality.

c) Considering that a State may, by virtue of reciprocity, invoke the reservation to the declaration of the adverse party, reservations tend, in practice, to make their effect felt more often than not, precisely against the State or States making a reservation, which is to say that this is a two-edged weapon.[80] Such was the case whenever the Court established the lack of its jurisdiction by invoking precisely the reservation or limitations contained in the declaration of the applicant State, while the respondent State relied on the reciprocity principle for causing the application of the other State to be rejected by the Court.[81]

[79] *Ibid*
[80] Decaux: *op. cit.* 88.
[81] This is what happened in, e. g., the Norwegian Loans Case.

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Wrongdoing, Culpability and the Logic of Criminal Law Defences

Abstract. This article examines the question of criminal liability in terms of the theoretical distinction between justification and excuse. By contrast with German and other continental criminal law systems, the distinction has not played a significant part in the development of criminal law doctrine in common law jurisdictions. Over the past twenty years, however, there has been a growing interest in the benefits of this approach to conceptualising criminal liability, manifested by the considerable literature on justification and excuse and the frequent references to the distinction in judicial decisions and legislative enactments. Although the distinction has been given a great deal of attention in common law countries in recent years, attempts at a systematic classification of criminal law defences on this basis run up against serious difficulties. These difficulties have much to do with the fact that elements of both justification and excuse often appear to overlap in the moral basis of a legal defence. It is argued that, notwithstanding these difficulties, the theory of justification and excuse offers a viable model, which can achieve and maintain coherence among criminal law defences and facilitate understanding and acceptance of criminal law and its presuppositions.

Keywords: criminal liability, theory of justification, theory of excuse, culpability

Justifications, excuses and criminal liability

Criminal law doctrine proceeds from the principle that a person cannot be convicted of an offence unless two basic elements are established: the conduct or state of affairs which a particular offence prohibits (*actus reus*), and the state of mind which a person must have at the time of such conduct or state of affairs (*mens rea*). Establishing criminal liability depends, moreover, upon the absence of a valid legal defence. A distinction is drawn between two types of defences: justifications and excuses. A justification-based defence challenges the unlawful character of an act which, on the face of it, violates a criminal prohibition. When such a defence is raised the argument is that, in the circumstances, an act which would normally constitute a criminal offence should be considered right or, at least, legally permissible. The circumstances of justification, in other words, are understood to alter the grounds for the moral and

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legal assessment of the relevant act. Self-defence and defence of another are often referred to as examples of justification-based legal defences. Claims of excuse, by contrast, do not deny the wrongfulness and unlawfulness of the act. What these defences call in question is the necessary internal relationship between a *prima facie* unlawful act and the actor. An accused who pleads a valid excuse cannot be held morally blameworthy and therefore culpable for having brought about the external elements of a criminal offence. Examples of this type of legal defence include insanity, duress and certain types of necessity.

Central to the theory of justification and excuse is the distinction between primary or prohibitory norms and norms of attribution. The former impose general duties of conformity with minimum standards of conduct on members of society who are required to guide their conduct accordingly if they are to avoid the sanctions provided by the law. These primary or prohibitory norms are complemented or modified by the norms of justification, which allow for exceptions to the application of the primary norms in prescribed circumstances. For example, the primary norm against committing acts of violence is complemented or modified by the provision which licenses the doing of such acts in self-defence or in defence of another. Justifications operate on the assumption that, when done under the prescribed circumstances, the act in question, harmful though it may be, should be assessed differently than when done under normal circumstances, i.e. under those in which the original prohibitory norm would apply. By contrast with the primary or prohibitory norms, the norms of attribution are specifically addressed to judges and juries as these norms lay down grounds for legally excusing someone who has violated a legal prohibition. Unlike claims of justification, the norms of attribution do not modify the primary norms. Their role is not to guide conduct but to allow for exceptions in ascribing moral blame as a prerequisite for legal culpability. According to Professor Fletcher:[1]

> "Wrongful conduct may be defined as the violation of the prohibitory norm as modified by all defences that create a privileged exception to the norm. The analysis of attribution turns our attention to a totally distinct set of norms, which do not provide directives for action, but spell out the criteria for holding persons accountable for their deeds. The distinction as elaborated here corresponds to the more familiar distinction between justification and excuse."

[1] Fletcher, G.: *Rethinking Criminal Law*. 1978, 458.

As criminal law is concerned not only with punishing wrongdoers but also with highlighting and reinforcing societal values and expectations, it should be capable of identifying the moral character of actions and the moral basis for exempting certain persons accused of offences from criminal liability and punishment.[2] In this respect, describing a defence as a justification conveys the message that the relevant conduct is approved or, at least, tolerated. On the other hand, labelling a defence as an excuse draws attention to the fact that, although the actor is free from blame, his conduct remains wrongful and as such is to be avoided. A failure to recognise the distinction between justification and excuse will result in sending confusing or contradictory messages to the community.[3] Besides its great moral significance, the distinction between justification and excuse has important practical implications. It is recognised, for example, that as the defence of duress operates as an excuse, a person who assists another in the commission of an offence should be convicted as an accessory even though the principal offender is excused on such grounds. By contrast, other things being equal, an alleged accessory would be free from criminal liability if the person accused of an offence as a principal successfully pleads a justification-based defence. Moreover, legally justified or authorised conduct cannot be resisted by force—e.g. one cannot justifiably use force to resist a lawful arrest, for this would undermine the greater interest being protected, i.e. the enforcement of the law—and third parties are generally entitled to assist a person whose action is deemed justified. On the other hand, because excuses do not deny the wrongful character of conduct, a person may use force to resist an attack by an excusable aggressor.[4] Moreover, whether a defence is classified as a justification or as an excuse may have important consequences as regards the issue of compensation of those harmed by the accused's conduct. If the defence is regarded as an excuse a person harmed would have a strong claim for compensation. By contrast, if the defence is

[2] According to M. Moore, by moral values and expectations we mean those "attitudes of resentment, moral indignation, condemnation, approval, guilt, remorse, shame, pride and the like, and that range of more cognitive judgments about when an actor deserves moral praise or blame." "Causation and Excuses" (1985), 73 *California Law Review*, 1091, 1144.

[3] See Robinson, P.: A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability. 23 *University of California at Los Angeles Law Review* (1975) 266, 276–277.

[4] See Fletcher: *op. cit.* 761–762; Alldridge, P.: The Coherence of Defences. [1983] *Criminal Law Review*, 665–666.

classified as a justification the victim's claim for compensation would be significantly weaker.[5]

Commentators agree that, by contrast with German and other Continental criminal law systems, the distinction between justification and excuse has not been given enough weight in the development of modern criminal law doctrine in Common law jurisdictions.[6] It is argued that much of the confusion surrounding criminal law doctrine today could have been avoided had the importance of the distinction been recognised at an earlier stage in the development of the law.[7] Nevertheless, the increasing literature on justification and excuse and the frequent references to the relevant distinction in judicial decisions and legislative enactments in recent years manifest a renewed interest in the benefits of this approach to conceptualising criminal liability.[8]

Justification and excuse in common law jurisprudence

At early common law the distinction between justification and excuse was fully recognised and had important practical implications, particularly in the context of the law of homicide. A successful justification-based defence resulted in the full acquittal of the accused. On the other hand, an excuse-based defence resulted in the usual sentence for homicide—death—and the forfeiture of the accused's property. The excused person, however, could escape execution on the grounds of a royal pardon. The Statute of Gloucester, enacted

[5] See Horowitz, D.: Justification and Excuse in the Program of the Criminal Law. 1986. 49 *Law and Contemporary Problems* 109–122.

[6] See e.g., Fletcher, G.: The Individualization of Excusing Conditions. *Southern California Law Review* 47, (1974), 1269; The Right and the Reasonable. *Harvard Law Review* (1985), 949; Yeo, S. M. H.: *Compulsion in the Criminal Law*, 1990, 5.

[7] As Professor Yeo points out: "The criminal theory concerning justification and excuse can no longer be ignored by the courts. Its primary contribution is consistency in the development of the law, a goal which the courts themselves proclaim as most desirable. Without the theory to guide the courts, aspects of the law of self-defence, duress, necessity and, until only recently provocation, have developed in an inconsistent fashion." Yeo, S. M. H.: Proportionality in Criminal Defences. *Criminal Law Journal* 12 (1988), 227.

[8] See e.g. the decision of the Supreme Court of Canada in *Perka v. R.* [1984] 2 S.C.R. 232, 42 C.R. (3D) 112. As Dickson J. pointed out in that case: "Criminal theory recognizes a distinction between 'justifications' and 'excuses'. A 'justification' challenges the wrongfulness of an action which technically constitutes a crime...In contrast, an 'excuse' concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor." (S.C.R. 247, C.R. 128).

in the thirteenth century,[9] provided that killing another in self-preservation, like the killing of another by misadventure or accident, was excusable and therefore subject to royal pardon. The distinction between justifiable and excusable homicide was elaborated further by the commentators of the 17th and 18th centuries. In his *Commentaries on the Laws of England* (1769), William Blackstone distinguished between justifiable homicide as it is committed "either for the advancement of public justice or for the prevention of some atrocious crime",[10] and excusable homicide which could be of two kinds: "either *per infortunium*, by misadventure; or *se defendendo*, upon a principle of self-preservation."[11] Killing in self-defence was considered excusable when two persons became engaged in a fight in the course of which deadly violence was used by one of the parties. If the killing took place in the heat of the moment, it was called "chance-medley" and the offender was guilty of the lesser crime of manslaughter. If, however, the accused had killed the other after he had retreated as far as possible, this was excusable homicide *se defendendo*.[12]

[9] 6 Edw. I.c.9 (1278).

[10] Blackstone, W.: *Commentaries on the Laws of England* (1769), 179.

[11] *Ibid.* 82.

[12] Francis Bacon was one of the first English writers to comment on the distinction between justification and excuse. In discussing what he called "necessity of conservation of life" Bacon used as examples the stealing of food by a person to satisfy his present hunger and the escaping of prisoners from a jail following an accidental fire. Bacon regarded the first of these cases as an example of excusing necessity; however he treated the second case as an example of justifying necessity, a view that was to be questioned by later writers. Further, Bacon described as justifiable action one's pulling down the wall or house of another to prevent a fire from spreading and as excusable the killing of another by misfortune. Bacon, F.: *The Elements of the Common Laws of England*, (1630), 29 ff. And see Coke: *The Third Part of the Institutes* (1660), 50 ff.; Dalton, M.: *Countrey Justice*, (1619) 224 ff. In his *Pleas of the Crown*, published in 1678, Hale distinguished between three kinds of homicide: "(1) Purely voluntary, viz., murder and manslaughter; (2) purely involuntary, as that other kind of homicide *per infortunium*; (3) mixed, partly voluntary and partly involuntary, or in a kind necessary; and this again of two kinds, viz., including a forfeiture as *se defendendo*, or not including a forfeiture as (1) in defence of a man's house; (2) in defence of his person against an assault in *via regia*; (3) in advancement or execution of justice." (472) Hale differentiated homicides which were "justifiable, and consequently including no forfeiture at all, nor needing pardon", from homicides which were "excusable and including a forfeiture." (39–40). William Hawkins, in his *Treatise of the Pleas of the Crown* (1716), explained justifiable homicide as being "either of a publick or a private nature. That of a publick nature, is such as is occasioned by the due execution or advancement of publick justice. That of a private nature is such as happens in the just defence of a man's person, house, or goods." (70). Moreover, he distinguished between

East, in his *Pleas of the Crown* (1803), offered a more elaborate analysis of the distinction between justifiable and excusable homicides. Three kinds of homicide *ex necessitate* were identified: (i) homicides in the advancement of justice, deemed justifiable by permission of the law, e.g. where a person having authority to arrest or imprison another kills the party who resists arrest in a fight; (ii) homicides in execution of justice, regarded as justifiable by the command of the law, e.g. the lawful execution of a convicted criminal; and (iii) homicides "in defence of person or property under certain circumstances of necessity" which are "either justifiable by permission of the law, or only excusable."[13] In the third category East included: (i) the justifiable killing of another "who comes to commit a known felony with force against his person, his habitation, or his property"[14]; (ii) the excusable killing of another in self-defence upon a sudden combat, described as homicide *se defendendo* upon chance-medley, and (iii) the killing of a person in circumstances of "dire necessity, which is not induced by the fault of either party, where one of two innocent men must die for the other's preservation: this has been held by some to be justifiable; perhaps it may more properly be considered as excusable: justification is founded upon some positive duty; excuse is due to human infirmity."[15] A further kind of excusable homicide, identified by East, was homicide by misadventure, which occurs "when a man doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person." In East's time it was recognised that in this case the "the jury under the direction of the court may

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two kinds of excusable homicide: *per infortunium* and *se defendendo*. "[H]omicide *per infortunium*, or by misadventure...is when a man in doing a lawful act, without any intent of hurt, unfortunately chances to kill another..." (73). "[H]omicide *se defendendo*...seems to be where one who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him...kills the person by whom he is reduced to such an inevitable necessity." (74–75). See also: Foster, M.: *Crown Cases* (1762), 273; Stephen, J. F.: *A History of the Criminal Law of England* III, (London 1883); Pollock, F. and Maitland, F.: *The History of English Law*. (2nd ed., 1898), 478–481; Green, T. A.: Societal Concepts of Criminal Liability in Medieval England. 1972. 47 *Speculum* 669, 675 ff; "The Jury and the English Law of Homicide, 1200–1600" (1976) 74 *Michigan Law Review* 413, 428; Kaye, J. M.: The Early History of Murder and Manslaughter. 1967. 83 *Law Quarterly Review* 365 and 569.

[13] 220–221.

[14] 221.

[15] 221.

acquit the party, without putting him to purchase a pardon under the statute of Gloucester, c.9." [16]

Although at first pardons were granted in special occasions, their number gradually increased until they came to be granted by the chancellor as a matter of course, without the need to consult the monarch. Until the pardon was confirmed, the excusable offender remained in jail or, in later years, under bail. Besides the pardon, the excused offender was granted a special writ of restitution of his goods. Gradually the practice relating to the forfeiture of the offender's goods fell into abeyance, until 1828 when forfeiture was formally abolished by statute.[17] Thus, at the end, both justifications and excuses led to the same result, namely the accused's acquittal. As the difference between the effects of pleading a justification and an excuse gradually disappeared, the significance of the distinction for the common lawyer withered away and its possible role in formulating a comprehensive system of criminal law defences was subsequently overlooked. The terms justification and excuse have often been avoided by common lawyers and, when they have been used by judges and commentators, they have often been treated as interchangeable or synonymous.[18] The view that came to prevail in English criminal law is that the absence of a justification or an excuse constitutes part of the legal definition of a criminal offence. According to this approach, when a person acts under a valid justification or excuse he cannot commit the offence charged. Some authors subsume the absence of such a defence under the requirement of *actus reus*, while others regard it as an independent definitional requirement that should be distinguished from the *actus reus* and *mens rea* elements of the offence.[19] Under the latter view, a distinction should be drawn between

[16] 221–222.

[17] 9 Geo. IV c. 1, s. 10 (1828).

[18] As one commentator remarked: "[T]he distinction between justifiable and excusable self-defence was, at one time, one of considerable importance. Moreover, it is still occasionally referred to in the cases and the two are still separately classified in the texts. However, so far as the present day law is concerned, the distinction is one without a difference... The terms are generally used synonymously and interchangeably." Miller, J.: *Handbook of Criminal Law*, 1934, 199. And see Stephen: *History of the Criminal Law... op. cit.* III, 1883, 1.

[19] Glanville Williams, for example, argues that: "[the] *actus reus* includes not merely the whole objective situation that has to be proved by the prosecution, but also the absence of any ground of justification and excuse." *Criminal Law: The General Part*, 1961, 20. And according to Hart, H. L. A.: "[The modern English lawyer] would simply consider both [excuse and justification] to be cases where some element, negative or positive, required in the full definition [of the offence] was lacking." Hart goes on to point out,

excusing conditions negating the *actus reus* and/or *mens rea* elements of offences (e.g. automatism, mistake), and excusing conditions operating outside these elements (for example, duress, necessity). In the latter case the actor brings about the *actus reus* of an offence with the requisite intent, but criminal responsibility is precluded or diminished (in the case of a partial excuse) on the basis that, in the overwhelming circumstances the actor found himself in, his normal capacity to choose the course of his action was vitiated or substantially impaired. Sometimes the statutory definition of an offence includes the phrase "without lawful authority or excuse". It is suggested that the aim of this phrase is to serve as a reminder to judges and juries that the application of the provision creating the offence is not absolute but always subject to the absence of a recognised general defence. On the other hand, the use of the phrase "without reasonable excuse" instead of "lawful excuse" in the legal definition of an offence implies that, at the court's discretion, the accused may rely on an excuse not formally recognised by the criminal law, provided that such an excuse is reasonable.[20]

Professor George Fletcher has offered an important lead in re-awakening interest in the distinction between justification and excuse in Anglo-American criminal jurisprudence. Fletcher traces the decline of the distinction to the prevalence of positivistic ideas in the development of modern law. He argues that the judges' tendency to abstract the judicial decision from the individual case in order to formulate general rules of law resulted in the overlooking of the fundamental character of criminal law as "an institution of blame and punishment".[21] According to Fletcher criminal condemnation and punishment presuppose a negative moral judgment of the actor's character as reflected in her voluntary violation of a criminal prohibition. From this viewpoint, excuses are seen as introducing exceptions in the application of the rules of positive law, for their role is to block the normal inference from a wrongful act that the actor's character is morally flawed. Such moral assessment of the accused's

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however, that "...the distinction between these two different ways in which actions may fail to constitute a criminal offence is still of great moral importance". Hart, H. L. A.: Prolegomenon to the Principles of Punishment. In.: *Punishment and Responsibility*, 1968, 13.

[20] Smith, J. C.: *Justification and Excuse in the Criminal Law: The Hamlyn Lectures*, 1989, 47 ff.

[21] Fletcher: *Rethinking... op. cit.* 467. See also his article "The Individualization of Excusing Conditions", *Southern California Law Review* 47, (1974), 1269.

character is essential to any theory of criminal liability that connects the application of criminal punishment with the principle of just deserts.[22]

Fletcher argues, moreover, that the common law's reliance on the concept of reasonableness, as providing a single standard for dealing with legal disputes, tends to overshadow the distinction between justification and excuse. The common law approach is characteristic of what he calls a "flat" legal discourse—a system in which all the criteria pertinent to the resolution of a legal problem revolve around the application of a single norm. In Fletcher's words:[23]

> "The reasonable person enables us to blur the line between justification and excuse, between wrongfulness and blameworthiness, and thus renders impossible any ordering of the dimensions of liability. The standard 'what would a reasonable person do under the circumstances?' sweeps within one inquiry questions that would otherwise be distinguished as bearing on wrongfulness or blameworthiness. Criteria of both justification and excuse are amenable to the same question."

Fletcher contrasts the common law approach with what he terms "structured" legal discourse, and points to the German law as an example. In this context legal disputes are resolved in two stages. The admission of an absolute norm, at the first stage of analysis, is followed by the introduction of qualifications introducing restrictions to the application of the norm, at the second. The distinction between justification and excuse is most at home in a system which adopts such a structured approach to defining and tackling legal disputes. In such a system, the question of wrongfulness of an act logically precedes the question of its attribution to the actor. Questions of justification, as pertinent to the issue of wrongdoing, take precedence over questions of excuse. This structured approach to criminal liability, Fletcher argues,[24] is consistent with a theory of criminal responsibility that lays special emphasis on retributive punishment and the principle of just deserts. From the viewpoint of retributive theory, the question of whether the actor deserves punishment cannot be considered before determining the wrongdoing to be punished. As

[22] Fletcher: *Rethinking... op. cit.* 800. See also Bayles, M.: Character, Purpose and Criminal Responsibility. *Law and Philosophy* 1, (1982), 5–20.

[23] Fletcher: The Right and the Reasonable. *op. cit.* 949, 962–963.

[24] Fletcher: *Rethinking... op. cit.* 961. For an interesting account of the role of excuses from the viewpoint of retributive theories of punishment see Dressler, J.: Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code. *Rutgers Law Journal* 19 (1988), 671.

related to the requirement of just deserts, claims of excuse become relevant following an admission that a wrongful act has been committed.

By contrast with the general trend in modern common law jurisprudence, the distinction between justification and excuse has been instrumental in the formation of criminal law doctrine in Germany and other Continental European jurisdictions. A general account of the distinction as developed in German criminal law theory is offered in the following paragraphs.

Justification and excuse in German criminal law theory

In Germany and other Continental European legal systems legal doctrine is permeated by the fundamental idea that the normative principles of law are not reducible to the body of enacted legal rules, or law in a strict sense (*Gesetz*). According to Kant, the transcendental conception of law, captured in the notion of Right (*Recht*), pertains to the conditions of freedom that allow diverse choices in society to harmonise with each other.[25] Right, or law in a broad sense, derives its binding force from its content; enacted law derives its binding force from its form-from the fact that its rules have been duly enacted by a legislative authority. The principles of the Right are perceived as pre-existing and transcending the body of enacted rules whose role is merely to lay down what is to happen when the former principles are violated. An enacted rule, which by definition pertains to a specific type of legal relationship, draws on the Right, but cannot be identified with it-it is only a *vinculum iuris*, a bond based on Right. The application of a legal rule is typically strict, for the act or dispute is treated under the conditions specified by the letter of the law, without taking into account the circumstances of the individual case. By contrast, the application of the Right is flexible and as such adaptable to the needs of each particular case. Unlawfulness is defined primarily in relation to the Right, for an unlawful act is taken to encroach upon the normative principles which inform the particular legal provision under which the act is subsumed.[26] The distinction between Right, or law in a normative sense and enacted, posited law is characteristic of continental jurisprudence.[27] The

[25] Kant, I.: *The Metaphysical Elements of Justice*; and see Fletcher: The Right and the Reasonable. *op. cit.* 965; Fletcher: *Rethinking... op. cit.* 779 ff.

[26] See Jescheck: *Lehrbuch des Strafrechts, Allgemeiner Teil* (2nd ed. 1972), 154.

[27] Thus the Germans distinguish between *Gesetz* and *Recht*, the French between *Loi* and *Droit*, the Italians between *Legge* and *Dirrito*, the Russians between *Zakon* and *Pravo*, the Greeks between *Nomos* and *Dikaeon*.

prevalence of positivistic views in Anglo-American jurisprudence precluded a similar distinction from being recognised in common law jurisdictions. The distinction between Right, or law in a broad normative sense, and enacted law, as elaborated by the jurist Karl Binding,[28] allowed German theory to advance a conception of unlawfulness that goes beyond the statutory definition of a criminal offence. This development was, in turn, essential, to distinguishing between unlawfulness and guilt and, subsequently, between justification and excuse.

In German legal thinking the theory of justification and excuse emerged from the elaboration of the fundamental distinction between wrongfulness and blameworthiness. Although initially expressed in these general moral terms, this distinction was brought closer to law through a contrast between unlawfulness (*Rechtswidrigkeit*) and guilt (*Schuld*).[29] The latter distinction was first recognised in the domain of private law and was subsequently introduced in criminal law theory.[30] This development is associated with the emergence of the so called 'tripartite' system in German criminal law theory. Crime was described as an act which a) meets the statutory definition of an offence (*Tatbestandsmassigkeit*), b) is objectively unlawful (*Rechtswidrig*) and c) can be subjectively attributed to the actor (*Schuldhaft*).[31] From this viewpoint, guilt was described as the subjective or internal relationship between the actor and the prescribed harm and as such it was distinguished from the objective or external unlawfulness of the act. The subjective link between the actor and the harm captured in the notion of guilt pertains to the elements of intention, recklessness and negligence. This interpretation became known as the

[28] Binding, K.: 1 *Die Normen und ihre Übertretung* 135 (1872). Binding's second important contribution to the theory of criminal liability was his analysis of guilt in terms of intention, recklessness and negligence, an approach that was widely adopted by later jurists.

[29] See Achenbach: *Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre* (1974) 19 ff.; Jescheck, supra note 26, 153 ff.

[30] As Jhering, R. first explained, the negation of the subjective blameworthiness of the actor does not necessarily preclude the wrongful act from having certain legal consequences. *Das Schuldmoment im Römischen Privatrecht* 4, (1867); for a fuller discussion of this matter see Eser, A.: Justification and Excuse. *American Journal of Comparative Law* 24 (1976), 625.

[31] As proposed first by Beling, E. in his *Lehre vom Verbrechen* (1906) and elaborated by Liszt, V. in his *Lehrbuch des Deutschen Strafrechts* (1919) 110 ff.; For an interesting discussion of this approach to criminal liability see Fletcher, G.: The Right Deed for the Wrong Reason: A Reply to Mr Robinson. 23 *University of California at Los Angeles Law Review* (1975) 293, reprinted in Michael Louis Corrado (ed), *Justification and Excuse in the Criminal Law*, 1994, 305.

"*psychological*" theory of guilt.[32] In criticising the tripartite system, some authors have argued that the satisfaction of the formal requirements of a legal provision is but another condition of unlawfulness. These authors have proposed, instead, a twofold approach to criminal liability based solely on the distinction between unlawfulness and guilt.[33]

The clear-cut dichotomy between objective, i.e. pertinent to unlawfulness, and subjective, i.e. pertinent to guilt, aspects of crime was finally set aside in the light of subsequent developments in German criminal theory. Jurists recognised that unlawfulness cannot be adequately canvassed without reference to certain subjective requirements. Thus, knowledge on the part of the actor that his conduct met the objective conditions of lawfulness was seen as a further condition of legal justification. Moreover, it was accepted that the notion of guilt hinges not only on subjective but also on objective considerations. The introduction of an objective element in relation to guilt meant that a claim denying attribution of an unlawful act to an accused was to be assessed also by reference to the question of what could reasonably be expected of a normal person when faced with the circumstances of pressure the accused found himself in. As a result of this development, the "psychological" theory of guilt was abandoned in favour of the so called "*normative*" theory of guilt.[34] According to the latter theory, the requirements of guilt are not restricted to intention, recklessness and negligence, but include, in addition, considerations of capacity and control. Lack or substantial impairment of the actor's ability to comply with the law would exclude or mitigate guilt, notwithstanding his acting intentionally, recklessly or negligently. Nevertheless, the tripartite approach to criminal liability, despite the criticisms and further refinements it was subjected to, continued to be regarded as the basis of legal doctrine in German criminal jurisprudence.

James Goldschmidt was the first jurist to offer a convincing analysis of justification and excuse in German criminal jurisprudence. His theory proceeds from the fundamental distinction between legal norm (*Rechtsnorm*) and norm of responsibility (*Pflichtnorm*).[35] According to Goldschmidt, a formally expressed

[32] Eser, A.: *op. ci.t.* 626–627.

[33] See e.g. Schmidhauser: *Strafrecht, Allgemeiner Teil*, (2nd ed.), 1975, 141 ff. See reference in Eser: *op. cit.* 627.

[34] As elaborated by Frank, R. in his *Der Aufbau des Schuldbegriffs* (1907) and *Das Strafgesetzbuch fur das Deutsche Reich* (18th ed. 1931) 136 ff. and Goldschmidt, J. in his "Normativer Schuldbegriff" 1 *Festgabe fur R. v. Frank* (1930) 428.

[35] Goldschmidt, J.: Der Notstand, ein Schuldproblem. 4 *Osterr. Zeitschrift fur Strafrecht* (1913), 144 ff.

legal norm, i.e. a statutory provision, is tacitly complemented by a norm of responsibility requiring one to regulate her internal stance so that his actions do not conflict with the legal norm. The distinction between justification and excuse is attuned to that between legal norm and norm of responsibility. Claims of justification dispute the unlawful character of a prima facie infringement of a legal norm; claims of excuse, in contrast, challenge the violation of a norm of responsibility, i.e. the required correspondence between internal attitude and external conduct according to a legal norm. In cases of justification criminal liability is excluded by virtue of what Goldschmidt calls a "*greater objective interest*". In cases of excuse, on the other hand, it is excluded by virtue of an "irresistible subjective motivation". The distinction between justification and excuse, as articulated by Goldschmidt, was subjected to further theoretical elaboration and refinement and is now fully recognised in German criminal law. Thus, under the new German Penal Code, enacted in 1975, self-defence is regarded as a justification.[36] The defence of necessity is treated under two separate headings: necessity as a justification,[37] and necessity as an excuse.[38]

The theory of justification and excuse as a basis for the classification of criminal law defences

The distinction between justification and excuse offers a basic theoretical formula for understanding the way criminal law defences operate. One may seek to explain, on this basis, the demarcation of different defences as well as of different ways in which a legal defence operates or, to put it otherwise, of different pleas treated under the same label. From this viewpoint one may distinguish, for example, between self-defence as a justification and duress as

[36] Para 32 (Self-defence) provides: "(1) Whoever commits an act in self-defence does not act unlawfully. (2) Self-defence is that defence which is required in order to prevent a present unlawful attack on oneself or another."

[37] Para 34 (Necessity as justification) provides: "Whoever commits an act in order to avert an imminent and otherwise unavoidable danger to life, limb, liberty, honor, property or other legal interest of himself or of another does not act unlawfully if, taking into account all the conflicting interests, especially the legal ones, and the degree of danger involved, the interest protected by him significantly outweighs the interest which he harms. The rule applies only if the act is an appropriate means to avert the danger."

[38] Para 35 (Necessity as excuse) provides: "(1) Whoever commits an unlawful act in order to avert an imminent and otherwise unavoidable danger to his own life, limb, or liberty, or to that of a relative or person close to him, acts without guilt..."

an excuse, as well as between justifying and excusing necessity.[39] Although, at a theoretical level, the distinction between justification and excuse presents few difficulties, attempts at a general classification of the criminal law defences along these lines come up against a number of problems. These problems have much to do with the fact that, in practice, elements of excuse often appear to overlap with elements of justification. According to Greenawalt[40]

> "The difficulty in distinguishing rests on the conceptual fuzziness of the terms 'justification' and 'excuse' in ordinary usage and on the uneasy quality of many of the moral judgments that underlie decisions that behavior should not be treated as criminal. Beyond these conceptual difficulties, there are features of the criminal process, notably the general verdict rendered by lay jurors in criminal trials, that would impede implementation in individual cases of any system that distinguishes between justification and excuse."

Greenawalt argues that there is little room for a systematic classification of criminal law defences on the basis of the justification-excuse distinction in Anglo-American law, although he does not deny the importance of the distinction in elucidating problems of moral and criminal responsibility.

Necessity offers an example of a defence whose rationale may be seen as resting upon both justificatory and excusative considerations. Necessity relates to situations where a person is forced to commit an offence in order to avoid a greater, imminent threat to himself or another. What distinguishes this defence from that of duress is that the danger which compels a person to break the law arises from the circumstances the person finds himself in, rather than from the

[39] As Robinson notes, it is possible to recognise "two different categories of defense under the same label at the same time and in the same jurisdiction. A jurisdiction may properly provide a 'self-defense' justification and a 'self-defense' excuse. Such multiple defenses may even occur in the same provision..." He goes on to argue, however, that "when this is done, the potential for misunderstanding and confusion increases significantly." "Criminal Law Defenses: A Systematic Analysis", 82 *Columbia Law Review* (1982) 199, 240. For a further discussion of this problem see Gur-Ayre, M.: Should the Criminal Law Distinguish Between Necessity as a Justification and Necessity as an Excuse? *Law Quarterly Review* 102 (1986), 71.

[40] "The Perplexing Borders of Justification and Excuse", (1984) 84 *Columbia Law Review*, 1897, 1898. Consider also "Distinguishing Justifications from Excuses" (1986) 49 *Law and Contemporary Problems* 89. And see Eric Colvin, *Principles of Criminal Law*, 1991, 204–205.

threats of another human being.[41] Although, in Anglo-American jurisprudence, necessity is traditionally recognised as an excuse,[42] questions of justification may still arise in so far as the person is still regarded as being capable of exercising a degree of choice. Thus, in English law, when an accused pleads necessity the jury are directed to consider these two interrelated questions: a) was the accused compelled to act as he did because he had a good reason to believe that otherwise he or another person would suffer death or grievous bodily harm? and b) if so, would a reasonable person, sharing the relevant characteristics of the accused, have responded to the situation the way the accused did?[43] The first of these questions is concerned with the subjective condition of compulsion, and as such it pertains to excuse; the second is concerned with the requirement of proportionality, or the objective appropriateness of the accused's conduct in the circumstances, and as such it relates to justification. The defence may be available only if, from an objective standpoint, the accused can be said to have acted reasonably and proportionately in order to avoid the forms of harm specified, i.e. death and serious bodily injury. A similar position was adopted by the Supreme Court of Canada in *Perka v. R.*[44] In that case it was held that necessity should be recognised as an excuse, as a concession to human frailty, and therefore it implies no vindication of the accused's actions. At the same time, however, it was stated that the defence requires a balancing of harms and that a plea of necessity should fail unless the harm inflicted was less than the harm prevented. According to this interpretation of the necessity defence, the success of the proposed compulsion-based excuse depends upon objective or justificatory considerations.

Similarly, the defence of self-defence, which is traditionally treated as a justification, may also be conceptualised as an excuse if the emphasis is placed on the assumption that a person whose life is under immediate threat is incapable of exercising free choice, i.e. acts morally involuntarily.[45] This

[41] Hence the defence of necessity is sometimes referred to as "duress of circumstances".

[42] See e.g. *Moore v Hussey* (1609) Hob 96.

[43] *R v Conway* [1988] 3 All ER 1025; *R v Martin* [1989] 1 All ER 652.

[44] *Perka v R* [1984] 2 S.C.R. 232; 42 C.R. (3d) 112; (1985) 14 C.C.C. (3d) 385.

[45] For a discussion of the rationale of self-defence see Omichinski, N.: Applying the Theories of Justifiable Homicide to Conflicts in the Doctrine of Self-Defence. 1987. 33 *Wayne Law Review* 1447; Fletcher, G.: The Right to Life. 1979. 13 *Georgia Law Review* 1371; Kadish, S.: Respect for Life and Regard for Rights in the Criminal Law. 1976. 64 *California Law Review* 871; Ashworth, A.: Self-Defence and the Right to Life. 1975. 34 *Cambridge Law Journal* 282; Dressler, J.: New Thoughts about the Concept of Justification

interpretation of the defence may also be adopted in cases where force in self-defence is used against an excusable aggressor, e.g. an insane person or a child. In such cases the aggressor's culpability in starting the fight can no longer be said to render the aggressor's rights less worthy of protection. Further, it is recognised that when the defence of self-defence is raised, a mistaken belief as to the existence or intensity of an attack and/or the psychological pressure an accused was experiencing in the circumstances (excuses) are usually taken into account in deciding whether his response was reasonable and therefore justified.[46] What is known as "putative self-defence" offers another example of a defence whose rationale involves an overlap of justificatory and excusative considerations. In English law, when an accused is charged with an offence against the person and pleads self-defence or defence of another, he will be judged in the light of the circumstances as he believed them to be. The accused's belief need only be honest, not reasonable.[47] What this means is that, even if the accused's actions were based on a mistaken assessment of the situation, his response will be deemed justified if the force used was reasonable in the light of that mistaken belief. It is obvious that here an excusing condition, i.e. mistake of fact, becomes an element of self-defence as a justification-based defence. One may argue, however, that in such cases the accused's initial mistake converts the entire defence into an excuse. From this viewpoint it may be said that only where the use of force, as well as the amount of force used, is objectively warranted one may speak of self-defence as a justification.[48] On the other hand, it has been argued that, in moral discourse, the justification of an action is seen as depending not only on its consequences but, more importantly, on the propriety of the reasons for which the action is taken. If the emphasis is placed on this letter element, then we

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in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking. *University of California at Los Angeles Law Review* 32 (1984), 61.

[46] See e.g. Lord Morris' judgment in *Palmer v. The Queen* [1972] A.C. 814.

[47] *R v Williams* [1987] 3 All ER 411 (CA); *Beckford v. R.* [1988] AC 130. The traditional approach has been that for self-defence to be accepted in such cases the accused's mistake must be both honest and reasonable. This position was recognised in England prior to the decisions in *Williams* and *Beckford* and is still accepted in other common law jurisdictions. See e.g. the decision of the High Court of Australia in *Zecevic v. DPP.* (1987) 162 C.L.R. 645; Canadian Criminal Code, ss 27, 34, 35, 37; New Zealand Crimes Act ss 48–49.

[48] See e.g. Fletcher: *Rethinking... op. cit.* 762–769; Robinson: Criminal Law Defenses: A Systematic Analysis. supra note 39, 239–240.

may speak of a person as acting justifiably irrespective of whether her actions, in view of their consequences, are objectively justified or not.[49]

Elements of justification and excuse also appear to overlap in some cases where a mitigating or partial defence is raised. A plea for mitigation may be at issue, for example, where an accused's defence of self-defence has failed on the grounds that the amount of force used was unreasonable or excessive. In such a case the accused may seek to rely on a partial excuse, claiming that under the pressure of the circumstances it was very difficult for him to assess correctly the amount of force needed to stifle the attack; or he may seek to rely on a partial justification, claiming that the fact that he was defending against an unlawful attack is sufficient to diminish the objective wrongfulness of his response. A similar overlap of excusative and justificatory elements is apparent in relation to the partial defence of provocation. Provocation, when pleaded as a partial defence to murder in English law, is not aimed at complete exoneration but only at the reduction of homicide from murder to manslaughter. Conceptually, the defence is understood to hinge upon two interrelated requirements, namely the wrongful act of provocation and impaired volition or loss of self-control. If the emphasis is placed on the assumption that the accused was acting in response to the victim's wrongdoing, the defence could be regarded as a partial justification. If, on the other hand, the emphasis is placed on the fact that the accused had lost self-control at the time of the killing, the defence would appear to operate as a partial excuse. As J. Dressler remarks[50]

> "Confusion surrounds the provocation defence. On the one hand, the defence is a concession to human weakness; the requirement that the defendant act in sudden heat of passion finds its roots in excuse theory. On the other hand the wrongful conduct requirement may be, and certainly some decisions based on that element are, justificatory in character. It is likely that some of the confusion surrounding the defence is inherent to the situation, but it is also probably true that English and American courts were

[49] See Colvin, E.: *Principles of Criminal Law*, 1991, 211; Dressler, J.: New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking", *University of California Law Review*, (1984), 92–95; Greenawalt, K.: The Perplexing Borders of Justification and Excuse. *Columbia Law Review*, (1984), 1922–1925.

[50] "Provocation: Partial Justification or Partial Excuse?" *Modern Law Review* 51 (1988), 467, 480. See also Dressler: Rethinking Heat of Passion: A Defence in Search of a Rationale. 73 *Journal of Criminal Law and Criminology*, (1982), 421, 428.

insufficiently concerned about the justification-excuse distinctions while the law developed."

The main obstacle to drawing a clear distinction between justifications and excuses is that, in the moral discourse, warranted conduct ranges from that which might properly be approved and encouraged through that which might only be accepted to what might be tolerated as a regrettable but unavoidable consequence of the interplay of human nature and circumstance. Anglo-American law has attempted to circumvent these problems of moral shading by avoiding framing legal defences in terms of justification and excuse, placing the emphasis, instead, on the all-embracing requirement of reasonableness.

Excuse, justification and the reasonable person

The mythical figure of the "reasonable person" maintains a tenacious hold on Anglo-American criminal law doctrine. As Fletcher points out, law's recourse to the standard permits a continuous infusion of commonly accepted moral values into the law and, as such, constitutes an effort to go beyond the formal sources of the criminal law and to reach for "a higher, enduring, normative plane".[51] This understanding of the "reasonable person" gains support in the light of the ever-increasing tendency towards leaving questions of reasonableness to be determined by the jury, the embodiment of community values and expectations. Nonetheless, one could not easily account for those moral considerations which underpin the "reasonable person" as the basis of a generally applicable test, nor could one prescribe the nature of the disputes to be resolved on such a basis. According to Fletcher, the law's reliance on the "reasonable person" means that heterogeneous criteria of justification and excuse, of wrongfulness and blameworthiness, are subsumed under the same inquiry and this makes it difficult to demarcate between fundamentally different perspectives of liability.

Nevertheless, the role of the "reasonable person" may be interpreted in different ways, depending on the nature of the inquiry within which the relevant standard operates. With regard to inquiries of justification, the "reasonable person" indicates the course of action that should be re–garded, in the circumstances, as legally permissible. In this respect the "reasonable person" embodies the moral principles that inform and support judgments of legal justification, recognising exceptions to the primary or prohibitory rules of the criminal law.

[51] Fletcher: The Right and the Reasonable. *op. cit.* 980.

In this context reasonableness defines the required levels of vigilance, prudence and regard for the welfare of others which need to be met for conduct to be considered justifiable. Thus, in a situation wherein a conflict of values or interests becomes inevitable the actor is called on to act as a reasonable person, that is to preserve the value or interest which is considered as being objectively superior. From the point of view of the justification theory, such an act, harmful though it may be, should nonetheless be considered legally acceptable. Further, causing harm in pursuance of a legal right, e.g. the right of self-defence, would not be legally warranted unless the actor observes certain limitations or, one might say, does not act "in abuse" of the right. In this regard the "reasonable person" is referred to as relevant to circumscribing the bounds within which a legal right is regarded as being properly exercised.

With regard to inquiries of excuse, on the other hand, the central question is whether the actor is fairly expected to stand up to the pressure of the circumstances and refrain from acting wrongfully. The "reasonable person" provides a yardstick in answering this question. In this context the standard of reasonableness is based on a minimalist conception of ethics. What is excluded from criminal responsibility is conduct that meets common sense expectations as to what degree of pressure ordinary people, concerned for the welfare of others, should be able to stand up to, even though such conduct may be regrettable from an idealistic viewpoint. In the context of excuse theory, the interpretation of the standard is for the most part informed by considerations having to do with what is often referred to as the "realities" or "failings" of human nature. The slide from the notion of "reasonable" to that of "ordinary" or "average" or "normal" person is sometimes suggestive of a shift from justification to excuse, as the latter notions seem more apposite to accommodate the element of human frailty.[52]

Although legal excuses are said to constitute concessions to the failings of human nature because it is assumed that these failings are common to all people, the combination of factors that occasion a person's surrender to pressure, as a manifestation of human frailty, could only be determined by reference to the idiosyncrasies of the particular case. Thus it becomes necessary to endow the "reasonable person" with certain individual characteristics of the accused, i.e. those that are deemed relevant to determining, in an objective way, the degree of pressure to which the actor was subjected. Only on such a basis may it properly be asked whether the accused should fairly be expected to resist the pressure and abstain from breaking the law. Of the characteristics that may bear upon the actor's capacity to withstand the compelling situation

[52] See Greenawalt, K.: The Perplexing Borders... *op. cit.* 1904–1905.

only those for which he cannot be blamed may be taken into account in describing the ambit of the applicable test. The singling out of those individual characteristics that are material to the assessment of the proposed excuse can itself be perceived as a involving an objective moral judgment. In this respect, it seems correct to say that incorporating certain personal characteristics of the actor into the "reasonable person" standard does not in reality undermine the basically objective character of the relevant test.[53] A clear distinction should be drawn, however, between individual peculiarities that may be attributed to the "reasonable person" and peculiarities whose presence would render the standard inapplicable. The latter pertain to conditions which are taken to remove the actor from the category of "reasonable" or "normal" people. As was indicated before, these conditions provide the basis for a different type of legal defence revolving around the notion of *abnormality of mind* rather than a general assumption of human frailty.[54]

Concluding note

At the heart of the theory of justification and excuse lie questions that have been the focus of moral philosophy for centuries. And the difficulties in categorising legal defences have largely to do with the confusion surrounding the choice of the moral theory upon which the role of legal defences is to be explained and justified. From the viewpoint of consequentialism, conduct is evaluated by reference to its effects. In this respect defences such as necessity and duress bear closer to justifications, for the emphasis is on whether the harm prevented by the relevant conduct outweighs the harm caused. On the other hand, the classification of the same defences as excuses reflects a nonconsequentialist, deontological approach which stresses a person's duty to abstain from performing certain actions that constitute violations of moral standards. For a deontologist, such actions remain wrongful, irrespective of their consequences, and the only way for exculpating the actor would be on the basis of an excuse. As this suggests, the same defence could be regarded as a justification or as an excuse, depending upon the moral viewpoint which one adopts.

[53] For a further discussion of the standard of reasonableness see Allen, H.: One Law for All Reasonable Persons? 1988. 16 *International Journal of Sociology of Law* 419.

[54] In *R. v. Ward* [1956] 1 Q.B. 351 at 356 the 'reasonable person' was described as "a person who cannot set up a plea of insanity".

Notwithstanding the apparent difficulties in formulating a comprehensive system of defences on the basis of the distinction between justification and excuse, the increased emphasis on the distinction in recent years has enabled courts and legislatures to achieve a greater measure of consistency in Anglo-American criminal law.[55] The distinction has provided judges with a valuable tool in elucidating problems of criminal liability and in interpreting and declaring the law in a way that reflects more accurately community values and expectations. In the work of codification of the criminal law, legislatures rely on the distinction as a useful guide towards achieving and maintaining coherence and clarity of definition. The analysis of existing and future defence categories in terms of the theory of justification and excuse is important in bringing the criminal law closer to the community's moral values and expectations and securing a greater degree of comprehension and acceptance of the law. The theory offers a viable normative model which can achieve and maintain coherence among criminal law defences and secure community understanding and acceptance of the presuppositions upon which the criminal law system operates. This is because the very focus of the theory is on the question of rightness or wrongness of actions and society's expectations in dealing with the authors of such actions. Attention to the theory of justification and excuse will warrant the legitimacy and institutional efficacy of the criminal law system as a system which derives its aims and guiding purposes from the society which it serves.

[55] For a reply to the critics of the theory of justification and excuse see Dressler, J.: Justifications and Excuses: A Brief Review of the Concepts and the Literature. 1987. 33 *Wayne Law Review* 1155, 1168–1169. And see Yeo, S. M. H.: *Compulsion in the Criminal Law*, 1990, 5 ff.

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Coercive Conduct in Criminal Procedures

(The Subjects of Secondary Victimisation)

Abstract. This interdisciplinary study shall explore the implications of coercive conduct in the course of criminal procedures, both in the legal theoretical and the practical sense of the term. We shall make a distinction between legal-necessary and illegal-unnecessary coercive conduct and the forms of its implementation. These issues will be analysed in the respective stages of the procedure (investigation—detention—court trial—law enforcement). The study will explore the issue both from the viewpoint of the victim and the parties concerned in the procedure, who are subjected to coercive conduct, furthermore will highlight the major features of the offences affecting them. It shall discuss victimisation catalysts and their functions and finally, assess the ways of reducing the potential of related secondary victimisation.

Keywords: necessary-legal coercive conduct, unnecessary-illegal coercive conduct, necessity, proportionality, the right to command the use of force, secondary victimisation, victimisation catalysts, "velvety" prosecution.

1. The place and role of coercive conduct in criminal procedures

In constitutional democracies, rules of prosecution are set down in writing, both accessible and applicable to all citizens and are implemented in the process of prosecution. These are designated to ensure the lawfulness and fairness of legal procedures, by which crimes are investigated and the penal code is brought to bear against the perpetrators of criminal activities. Procedural rules by their mere existence as directives imply, or at any rate are supposed to imply, a symbolic threat and their role equals that of "the cane on the primary school wall" of old days.[1] In the classroom, the cane occasionally had to be put to actual use, which might also be necessary in the process of prosecution. We cannot claim that coercive conduct is a fundamental prerequisite to all prosecution, but it nevertheless looms in the background and thereby ensures voluntary compliance and peaceful behaviour on the part of the parties

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[1] See, Farkas, Á.: *A falra helyezett nádpálca* (Cane Hanged on the Wall), Budapest, 2002.

concerned against, which, as a potential threat averts the need of taking the cane off the wall in the first place.

Both theoretical and practical research have shown that those, who have committed a crime, either as a consequence of the drive of human nature or in response to their own instincts, will try to avoid the potential of being held accountable for their actions as well as to obstruct the authorities in their attempts to ascertain the facts of the case through comprehensive investigation, to precisely reconstruct preceding events, furnish either damning and aggravating, or, occasionally, exonerating or extenuating evidence and reveal the circumstances linked directly to the act of crime. Such behaviour in a way substantiates the employment of coercion on the part of the authorities. It is no exaggeration to assert that if the threat of coercion and other means of force were eliminated, the implementation of rules of prosecution and law enforcement would not be effective and it would be impossible to guarantee law and order in society.

A further fundamental pillar that substantiates the employment of coercion is the predominance of a high-level interest, namely a criminal-political interest, by which all members of society can demand that efficient law enforcement and enforcement of criminal law be categorically upheld. The force of that belief is so strong that it sufficiently substantiates the employment of otherwise undesirable state–implemented coercion, which can also prevail in constitutional democracies, insofar as it is enforced in full compliance with constitutionally guaranteed rights and within specified limitations.[2]

[2] As Ákos Farkas clearly states, "an efficient judicial system must have effective instruments so as to facilitate criminal investigation and punishment as well as the elimination of obstacles in its path, even without the involvement of the defendant, in order to administer punishment as stipulated by the state. However, the authorities involved in the above system are each led by different objectives, i.e., the police aims to improve crime-fighting statistics, the prosecution aims to win as many cases as possible, the courts aim to conclude as many cases as possible with a minimum level of successful appeals, whereas the penitentiary system aims to guarantee that the period of penal servitude expires with as few problems as possible.

These objectives often clash not only with one another, but also with law. In the interest of achieving their own objectives, the authorities find several ways to interfere with the rights of the individual.

On the other hand, the defendant demands a fair trial and besides the observation of the rules of prosecution, also protection of his rights and a constitutionally valid investigation. Finding the right balance is extremely difficult, a challenge in itself for a court of constitution." Farkas, Á.: Alkotmányosság és büntetőeljárás (Constitutionalism and Criminal Procedure). In: *Kriminológiai és kriminalisztikai tanulmányok* (Essays on Criminology), Vol. 30, 1993. 45.

2. Differentiation between necessary—legal and unnecessary—illegal coercive conduct

In the followings, we will differentiate between legal and illegal (lawful and unlawful or legitimate and forbidden) coercive conduct within the criminal procedure. Legitimate coercive conduct is specified and permitted primarily under the Constitution, furthermore under Act I. of 1973 on Criminal Procedure and other related regulations, such as those governing the police, the border guards, the domestic revenue and customs prosecution authorities as pursuant to Act V. of 1972 on Prosecution, etc. The legal basis of coercion does not in itself justify employment in each case, since that would constitute a serious violation of human rights. Law-enforcement authorities may resort to coercive conduct exclusively with respect to the strictly specified standards of necessity and proportionality.[3] *Necessity* occurs in the event of inevitability and absolute necessity in a situation, which is otherwise unworkable. Whereas *proportionality* requires that the principle of a minimum level be followed, that is to say, the lightest coercive conduct or form of coercion shall be applied in the given situation. The violation of either of the criteria under necessity and proportionality is a serious breach of both the norms specified by the rules of prosecution and the rights of the individual guaranteed by the constitution.

The Act on Prosecution (hereinafter: AP) in Hungary provides that "in a criminal procedure the right of privacy and other rights of the citizen shall be respected, and these can only be limited in cases and in ways as specified herein. In the course of the prosecution the authorities shall ensure that any recourse to force shall not impinge on the rights of the citizen."(Paras. 1–2 of Art. 4.)

Which, in negative terms, implies that any form of coercive conduct, which does not correspond with the criteria above, shall be forbidden. In positive terms, however, it is in compliance with the definition of unlawful coercion as set forth under Para. 8 of Art. 76 of the Police and Criminal Evidence Act of 1984 in the UK. Accordingly, oppression includes torture, inhuman or degrading treatment, as well as the threat of torture or coercion without torture.

[3] These criteria, in view of the fact that coercion features in both, share similarities with the requirements of justified defence, where both the theoretical literature and law enforcement specify necessity, proportionality, directness, direct attack and inevitability as requirements.

3. Features of coercion in the four main stages of the criminal procedure —investigation, confinement under remand, hearing, penalty enforcement

The Act on Prosecution stipulates the task of investigative authorities as follows: "The investigative authorities shall conduct a fast and thorough investigation of crimes and take the necessary steps to call those responsible for crimes to account for their actions." (Para. 1 of Art. 16. of AP) The elements of speed and thoroughness as requirements are also included in the sections of the Act on Criminal Procedure, which deal with the criminological aspects of investigation strategies in practical terms. The so-called *erster Angriff* "first strike"[4] is an extremely important element with respect to the efficiency of the entire criminal procedure. Let us consider, for example, what happens when someone is caught in the act of a crime. Then, the perpetrator is apprehended and brought forth, which is followed by the primary collection of facts and immediate investigative activity such as search of the surroundings, house and body search, arrest and taking into custody. Practically, each phase contains a violation of human rights, and, in cases where resistance occurs, coercion on the part of the authorities and limitation of rights shall be incurred. In the phases mentioned above, the process of apprehension is of special significance, so far as the public and individuals are guaranteed the right to use force in order to apprehend the perpetrator of a crime. In this respect the criteria of necessity and proportionality shall be respected and the right to resort to legitimate coercion shall not be abused, whereas the authorities shall be informed immediately, so that the apprehended perpetrator can be handed over. In practice, that results in numerous conflicts. People, confronted with someone who is emotionally overloaded, generally offended and behaving threateningly towards them, their family, or other people or assets, very often take the law into their own hands and act like judge, jury and prosecutor, and thereby abuse the perpetrator unnecessarily and employ excessive coercion without sufficient cause.

The law-enforcement authorities themselves have also been noted to occasionally resort to excessive coercive conduct. Despite the two–century–old principle that an individual is innocent until proven guilty, some are subjected to unjustified and illegitimate coercive conduct on the grounds of "presumed

[4] Tremmel, F.–Fenyvesi, Cs.: *Kriminalisztika tankönyv és atlasz* (Manual and Atlas of Criminology). Budapest–Pécs, 1998. 242.

concealment of guilt",[5] because of a "passion for the hunt", even in order to create a distorted statistical profile of efficiency. Coercive conduct can take physical or psychological form, or a combination of the two. It appears in its most varied forms at the beginning of the procedure, i.e., threatening with arrest, threats with respect to the children, the family or the workplace of the individual concerned, physical assault, to list just a few examples.

In view of the fact that the investigation is confidential by nature, and therefore secluded from the public domain, the instruments of coercion and instances of multiple limitations on rights may all substantiate serious cases of human rights violations, i.e. conditions of detention,[6] custody,[7] temporary enforced displacement, which demonstrate both the extent to which law enforcers are able and willing to abuse the law and that they are in a position to do so. In a survey of the Hungarian files on ill–treatment during official procedures, we see that in nearly every case such an ill–treatment occurred either in the phase immediately preceding the criminal procedure or during the initial investigative phase, frequently during investigations by the police. In

[5] See Farkas, Á. –Pap, G.: Alkotmányosság és büntetőeljárás (Constitutionalism and Criminal Procedure). In: *Kriminológiai és kriminalisztikai Évkönyv* (Yearbook of Criminology). Budapest, 1993, 45.; Skolnick, J.: *Justice Without Trial*, New York, 1994. 112; Szikinger, I.: Az ártatlanság vélelme — alkotmányos alapelv (The Presumption of Innocence—A Constitutional Principle), *Belügyi Szemle*, 1989/3. 8.

[6] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment implemented inspections in Hungary in 1992 and 1994. According to the report of November 1994, the danger of abuse in custody shall be reduced if it is stipulated under a provision that those taken into custody may notify relatives and request a doctor or lawyer immediately after taken into custody... The Report of the Committee stressed that individuals shall be entitled to the above rights from the very moment of the outset of custody at a police station, and that, in any case, where a limitation of these rights occurs, the authorities shall justify the necessity of such limitation in writing. It is also deemed necessary that such measure shall be authorised by a lawyer or judge, who would also be responsible for the stipulation of the precise duration of the limitation." For further details, see the report, *Összefoglaló tájékoztatás az Európa Tanács Kínzás Ellenes Bizottsága (CPT)* [Information on the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe (CPT)], *Kriminológiai Közlemények*, 1996/53. 50.

[7] For further details on the anomalies, see, Herke, Csongor, A letartóztatás (Arrest), Budapest–Pécs, 2002. 1–366, and, Róth, E.: Emberi Jogok kontra fogvatartás a büntető eljárásban (Human Rights versus Detention in the Legal Procedure), *Acta Humana*, 1995/20. 3–87.

other words, the authorities employ illegitimate coercion[8] in the expectation of greater criminological and procedural efficiency and attempt to reveal facts of the case at a time when no counsel for the defence is present.

Instances of unlawful coercive conduct against the perpetrator are uncommon in the second phase of the criminal procedure, i.e. during confinement under remand, when it is the public prosecutor, who decides what direction the process will take and in the preliminary phase of the trial, when documents are examined by the court. In that phase, contact both with the parties concerned in the trial and the defendant occurs only in exceptional cases.[9]

In the third phase of the criminal procedure, that of the court trial of the first and second instance and the remedial phase, both the judiciary and the principal judge have the right to command the use of force, take a person into custody, have a person expelled in the time of hearings or removed from the building, etc. Instances of illegitimate coercive conduct might include cases when the trial judge hears the witnesses in an excessively authoritarian style reminiscent of the mode of interrogation. Which, as a conduct, is expressly coercive, excessively constraining, we could say, violent behaviour on the part of the judge, who, faced with a situation where the defendant refuses to offer evidence, launches an interrogation about the underlying reasons for this stance and bombards the defendant with questions concerning the merits of the case. Defendants, who refuse to offer evidence, must not be asked questions, since that equals coercion to offer evidence. Any intent on the part of the judge to do so, either implicitly or explicitly, constitutes illegitimate coercion, which further exacerbates the case of the already "enormously disadvantaged defendant".[10]

The fourth phase of the criminal procedure, separately regulated, is that of punishment. The defendant now has the legal status of a convict, and as such,

[8] On the subject of coercive conduct against the perpetrator under remand in the investigative phase, we note that in the United States "the Miranda verdict established a practically unshakeable presumption, when it deemed the interrogation of the person in custody to be *ab ovo* coercive conduct, against which the defendant is entitled to protection by law." Grano, J. D.: Miranda's Constitutional Difficulties: A Reply to Professor Schulhofe. *The University of Law Review*, 1988/Jan. 174–178, quoted in: Szikinger, I.: Miranda-ügy (Case Miranda), *Belügyi Szemle*, 1990/3. 111–119.

[9] During the phase of the confinement under remand, the public prosecutor is liable to interrogate the accused held in custody, therefore contact can only occur on that occasion, but in that respect, I haven't encountered instances of illegitimate coercive conduct either in legal literature or my survey.

[10] Tremmel, F., *Magyar büntetőeljárás* (Hungarian Criminal Procedure), Budapest–Pécs, 2001. 95.

is even more unprotected and vulnerable. In the confined and strictly ordered prison environment, the convict can only maintain sporadic contact with a lawyer, provided that he/she has one, whence the assumption of innocence until proven guilty is no longer valid, since a verdict has been brought under full force of the law. The potential for reversal on appeal is slight and the trial judge does not allow for the principle of *contradictorium.* The "guardian" of the rights of the convict is the public prosecutor, who has afflicted the status of the convict by seeking a verdict of guilty, now acts as a guardian of justice. An institution, in which external regulation practically hardly ever interferes, the defendant can suffer legitimate and illegitimate coercion in countless ways.[11]

4. The recipients of secondary victimisation in the criminal procedure

In the four distinct phases of the criminal procedure, the defendant is not the only one who can suffer legal and illegal coercion. As the terms themselves suggest, both the victim of the crime and the witness can appear on the receiving end of coercive conduct within an investigation. Special attention needs to be given to the situation of the victim, who has to undergo voluntarily the tribulations of the whole procedure, besides having suffered unlawful violent attacks against his or her person, rights or property. Coercion can inflict injuries in several ways and cause different forms of damage, be it emotional, physical, financial, enduring, etc. Therefore, different forms of coercion have sweeping effects and combined with the indiscretion, insensitivity and the humiliation involved in the serial interrogations by the incompetent and rough police officers (or other authorities), who are often biased and prone to treat victims and witnesses, as if they were suspects themselves, their situation is merely exacerbated.[12] The severity of occasional medical examinations, the tension caused by the ever-present procedural bureaucracy and the depressing impact of force only adds to the above. In that respect, young people and children as those with vulnerable or damaged emotional development, who are particularly exposed to victimisation at the hands of the seeming

[11] The prevalence of human rights violations in the punishment phase is demonstrated by the fact that the European Court of Human Rights received 40% of the complaints from those held in custody. Vókó, Gy.: Az elítéltek jogi helyzetéről, mint reszocializálásuk kiinduló pontjáról (The Legal Status of Convicts as a Starting—Point of their Reintegration into Society), *Jogtudományi Közlöny*, 1989/12. 626.

[12] This observation is supported by the fact that police interrogation rooms are frequently papered with photographs of naked women, often pictured in bizarre poses or with men, and female victims of sexual assaults may also be interviewed in such a room.

omnipotence of the grown-up authority deserve special consideration. In such cases, in view of the age of those concerned, the authorities shall ensure that it is not the standard interrogation procedure that shall be applied.[13]

Usually five to seven witnesses are called in the course of a trial, and they, too, can become victims of both kinds of coercive conduct. They can be forced to attend the trial, be subject to various investigations and confined to a particular place, etc.[14] Simultaneously, they can become the victims of illegitimate threats and coercive conduct, in view of the fact that effective law does not allow them to engage a counsel.[15]

Others who may also endure coercive conduct are victims of confiscation, who themselves are neither defendants nor witnesses to an act of crime. Here, we could refer to the shocked owner of a second–hand car, who discovers that it is just being forcibly confiscated by the authorities due to its former involvement in an act of crime (theft, smuggling, etc.).

5. Victimisation catalysts and their functions

The harmful effects of coercive conduct, be it legitimate or illegitimate, employed by the authorities can be mitigated both by authorities within the institution of the Hungarian Prosecution Service and by independent individuals and organisations. These, in my view, include the agents of law enforcement (the head of the investigation, the prosecuting attorney, the judge), the defence counsel, and individuals and organisations, such as the Constitutional Court, the ombudsman, and various organisations for the protection of the rights of individuals, such as the Helsinki Convention. All these parties, especially the prosecuting attorney, who is designated to a special status, are obligated to safeguard against coercive conduct and secondary victimisation by the authorities. In the former case, they are in a position to influence the way of proceedings, however, in the latter case they cannot be of

[13] Such a case is both distressing and, from a criminal–strategic point of view, abhorrent as a model, when a child or a juvenile is forced to furnish evidence as a witness against a close relation, for example, the father, who sexually abused them, but denies that.

[14] According to Para. 3 of Art. 4. of the Act on Criminal Procedure "the authorities shall be liable to inform the parties involved in the procedure of their rights and remind them of their legal obligations." Witnesses often get the impression that the latter is overemphasised.

[15] This is due to be amended as of July 1st, 2003, when the new Act on Criminal Procedure will guarantee the witness the right to engage a counsel.

assistance, since victimisation usually occurs close to the act of crime in terms of time and place, which implies that the authority is not present. Since the role of the defence counsel in the investigation is restricted, in that respect s/he is insignificant. Furthermore, empirical studies dating back several decades have shown that barely a third of defendants receive the formal protection of an attorney, and that two-thirds of these attorneys are publicly appointed. Thus, a mere ten per cent of all defendants receive a form of "effective" defence as stipulated under the European Convention and Court of Human Rights.[16]

The struggle of independent organisations to safeguard against coercive conduct can become effective only after the respective incident occurred and shall only affect the situation of victims and perpetrators after a series of stages. Therefore, it is less effective than the implementation of internal "catalysts" in the investigation process itself.

6. Potential ways of the reduction of cases of coercive conduct in criminal procedures and of secondary victimisation

Since in my view both the distortion of legitimate coercive conduct and unlawful coercive conduct have the same origins, they can be redressed in the same way, not only by the removal of those who employ coercion, among them detectives and investigators, but also of those in the field of penalty enforcement. It is precisely the preparedness and competence, experience and self-confidence of the officers concerned that needs to be established, built up and relied on.

The requirements above can be met on condition that a particularly competitive admission system is established, in which through the examination of personality traits, candidates and employees with an aggressive disposition and a lack of self-control shall be rejected or dismissed. Successful candidates would also need to demonstrate advanced knowledge of legal texts and an ability to enforce them, as for the management of police documents and

[16] For further details, see Nagy–Szabó, Th.: *A vétségi nyomozás a gyakorlatban* (Investigation of Crimes in Practice), *Belügyi Szemle*, 1983/10. 28.; Tóth, M.: Nyomozás és védelem (Investigation and Defence), *Magyar Jog*, 1989/4. 350; Kiss, A.: A védő szerepe a büntetőeljárásban (The Position of the Attorney in the Criminal Procedure), *Kriminológiai és Kriminalisztikai tanulmányok XXVIII.* Budapest, 1991. 177.; Fenyvesi, Cs.: *A védői jogállás empírikus vizsgálat tükrében* (The Legal Status of the Attorney for Defence in View of Empirical Study), *Belügyi Szemle*, 2001/2. 37. and, A kirendelt védői intézmény problematikája (The Problematic of the Institution of the Appointed Attorney for Defence), *Jogelméleti Szemle*, 2001/4.

criminal procedures, as well as knowledge of criminology, i.e., strategies and techniques as contained by criminal methodology, psychology, i.e., the psychic implications of criminal imprisonment, furthermore, conflict resolution.

Within the scheme of criminal procedure, it is a major imperative that the role, presence and significance of the "catalysts", especially of the authorities in charge, i.e. the defence and prosecution attorneys, be highlighted both from a theoretical and a procedural standpoint.

Summary

Finally, we wish to add a few closing remarks as a conclusion.

The practice of criminal procedure shows that the legislative threat ("cane on the wall") is in itself ineffective in terms of the desirable objectives of law enforcement and crime prevention. Therefore, legitimate coercion and measures of force (the use of the cane) are admissible. The criminal procedure in itself is a repository of force, pressure and constraint, so "velvety" prosecution as such is inconceivable, at best, it is considerate. The truth of this statement is most conspicuous in cases of organised crime, where the parties involved are not reputed for being overly scrupulous in their choice of methods and instruments, yet, the constitutional and legal limitations must not be transgressed. Coercive conduct cannot be high-handed, autocratic, excessive or disproportionate, either in degree or in time, legislators and law–enforcement authorities must maintain a delicate balance between permissible coercive conduct and the due respect of human rights of the defendant and other parties concerned in the case.

As we've pointed out in our study, it is not only the defendant who, as a "main character", is forced to suffer and endure legitimate coercion in the course of the criminal procedure. Other parties also undergo similar treatment, whilst also, unfortunately, may be subjected to contingent illegitimate coercive conduct. Ill–treatment by the authorities can at times have such a great impact that it by far exceeds the disadvantages suffered by the already injured person as a consequence of an act of crime. Which is both highly damaging and constitutes persecution. Secondary victimisation is a real phenomenon in Hungarian prosecution and its prevention should be both a priority and an imperative for all legislators and law enforcement agents, as well as for official and non–official "victimisation catalysts."

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The Right to Effective Judicial Protection in the System of Judicial Review in the European Community

Abstract. The system of judicial review in the European Community has recently come under scrutiny on grounds of the right to effective judicial protection as provided in Article 6 ECHR and in the Charter of Fundamental Rights of the European Union. The applicants in cases *UPA* and *Jégo-Quéré* claimed that in case their action was found inadmissible under Article 230 (4) EC, they would be deprived of effective judicial protection since other means of protection against violation of law by the Community do not provide adequate remedies. The Court of First Instance in *Jégo-Quéré* responded to the claims of the applicant by concluding that a new interpretation of the condition of individual concern laid down under Article 230 (4) EC could ensure the right to effective judicial protection in the system of judicial review in Community law. In spite of the fact that the Advocate General also envisaged that the amendment of the condition of individual concern may guarantee the protection of this right, the Court of Justice in *UPA* rejected such a solution, and stated that it is the duty of the Member States to provide effective judicial protection under Community law acting on national or Community level.

Keywords: European Community law, preliminary ruling procedure, action for annulment, right to effective judicial protection, European Court of Justice

Introduction

Criminal Two recent cases[1] have shed further light on the understanding of the European Courts as regards to the admissibility of actions for annulment under Article 230 (4) EC. The Treaty and the right to effective judicial protection have always been in conflict, and the European Courts had to do their best in order to ensure that both are respected. In the analysed cases the European Courts brought judgements, which evaluated the problem in different ways. The European Court of Justice (Court) tackled the question of enforcing the right to effective judicial protection under Article 230 (4) EC actions by examining whether it could depart from the wording of the

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[1] *Union de Pequenos Agricultores v. Council* T-173/98 [1999] ECR II-3357 and C-50/00 P [2002] ECR I-6677, *Jégo-Quéré et Cie SA v. Commission* T-177/01 [2002] ECR II-2365.

Article in question in order to ensure effective judicial protection. The Court of First Instance (CFI) followed another line of argument concentrating on a possible change in judicial attitude towards the notion of individual concern in order to establish effective judicial protection. The clear contradiction in case law is shadowed, however, by the latter decisions of the CFI, in which it followed the position of the Court. Nevertheless, it has been shown that other solutions can be admissible in case law.

Under the rule of law, Community law must establish a system of review of Community measures. The subjects-at-law are entitled to initiate an action for annulment of a Community measure, which invests rights or imposes obligations on them. During the action for annulment the validity of a Community measure is under scrutiny on the following grounds: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, misuse of powers.

Article 230 EC on the action for annulment distinguishes among the subjects-at-law of Community law on the basis of the scope of their right to initiate an action for review. Privileged applicants, such as the Member States, the Council, the Commission, and for the purpose of protecting their prerogatives, the European Parliament, the Court of Auditors and the European Central Bank are entitled to bring an action for annulment of regulations, decisions, directives, and the regulations, decisions concerning the European Central Bank in the European Court of Justice. The acts of the European Parliament can be brought under review, if they are intended to produce legal effects vis-à-vis third parties. In the application for annulment brought by privileged applicants, the Treaty does not require the proof of existence of conditions of admissibility, contrary to the applications lodged by non-privileged applicants, i.e. natural or legal persons.

If natural or legal persons wish to attain the direct review of a Community measure under Article 230 (4) EC, they must provide proof of the existence of serious conditions of admissibility. The Treaty contains three conditions of admissibility. Firstly, the nature of the Community measure under scrutiny; secondly, the individual concern, and finally, the direct concern. Regarding the point of view of the cases analysed below, only the first two conditions are significant, rendering the examination of the third condition negligible in this case. The Treaty allows non-privileged applicants to bring an action for annulment of a Community measure, if the measure is: a decision addressed to the applicant; a decision addressed to another party, but the applicant is of individual and direct concern to the measure; and, a decision in the form of a regulation when the applicant is of individual and direct concern to the

measure. It is evident from the rules mentioned above, that non-privileged applicants can ask for the review of a measure of specific application addressed to them without proving the existence of the other conditions of admissibility. The Treaty, however, requires the proof of other conditions of admissibility if the applicant asks for the review of a Community measure of specific application not addressed to the applicant, or if the Community measure in form is of general application, but in substance is of specific application. It can be concluded that the Treaty offers the right to initiate an action for annulment of a Community measure for non-privileged applicants in case the measure is a decision and is addressed to the applicant, or the applicant is of individual and direct concern to the decision.[2]

In the case law of the European Court of Justice the examination of whether the measure under review was a regulation or a decision, and whether the applicant was of individual and direct concern to the measure has been separated for a long time. The question of "regulation–decision" was decided under Article 249 EC on the basis of being of general or of specific application. If the Court thought that the measure under review qualified as a regulation, it could declare the action inadmissible without examining whether the applicant was of individual and direct concern to the measure. It appeared in case law, however, that the applicant was of individual concern to some valid regulations, therefore the necessity of the application of the "regulation-decision" test was questioned. The Court in *Codorniu*[3] stated that a Community measure of general application may be brought under review by a non-privileged applicant, if the applicant was of individual concern to the measure. Since *Codorniu*, individual concern has been the thoroughly examined condition of admissibility. The Court defined the notion of individual concern in the *Plaumann* case.[4] According to the Court, natural or legal persons shall be regarded as individually concerned by a measure not addressed to them, if it affects their position by reason of certain attributes peculiar to them, or by reason of circumstances which differentiate them from all other persons, and distinguishes them individually in the same way as the addressee. This means that the applicant must be distinguishable from all others by reason of some of his peculiarities, or by reason of a factual situation. It can be asserted that both the European Court of Justice and the Court of First Instance have applied the *Plaumann*–test rather strictly. The

[2] See also: Hartley, T. C.: *The Foundations of European Community Law*. 4th ed. Oxford, 1998. 327–376.

[3] *Codorniu SA v. Council* C-309/89 [1994] ECR I-1853.

[4] *Plaumann & Co. v. Commission* C-25/62 [1963] ECR 95, 107.

European Courts interpreted individual concern in such way that very few actions by natural or legal persons have been found admissible on this basis.[5]

If the European Courts reject the application for annulment on grounds of inadmissibility, the only other way of the review of Community law is through the preliminary ruling procedure.[6] In this procedure the national judge asks the Court in the form of judicial questions to decide on the validity of the Community measure applied in the proceedings in the national court. This procedure, however, does not guarantee access to the European Court of Justice. The preliminary ruling procedure requires a procedure in a national court, and the posing of a question on validity by the national judge, because the assertion [by the party] of the invalidity of the measure does not bind the national judge to turn to the European Court of Justice. The preliminary ruling procedure, in our view, is not an adequate alternative for Article 230 EC action.[7]

Article 235 EC and Article 288 (2) EC jointly establish a Community remedy for individuals against Community violations of law. These dispositions rule on the procedure of non-contractual liability of the Community. This procedure, nevertheless, is not aimed at the annulment of the Community measure, rather, it focuses on the compensation for damages. It can be concluded from the facts mentioned above, that the Treaty does not provide complete and effective judicial protection for individuals who have rights and obligations derived from the Treaty against unlawful Community measures. Since the European Community is based on the rule of law, it must ensure that the right to effective judicial protection is enforced. This obligation of the Community was recalled under the Union de Pequenos Agricultores,[8] and subsequently the European Courts were asked to revise their standpoint concerning the admissibility of Article 230 EC action.

The argument above is supported by precedents. In *ASOCARNE*,[9] the applicant referred to the disadvantages of the review via the preliminary ruling procedure, being fully aware of the delay factors in the functioning of the

[5] See also: Neuwahl, N.: *Article 173 Paragraph 4 EC: Past, Present and Possible Future*, 1996 21 EL Rev. 17–31.; Ward, A.: Amsterdam and Amendment to Article 230 EC: an opportunity lost or simply deferred? In.: *The Future of the Judicial System of the European Union* (ed.: Dashwood, A.–Johnston, A.), 2001. Oxford and Portland, Oregon. 37–40.

[6] Article 234 EC.

[7] See also: Ward, A.: *Judicial Review and the Rights of Private Parties in EC Law*, 2000. Oxford, 202–287.; Arnull, A.: *The European Union and its Court of Justice*. Oxford, 1999. 21–69.

[8] *Jégo-Quéré et Cie SA v. Commission...*, *op. cit.* par. 28.

[9] *ASOCARNE v. Council* C-10/95 P [1994] ECR II-871.

Spanish judicature, in order to establish the admissibility of action. The Court, however, decided that it can only proceed within the framework of the Treaty and shall not depart from the conditions of admissibility as set forth under the Treaty on the basis that the other judicial channel of review does not provide adequate judicial protection. The Court of First Instance in *Salamander*[10] rejected the argument in which the applicant stated that in case of rejection of its application, it would not receive effective judicial protection in the national court, because the preliminary ruling procedure is less effective than the procedure under Article 230 EC. The court argued that even in case of ineffective judicial protection, it cannot amend the Treaty in order to change the system of remedies. The features of Article 234 EC action do not establish the admissibility of application under Article 230 EC action. In *Pescadores*,[11] the Court repeated this standpoint, in spite of the fact that the applicant relied on Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on adequate court procedures. The standing of the case law shows that by applying such arguments one cannot efficiently rely on the right to effective judicial protection in order to declare an action admissible. The question is whether there is another line of argument serving as a basis for the European Courts to accept the reference to the right to effective judicial protection in annulment cases? In the case examined, first the applicant, then the Advocate General tried to convince the European Courts that effective judicial protection is not completely accomplished in the Community.

Reaffirming judicial attitude towards annulment actions: the *UPA* case

The application for annulment of Regulation 1638/98/EC[12] by the Union de Pequenos Agricultores was lodged at the Registry of the Court of First Instance on 20 October 1998. The Regulation in question amended Regulation 136/66/EEC[13] on the establishment of a common organisation of the market in

[10] *Salamander AG and Others v. Parliament and Council* T-172/98, 175-177/98 [2000] ECR II-2487.

[11] *Federacion de Cofraidas de Pescadores de Guipuzcoa and Others v. Council* C-300/00 P(R) [2000] ECR I-8797, par. 84.

[12] Council Regulation (EC) No. 1638/98 of 20 July 1998 amending Regulation No. 136/66/EEC on the establishment of a common organisation of the market in oils and fats, OJ L 210, 28/07/1998. 32–37.

[13] Regulation No. 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organisation of the market in oils and fats, OJ, English Special Edition 1965–1966, 221.

oils and fats, in particular the common organisation of markets in olive oil. Fundamentally, the Regulation amended the subvention system of olive oil production. The applicant is a trade association, who represents and acts in the interests of small Spanish agricultural businesses and is considered a legal personality under Spanish law. The Council raised an objection of inadmissibility on 23 December 1998. The CFI upheld the objection of inadmissibility and dismissed the application as inadmissible.

According to settled case law, the CFI examined the nature of the challenged provision and decided that it was of general application and was legislative in character that it did not substantiate a decision according to Article 249 EC. Pursuant to settled case law, the court went on to examine whether the contested measure of general application may be of individual concern to the applicant that it affects the applicant in a way that he can be differentiated from others either by reason of certain attributes which are peculiar to them or by reason of circumstances. The CFI pointed out that applications from associations were found admissible, when the challenged Community act guaranteed procedural powers to them, or they represented undertakings, which would [themselves] be entitled to bring actions, or when the contested measure affects their interests as associations.[14]

When applying the criteria mentioned above, the CFI decided that the applicant had not proved that its members could be differentiated from others by reason of certain attributes, which are peculiar to them or by reason of circumstances. It argued that in spite of the fact that some members of the applicant operated in the given market and that some of them were forced to give up operation in the market, they could not be differentiated from others because their market position is comparable on objective grounds with the market position of others even in the present, or in the future. In addition, the CFI concluded that the applicant could not prove the existence of any specific interest that would imply he was individually concerned. Furthermore, it stated that the applicant could not prove the admissibility of his actions under the case law concerning associations.

The last argument of the applicant focused on the fact that a denial of admissibility under Article 230 EC would deprive him from effective judicial protection. In his view, there was no legal mechanism in the applicable national law that would guarantee the review of Community law via preliminary ruling. The CFI declined the argument stating that according to the principle of equality, the success of review of Community law must not depend on the different conditions stipulated by applicable national law. According to the

[14] *Union de Pequenos Agricultores v. Council... op. cit.* par. 45.

principle of sincere co-operation as laid down under Article 10 EC, the Member States must establish a complete system of remedies in order to ensure the review of Community law. On these grounds it is not exclusively the court's task to guarantee the right to effective judicial protection, but it is the obligation of the Member States. The CFI may not depart from the law to guarantee this right. The argument of the applicant that the preliminary ruling proceedings would last long under effective rules must not substantiate an exemption from the requirements as pursuant to Article 230 (4) EC.

In its appeal the *UPA* presented the following arguments. He stated that when the CFI declared the application inadmissible, it violated UPA's right to effective judicial protection guaranteed by Community law. According to the appellant, Community law did not provide an alternative remedy to the one prescribed under Article 230 EC, because in the given case the procedure for preliminary ruling was excluded. Firstly, there was no related national regulation, secondly, it was not possible to infringe the provisions of the Regulations by virtue of their content that the appellant could institute proceedings. The appellant concluded that the CFI must examine in each case whether another remedy was at disposal.

The Council and the Commission in their intervention rejected the arguments of the applicant. According to their views, the conditions for actions for annulment were set forth under Article 230 (4) EC, in which the right to effective judicial protection was not included. They pointed out that the appeal was not aimed at the substantial part of the judgement, in particular at individual concern, but it replied to the content of the judgement in the light of effective judicial protection. The Council and the Commission stated that the Treaty had established a complete system of remedies. When the Member States entailed difficulties in the functioning of the system by obstructing the course of preliminary ruling proceedings, they violated their obligation of sincere co-operation laid down under Article 10 EC. Pursuant to this, the proceedings under Article 226 EC shall be instituted against the Member State.

The Commission rejected the criticism of the improper functioning of the system of remedies as pursuant to the Treaty in the following way. When an application is lodged, the relevant national authorities must commence proceedings under a directly applicable regulation. If the national authority does not commence proceedings in due course or its decision is contrary to the interests of the citizen, the national judicial remedies will be at disposal and then it is possible to rely on the preliminary ruling procedure.

The Court affirmed the conclusions of the Court of First Instance with respect to case law concerning Article 230 (4) EC and it recorded the well-known conditions of action for annulment by non-privileged applicants. After

concluding that the appeal basically focused on the guarantee of the right of effective judicial protection, the Court went on as follows. Whence, the European Community is based on the rule of law, it shall ensure that the law created by its institutions is reviewed. Pursuant to this, individuals are entitled to effective judicial protection of their rights guaranteed by Community law. This entitlement stems from the common constitutional traditions of the Member States and is protected by the European Convention on Human Rights. The Treaty of Rome has established the complete system of review under Community law, which functions via European court actions and national court remedies. Inasmuch as the Community has fulfilled this obligation laid down in the Treaty, it is the obligation of the Member States to supplement the system of effective judicial protection. The courts in the Member States must interpret the rules of national law in such a way that the review of Community law is possible. Furthermore, it is neither the duty, nor the competence of the European Courts to examine the national rules of procedure or national substantial law when they decide on admissibility or to decide whether direct action under Article 230 EC is required in order to guarantee the right to effective judicial protection. The European Courts cannot depart from the condition of individual concern in order to declare actions admissible on the grounds of the right of effective judicial protection, because the Treaty requires them to apply it. If the Member States view the system of remedies established by the Treaty inadequate, it is their responsibility to initiate the amendment of the Treaty under Article 48 TEU.[15] The Court decided that the CFI did not err when it declared the action inadmissible without the examination of whether another remedy existed. Therefore, the Court rejected the appeal.

In its judgement the European Court of Justice had to follow two ways of reasoning, one concerning Article 230 (4) action and one concerning the right to effective judicial protection. If the reasoning on the action for annulment is examined, it can be concluded that the Court followed a well-known path. Its reasoning is consistent and well-grounded, it pinned down [again] the conditions of Article 230 (4) action as prescribed under the Treaty and in case law. The Court's reasoning on individual concern was the usual, it must be proved that the applicant belongs to a closed category by reason of certain attributes peculiar to him or by reason of circumstances in which the applicant can be distinguished from others.

It is noteworthy that the Court of First Instance, besides applying the classical *Plaumann*-test, decided upon admissibility by examining case law on

[15] Treaty on European Union.

the admissibility of applications lodged by associations. This means that the analysis of the European Courts concentrates on finding a common element in the case in front of them and in a previous case, where individual concern was established under *Plaumann* based on the fact in question. The question of individual concern is decided by comparing specific facts determined in previous cases and not by applying the general concept of individual concern as in *Plaumann*. This means, that according to case law there is a separate set of conditions established on the grounds of *Plaumann* concerning the admissibility of applications lodged by associations.[16] The use of special categories crystallised from the general concept in *Plaumann* appears not only in this specific area, but in such territories, where the decision on individual concern is based on peculiarities and circumstances returning case-by-case.[17] This method may facilitate the application of law, however, it may result in a stiffening of the applied law. This may exclude a wider domain of interpretation provided under the general concept of individual concern by not permitting deflection from the specific conditions of admissibility.

Concerning the right to effective judicial protection the Court recognises the right and its obligation to guarantee such right. The sole purpose of its argumentation, however, is to point out the limits of its powers, which exclude the fulfilment of this obligation. Viewing the question from a formal point of view, it can be asserted that the Court shall not overreach the facilities provided by the Treaty. From the Court's point of view, the system of judicial protection is complete, because it may manoeuvre within the limits of the Treaty and the Court takes advantage of its elbow–room. The Member States, however, under Article 10 EC must create such rules of procedures and the national court must interpret and apply these rules in such a way, that the right to effective judicial protection prevails in the Community. Moreover, it is the obligation of the Member States as objects of international law that by the amendment of the Treaty this right is enforced. Consequently, the Court can do nothing else but burden those obligated by law with the obligation to establish a complete and effective system of judicial protection. That is why, the

[16] Expressly granted procedural powers, members of which are entitled to bring action for annulment, own interests, *Union de Pequenos Agricultores v. Council... op. cit.* par. 47.

[17] Obligation to take into consideration (*Piraiki-Patraiki and Others v. Commission* C-11/82 [1985] ECR 207; *Sofrimport v. Commission* C-152/88 [1990] ECR I-2477; *Antillean Rice Mills v. Commission* T-480/93 and T-483/93 [1995] ECR II-2305), procedural rights (*Rica Foods v. Commission* T-47/00 [2002] ECR II-113, *Sociedade Agricola dos Arinhos and Others v. Commission* T-38/99-50/99 [2001] ECR II-585); special situation (*Extramet Industrie v. Council* C-358/89 [1991] ECR I-2501, *Codorniu SA v. Council.. op. cit.*).

enforcement of the right to effective judicial protection is in the competencies of the Member States.

The Court pays less attention to the problems concerning the preliminary ruling procedure than the Commission, because the Court understands that the difficulties of the preliminary ruling procedure lay rather in Community law, than in the law of the Member States. Among the dispositions under the Treaty, it is not the provisions concerning the preliminary ruling procedure that impede the effective review of Community law, since the preliminary ruling proceeding is regulated with the intention that it may be initiated when a national judge decides so in a dispute in front of him. Moreover, its objective was to ensure the uniform interpretation and application of Community law by the national courts. The dispositions of judicial review in Community law rather obstruct effective review. The Court, however, may not decide against the Treaty, hence it is the task of the Member States to alter the provisions in the Treaty.

The message of the Court seems quite clear. It declines to overreach the boundaries of the Treaty, because it is the role of the Member States. Certainly, this also means that the Court does not undertake initiating such direct action for annulment, through which substantial protection of rights can be achieved, without worrying to prove individual concern according to case law. The Court camouflages his resistance to change its position concerning the admissibility of actions for annulment by non-privileged applicants with adequate legal reasoning. Change must be reached through amendment of the Treaty. This passivity contradicts [to some extent] the former practice of the Court pursued in this area of law, when it often *contra legem* extended its powers under Article 230 EC.[18]

When the Court refers to the amendment of the Treaty, it does not specify which provisions of the Treaty it wishes to modify. It must be considered that according to Arnull,[19] case law of the Court on individual concern reflects a judicial intention that non-privileged applicants rather attain the annulment of a Community measure via preliminary ruling procedure. Knowing this, it may

[18] *Parti Ecologiste Les Verts v. European Parliament* C-294/83 [1986] ECR 1339, *European Parliament v. Council* C-70/88 [1990] ECR I-2041, *Commission v. Council* C-22/70 [1971] ECR 263, *Codorniu SA v. Council... op. cit., Extramet Industrie v. Council... op. cit.;* see also: Hartley: *The Foundations of European Community Law... op. cit.* 78–81.; de Burca, G.: *EU Law.* 2nd ed., Oxford, 1998. 86–95.

[19] Arnull, A.: *Private Applicants and the Action for Annulment under A 173 of the EC Treaty*, 1995 32 CML Rev. 41–42, Arnull, A.: *Private Applicants and the Action for Annulment after Codorniu*, 2001 38 CML Rev. 7–52.

not be asserted that under amendment of the Treaty the Court understands solely the modification of Article 230 EC, but it is assumable that the judicial will is also aimed at the amendment of Article 234 EC. It must be stated, however, that these procedures serve different purposes and it is necessary that the Court is aware of this when it refers to the amendment of the Treaty.

The European Court of Justice explicitly answered the criticism of its decision in such fashion that in a formalistic sense it leaves no room for objection. On solid grounds it declined the responsibility to establish the complete and effective Community system of judicial protection by judicial means. In its answer it appointed the responsible party and it seems that it made its role clear. Notwithstanding, it should be asked whether the European Court of Justice and the Court of First Instance have done everything by their own means in order to enforce the right to effective judicial protection and to operate a complete and effective system of judicial protection founded by the Treaty.

However, in a substantial point of view, the activity of the European Courts cannot be viewed as adequate. It is true that the courts shall not overreach the scope of formal law, nevertheless, when they interpret and apply the law, they have room for assigning substance to the units of formal law. Article 230 (4) contains the notions of direct and individual concern, which limit the European Courts in finding applications for annulment of Community measures admissible. The European Court of Justice through the interpretation of Community law defined the notion of individual concern in *Plaumann*. According to this, the applicant is individually concerned if the given Community measure affects him in a way that the applicant can be distinguished from others by reason of certain attributes peculiar to him and by reason of circumstances. The substance of this notion was revealed via case–by–case application, because the notion contains elements, the meanings of which can be explored when they are assigned to the facts in the cases.

When the *Plaumann*–test is scrutinised, it can be asserted that it is not conclusively determined whom the applicant shall be distinguished from by reason of certain attributes and by reason of circumstances established by the Community measure in question. Nothing orders the European Courts where and how to set up that category in which those individuals belong and from whom the applicant shall differ. The *Plaumann*–test does not require the courts to distinguish the applicants from its present or potential competitors. It is not set forth that on others than the workers of the same sector, the inhabitants of the same geographical area must be understood. Nothing prevents the European Courts from setting up different closed categories case–

by–case, on the grounds of which the applicant shall be distinguished from others. Such analysis of the text of the *Plaumann*–test indicates that the European Courts have and had a wide domain of interpretation when defining the meaning of the notion of individual concern. Which demonstrates that such interpretation is possible when the right to effective judicial protection is enforced in the present system of judicial protection of the Treaty.

The above reading of judicial practices of the European Courts is based on an interpretation according to which the courts first select a closed category that is empty; then they appoint that group of individuals which they think belongs to the closed category by reason of attributes peculiar to them or by reason of circumstances. In the course of such interpretation, however, when the closed category already contains a group of individuals, the membership of the closed category is decided by comparing the individuals included in the closed category with the ones excluded from it. The comparison is also pursued according to the conditions of individual concern in the *Plaumann*-test, however, selection is restricted, because a reference group is used. Nevertheless, taking into consideration that the members of the reference group are also selected by the courts according to the *Plaumann*–test, the restriction created by the comparison remains virtual, therefore the courts decide on the question on the basis of a discrepancy from those they see fit. The first interpretation of closed category is based on cases when individual concern could not be determined, because besides the applicant, an indefinable number of individuals would have been individually concerned.[20] The latter reading is based on cases in which only a small group of individuals had individual concern, and the courts found the applicant not individually concerned by the contested measure, because it could not be distinguished from others within the group. This interpretation is supported by those arguments by the courts, according to which, despite the existence of a small group of individually concerned individuals, the individual concern of the applicant was not well-founded due to the fact that the number of individuals in the group would have risen by reason of the appearance of new operators in the market.[21]

What kind of new interpretation shall be given, then? The basis of the following approach is that the European Courts shall not interpret the notion of individual concern in a way that anyone would have the right to start an action for annulment, because it is contrary to the Treaty. Hence such

[20] *Stichting Greenpeace Council v. Commission* C-321/95 P [1998] ECR I-1651, *Danielsson v. Commission* T-219/95 R [1995] ECR II-3051.

[21] *Piraiki-Patraiki and Others v. Commission... op. cit., Calpak SpA and Societa Emiliana Lavorazione Frutta SpA v. Commission* C-789&790/79 [1980] ECR 1949, par. 9.

minimum condition should be found that ensures that the requirement of individual concern predominates. If the applicant is able to name his right, the violation of which he supposes, the applicant fulfils the requirement of individual concern. This also purports that the action of annulment would not be open for anybody, because it may be rather difficult to name a violated right. Secondly, this new condition will be sufficient to distinguish the applicant from others in the meaning of *Plaumann*, if this is still a requirement, because the applicant differs from those, who cannot name such a right. Such adjudication of admissibility would not affect questions of substance, so it does not qualify as *prejudicatio*. While the opinion of the Advocate General in *UPA*[22] suggests another new interpretation of individual concern, the model above will be scrutinised below, together with the approach of the Advocate General. It should be noted that the sole purpose of the above mentioned model is to prove that European Courts have not reached the limits of judge–made law in order to enforce the right to effective judicial protection. European Courts, within the structure of the Treaty, have the power to establish the complete system of effective judicial protection. The conclusion of the Court is incorrect when it asserts that only the Member States are able and obliged to act in order to enforce this right. Because, through interpretation, the European Courts are also able to create a scope for Article 230 (4) EC so that remedy can be given when the rights of individuals are violated.

It must be observed, however, slightly contradicting the above, that the applicant never argued on the basis of individual concern under the regulation in question. The appeal was based solely on the right to effective judicial protection. What the applicant demanded was not an adjustment to the notion of individual concern, but it asked the Court left the wording of the Treaty in order to ensure effective judicial protection. From this point of view, the judgement of the Court seems adequate, because the Court declined to overreach the boundaries of Article 230 (4) EC. If the Court had been asked to reconsider the notion of individual concern in the light of the right to effective judicial protection, the Court would have answered in a different way. In spite of the fact that the applicant's argument evidently lacked certain aspects, the Court should have tackled the question in its entirety.

Does the current system of judicial review comply with fundamental rights—the *dictum* of the Advocate General?[23]

It is often useful to analyse the opinion of the Advocate General parallel with the judgement of the Court. In this case, however, it is less reasonable,

[22] Opinion of Mr. Advocate General Jacobs on 21 March 2002, [2002] ECR I-6681.
[23] *Ibid.*

because Mr. Jacobs is opposed to the opinion of the applicant, the Council, the Commission and the European Court of Justice. This is not contradicted by the fact that the Court under paragraph 43 of its judgement refers in consent to some points of the opinion of the Advocate General, because in this part of its opinion the Advocate General confuted the argument of the applicant, instead of orienting the Court in the direction of the interpretation he suggested.

The opinion of the Advocate General is one of the most comprehensive criticism of the case law of the European Courts concerning Article 230 (4) EC. Mr. Jacobs not only opposes the interpretation of the article, but he is up against the formalist legal arguments presented by the CFI and later by the ECJ. It rejects the solutions proposed in the interventions and refuses to agree with the applicant. The Advocate General points out the weaknesses of the present system of judicial protection and suggests a solution within the framework of the Treaty in order to ensure proper functioning.

The review of Community law by non-privileged applicants is pursued via two means, one through direct action by Article 230 (4) EC, the other through the preliminary ruling procedure under Article 234 EC. The Advocate General concluded that according to the case law of the European Court of Justice, the primary procedure of review of secondary Community law of general application is the preliminary ruling procedure. According to the courts, the preliminary ruling procedure makes the system of judicial protection complete in the framework of the Treaty, because this procedure is open for those who are not able or who were not able to apply for annulment under Article 230 EC. The Advocate General asserted, however, that the system of judicial protection completed by the preliminary ruling procedure is not sufficient to enforce the right to effective judicial protection, because of the peculiarities of the preliminary ruling procedure.

The Advocate General pointed out the following peculiarities. Firstly, he asserted that the preliminary ruling procedure cannot be initiated without a procedure in a national court or tribunal. This may be impossible when no national measure or no damage exists, or the applicant has to initiate a procedure against itself. It costs money and time to reach a court of last resort in the procedure in the national courts, where it is obligatory to request a preliminary ruling. It is not the right of the parties, but the right of the judge in a proceeding in a national court to ask for a preliminary ruling. This also means that the national judge decides which questions to ask and which Community measure it asks to annul. The procedure in the ECJ means further delay and costs. The application of an interim measure is also a problem, because the order on an interim measure requested in different

Member States depends on the discretion of the national courts and different orders endanger the uniform application of Community law. The interim measure pursuant to Article 230 EC action is valid in all Member States, which ensure uniform application. The Community institution, which ordered the Community measure in question, is not a party in the preliminary ruling procedure contrary to Article 230 EC action. In the action for annulment the courts may deal with all questions related to annulment under Article 234 action, however, the Court is only entitled to answer the judicial questions. The application for action for annulment is published in the Official Journal, meaning that intervention may occur on a wider scale. The two–month deadline in the Article 230 EC procedure ensures that the review of Community law takes place as soon as possible, thus enhancing legal certainty opposed to the preliminary ruling procedure, which may last for years.[24]

The Advocate General may have missed one important momentum when he examined review via Article 234 EC action. Mr. Jacobs asserted that the national court is not entitled to declare a Community measure invalid, and that it may ask for review in case of grounded suspicion of invalidity. The Advocate General nevertheless forgot to deal with the possibility that the national judge does not doubt the validity of the Community measure, even if it has been referred to by the parties during the procedure. The national court is not obliged to ask for preliminary ruling every time suspicion is raised on the validity of a Community measure, because by declaring the Community provision valid, the question of validity does not appear any more in the national court. This momentum may bar out the possibility that the preliminary ruling procedure adequately supplements the action for review under Article 230 EC in order to enforce the right to effective judicial protection in the framework of the Treaty.

The opinion of the Advocate General points out, however, that the limits of this right do not reside exclusively in the peculiarities of the preliminary ruling procedure. Mr. Jacobs submitted that the review of Community measures must be realised in the framework of Article 230 EC. He stated that the limits of the vindication of the right of effective judicial protection lies not in the provisions of the Treaty, but in the substance attached by the courts to the provisions of the Treaty. The European Courts must create a new meaning of individual concern in a way that the review of Community law would be possible without violating the right to effective judicial protection. The Advocate General thought that the complete and effective system of judicial protection has not been established within the framework of the Treaty. The Advocate General did not

[24] *Ibid.* par. 41–49.

settle for this call, but proposed a new meaning of individual concern. In his view, a person is "individually concerned by a Community measure where, by reason of his particular circumstances, the measure has or is liable to have, a substantial adverse effect on his interests".[25]

It is obvious that Mr. Jacobs in his opinion did not request the transformation of Article 230 (4) EC into an *actio popularis*, but he wanted to keep the *locus standi* provided by the article. One may argue for such transformation, nevertheless the opinion focused on the reconstruction of the *locus standi*, so it will be discussed below.

It must be premised that the centrepiece of the solution suggested by Mr. Jacobs is the dereliction of the main element in *Plaumann*, the condition that the applicant shall be distinguished from others. The interpretation of individual concern by the courts limited the admissibility of applications to a large extent, because the above mentioned condition of *Plaumann* allowed the courts to value the applicant's uniqueness as an absolute category. In our view, it is not only uniqueness that establishes individual concern, but individual concern is founded when the applicant can be distinguished from others, together with others. Individual concern is not equal to being the addressee of a measure. The determination of individual concern shall not be refused on grounds that others are similar or they have the potential to be similar to the applicant. The requirement of individual concern must work in a way that it excludes those who are not concerned, but includes those who are not unique but concerned.

Beyond the fact that the Advocate General rejected the requirement of being distinguishable from others, the new interpretation of individual concern raises different problems.

It is difficult to value the notion of interest in legal terms, because there are interests that are outside the scope of law, and there are others that have legal relevance. In my view, an interest gains legal relevance not when it is referred to in a procedure in a court, but when a court in a procedure values it as legally relevant. On this basis it is difficult to specify the interest that shall have legal relevance and get legal protection. When we speak of rights and obligations, however, their relevance and protection by law is obvious.

The notion of adverse effect is also difficult to interpret, because it is not easy to define when an adverse effect would be perceptible. The palpability of adverse effect is a matter of proof in a procedure. When it does not appear in the outside world as a fact, it will be impossible to refer to in a procedure. Adverse effects may appear near at hand as abuse or in the distance as endangering and they may be actual or potential. At which point does it bear

[25] *Ibid.* par. 56–60.

relevance? When is it perceptible? The notion of substantial tries to answer to these questions, but its meaning still allows such a wide domain for interpretation that uncertainty around the meaning of individual concern still lingers.

The ambiguities in the interpretation of the approach suggested by Mr. Jacobs are increased further by the fact that by reason of the particular circumstances the measure has or it is liable to have a substantial adverse effect on his interest. This can be interpreted in a way that it corresponds to the notions of certain peculiar attributes and circumstances known from *Plaumann*, because in some contexts they are the particular circumstances of the applicant. The rights and obligations of the applicant may also belong to the notion of particular circumstances. This notion, which can be interpreted in different ways, still offers a chance for the European Courts to adopt an interpretation of individual concern that does not allow for the enforcement of the right to effective judicial protection.

According to my suggestion for the reduction of uncertainties of interpretation of individual concern, it is sufficient for the applicant to prove individual concern to indicate the right or obligation, the protection of which it asked for in his application. When determining rights and obligations, well-established legal categories can be relied upon. Furthermore, it is unnecessary to prove effect and substantiality. Being distinguishable is not a condition, because the indication of rights and obligations does not require the specification of exclusive rights and obligation. An action under Article 230 (4) EC would not be an *actio popularis*, since the condition of individual concern could not be fulfilled by everybody, since the rights and obligations in Community law are often specific. This means that there are individuals, who have rights or obligations under a specific measure of Community law and there are others who do not. In case of general measures containing rights and obligations for all concerned subjects-at-law, exclusion from judicial protection is not justifiable.

The Advocate General protected his position with different arguments, which support both new interpretations. They suppose that the interpretation of individual concern by the European Courts is unacceptable, and by reaching a new interpretation the European Courts facilitate the establishment of a complete and effective system of judicial protection in the framework of the Treaty. By applying a new interpretation, the denial of justice (*déni de justice*) can be excluded, and the development of judicial protection could be ensured. If the European Courts applied a new interpretation of individual concern, the controversies in case law could be resolved. Furthermore, the paradox situation implying that the more individuals are affected, the less chance they

have to prove that they are individually concerned, would cease to exist. This situation is supported by the approach, according to which the more general the interest of the review of a Community measure is, the more the institutions and the Member States shall be obligated to initiate an action for review. It may be submitted, however, that the lack of such action shall not deny access to justice for individuals. According to Mr. Jacobs, this would allow the European Courts to rule more on the merits, and less jurisdiction in matters of admissibility. This does not mean that the Advocate General proposed no examination of admissibility in the proceedings, or that the European Courts should decide on merits when they consider admissibility. Whence, he neither acknowledged that Article 230 (4) EC action was *actio popularis*, nor argued for jurisdiction against legal principles. Mr. Jacobs stated that a more permissive interpretation of individual concern would fit in the more liberal stance of preceding case law, since the Court often ruled *contra legem* on the grounds of principles of law (the rule of law).[26]

It must be seen, however, that in these cases the European Court of Justice served its own purpose expanding its jurisdiction. The less strict approach of Article 230 (4) EC action, however, may be contrary to the interest of the European Courts, because a relaxed *locus standi* means a larger number of cases, and this increase in workload is not compensated by the increase of judicial competence in the Community courts.[27] A dangerous increase of workload may make the functioning of the European judicature impossible.

The Advocate General asserted that the objection against a new interpretation of individual concern cannot be well-grounded. Article 230 EC does not exclude the opportunity for a new interpretation. The political, procedural difficulties of legislation and its length do not justify that a Community measure violating Community law evades review. In addition, the democratic deficit of the legislative procedure emphasises the necessity of review. Finally, the two–month deadline, the condition of direct concern and the future judicial reform make the reference to immense workload as opposed to a relaxed interpretation of individual concern senseless.[28]

One argument against a new interpretation of individual concern was that case law on individual concern was settled.

[26] *Ibid.* par. 61–67.

[27] Rasmussen, H.: *Why is Article 173 EC Interpreted against Private Plaintiffs?*, 1980 5 EL Rev. 112–127, 1980; Neuwahl: *Article 173 Paragraph 4 EC... op. cit.*

[28] Opinion of Mr. Advocate General Jacobs... *op. cit.* par. 75–81.

Whereas Mr. Jacobs stated that case law is not settled regarding all aspects because in several cases the limits of admissibility were indistinct.[29] The liberal jurisdiction of the national courts and the establishment of the Court of First Instance also supports the departure from case law. According to the Advocate General, the Court applies an interpretation of the principle of effective judicial protection regarding the national courts that it is hard to support the strict interpretation on individual concern applied by the European Courts.[30]

The Advocate General not only expounded his point of view, but he examined the arguments put forward in the procedure by others. The core of the applicant's argument was that in case the application of Article 230 EC action was declined, it would not be granted effective judicial protection.[31] Mr. Jacobs rejected the argument by stating that the Treaty exactly specifies the *locus standi* conditions of Article 230 (4) EC action. Furthermore, the European Courts lack the jurisdiction to interpret or annul national laws. An examination of national law by the European Courts concerning the possibility of a review of Community law may be contrary to the former rule. After all, such analysis would establish that admissibility under Article 230 (4) EC would be determined by the laws of the Member States.[32]

The standpoint of the Advocate General differs from the point of view of the applicant only in that it construes the right to effective judicial protection in another context. He asserted that the enforcement of the right resides in the alteration of the interpretation of individual concern. The applicant, however, stated that if any judicial channel is open for his claim then the right is enforced. This argument can be rejected on the grounds that the operation of judicial channels shall not depend on each other. Each one is situated in a specific environment, their functioning serves specific aims and they require particular conditions when initiated. The individual seeking judicial protection shall choose the one that is more effective.

The Advocate General rejects the submission of the Council and the Commission on the functioning of a complete system of judicial protection in the Community, and states that Article 234 EC action would not be a right even if national rules were changed, because a court–case cannot be created by

[29] *Ibid.* par. 82–85.

[30] *Ibid.* 22, par. 89–99, see *Johnston v. Chief Constable of the URC* C-228/84 [1986] ECR 1651, *Brasserie du Pecheur SA V. Germany and R v. Secretary of State of Transport, ex parte Factortame Ltd and Others* C-46/93 and C-48/93 [1996] ECR I-1029, *Verholen and Others v. Sociale Versekeringsbank* C-87-89/90 [1991] ECR I-3757.

[31] Opinion of Mr. Advocate General Jacobs... *op. cit.* par. 34.

[32] *Ibid.* par. 37.

amending the rules of procedure. On the other hand, if a review through preliminary ruling was made more accessible, it would not help the problem of Article 230 (4) EC action.[33]

When analysing the decisions of the European Courts it must be taken into consideration that they are the units of a process. They represent a standpoint of the law, at the same time they open up new chances for further development in the law. That is why, it must be examined which parts of the judgement define the future evolution of law.

In its judgement the Court rejected its further obligation concerning the enforcement of the right to effective judicial protection on formalist grounds. It positioned this obligation on the Member States. Now, there is no amendment of the Treaty in prospect that would directly concern Article 230 (4) EC. The judicial reform in the Treaty of Nice[34] may indirectly have such effect, that the European Courts would ease the conditions of admissibility. This statement is based on the assumption that the cause of judicial conservatism shown during the interpretation of the conditions of admissibility is that with strict conditions of admissibility the workload of European judicature can be lessened. After the Treaty of Nice entering into force, if not the number of applications, but the workload on the European Courts will decrease by the distribution of case. Therefore, it would be possible to declare more applications admissible. The decrease of workload can be influenced by the number of judicial panels, their competence and by the number of final judgements in first instance.

The CFI departs from settled case law: the *Jégo-Quéré* judgement

In this procedure the case law on the individual concern of non-privileged applicants had a particular turn. The events just heightened the obtuseness with the activity of the European Courts in this field. The Advocate General presented his opinion on the *UPA* case on 22 March 2002. The Court of First Instance decided in *Jégo-Quéré* on the 5th of May. The European Court of Justice brought its judgement on 25 July 2002. The succession of events requires us to assert that in spite of new elements in case law, the legal situation has not changed. The analysis of the judgement in *Jégo-Quéré* shall not be ignored, because the decision contains such new judicial approach that, in our view, must be followed and the examination of the judgement can point out the weaknesses of the new approach.

[33] *Ibid.* par. 56–58.
[34] Treaty of Nice, OJ C 80, 10/03/2001. 1–87.

The applicant French enterprise asked for the annulment of certain provisions of Regulation 1162/2001 EC[35] from the Court of First Instance under Article 230 (4) EC. The Regulation applying to certain fishing vessels and its provisions set the minimum mesh sizes used by the vessels. The Commission raised an objection of inadmissibility and asked the court to reject the application.

The argument of the applicant can be divided into two. First, it deals with the nature of the given Community measure and with its being of individual concern to it. Second, the core of its argument concerns the enforcement of the right to effective judicial protection. It asserted that the Regulation is rather a bundle of decisions, than a measure of general application. The Regulation concerned it individually, because it was distinguishable from others on the basis that it was the only French undertaking fishing in the Celtic Sea. In the course of legislation the Commission was obliged to observe the fact that the applicant fishes for fish that are smaller than hake, therefore, the increase of mesh sizes deprives it from its catch.

The applicant concluded that besides Article 230 EC action, no other means of judicial protection were available and asked the court to adopt a relaxed interpretation of Article 230 EC in the light of Article 6 of the ECHR.

The argument of the Commission also followed two directions. First, it denied the individual concern of the applicant. Furthermore, it stated that the applicant was not denied of other means of judicial protection. When it examined individual concern, it analysed first the nature of the measure in question and asserted that according to case law, even tough it was a measure of general application, the applicant may be of individual concern to it.[36]

According to the Commission, however, individual concern was not proven in this case, because the scope of the Regulation was set by objective criteria. The Regulation applies to all fishing vessels equally within its scope. There was no higher rule of law that obliged the Commission to take account of the situation of the applicant in the course of legislation. The Commission stated that alternative means of judicial protection are Articles 235 and 288 (2) EC, which regulate the action for non-contractual liability of the Community.

[35] Commission Regulation (EC) No. 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels, OJ L 159, 15/06/2001. 4–9.

[36] *Codorniu SA v. Council... op. cit., Extramet Industrie v. Council... op. cit.; Campo Ebro and Others v. Council* T-472/93 [1995] ECR II-421, *ACAV and Others v. Council* T-138/98 [2000] ECR II-341.

The Court of First Instance, lead by the president of the court, proceeded in an extended composition chamber and asserted that the Community measure under scrutiny is of general application, because it applies to undefined classes of persons and to objectively determined situations. According to settled case law,[37] measures of general application can be of individual and direct concern to some economic operators. The condition of direct concern is fulfilled because the application of the Regulation does not depend on the discretion of a third person. The examination of individual concern was done by applying the general concept of *Plaumann*, and by applying case law crystallised categories, in which individual concern was always established. The court did not accept individual concern as proven by the applicant under the notion in *Plaumann*, because the Regulation affects the applicant as a fishing undertaking, and as such, it cannot be distinguished from other fishing undertakings. In case law, individual concern was established many times, and the legislator was obligated to take into account the applicant when making the Community measure, however, this time it was not the case. Under Community law, the applicant had no procedural rights or guarantees, so these specific cases do not establish individual concern of the applicant. The court asserted that the applicant was not in a special position, nor had special rights in order to be distinguishable from others.[38]

However, the argument of the Court of First Instance took a turn. The court ascertained that the Community is based on the rule of law and that Community law established a complete system of legal remedies in order to facilitate a system of review of Community law.[39] The obligation of effective judicial protection is based on the constitutional traditions common to the Member States and on Articles 6 and 13 of the ECHR. Under Article 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000,[40] the European Courts shall give remedy to the party whose rights and freedoms are guaranteed under the law of the Union. Fully aware of this obligation, the Court of First Instance stated that the inadmissibility of an action for annulment, where a non-privileged applicant

[37] *Piraiki-Patraiki and Others v. Commission... op. cit.; Sofrimport v. Commission... op. cit.; Antillean Rice Mills v. Commission... op. cit.; Rica Foods v. Commission... op. cit.; Sociedade Agricola dos Arinhos and Others v. Commission... op. cit.; Extramet Industrie v. Council... op. cit.; Codorniu SA v. Council.. op. cit.; Emesa Sugar v. Council* T-43/98 [2001] ECR II-3519.

[38] *Ibid.*

[39] *Parti Ecologiste Les Verts v. European Parliament... op. cit.*

[40] OJ 2000 C 364, 1.

requests the annulment of a measure of general application, would mean that the applicant shall be deprived of the right to effective judicial protection.

According to the court, the review via preliminary ruling is not an adequate means of judicial protection, because the enforcement of the right to effective judicial protection shall not force an individual to violate the law. The action for non-contractual liability of the Community is not an alternative judicial remedy, because in this procedure the annulment of Community law does not take place. The question of admissibility and the questions on the merits are often examined together, as it is excluded in Article 230 EC action. In this procedure, the analysis of lawfulness does not reach the same level as in the action for annulment.

The Court of First Instance asserted that under the ECHR and the Charter of Fundamental Rights of the European Union, the Community system of remedies cannot provide effective judicial protection in a case, when such Community measure of general application is under review, directly affecting the legal position of the applicant. This situation, however, does not entitle the Community judicature to depart from the provisions of the Treaty. The only possible solution is the new, relaxed interpretation of individual concern within the framework of Article 230 EC.

The Court of First Instance gave the following interpretation to the notion of individual concern. "In order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly, if the measure in question affects his legal position, in a manner which is both definite and immediate,[41] by restricting his rights or by imposing obligations on him. The number and position of other persons, who are likewise affected by the measure, or who may be so, are of no relevance to that regard."[42]

By applying the new test, the Court found the applicant individually concerned, because the Regulation imposed obligations on *Jégo-Quéré*. The application, therefore, was found admissible.

The approach of the Court of First Instance is radical, since it recalls those times, when the Court declared actions for annulment of regulations lodged by non-privileged applicants admissible.[43] This is a judicial approach, which had been demanded by the critics and with which, in our view, the European Courts had owed for a long time, if they acknowledge that Community law is based on the rule of law. The new judicial attitude is welcomed without

[41] *Certaine et actuelle, unzweifelhaft und gegenwartig.*

[42] Par. 51, in: *Jégo-Quéré et Cie SA v. Commission... op. cit.*

[43] *Extramet Industrie v. Council... op. cit.; Codorniu SA v. Council.. op. cit.*

reservation, if it is expressed in the decision on merits. This means that the new interpretation of individual concern shall establish such *locus standi*, which creates the conditions of effective judicial protection within the framework of the Treaty.

The argument of the court in one section runs parallel with the argument applied in UPA. The starting point is the rule of law and the obligation derived from it, so that a complete and effective Community system of remedies must be established at the disposal of Community subjects-at-law. The court sees the effective judicial protection not only as an obligation, but as a right, which can be deduced from the common constitutional traditions of the Member States, from the ECHR and from the Charter of Fundamental Rights of the European Union. In spite of the fact that reference to the latter is questionable due to its legal nature, it is acceptable on similar grounds as the reference to the ECHR. The Court of First Instance sees in that way that the present system of judicial remedies is not complete and effective with respect to the right and the obligation mentioned above.

At this point the arguments depart. While in *UPA* the obligation of the Member States comes into focus, in this case the court examines the obligation of the European Courts regarding the complete and effective system of judicial protection.

According to the court, in order to enforce the right to effective judicial protection, a new interpretation of individual concern is required. The court creates the new notion of individual concern from the following elements: measure of general application that concerns the legal position of the applicant directly; definitely and immediately, by restricting his rights or by imposing obligations on him, and the number of persons affected is not relevant.

According to the judgement of the Court of First Instance, the court wants to apply the new conditions of individual concern only in actions for annulment of measures of general application, i.e. regulations. The text of the judgement refers to measures of general application, which means that in case of a decision addressed to another person or in case of a decision in the form of regulation, the applicant in an action for annulment must prove individual concern by applying the interpretation in *Plaumann*. It appears that the Court of First Instance does not intend to treat the right to review of non-privileged applicants equally in respect of regulations and other Community measures mentioned in the Treaty. If the wording of the new interpretation was intended, it must be stated that this distinction cannot be justified on the grounds of general or individual nature of Community measures. The obligation to establish a complete and effective system of remedies requires the court to

extend the new interpretation of individual concern to decisions addressed to another person and to decisions in the form of regulation.

In connection with the nature of the Community measures under review it requires an explanation, why it was important in the argument of the parties that the Community measure in question was of general application or it was a bundle of decisions? Arnull stated that in UPA a similar argument was made by the Court, when it stated that the applicant would be of individual concern to the regulation in question, because the regulation had the nature of a decision in that regard.[44] After *Codorniu* this argument is incomprehensive, however, it can be asserted that the examination of the nature of the Community measure is a common element in the arguments of judgements of the European Courts.[45] In our view, this is only applied to create a complete line of argument, because the courts every time assert that the review of measures of general application is possible when individual concern of non-privileged applicants is proven. The complete line of argument is needed, because case law somewhat deflects from the wording of the Treaty, according to which, the action for annulment of regulation is the right of the Institutions, the ECB and the Member States. The courts shall reinforce the legal basis of the review case–by–case, which is contrary to the Treaty, in order to avoid the questioning of jurisdiction that is in compliance with the Treaty.

The court inserted the requirement of direct concern into the new concept of individual concern. This suggests that the court ensures that both conditions in Article 230 (4) EC are fulfilled by the applicant.[46]

According to the judgement in *Jégo-Quéré*, in order to establish individual concern the applicant must prove that the Community measure in question affects his legal position in a manner which is both definite and immediate, so it restricts his rights or imposes obligation on him. If the notions of restriction of rights and imposition of obligations imply the meaning of the notion of definite and immediate effect on the legal position, it is questionable whether it is necessary to include both the result of interpretation and the notion under interpretation in the new concept of individual concern. If the expressions can substitute each other, in our view, it is sufficient to indicate only the restrictions of rights and the imposition of obligations, because these notions restrict the European Courts in their discretion when deciding

[44] Arnull, A.: *Editorial Comments*, 2002 27 EL Rev.

[45] *Union de Pequenos Agricultores, Jégo-Quéré et Cie SA v. Commission... op. cit., Federacion de Cofraidas de Pescadores de Guipuzcoa and Others v. Council.*

[46] Par. 26, 43, 47, in: *Jégo-Quéré et Cie SA v. Commission... op. cit.*

on admissibility. Legal certainty requires such legal provisions that make legal actions predictable.

When the expressions are not substitutable, it is difficult to define the notion of effect on legal position. Although, the application of the categories of "definite" and "immediate" can narrow the domain of interpretation defined by "restriction of rights and imposition of obligations". Case–by–case the content of the new interpretation of individual concern could be defined, if the premises applied in the enforcement of the right to effective judicial protection are derived from the rule of law.

The Court of First Instance undoubtedly indicated that it wanted to relinquish the application of the method in *Plaumann*, which required the courts to distinguish the applicant from all others. It undertook to concentrate solely on the position of the applicant irrespective of others surrounding him. This is the only part of the new conditions of individual concern that is worth welcoming, because the above mentioned critical remarks show the shortcomings of the new method of examining individual concern suggested by the court. This means that in spite of the fact that the court stopped applying the method of closed category, it rejected to restrict its operations within the frame of well-definable notions.

The purpose of examining uncertainty is not to prove that a concept of individual concern that has absolute meaning is necessary, rather it is to point out the advantages of the method suggested by us against the suggestions of the Advocate General and the court. We think that the new concept of individual concern should bear the highest degree of certainty without the exclusion of individuals from the review of Community measures.

At this point, it is necessary to compare the core solutions of the three suggested methods in order to choose the most adequate. The Advocate General gave the widest domain to individual concern, when he required the proof of substantial adverse effect on the applicant's interest. Our suggestion of the indication of rights and obligations defines a narrower scope, because rights and obligations represent a narrower domain than interests. The restriction of rights and imposition of obligations suggested by the Court of First Instance is the narrowest interpretation, because that requires activated rights and obligations. Parallel to this, it can be stated that by narrowing the domain of interpretation the definability of the concepts increased. While the notion of interest applied in the first solution is definable with difficulty, the content of rights and obligations, restriction of rights and imposition of obligation can be determined easier. In our view, the limitation of the concept to restriction of rights and imposition of obligations is unjustified,

because remedies shall not be provided only for those whose right has been restricted or who has been obligated. Rather, those shall also have a share in judicial protection, whose right would be restricted or whom obligation would be imposed upon. The Community measure under review does not always cause immediate violation of law, but it often carries this potential.[47] If a Community measure violates Community law, it does not mean that it also violates the rights of an individual, because the grounds of illegality in Article 230 EC only means the violation of Community law and not the rights of an individual. That is why it is necessary to establish such concept of individual concern that provides that individuals, whose rights can potentially be violated by a Community measure, may ask for the review of that Community measure. It is not justified to leave the action for review of the Community measure in case of indefinite and not immediate violation of law to privileged applicants, because without being affected they will not perceive that the Community measure does indeed violate Community law. The affected individuals have no such mechanism at their disposal through which they could enforce any privileged applicant to launch an action for annulment. The most effective way to enforce the right to effective judicial protection is to ensure that the affected persons have the right to initiate such proceedings.

In the course of analysis other factors outside the scope of law must be considered. The publication of the opinion of the Advocate General a few weeks ago must have had a great effect on the development of the judicial approach. In spite of the fact that the applied interpretations on individual concern differed, the starting point of their approach was the same: the need for a new interpretation in order to establish effective judicial protection in the Community.

In this case a regulation of the Common Fisheries Policy was under review. This sector is in deep crisis, because the amount of fish in the seas has decreased significantly as a consequence of excessive fishing activity. The reforms suggested and implemented by the Commission sensitively affect the undertakings in the sector, because their means of earning a living is in danger. The reception of the measures of the Commission often degenerates into violent acts by these people. Every week, during protests against the new rules, the fresh catch is dumped in front of the buildings of fishing authorities. When courts apply the law, they shall not leave the social circumstances [behind the law] out of consideration.

[47] *Stichting Greenpeace Council v. Commission... op. cit., Danielsson v. Commission... op. cit.*

Closing remarks

The new radical concepts emerging in case law and in the opinion of the Advocate General have grounds to call the constructive judicial activity of the Court, which has defined Community law in its basis, on account. It is questionable that the European Court of Justice rejects the two reform concepts on purely formalistic legal grounds. That Court, which have created the missing elements of the Community system of judicial protection of individuals in its case law, cannot back out from the obligation of further perfection of the Community system of remedies.

The significance of *Jégo-Quéré* is that the Court of First Instance rejected the condition of being distinguishable from others, as the core element of the concept of individual concern. According to this, the applicant has to concentrate on his position in the proceeding. In our view, however, under the criteria set in the case, the group of individuals, who may qualify as individually concerned, is set narrow without reason. Only in case of real violation of law, i.e. restriction of rights or imposition of obligations, would their actions be admissible. Judicial interpretation would preclude individuals whose rights are not violated directly at the effective date of the Community measure and allow action for them later, when the result aimed by the Community measure ensues. Nobody shall be excluded from the review of a Community measure violating Community law, if the right of that person would be violated by the later effect of the unlawful measure.

In the light of the *UPA* judgement it must be stated that according to case law individual concern must be interpreted as in *Plaumann*.[48] According to the argument of the applicant in *UPA*, it had *locus standi* under Article 230 EC action because Article 234 EC action was not open for his application, therefore, in order to enforce the right to effective judicial protection, the direct action for review shall stand for its disposal. The Court rejected the argument by stating that it had no jurisdiction to examine national laws whether they serve Article 234 EC action appropriately. The Court of First Instance rejected the same argument on the same basis in case *SLIM Sicilia* only a month after the judgement in *Jégo-Quéré*.[49] Three months after the decision in *Jégo-Quéré*, the President of the CFI repeated the UPA judgement stating that the lack of

[48] See: Arnull's comment: *Plus Ça Change..*, Arnull: *Editorial Comments... op. cit.*

[49] *SLIM Sicilia v. Commission* T-105/01 [2002] ECR II-2697, par. 55, Order of 6 June 2002.

other means of judicial protection does not require the court to depart from the conditions of admissibility set in Article 230 (4) EC.[50]

In view of the functioning of the European Courts, the *Jégo-Quéré* judgement is not the result of a communication failure. The European Court of Justice does not want to alter the present set of conditions. It must be seen, however, that the judgement in *Jégo-Quéré* is the part of Community law, and it has not been reversed yet by the European Court of Justice in an appeal procedure. The judgement of the Court of First Instance can be relied upon and it will be relied upon. Furthermore, the proceedings in *Jégo-Quéré* are still underway, only the question of admissibility was decided. The decision on merits will follow the possible appeal, the opinion of the Advocate General will come later, and finally, the judgement of the European Court of Justice will hopefully clarify the situation. The process is not over yet and it is still possible that the interpretation of individual concern will change in the forthcoming months.[51]

[50] Order of the President of the CFI, *VVG International and Others v. Commission* T-155/02 R of 8 August 2002, par. 39.

[51] The comments of Allan F. Tatham and Ernõ Várnay are gratefully acknowledged.

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BOOK REVIEWS

Konstitutsionnye proekty v Rossii, 18–nachalo 20 v. otv. redaktory S. Bertolissi, A. N. Sakharov (Moskva: IRI RAN, 2000)

[*Draft constitutions in Russia, 18th to early 20th century, S. Bertolissi–A. N. Sakharov, eds. (Moscow: IRI RAN, 2000)*]

In 2000 the Institute of History of the Russian Academy of Sciences and the Oriental Institute of the University of Naples, in a joint publication, released a book of great importance on the history of Russian constitutionalism. The subject of Russian constitutionalism is today of exceptional interest and importance. The continuing global significance of Russia's role in political, military and cultural affairs means that the development of Russian constitutionalism will be watched with great interest from outside Russia's own borders, just as it had been in the previous era. The book is in a class of its own, endeavoring a full and thorough introduction to the origins of Russian constitutionalism. It aims to present Russian constitutionalism in its entirety, understanding constitutionalism in the narrower sense of the term. The volume contains documents, which were drafted to limit tsarist autocracy. The collection begins with various constitutional plans discovered in connection with the ascendance of tsarina Anna Ivanovna in 1730, and covers projects up to the Constitutional Convention of 1917.

The book offers a truly exceptional presentation of unique historical documents. The largest part of this more than 800-page-volume is devoted to the development of Russian constitutional thought, in which 50 documents, covering the main stages of constitutional development, are presented. Extensive introductory essays by A. N. Sakharov, S. Bertolissi and A. N. Medushevsky open the presentation of these documents. The three introductory essays, written from three different perspectives, as well as the detailed references in the work of A. N. Medushevskij, comprehensively illuminate the historical context of the documents' origins. This apparatus also makes the historical documents accessible to those not that familiar with the intricate details of Russian politics, law, and institutional and social history. Indeed, the need to outline the legal and institutional historical context is of great significance given that, as the title suggests, the book contains only those draft constitutions that were (actually) intended to be realised. These drafts can only be properly

analysed with an understanding of their legal and institutional context. By placing these documents one after the other, it becomes possible to reconstruct and analyze in its entirety the nearly three centuries of Russian constitutional thought, which began following the reign of Peter I.

The massive amount of historical material offers useful insights not only to those specialising in Russian history. Foreign scholars of European and North American comparative law and constitutionalism who are less familiar with Russian history and constitutional developments may also make exciting discoveries. Analysing the development of Russian constitutional thought through concepts, institutions and solutions that emerged during the centuries-old evolution of constitutionalism in Europe and North America, reveals aspects of this development, which would otherwise have remained hidden. (Although, to a certain extent, such an outsider approach might seem rigidly analytical and overly unhistorical.)

Sakharov approaches Russian constitutionalism primarily from its historical, cultural and civilizational aspects. Full of ideas and inspiration for further thought, Sakharov's essay touches upon a few major episodes in the development of the Russian political system before the reign of Peter I, which had the potential to direct Russian history in a completely different direction. A central concept in his essay is the emphasis on the non-determinate, alternating nature of Russian history. Although following the rule of Peter I, the "constitutional" or "liberal" alternative was clearly more apparent, with a slight exaggeration, it was already noticeable before his reign. It is in this light that Sakharov evaluates, admittedly only tangentially and in a careful fashion, the boyar opposition to Ivan IV ("the Terrible"), the Russian elite's renewed attempts to limit the tsar's power in the time of Boris Godunov and Prince Vasily Shuysky, and—with much greater emphasis—Prince Kurbsky's opposition to the 'terrible ruler'. In relation to Kurbsky, Sakharov speaks directly of "his draft constitution to limit autocracy". The author places much significance on Kurbsky's endeavors to reform the "Chosen Council" and to include representative elements in local councils. In Sakharov's view, had these reforms been realised, they would have brought into being a completely different, alternative model of Russian political development in the second half of the sixteenth century which would have been "on the level of East-European and Swedish civilizational experience". In Sakharov's evaluation, Kurbsky's stance against Ivan IV "was the first forceful and dramatic attempt in the ongoing struggle for an alternative Russian development to end in failure".

Worthy of note is Sakharov's "cultural" and "civilizational" approach, which can be traced on more than one occasion both within and outside

Russia, admittedly imbued with differing value content. In the end, he connects the autocracy—constitutionalism duality back to the Russia—Europe duality. Furthermore, perhaps exactly due to the systematic application of this "cultural" outlook, the reign of False Dimitry I is presented in a fundamentally different manner than is commonly accepted in historiography. False Dimitry I came to power during the so-called Time of Troubles, the time of the fatal blow to Russian statehood, and he is commonly held to have represented Catholic and Polish interests. At the same time, Sakharov's interpretation of False Dimitry I's reign presents a perspective which fits well into the "autocracy" v. "liberalism / constitutionalism" dualism of Russian history. From this perspective, the measures adopted by False Dimitry I point exactly in the "liberalism/constitutionalism" direction. False Dimitry I permitted Russian people to freely travel abroad, he announced freedom of religion, he eased the situation of the peasants and *kholoptsvo*, and planned to convene the elected representatives of the serving nobles to familiarise himself with their demands. According to Sakharov, the origins of the conspiracy to overthrow and assassinate False Dimitry I can basically be explained by the above measures of the usurper tsar. In Sakharov's conception (which is at notable variance with standard historiography) the reign of False Dimitry I was of great significance as it presents the focal point of a potential for an alternative Russian history that could have stepped off the path of autocracy.

Sakharov's evaluation of the character of Peter I similarly differs from common historiography. In his description it is Peter I who represents the ever-dominant autocratic-authoritarian pole in Russian history. This is opposed to Regent Sophia and Prince Vasily V. Golytsin, a key figure under the Regent's reign and the head of the '*posolsky prikaz*', i.e. the minister of foreign of affairs (in the words of Sakharov the "enlightened chancellor") who represented the failed non-autocratic/authoritarian alternative. (Their reign ended in 1689 by the coup d'etat of the Naryshkin clan, thereby assuring the reign of Peter I.) Peter I did not continue any of the important aspects of Sophia's and Golytsin's reform measures and carried on the previous autocratic traditions of Moscow Russia, his own superficial reforms changing nothing. Thereupon, it is not surprising that Sakharov presents twelve documents in relation to the attempts to limit the powers of the Supreme Privy Council in the 1730's. At the time the eight-member oligarchic Supreme Privy Council attempted to limit the power of the ascending tsar, Anna Ivanovna in a legal document, setting certain "conditions", thereby also highlighting the constitutionalist alternative.

Besides the above document prepared by the autocrats of the Supreme Privy Council (of which the book presents numerous versions), a good number of other plans were produced in the circles of the nobility which also sought to limit the power of the autocratic ruler. These attempts were supplemented by countless highly articulate open political initiatives undertaken by Russian nobility up to 1905. These events point beyond themselves and are truly worthy of further examination.

Having read the assorted documents on Russian constitutional thought after Peter I, Sakharov's central argument concerning the alternating nature of Russian history seems very fertile and inspiring, yet it still bears a number of paradoxes. Indeed, it is arresting that constitutional plans which sought to limit autocratic power were often fatally aborted at the last minute, sometimes being thrown out by the ruler herself right after royal concession (Anna Ivanovna, Catherine II, the Great). Alexander II, who accepted the plan for constitutional reform (the consultative involvement of the *'zemstvo'*-s and municipal representatives in the legislative process), was assassinated two weeks after he affixed his signature on the resolution, which made the reforms executable. His heir, Alexander III had no intention in continuing his father's work, and in the first weeks of his rule issued the famous manifesto on the reinforcement and inviolability of autocracy—a departure from the logic of constitutional reform presented.

In this respect, the rule of Alexander I is extremely interesting, as a number of constitutional plans were commissioned and prepared during this period, which occupy a significant place in the present book. Most notable among these include 'The most gracious charter to the Russian people' from the Unofficial Committee (Neglasny Komitet) (1801), Speransky's plan entitled 'An introduction to the code of state laws' (1809), and Nikolai Novosiltsev's 'The charter of Russia's state organisation' (1820). Had any of these draft constitutions been adopted, they would have affected Russian history in a manner, which would be felt even today. According to the original plan, the proclamation of the 'The most gracious charter' was to be introduced on the occasion of Alexander I's coronation in September 1801. Speransky enjoyed the full confidence of the tsar between 1807 and 1811 and was almost as powerful as the almighty favourites of the 18th century, who actually decided on all state affairs. In the light of the magnitude of his influence, his quick fall is even more striking (Alexander I having expelled him).

As if observing the cruel play of destiny, the choreography of key aspects, the pattern of events is strikingly similar. In an autocratic environment, documents that have the capacity to bring about substantial changes (those

containing the minimum of civil rights) are prepared in the highest circles of the government, sometimes even with the encouragement and assent of the czar, and seem to have every chance of being realised. Yet, hardly any of these documents, some of which were lengthy and thoroughly elaborate, such as Speransky's, were put into effect, or they were realised with their most important elements being left out. Out of Speransky's plan, components of a bureaucratic machinery such as the institution of ministries and the Council of State were preserved. An exploration of the historical context of the constitutional documents presented in the volume tends to suggest that there should be some deeper reason standing in the way of the realisation of these constitutional projects. Curiously, the failure of these constitutional projects, which were so close to being realised, often contains a tragic element, given that these schemes could have lead to a totally different path for Russian constitutional development and Russian history in general.

Studying all the draft constitutions presented in the book, one is inclined to agree with many considerations that Medushevsky makes in his essay. On the one hand, Russian constitutionalism, just as its counterparts in Western Europe, was born from a conflict between state and society. Thus, the stages and the principles of Russian constitutionalism are akin to those found in Western Europe. However, there are a number of significant, possibly structural, differences. For instance, in Russia a social class or group that could carry the idea of constitutionalism was always absent, or at least very small and isolated. All draft constitutions or legislative reforms emanated from the highest circles of government or from groups in the political elite, and at times it was even the ruler who inspired or commissioned such proposals (i.e. the Instruction of Catherine II, the Great). For this reason, until 1905 and 1917, constitutional reforms were not representative of the political forces of the society, which, through the political process could have been capable of reforming the absolutist-autocratic state. (The events of 1730 might be an exception to this). In Russia, reform was a purely philosophical or ideological phenomenon, where reform of the method of exercising power was sought for the sake of principles and the implementation of the reform was expected from the state itself. The all-encompassing rationale behind the reform initiatives was to make the state rational and more efficient, to make the administration more professional through reforms, which are conducted from above. In Russia, the primary force of constitutionalism is the autocratic state itself. This is the underlying paradox and self-contradiction of Russian constitutionalism, and it is this feature which makes Russian constitutionalism essentially different from its Western European counterparts. This also explains the differences in the emphasis of

themes that exists between various Russian projects and Western European solutions.

This further sheds light on the fact that despite the radical declaration of basic rights in the various reform schemes, the government could never commit itself to the final step on the most crucial issue, that of full popular representation, which could have substantially limited autocracy. In this respect, Medushevsky rightly quotes one of the interpreters of "The most gracious charter" of 1801, who explored the Western European sources of this document (the Habeas Corpus Act of 1679 and the declarations of the rights men and citizen found in three French Constitutions): "on the soil of Russian peasants, these formulas were similar to those tropical plants, which have been planted in frozen soil".

The autocratic Russian state has never committed itself to limiting and thus weakening its own power. Many thought that self-restraint would have put an end to Russian statehood. Among others, this position was shared by Nikolay M. Karamzin in his famous work, *Memoir on Ancient and Modern Russia* [Zapiska o drevnei i novoi Rossii (1811)], who criticised the views of Speransky. Karamzin's words are well known and widely quoted: "Autocracy has founded and resuscitated Russia. Any change in her political constitution has led in the past and must lead in the future to her perdition, for she consists of very many and very different parts, each of which has its special civic needs; what save unlimited monarchy can produce in such a machine the required unity of action? If Alexander [I] inspired by generous hatred for the abuses of autocracy, should lift a pen and prescribe himself laws other than the laws of God and of his conscience, then the true, virtuous citizen of Russia would presume to stop his hand and to say: 'Sire! you exceed the limits of your authority. Russia, taught by long disasters, vested before the holy altar the power of autocracy in your ancestors, asking him that he rule her supremely, indivisibly. This covenant is the foundation of your authority, you have no other. You may do everything, but you may not limit your authority by law!' "[1]

The extent to which the delineation of competencies and the clarification of the relationships between the various planned bodies are absent from even the most progressive reform schemes is striking for the non-Russian constitutional lawyer. It may be said that such practical considerations were lost in the intellectual and institutional vacuum in which such schemes came into being, given that it was not a question of arranging the relationship between

[1] Translation in: Richard Pipes: *Karamzin's Memoir on Ancient and Modern Russia, A Translation and Analysis*, Cambridge, Mass.: Harvard University Press, 1959, 139.

real and existing bodies. It may have been that the clarification or the precise description of legal competencies could have made the tsar of the day suspicious, since even those tsars who would otherwise flirt with limiting autocratic rule do not particularly like to see their own power actually restrained. What is for sure, however, is that the various constitutional schemes contain hardly anything as for practical matters. The concept of a legislative act is similarly underdeveloped. Some of the constitutional schemes had the modernisation of the legislative procedure as their primary purpose, but did not aim to alter the established governmental structure. This may be in line with the enlightened absolutist model of the 17th century, but it does not answer the question as to whose will the rationalised legislative process is ultimately supposed to represent. For the non-Russian constitutional lawyer it appears that a certain tradition of thought is emerging, in which '*zakon*' [legislative act] and other norms are mixed. And since the constitutional schemes (again with an eye on autocracy) do not differentiate between legislators, no legal hierarchy, which is the basis of the rule of law, emerges.

The present volume contributes significantly to the study of Russian constitutionalism. The analysis of the never realised draft constitutions prepared in Russia before 1917, and the illustration of their destinies, may help contemporary Russia in finding the path to modern constitutionalism.

András Sajó and Gábor Sisák

MIKLÓS LÉVAY (ed.): **Essays for Professor Emeritus Tibor Horváth's 75th Birthday (Tanulmányok Horváth Tibor Professor Emeritus 75. születésnapjára).** Miskolci Egyetem, Bíbor Kiadó, Miskolc, 2002

The 3rd Serial of the Bulletin of Criminal Scientific Section, a brochure of the Department of Criminal Sciences at the University of Miskolc, has been released in May 2002. The volume features essays of current concern from the field of national and international criminal law, edited by Professor Miklós Lévay, head of the Department of Criminal Sciences, Dean of Faculty of Law. The recently published omnibus edition, Volume III, is collated on the occasion of Professor Emeritus Tibor Horváth's 75th birthday, a great authority at the University of Miskolc. This book allows space for the essayists and the editors to express to their gratitude to Tibor Horváth, who is also the founder of the Miskolc workshop of criminal sciences. The writers them-

selves studied and graduated at the Faculty of Law, University of Miskolc, so they were all educated by the honoured professor and they are former or present participants of the department project of "Evolution Tendencies in Criminal Sciences" directed by Tibor Horváth, embraced by the doctoral program (Ph.D.) of the Faculty. The papers widely explore and review international legal literature, so the rich notation helps those interested get informed in the field of criminal sciences.

Márta Ábrahám's essay offers insight into *The Reformulation of the Austrian Criminal Procedure*. As the author asserts, the amendment of the Penal Procedure Code was necessitated by the Janus-faced situation that, although, the legislator's intention was to guarantee a leading role to the judge in the investigation process, instead, the police department controls it *de facto*. According to the Code in force, the principle of letting the judge control and monitor police investigation, is not admissible. Urgent measures cannot be formerly authorised by the prosecutor, nor can be monitored by the judge, since the police is liable to make the first step and the prosecutor's role is mainly reduced to laying an indictment. The paper provides a detailed analysis of the draft act, which is focused on the *„restraints and outweighs"*. The hinge of the draft is the empowerment of the position of the offended party, as well as the abolishment of immediate trial investigation. Ábrahám, while analyses the channels of collaboration among the police, the prosecution and the court, also draws the attention to the anomalies of the amended draft.

Edit Fogarassy, while starts her analysis in her work titled *About the Criminal Acts Ex Post Facto* from the underlying principles of *„nullum crimen sine lege"* and *„nulla poena sine lege"*, construes the interdiction of a stricter penal stance adopted as retrospective, as a concept enacted after World War II. In her paper, she studies the emergence, the evolution as well as the reinforcement of the standard above, its theoretical and historical background, as well as its role in international law. The essay relies on *Pál Angyal*'s unique monography published in 1916, which surveyed the emergence of the retrospective effect of substantive penal law.

According to the study by *József Gula*, the economic, social and judicial changes of recent years faithfully reflect the transformation of economic crimes. The paper, dealing with *Jurisdiction and Legislation Problems in the Field of Economic Crime*, emphasises the role of penal law as *„ultima ratio"*.

The effect of penal law must be dramatically limited in respect of economic movements. At the same time, there is a contrary demand for the

protection of the new market-economic legal institutions, which, following the European legal harmonisation process, puts pressure on legislation. However, the writer enumerates the advantages of lawmaker's frame disposition on economic crimes and attaches importance to the relative stability of detailed regulations as a fundamental prerequisite of lawful conduct. The writer offers a stunning presentation of the transformation of the field of economic crimes and of the way, in turn, they have transformed frame provisions.

According to his analysis, organised crime and money laundering is a severe illness of our society, which, finally, creates a vicious circle, since „clean" money originating in money laundering ensures that racketeering rolls onward. Therefore, the legislators' most important mission is to penalise hiding or concealing possession arising from crimes on both the national and transnational level. In the volume, we find two excellent papers that discuss the problem of legislation on money laundering.

Judit Jacsó provides a survey of *The Provisions of the Austrian Penal Code for Money Laundering and Confiscation of Property*. Both international collaboration against and the national demand for criminal prosecution of organised crime (the Austrian method) indicate that a war should be declared on money laundering and confiscation of property by efficient legislation. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceedings from Crime (Strasbourg, 8 November 1990), which unified regulations on confiscation of property, was ratified by Austria in 1997. However, the legal preconditions of the confiscation of property arising from acts of crime have been formulated under the Amendment of 1996 of the Penal Code in consistence with the EU directive. The study reviews the ways of confiscation of illegally obtained money and presents the up-to-date Austrian regulation.

The paper by *Ferenc Sántha* focuses on *Money Launder within the Monetary Sector and the European Convention on Laundering* (see above) and in connection with that *The Legal Regulations of EU Member States*. Harmonisation and strict coordination of legal regulations by the states are highlighted as primary imperatives of the treaty. EU Member States apply different regulations within the framework set by the standard, which are eventually in accordance with the *acquis*.[1] Therefore, potential offenders can concentrate their actions on countries that sustain the most favourable conditions for crime.

[1] *Acquis*: an umbrella term for European Union legal norms, which is supposed to be followed by acceding states.

Katinka Kígyóssy, based on the studies of French legal scientists Mireille Delmas-Marty and Christine Lazerges, provides an introduction to *the models of criminal policy*. The scope of antisocial activities covers not only crimes, but also actions, which are dangerous for society and potentially interfere with public order. She claims that criminal political considerations are not restricted to the fields of substantive penal law, penal procedure law and criminology, but instead, tend to establish a global plan, an embracing strategy. By studying responses from different segments of society, such as family, school, professional circles and other communities, the essayist proposes social action plans as proper methods of criminal–policy against crimes and deviant behaviour.

László Miskolci examines *The Way Police Provoked Crimes are Judged in Different Systems of Common Law*. According to his argument, the evolution of criminal methods should be tracked both by substantive and procedural law, as well as by way of according adjustment of the objectives of prevention, the scope of criminology and the investigation process. To reveal crimes that remain unreported requires special agents. The revealing method of *„invisible"*, unreported crimes is employed in secret police actions, such as decoy or lure operations, manna from heaven operations, honey-pot operations, "sting", etc. The study outlines different views on *entrapment*, which is the most controversial form of "proactive" police operations and examines this practice in various systems of common law, in terms of the related legal regulations and debates on the admissibility of punishment in that case.

Péter M. Nyitrai reviews an array of *Pros and Cons of the Extradition of the Home Object*. Whereas in continental law extradition of the home object was substantially prohibited, it was a practice from the 19th century onward. Which was contrary to the principle effective in common law countries, where even home objects were liable to extradition to the state on petition (the petitor state) in order to prevent probation difficulties. While the writer analyses the arguments and counter-arguments in a realistic manner, presents the European institution of the warrant of arrest and the related new extradition procedure due to come into force.

Ildikó Soós analyses *The Effect of Positivist Criminology on Hungarian Legislation in Relation to the Amendment of 1908 Penal Law*. Soós surveys penal judiciary letters and theories since the end of the 19th century to the first third of the 20th century. She provides a cross-sectional overview on the trends of the age from Lombroso's criminal-anthropology to Tarde's criminal-sociology, from the *offender-focused school* up to the *intermediary*

school. She also reviews the work of the most noted Hungarian legal scientists, whose activity is attached to the radical transformation of the classic definition of guilt. She studies the basic notions and trends that mark the age of fierce legal debates. Some of them, like penal sanctions against juveniles, the methods of enforcing penalties, the problems of „patronage", death penalty and fines and the advisability of suspended sentence still need serious consideration.

Nóra Széles surveys *The Development of Derivational Crime* and summarises *The Amendment of Substantive Penal Law* as well as *Criminal Conspiracy and Criminal Organisation* in her study. The definitions of criminal conspiracy and criminal organisation as amended are in compliance with EU norms and in accordance with the objectives of legal attempts at struggle against organised crime, which becomes more and more important nowadays. The study points out the new components of definitions in a critical manner and compares them to EU protocols and conventions. The question that arises here is if it makes sense to interpret those definitions of Hungarian law that are incommensurable with EU legislation in terms of the EU regulations, and amend penal regulations, non–compliant with European Union legislation, for geopolitical considerations.

The edition presents us with an opulent perspective on legal trends and legal history, while it does not lack critical censure or theories useful for legislators. This is an extensive collection of miscellaneous studies. Not only as former students, but also as candidates, the essayists are all obliged to Professor Horváth for embedding a veneration of values of Hungarian criminal cogitation, a sensibility for the exploration and analysis of newly arising problems and thoroughness in work.[2] The writer of this review, who also graduated at the Faculty of Law of the University of Miskolc, wishes to contribute to the essayists' gesture of paying tribute to Professor Horváth in the belief that the community of professionals in law has been enriched due to the publication of that valuable and noteworthy volume.

Katalin Parti

[2] For further details on Tibor Horváth's teaching and research, see, *Annual Essays*, vol. II. for Professor Tibor Horváth's 70th Birthday. Bíbor Kiadó, Miskolc, 1997, ed, I. Görgényi–Á. Farkas–M. Lévay.

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IMRE VÖRÖS*

The Legal Doctrine and Legal Policy Aspects of the EU-Accession

Abstract. The author deals with an important question of the Hungarian constitutional law, which question plays a relevant role during the accession process of a state of the European Union (EU). It means that the question of legal haromization always arises, when a state is going to join the EUZ. The author focuses on the question, whether the international law—namely the law of the EU—or the national law should be privileged in given cases. The author introduces the possible conflicts between international law and domestic law with the help of several examples. The author refers to the numerous solutions of member-states of the EU and also mentions the situation of some would-be member-states, too. The author analyses the practice of the European Court, as wee by underlining some important cases, inter alia, the famous case of Van Gend en Loos. The author highlights the point of view that the Community law precedes the constitutions of the member-states. As a result of this the Hungarian constitution has to be modified in order to meet the requirements of the legal harmonization process, which will emerge with the access of Hungary to the EU.

Keywords: constitutional law, constitution, EU-law, legal harmonization

I. The problem: A conflict between international law and domestic law

1. De lege lata *relationship between international law and domestic law*

1.1. In the first approach, the accession of Hungary to the European Union (EU) presupposes that the relationship between international law and domestic law is constitutionally settled.

In this respect, Hungary is not in an *advantageous* position. According to Para. 1 of Article 7 of the Constitution: "The legal system of the Republic of Hungary accepts the generally recognised principles of international law and shall harmonise the country's domestic law with the obligations assumed under international law." This article of the Constitution should be the governing one for the jurisdiction in case a *conflict* between domestic law and international law occurs, i.e., if international law, that is, an international agreement or inter-

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national customary law contains contradicting provisions to these of domestic law.

1.2. The emergence of this conflict has become more likely in a broader scope as a result of the process of integration of Hungary into international co-operation with higher intensity since the transition in 1990. Hungary as a member state of the international community and the UN, and a signatory state or a contracting party to several international conventions in human rights or international economic relations obviously shall not dispose of such free scope of legislation, as it used to before accession to these international treaties. Becoming a member state to these treaties also implies that Hungary *cannot create domestic law, which contradicts their content, whereas, with respect to effective domestic statutes, we are posed with the question concerning what way the lawmaker can resolve a potential conflict.*

Some examples: The accession of Hungary to two human rights treaties (the UN Charter and the European Convention on Human Rights) excludes the codification of capital punishment, while our accession to the WTO Convention excludes the possibility of the imposition of e.g. discriminative customs fees. Furthermore, since our accession to the Washington Convention on the protection of foreign investments, the codification of such important fields, which would not guarantee immediate, unconditional and just indemnification and due process of law, is inadmissible. So long as the Republic of Hungary codified domestic law that is contrary to the international treaty, Hungary would be abjudicated and obligated to correct domestic law, either by the Strasbourg Court, which is competent in the area of human rights, or by the proceeding panel of arbitrators in the scope of the Washington Convention, or by the competent dispute settlement council in the scope of the WTO. If Hungary failed to comply, its *liability* under international law for the breach of an international treaty would obtain and ultimately it would be faced with the option of the "uphold of its membership" in the respective international treaty or the withdrawal. The uphold of "domestic law" however that is contrary to international treaties is not tolerated on a long-term basis by the dispute settlement mechanism of the these treaties.

In the scope of the European Agreement, the European Community-Hungary Association Council was established between the European Community and the Republic of Hungary, furthermore, the implementation of the Agreement was transferred to its competence. Accordingly, the Council promotes the implementation of the Agreement gradually by adopting adequate decisions framed in legally binding government decrees.

1.3. The majority of international treaties, however, does not allow legal dispute settlement mechanisms: the requirement of the harmony between international law and domestic law, therefore, needs to be secured in general under domestic law, and in particular constitutionally, with respect to the fact that a fundamental problem of the functioning of the legal system arises. Therefore, the harmony needs to be guaranteed under the Constitution, since *Para. 1 of Article 2 of the Constitution binds the Hungarian organs of jurisdiction, that is, courts and other authorities, to enforce the Hungarian legal system*: ("The Republic of Hungary is an independent, democratic state under the rule of law."). This principle and the deduced requirement of security in law, which prevails in the general practice of the Constitutional Court, positively imply the requirement above, disregarding the fact that the judges, government officials and civil servants, by taking an oath on the Constitution, take an oath that they shall comply with constitutional rules as well as assure that they are observed.

Therefore, an *exemption* from the constitutional liability to implement Hungarian domestic law also needs to be guaranteed under the Constitution itself and its instrument is that the Constitution positively and clearly takes a stand point concerning the relationship between international law and domestic law. *However, Para. 1 of Article 7 of the Constitution quoted above is not adequate to achieve this goal.*

1.4. Concerning the relationship of international law and domestic law, the following *three issues* shall be considered:

— the monist-dualist conceptions,
— a division between the technique of transformation/adoption codification, and in this context,
— the issue of the self-executing and non-self-executing character of international treaties.

The core of these well-known, fundamental issues of international law—on a simplified way—is as follows:[1]

a) According to the *dualist conception*, international law and domestic law are two separate legal systems in terms of substantive law. According to the *monist* conception they are not, therefore, international law as framed by several national legislators shall be applied by the domestic jurisdiction con-

[1] For a summary, see, Bodnár, L.: A nemzetközi jog jogrendszerbeli helyének alkotmányos szabályozásáról [On the Constitutional Regulation of the Placement of International Law in the Legal System]. In: *Alkotmány és jogtudomány* [*The Constitution and Legal Science*], Acta Universitatis Szegediensis de Attila József Nominatae, Tomus XLVII, Fasciculus 1–18, Szeged, 1996, 22. and the following pages.

cerned, and so shall domestic law framed by the domestic lawmaker. According to the monist conception, the difference is merely formal: the former was made by several lawmakers, while the latter was made by a single one.[2]

b) The codification-technical consequences of the two conceptions, i.e., how international law becomes an integral part of domestic law, is deduced by the transformation-adoption model. According to the previous one, which echoes the dualist conception, separate domestic legislation, incorporation is deemed as necessary following the ratification, while according to the latter one, which "reflects" the monist conception, such incorporation procedure is unnecessary, since international treaties are incorporated into domestic law on their ratification and promulgation.

c) Finally, the conception, which attributes *self-executing character* to international treaties, is consistent with the monist-adoption conception. Accordingly, international treaties are to be implemented directly by the national courts and no separate rule of implementation is necessary to be enacted.

In the modern *globalising world economy and world politics*, with respect to the contemporary intensity of international relations and the increasing significance of regional integration, it is the *monist-adoption, self-executing model,* which can be considered as up-to-date. The problem, however, is that Para. 1 of Article 7 of the Hungarian Constitution quoted above shall not support either of these conceptions, since this provision is not positive, but *ambiguous*,[3] meaningless and eclectic.[4]

1.5. It is no wonder that *the Constitutional Court*, when it applied Para. 1 of Article 7, encountered significant difficulties.

1.5.1. *AB Decision of 53/1993 (X.13.)* (ABH 1993. 327) *postulated or more correctly, "interpreted" a tripartite hierarchy in the Constitution, which is unjustified or unformulated* under Para. 1 of Article 7. Accordingly, the Constitution dominates the hierarchy, and international law is subordinated to it, whereas domestic law prevails at the bottom, neither of which may not contradict the levels above.

[2] Vörös, I.: Az Európai Megállapodás alkalmazása a magyar jogrendszerben [The Implementation of the European Treaty in the Hungarian Legal System], *Jogtudományi Közlöny*, 1997, no. 5., 229–239.

[3] Bragyova, A.: Igazságtétel és nemzetközi jog [Retroactive Justice and International Law], Glossza az Alkotmánybíróság határozatához [Commentary on the Decision of the Constitutional Court], in: *Állam- és Jogtudomány*, 1993. nos. 34, 217–218., 220.

[4] Bodnár: *op. cit.*, 21–22.

Besides, the decision adopted the conception of German constitutional legal science and the idea of the German Federal Constitutional Court concerning Article 25 of the *Grundgesetz*,[5] according to which the necessary transformation has already been implemented in principle and in general as pursuant to Para. 1 of Article 7 of the Constitution with an effect to the future, therefore, no separate transformation is necessary.

The attempt for the "*introduction*" of the monist conception however, against the best intentions, was a failure. Since the Hungarian Constitutional Court, either as a result of its incompetence or simply of its insensitivity, disregarded a fact, which was also misconstrued by the "constructors" of the revised Constitution in 1989, namely, that Article 25 of the *Grundgesetz* pertained exclusively to international customary law, i.e., the general principles of international law, whereas a separate article, i.e., Article 59 based on the dualist-transformation model pertained to the international law of treaties.6 Para. 1 of Article 7, which was definitely framed under the influence of the *Grundgesetz*, testifies both an awareness of Article 25 of the *Grundgesetz* and the fact that the legislators were not aware of the existence of Article 59.

Consequently, it is understandable that Para. 1 of Article 7 of the Hungarian Constitution specifies as a constitutional requirement merely the harmony of international customary law and domestic law, whereas, it does not take a stand on a harmony with international treaty law. Furthermore, it neglects the clarification of the hierarchical relationship between international law and domestic law.

The requirement of "*harmony*" in itself is both meaningless and ambiguous, since it can imply both

— the necessity to adjust domestic law to international law, and also its contrary:

— that international law is hierarchically subordinated to domestic law. This interpretation obviously excludes any participation in international relations, since in case of conflict, domestic statutes would have priority in jurisdiction. The mere possibility of such interpretation should be categorically excluded under the text of the Constitution itself.

1.5.2. The defective provision in the Constitution "transplanted" incompletely from the *Grundgesetz*, consequently, did not facilitate that the Constitutional Court, while it was framing AB Decision of 53/1993 (X. 13), which is other-

[5] Hesse, K.: *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 16th edition, 1988, n. 103; BVerfGE 15, 25 (34).

[6] *Grundgesetz. Kommentar.* (hrsg.: von Horst Dreier), Mohr, Siebeck, 1998. Bd. 2, 1118, and the following pages. Hesse, K.: *op. cit.*, 101–104.

wise loaded with *a number of mistakes and technical deficiencies* of international law, clarified the relationship between international law and domestic law in a reassuring manner.[7] Hungarian special literature on international law has exposed the statements of the decision concerning international law to strong criticism (e.g. *the original English technical term of adoption was misconstrued and translated as „adaptation"*),[8] and reached the conclusion that „the Constitutional Court ... drafted the decision irrespective of the doctrinal grounds of international law.[9]

Nevertheless, it can be definitely inferred on the grounds of the positive analysis of the Hungarian legal system,[10] (not on the grounds of the analysis of the Constitution) i.e., of the provisions of *Act XXXII of 1989 (Abtv) on the Constitutional Court* concerning competence and procedural law. One has to take into consideration especially its Point c) of Article 1, Para. 3 of Article 21 and Articles 44–46 that the Hungarian legal system is constituted on the basis of the dualist conception, the transformation technique and on the recognition of the non-self-executing character of international treaties.

The "settlement" of the issue in such a ruling is, of course, an absurdity in constitutional law.

1.5.3. The Constitutional Court in its *AB Decision of 4/1977 (I. 22.)* (ABH 1997. 41.) reaffirmed its former standpoint and corrected some of its mistakes, which, however, did not modify the fact that the body in itself as a "legislator" did not manage to readjust the Hungarian legal system from the dualist-transformation, non-self-executing model to the monist-adoption, self-executing model.[11]

1.5.4. To sum it up, we can assert that the Hungarian Constitution does not contain a judicially governing provision either on the status of international law in the hierarchy of the sources of law, or on the admissibility or constitutionality of the direct application of the norms of international law by the Hungarian courts.

[7] Bragyova: *op. cit.*, 218.

[8] Bragyova: *op. cit.*, 218.

[9] Bodnár: *op. cit.*, 22.

[10] Vörös: Az Európai Megállapodás... *op. cit.*, see, especially, the explications in part IV.

[11] See, my dissenting opinion attached to the decision (ABH 1997, 53–54.); see also, Vörös, I.: *Dixi et salvavi, Különvélemények, párhuzamos indokolások (Dissenting Opinions and Parallel Motivations)*, Budapest, 2000, 107.

2. Some foreign examples:

This is not the case in a number of foreign legal systems. Article 28 of the Greek Constitution and Article 15 of the Russian Constitution positively sets forth
— the priority of international law versus domestic law and
— the doctrine of the obligation that national courts and other authorities directly enforced international law. Surprising as it may seem, Article 122 of the Albanian Constitution also contains a very high-standard provision.[12]

In the Czech Republic, the Constitution was amended on 18 October, 2001 expressly in the framework of the preparation for the EU-Accession. In that framework, the relationship between international law and domestic law was also settled. Article 10 of the Constitution accordingly specifies: "Those promulgated international treaties, the ratification of which the parliament consented to and which bind the Czech Republic, shall be part of its legal system. If such an international treaty provides otherwise than domestic law, the provisions of the international treaty shall be applied."

II. Legal doctrinal bases

1. Three fundamental problems:

The clarification of the legal doctrinal bases necessitates the analysis of three legal doctrinal issues:
— the relationship between international law and domestic law,
— the transfer of sovereign rights, and as a special sub-category of this second scope of issues,
— the problem of the potential transfer of sovereign rights specifically to the EU.

1.1. The unsettled character of the relationship between international law and domestic law

a) Since the relationship between international law and domestic law in the Hungarian Constitution can be construed as an open question, *the relationship between the Hungarian legal system and the law of the European Community is also unsettled.*

b) That is not a simple issue even in the relationship between the legal system of the member states and Community law, since both the Italian[13]

[12] Czuczai, J.: The Legal Alignment Process with the Constantly Evolving Constitutional acquis of the EU in Central and Eastern Europe, *Európa*, 2002, 1 March 2001. no. 1., 3. sqq.

and the German Constitutional Courts[14] have expressed their reservations concerning the absolute interpretation of the priority of Community law, according to which the latter prevails over not only a significant part of constitutional rules and other domestic statutes, but also over the national-member state constitutions.

In its *Frontini-Decision*, the Italian Constitutional Court set forth the limits of the doctrine of the priority of Community law (the issue of which we revert to later) as laid down and proclaimed by the European Court of Justice, which emphasised that although Community law could actually overrule the Italian Constitution, however, it shall certainly not overrule either inalienable rights guaranteed to persons under the Constitution or the fundamental principles as pursuant to the Constitution. Although, Article 11 of the Italian Constitution provides for the admissibility of the transfer and, consequently, the limitation of sovereignty, nevertheless, the fundamental principles and rights above are the "counter-balances" and "*controlimiti*" of this constitutionally guaranteed option. In its *Fragd-Decision* of April 21st of 1989, the Constitutional Court reserved the right to review the issue whether the respective regulations of Community law and the articles of the Italian Constitution concerning the protection of human rights are in accordance.[15]

The German Federal Constitutional Court equally held that *Community law shall not have absolute priority* over the protection of fundamental rights as guaranteed under the German *Grundgesetz*, until Community law provides similar protection: the constitutionality of Community law in this respect shall be constitutionally measured against the norms of the *Grundgesetz*.

c) These statements, according to the interpretation of *de Witte*, imply that *the thesis of the relative priority of Community law prevails* concerning the

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[13] On the priority of Community law, see, Várnay, E.—Papp, M.: *Az Európai Unió joga* (*The Law of the European Union*), Budapest, 2002. 235, and the following pages. On the decisions of the Italian Constitutional Court, see, de Witte, B.: Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries? In: *EU Enlargement. The Constitutional Impact at EU and National Level* (ed.: A. Kellermann, J. W. de Zwaan, J. Czuczai), The Hague, 2001. 74. sqq.

[14] The Maastricht-Judgement, BVerfGE 89, 155, The "Solange"-Judgements, e.g., BverfGE 73, 339, the argumentation of which was recently affirmed by the Federal Constitutional Court in its ruling of 7 June 2000, BverfG, 2 BvL 1/97, *Europäisches Zeitschrift für Wirtschaftsrecht*, 2000. 702.

[15] Gaja, G.: New Developments in a Continuing Story: The Relationship between EEC Law and Italian Law, *Common Market Law Revue*, 1990. 83.

relationship between the constitutions of the member states and Community law, thereby, they refute the doctrine of absolute priority.[16]

d) The relevance of the problem is adequately demonstrated by the *confusion*, which occurred when *the Hungarian Constitutional Court* dealt with the motion related to the unconstitutionality of *Article 62 of the European Agreement on the Establishment of an Association between the Republic of Hungary and the European Communities and their Member States* ratified under Act I of 1994. In my print of view, the Constitutional Court does not have competence to deal with the subsequent norm control of an international treaty even if it was ratified in compliance with the transformation conception,[17] since the constitutionality of an international treaty can only and exclusively be examined in the scope of a *preliminary* norm control (Point a) of Article 1 of Abtv.).

da) The Constitutional Court disregarded this minor "triviality" of procedural law, examined the motion on its merits and in its *AB Decision of 30/1998 (VI. 25)* (ABH 1998, 220.) it arrived at the conclusion that Para. 2 of Article 62 of the European Agreement, which specified competition law prohibitions, is not expressly unconstitutional, nevertheless, the Court stipulated constitutional criteria for its implementation.[18] According to the decision, the constitutional criterion is that Hungarian courts and judges authorities may not directly implement the application criteria as pursuant to Para. 2 of Article 62, which refer to and are contained in Community law.

Whereas, the Constitutional Court held that two provisions of the European Community-Hungary Association Council included in the Supplement of Government Decree no. 2320/1996 (XII. 26.) are *unconstitutional* and thereby annulled them, whereas, they were purported to implement the provisions of Article 62.

db) The decision (ABH 1998, 226–227), which was adopted not only in the absence of competence and sufficient knowledge of European law and *in several technical respects wrongly, contested the immediate effect and direct applicability of Article 62 of the European Agreement*, while it misinterpreted the content of the second notion above as established in the science of

[16] de Witte: *ibid.*

[17] See, note 11.

[18] The Constitutional Court is not competent to determine the "constitutional criteria", since no Hungarian statute authorises it to apply such legal consequences. The body applies this legal consequence prescribed by itself *contra legem*, and what is an even graver mistake, *contra constitutionem*. See, Dissenting Opinion of Constitutional Court Justice, Vörös, I.: *Dixi et salvavi* (note 11.) 71, 92, 110.

international law.[19] Relying on that, the decision in a self-contradicting manner concluded that in commercial relations between the member states and Hungary respective *Hungarian law*, i.e., Competition Act (No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices) shall be applicable with respect to the criteria specified under Community law.

The standpoint above is *defective* on the grounds that if there are international elements in relations of civil law, family law or labour law, *the rules on international collision of private law* prevail, since these norms define which law should be applied.[20] Article 62 shows familiarity primarily with civil law, since it pertains to the market conduct and competition conduct of companies—competition restrictions or abuse of economic superiority. In view of the fact that it is a competition law rule, those rules, which fundamentally bear the character of private law obtain *together* with those norms, which bear the character of public law and codify state intervention. Hence, such scope of legal norms as a typical instance of omnibus law shall not fall either under "private law" or "public law", but they are part of business law, which combines the elements of both branches of law.

At the end of the 20th century, we cannot set out from *a conception of the dualism of "public law" and "private law"*, unless we admit our legal technical ignorance, and especially, we cannot base a constitutional court decision on that doctrine. As it is known, the dualism based on this structure disintegrated in the second half of the 19th century.[21]

The Decision of the Constitutional Court, framed in the absence of the knowledge of the content and legal relevance of the *interstate commerce clause*, is misconstrued not only with respect to the fact that in such cases it is Hungarian law that shall be applied, but also when *it considers competition law as part of "public law"* (ABH 1998, 230): the application of Article 62 „shall incur that relations under public law are effective". By accumulating these misconceptions, the Constitutional Court concluded that since the criteria

[19] According to my view, Article 62 has direct effect and needs to be implemented directly. See, Vörös, I.: Az Európai Megállapodás... *op. cit.* Point 3.3., Part IV.

[20] Burián, L.—Kecskés, L.—Vörös, I.: *Magyar nemzetközi kollíziós magánjog* [*Hungarian International Collision Private Law*], 4th edition, Budapest, 2001, 70–75.

[21] Rittner, F.: *Wirtschaftsrecht*, 2nd edition, 1987, 10–23., Eörsi, Gy.: *Jog—gazdaság—jogrendszer-tagozódás* [*Law, Economy, the Structure of the Legal System*], Budapest, 1977. 65., 73., 79., 110. Here, Eörsi develops the arguments adduced in his previous work: *Összehasonlító polgári jog* [*Comparative Civil Law*], Budapest, 1975, 85, and the following pages, and Chapter VI., on the basis of the conclusions drawn from the law of Western market economies, at the same time, challenges the relations of planned economy.

under Community law entail the mandatory application of criteria pertaining to relations under public law by the Hungarian jurisdiction, and that is exactly what the rule of implementation provides for. Consequently, the rule *violates the constitutional requirement that a democratic state under the rule of law* (Para. 1 of Art. 2) prevails, and therefore, it is unconstitutional. According to the Constitutional Court, the violation consists in the fact that these criteria *are not promulgated* under a domestic statute (ABH 1998, 233).

dc) The complicated nature and the intricate technical legal difficulties of the argument reveals that the Constitutional Court—with its reference to 53/1993 (X. 13.) ABH and 4/1997 (I. 22) ABH—made a renewed attempt without avail to clarify the relationship between domestic law and international law. The case could have exposed a specifically problematic aspect of the relationship between Community law and domestic law (n.b. not the domestic law of a member state), if the Decision of the Constitutional Court had recognised it at all.

dd) The solution reached finally, i.e., the enumeration of the sources of Community law that contain the Community law criteria to be applied under Act X of 2002, is in accordance with a casual phrase of the decision (... "without the respective criteria following from ... a domestic source of law"). This phrase, however, *contradicts the overall purpose of the decision*, since, if the application of foreign law in relations under "public law" is inadmissible as pursuant Para. 1 of Article 2 of the Constitution, then this, in principle, is inadmissible even if these criteria are specified under a separate statute. Namely, *the Constitution does not a contain a provision, which stipulates the conditions of the transfer of sovereign rights.* Therefore, the transfer of sovereign rights or of the exercise of powers, which in the present case hides in the background of the issue of the domestic application of statutes adopted by foreign legislation, *is deemed as inadmissible.*

The doctrine that Hungary shall be a democratic state under the rule of law as pursuant to Para. 1 of Article 2 does not entail that if the criteria of the application of foreign "public law" is proclaimed under a domestic statute (ABH 1998, 223), then the application of a foreign "public law" rule is constitutional, since this provision *does not constitute* such possibility for exemption or an exception. Para. 1 of Article 2 is a categorical requirement, which allows no exception, therefore *it cannot substantiate* the reference by the Constitutional Court to domestic promulgation in order to qualify the application of foreign "public law" as constitutional.

As a result of this, Act X of 2002 on the grounds of 30/1998 (VI.25) ABH would probably fail to pass the test of constitutionality.

de) Law-Decree *Act 13 of 1979 on international private law* would also fail to pass such a test, since the argument the decision follows fails to offer an explanation why a constitutionally *bianco* authorisation for the application of a constantly changing foreign legal system can be granted under the norms of "private law". This is not substantiated or expounded either sufficiently or doctrinally in view of the fact that here "public law" norms and legal relations with ambiguous content and legal constitution are constructed in an isolated manner, detached from the legal system.

df) The *basic problem* is not if the European Agreement pertains to "public law" relations and norms, but whether that international agreement has *priority* over domestic law or not. The decision *does not adequately respond to* the expressly *specific* question in terms of Community law.

1.2. The unsettled character of the transfer of sovereign rights

a) As the argument of 30/1998 (XI. 25.) ABH also pointed out, *a further doctrinal problem lies in the background.* The decision admits that the problem delineates in that direction so far as the limitation of sovereignty, transfer of sovereign rights and of exercise of powers are concerned (ABH 1998, 232), however, it deals with these aspects only in the general context of an "independent, democratic state under the rule of law". We have to admit that it cannot do otherwise, since the Constitution *does not take a stand point* concerning the transfer of sovereign rights to an international organisation, either.

b) The *content-based* aspect as simplified is that the prerequisite of *international co-operation is the establishment of an open state*, which, however, in a given case facilitates the limitation or transfer of sovereignty. The openness that is indispensable in times of economic and political globalisation positively entails that *norms prescribed by a transnational organisation may enter the Hungarian legal system, which are not necessarily substantiated by Paras. 1 and 2 of Article 2 of the Constitution. Therefore the sovereignty of the Hungarian people will not legitimise them.*

The modern conception of sovereignty, which designates *the people as the depositary of sovereignty*, may make easing to solve the doctrinal problem. The conception of the state as opened by the constitutions in the direction of international co-operation, which is adequately determined as *"kooperativer Verfassungsstaat"* by *Haberle*,[22] as a matter of fact resolves the problem of the democratic "deficit" related to the transfer of sovereign rights, since in such cases it is the constitution of the respective state, which frames the conditions of the transfer and of constitutionality.

[22] Häberle, P.: Kooperativer Verfassungsstaat, in: *Verfassung als öffentlicher Prozess*, 2nd edition, 1996, 407.

c) The *formal* requirement following from the conception of the sovereignty of the people is that it is exclusively the people that can transfer sovereign rights, therefore, the transfer shall be prescribed in the scope of an act by the institution of the representation of the people.

According to that conception, it is the people that *constitutes the international (interstate) organisation* and also endows it with *adequate competence* to comply with its obligations according to the discretion of the representation of the people. When applicable, the transfer will impair the scope of sovereign rights of the representation of the people, while that scope of the international (interstate) organisation shall be constituted, or it increases under a subsequent amendment of an agreement. This, as long as the consequences are concerned, may modify *the constitutional status of the citizens of the respective state*, hence, its settlement is inevitable under an act.

1.3. A special instance of the transfer of sovereign rights: the transfer of sovereign rights to the European Union

The transfer of sovereign rights to the EU construed as the content and the essential element of the accession process *cannot be identified* with the general transfer of sovereign rights to an international organisation. The EU postulates the sovereignty of the member states, since it is not a federation of states and as a consequence of its constantly evolving, developing structure, its framework cannot be determined with legal exactness even on a short-term run. The European Union is constituted on the European peoples, not on an abstracted notion of a single, non-existent people, in which the sovereign rights derive from *the peoples of the member states with the mediation of the member states*: *the EU develops on an intergovernmental basis.*[23] The legal definition of Europe, which forms the European Union, is a difficult task even for German legal science reputed for its conceptual thought, its *Begriffshimmel.*[24]

As a consequence of the uncertainty of the conceptual definition, the doctrinal challenge is the issue of *the priority of Community law*, which *challenges* the rights of the member states and has been a *conditio sine qua non* of the European Community, which today is the EU. As we noted, (II.1.1.b), the problem is highlighted in the relationship to the Constitutions. The problem can be approached via the doctrine of absolute priority in legal relations and legal branches, however, in the area of the relation to the

[23] Rittner, F.: Az Európai Unió útja a szövetségi állam felé (The Progress of the European Union in the Direction of a Federal State), *Jogtudományi Közlöny* (1995) no. 6., 286.

[24] Häberle, P.: Európa mint formálódó alkotmányos közösség (Europe as a Constitutional Community in the Process of Formation), *Jogtudományi Közlöny* (2001) no. 10, 432.

constitutions, the priority has been relativised in the legal practice of the Constitutional Courts. In this context, i.e., *in a segment of the relations under constitutional law*, in which the determinant, the "strong core" is the protection of fundamental rights by the constitutions of the member states, the doctrine of the absolute priority does not obtain.

With respect to these, the transfer of sovereign rights to *an interstate organisation, which is vaguely qualified and outlined under international law* and vindicates, by all means, absolute or relative a priority for its *constantly evolving* legal system, can be posited as *a special doctrinal issue.*

The specific explication of that problem as *a third issue* distinct from the previous two ones is deemed as inevitable.

III. Legal political basis

From the analyses above, around *the three issues dealt* further legal political consequences emerge, and consequently, the following constitutional problems arise.

1. On the relationship of international law and domestic jurisdiction

1.1. The lawmaker needs to make a positive legal political decision concerning that on the grounds of which conception the Hungarian legal system "shall be arranged". In our view, with respect to doctrinal considerations, it cannot be doubted that Hungarian law in the future should follow a scheme, which is based on the *monist conception* with the application of the *adoption-codification technique* and the recognition of the *self-executing character* of international treaties.

1.2. Which necessitates that *the Constitution, instead of the present Para. 1 of Article 7, prescribes* that

— the ratified and promulgated international treaties shall be part of the Hungarian legal system,
— in the event of a collision between these international conventions and domestic Hungarian statutes, the provisions of international treaties shall prevail. In such cases, in case doubt is arisen, the court and other authorities shall enforce the international treaty, which implies that the jurisdiction is entitled to take a decision whether a harmony between all other statutes, except for the Constitution, and the respective international treaty prevails,

— the international treaty incurs a direct obligation for the jurisdiction, which implies that the adoption of a further rule of implementation shall not be necessary.

1.3. The amendment of the Constitution shall obviously not supersede the streamlining of the law on international treaties, since the currently effective Act XXVII of 1982 is completely out-of-date and inapplicable.

1.4. Without the amendment of the Constitution and framing a new statute on international treaties, not only the relationship between international law and domestic law remains unsettled, but we can't take a reassuring stand on the issue of domestic law and Community law in a reassuring manner, either. The two issues are closely related. The issue of the relationship to Community law is preceded by urgency of the constitutional settlement of transfer of sovereign rights with respect to the fact that in that relationship on the one hand the issue of the transfer of sovereign rights, on the other hand, the issue of the priority of Community law are inseparably intertwined.

2. The transfer of sovereign rights to an international, interstate organisation

2.1. The Hungarian constitution does not take an stand on the transfer of sovereign rights.

a) Para. 2 of Article 6 prescribes the endeavour to co-operate with all people and states of the world, which obviously does not entail that in a given case *any* kind of transfer of sovereign rights and exercise of powers is not unconstitutional with special respect to Para. 1 of Article 2 of the Constitution. The constitutional fate of Article 62 of the European Agreement and the concerning decision passed by the Constitutional Court analysed above is sufficiently indicative. Para. 1 of Article 2 shall have to be supplemented by a provision in the Constitution, which—under certain circumstances— exceptionally facilitates the transfer of sovereign rights and of exercise of powers.

b) The participation of the Republic of Hungary in an international co-operation and international organisations (e.g. NATO) is *de lege lata vaguely* substantiated constitutionally. It is not accidental that e.g. the German *Grundgesetz* addresses the problem in a separate article (Article 24), and so do the French (Article 15 of the Preamble), the Italian (Article 11), the Norwegian (Article 93) and the Spanish constitutions (Article 93). These articles are incorporated into these constitutions irrespectively of separate provisions concerning international treaties. The reason for this duality is that the conclusion of an international treaty does not necessarily incur either the transfer of sovereign rights and of exercise of powers, or the limitation of sovereignty.

c) The urgency of the settlement under the Constitution gains special relevance since the issue of the constitutionality of the transfer always arises *with respect to concrete sovereign rights or powers*, which is primarily not a *par excellence* issue of constitutional law, but an issue that is related to *another branch of law*, behind which, however, *the constitutionality of the transfer* is posited as *a preliminary question.*

From this viewpoint, the frequently quoted *Kehlrinne*-Decision of the German Supreme Court, the *Bundesgerichtshof* (hereinafter: BGH) (BGHZ 102, 118, GRUR 1988. 4. 290-Decision of 3rd of November, 1987) can be construed as an instructive instance.

ca) According to the facts of the case, the defendant is the proprietor of a European patent, which the European Patent Office (hereinafter: EPO) granted in 1977 with an effect to the German Federal Republic. The patent description was submitted in English, whereas, the patent claims were submitted in German, too.

According to the plaintiff, the patent in the German Federal Republic could not have a legal effect, since the patent description was not submitted in German, besides, only the English version had a binding force. According to Article 65 of the European Patent Convention (hereinafter: EPC) any member state has *carte blanche* whether it prescribes in a domestic statute the obligation of the submission of the patent description translated into its official language to the national patent office. The German Federal Republic did not stipulate that as an obligation and the legal *status quo* arisen thereby (which consists in the negligence of the prescription of the obligation to submit the patent description in German language by the GFR) contradicts several provisions of the *Grundgesetz*, especially Article 24 concerning the transfer of public authority, furthermore, also pertains to (restricts) the essential content of fundamental rights as guaranteed under Articles 2, 3, 12 and Para. 2 of Article 103 (the free development of personality, the right to the free choice of profession, the prohibition of discrimination), and finally, it violates the criteria of security in law originating in the rule of law. The competent court thereby rejected the claim, which was remitted to the BGH by reason of the appeal by the plaintiff.

In its appeal, the plaintiff requested the nullification of the patent, partly, because the respective statute, i.e., Article 65 of the EPC, which substantiates it on legal grounds, is unconstitutional in the absence of the German domestic regulation on the subject. Hence, the plaintiff requested the suspension of the procedure and submitted a request of reviewing the case to the German Federal Constitutional Court.

cb) As the BGH established, the patent was submitted and published in English language with the application of Paras. 1, 3 and 7 of Article 14 of the EPC, and it was supplemented with the German translation of the patent claim. Consequently, since the EPO proceeded according to the provisions of the EPC, and since the EPO is not a German institution, it does not exercise either German sovereign rights or German public authority, therefore, a violation of the German statutes cannot obtain in that case. *The EPO, when it grants European patents and exercises transnational sovereign rights, proceeds as pursuant to the EPC relying on the scope of competence transferred to it by the Contracting States.*

Nevertheless, the BGH has to examine *as a preliminary question*, which emerges in the context of constitutional law, if patent law as the object of legal dispute can be considered as validly constituted in the German Federal Republic. Hence, the BGH has powers to decide on the constitutional problem whether those European patents can be generally considered as validly constituted in the German Federal Republic, which are not published in their full text and are inaccessible in German language.

The BGH departed from the fact that concerning the language criteria of European patents in the German Federal Republic, Articles 14 and 70 of the EPC shall be deemed as applicable and governing. With reference to that, the Court did not agree with the plaintiff that the standpoint of the German law-maker incurred an unconstitutional situation (negligence), when it did not proceed in compliance with the authorisation under Article 65.

cc) According to the BGH, when the German Federal Republic acceded to the EPC, it transferred its sovereign rights in terms of granting European patents *to the European Patent Organisation*, and within that scope to the EPO, in full compliance with Article 24 of the *Grundgesetz*. It is the *Grundgesetz* itself that *defines the limits* of openness in the direction of interstate co-operation, which, according to the BGH are the following: the transfer of sovereign rights in the scope of an international convention shall not affect the foundations of the German constitutional order and the basic structures constituted by that shall not be renounced or emptied out for the sake of international co-operation. The essential content of fundamental rights attached to the bases of the constitutional order as constituted as pursuant to the *Grundgesetz* shall not be affected or made relative by the transfer of sovereign rights (*"nicht relativiert ... werden"*).

Therefore, the BGH did not deem that it was unconstitutional to construct the patent as the object of legal dispute on such a legislative basis and in such a legislative setting, in which the German lawmaker did not take the opportunity

for restrictive language regulation as pursuant to Article 65 of EPC. Therefore, a case of unconstitutional negligence did not obtain.

For Hungary, that decision is *extraordinarily important*, since our country has been invited to join the Contracting Members of the EPC. Our accession to the NATO constitutes also a transfer the exercise of powers to an other major international organisation, which has a broader scope of membership than the EU.

2.2. The settlement of the issue on the level of the Hungarian constitution is furthermore deemed as necessary, because that is the only instrument available for the codification of a doctrinal claim for the establishment of an "open state", a *"kooperativer Verfassungsstaat"* towards international co-operation.

2.3. It is obvious that a constitutional transfer of sovereign rights cannot be implemented to international organisations in general, but within that scope exclusively to *interstate organisations*—however, both non-interstate organisations and NGOs are excluded from that scope. To make the problem simple, we can assert that the transfer can exclusively be implemented via an international treaty, so that the established organisation is the subject of international law. In that case, the founding forces of international organisations are the states, which are themselves the subjects of international law.

2.4. The transfer, however, is constitutional, since *it is the Constitution itself that frames its criteria, i.e. its limits* in a restrictive sense. These limits, on the grounds of the doctrinal considerations above, would be the following:

— The fundamental limit of the transfer is the principle of *subsidiarity*, which implies that the transfer can be implemented exclusively if
  — it is necessary by the efficient administration of quasi-public duties,
  — it is deemed as inevitably necessary by reason of the occurrence of a problem, which transgresses borders and has an international dimension.
— The transfer *may not affect the fundamental set of values of the constitutional order*, i.e., the structure of the Hungarian Constitution.
— Following the transfer of sovereign rights, *the protection of fundamental rights* guaranteed under the Constitution of the Republic of Hungary and international human rights treaties, constitutive elements of the Hungarian legal system shall be secured on the grounds of the constitutional order.

2.5. The amendment of the Constitution would not imply the annulment of the currently effective Para. 2 of the Article 6, but the new regulation would align *as an adjunct* to this provision.

2.6. It needs to be noted that *Article 10a)* of *the Czech Constitutional Amendment* as of 18 October 2001 quoted above grants express authorisation—"Certain powers of the organs of the Czech Republic may be transferred to inter-

national organisations or institutions in the scope of international agreements"—with a simultaneous specification of its conditions.

3. A special sub-category of the transfer of sovereign rights and exercise of powers: Accession to the European Union

3.1. The accession of Hungary to the EU necessitates the analysis of *three* issues following from the doctrinal questions as explicated above:

a) What is the legal character of the EU?

b) What is the legal character of Community-law (Union law)?

c) Consequently, we are posed with the question whether the requirement of the incorporation of *a special rule* into the Constitution obtains, and if so, what does that requirement consist in. In other words: can the EU-accession be resolved by the settlement of the duality of the relationship between international law and domestic law and of the transfer of sovereign rights, or a separate third provision is deemed as necessary.

3.2. Concerning the legal character of the EU as an organisation three viewpoints have developed.[25]

a) According to one of these viewpoints, the EU is postulated as a federal state, while, according to the other it is classified as a special international organisation among the subjects of international law. Whereas, according to the third viewpoint, a so-called autonomous conception, it is a *sui generis* formation, which cannot be categorised as either of the above.

b) The *third conception* can be construed as a majority viewpoint. Its specific emergence is related to the introduction of the term of the „association of states" *(Staatenverbund)* in the Maastricht-Judgement of *the German Federal Constitutional Court*. The Maastricht-Judgement denied both that the EU could be posited as a state or as a federal state—the unique situation, according to the Federal Constitutional Court, is reflected in the moment of the introduction of the specific term itself (see, Opinion of Court, C II).[26]

[25] Schweitzer, M.—Hummer, W.: *Europarecht*, 5th Edition, Berlin, 1996. 83–88.

[26] The term of the "association of states" is a novelty only in legal practice, however, besides the terms of the federal state and confederation, it has been established in new German technical literature for a long time. Jellinek, G.: *Allgemeine Staatslehre*, 1917, 738., quoted in: Rittner, F.: Az Európai Unió útja a szövetségi állam felé (The Development of the European Union in the Direction of a Federal State), *Jogtudományi Közlöny*, 6. (1995) 286., note 14., which, in an interesting manner, draws a parallel with the Austrian-Hungarian Empire following the enactment of the *Pragmatica Sanctio*.

With respect to these, the EU is *an unique international institution, an interstate organisation*, which is constantly evolving and is in the process of incessant integration, and, *to which certain sovereign rights have been transferred by the German Federal Republic.*

3.3. Concerning *the legal character of Community law*, there is a debate between traditionalists and autonomists, the latter of whom constitute a majority.[27]

a) *Traditionalists* postulate that Community law falls under the scope of international law.

b) According to *autonomists*, although, *primary law* has been framed via international treaties, this ontological feature shall by no means prejudge the legal character of the legal system. Autonomists emphasise the *dual character* of Community law.[28] Which implies that in its framework *the international legal characteristics* are supplemented by the *pecularities of constitutional law*, since the EU is constituted on an international treaty. The specificity is contained in the fact that this nature of constitutional law is not linked to a state, but to a specific *(sui generis)* international, interstate organisation.

ba) *The European Court* developed this conception in its *Van Gend en Loos-Decision*,[29] which is considered as a leading case, then somewhat modified it in its *Costa/ENEL-Decision*.[30] While the Van Gend en Loos-Decision was based on an emphasis on the character of international law, the impressively pathetic phrasing of the opinion of the court in the Costa/ENEL-Decision was positively framed in compliance with the doctrine of a *sui generis* legal system and its revoke is not admissible by subsequent unilateral national jurisdiction of the member states.

bb) *Secondary law* shares in the fate of the legal character of primary norms. According to the autonomists, it is neither international, nor national law, since it originates in an autonomous source of law: it is constituted partly on primary law, partly on Community law as a new public authority.

[27] Schweitzer—Hummer: *op. cit.*, 75–82.

[28] *See, Grundgesetz. Kommentar*, note 6., 360 and 366. See, in note 278, the conception of Walter Hallstein and Manfred Zuleeg, according to which, although the founding treaty of the European Economic Community "was framed in the scope of an international agreement, it qualifies as a constitutional document of a community of rights (*Verfassungsurkunde*)".

[29] Várnay—Papp: *Az Európai Unió joga* (*The Law of the European Union*), (note 13), 202.

[30] Vörös, I. *Az európai versenyjogok kézikönyve* (*The Handbook of European Competition Law*), Budapest, 1996, 375.

bc) *As a conclusion*, we can state that *Community law precedes the constitutions of the member states*. Therefore, Community law cannot be measured against the norms of the constitutions of the member states, so, conceptually, it cannot be "unconstitutional". The limits of the autonomist conception are ultimately defined (and made relative with respect to fundamental rights) by the legal practice of the constitutional courts of the member states as analysed above (II.1.1.b).

bd) It needs to be noted that Article 51 of *the EU Charter of Fundamental Rights* has recently introduced the notion of "*Union law*", without determining its positive content and meaning. As a matter of fact, it is clear that the scope of that notion is broader than that of Community law (law of the EU).

3.4. With respect to the above and to the system of requirements as set forth by Jenő Czuczai,[31] we assume the following legal political consequences:

3.4.1. The issue of the EU-Accession *cannot* be discussed merely in the scope of the relationship between international law and domestic law, since Community law cannot be construed as exclusively a legal material of international law, the issue of the EU-Accession *cannot* be discussed merely in the scope of the transfer of sovereign rights or of exercise of powers. The exercise of sovereign rights opens up the way to the inflow of the norms of a such a legal system, which cannot be measured against the norms of national constitutions (disregarding the terrain of fundamental rights, the relevance of which cannot be underestimated), so that legal system is superior to the constitutions of the member states.

3.4.2. So long as the tripartite hierarchy in the relationship between international law and domestic law is dominated by the national constitution, to which international law is subordinated, whereas domestic statutes are positioned at the bottom of the hierarchy, the EU as an international organisation and its legal system, i.e., Community law (Union law) demonstrate such features, which incur *dual consequences*.

— *On the one hand*, these features exclude its classification as an international organisation or international law, as a consequence of which a potential constitutional provision pertaining to the relationship between international law and domestic law is inapplicable and senseless.

— *On the other hand*, in this case the hierarchy *turns upside-down*: Community law is positioned at the top of the hierarchy, whereas the constitution of the member state (except for fundamental rights) is positioned in the middle, while other domestic statutes are subordinated to these.

[31] Czuczai: The Legal Alignment... *op. cit.*, 33. sqq.

3.5. Following from the above, *a third scope of issues* has to be analysed. Namely, framing *a special constitutional provision, a specific "Europe Clause"* has become inevitable in legal-political terms, as well.

With respect to the EU-Accession, we need to address *all of the three issues* as analysed above, since the Europe Clause cannot be framed without the constitutional settlement of both the relationship between international law and domestic law, and of the problem of the transfer of the exercise of powers. This clause can exclusively be constructed on the grounds of the analysis of the former two problems, although the settlement of these separately, or of the other two combined cannot supersede the settlement of the third one.

It is not accidental that a so-called *Europe Clause*, related to the adoption of the Maastricht Treaty, was incorporated into the *Grundgesetz* in 1992. Since, on the adoption of the Maastricht Treaty it became obvious that Article 24, in itself, providing on the transfer of sovereign rights cannot sufficiently justify an economic and political integration with such depth and character on constitutional grounds. Article 23 designates participation in the advancement of the European Union as a state objective. This has been defined as the constitutional obligation of all state organs: it is an obligation that can be demanded by the Federal Constitutional Court. It is a further issue that the limits of that obligation with respect to the German *Grundgesetz* and the fundamental rights guaranteed under its provisions were determined by the Federal Constitutional Court under its Maastricht- and Solange-Judgements.

3.6. In our point of new, *framing the Europe Clause* will postulate the following legal-political requirements:

— It needs to be asserted that participation in the European economic-political integration is a constitutional *objective of the state*, which needs to be framed in general phrasing first in the Preamble, then also in particular in the Europe Clause by setting forth the conditions. Such conditions, in accordance with Para. 1 of Article 2 of the Constitution, can be, e.g., that the European Union is based on the democratic rule of law, on a commitment to social values as well as on the respect of fundamental constitutional values and the traditions of the member states.

— With respect to the protection of fundamental rights, it needs to be asserted that Community (Union) law shall not have priority until a European Constitution has been adopted, which *as a minimum standard* meets the protection level framed under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

— It needs to be asserted that *certain powers* exercised by the Republic of Hungary may be transferred to the Union in the process of the continuous

advancement of the EU integration. Of course, the word "certain" has ultimate relevance here, to which the Constitutional Court shall render adequate content. Such a provision can only be framed with *bianco-content*. This phrase could guarantee that the constantly evolving and vaguely outlined framework of the integration and its legal system shall not "absorb" the state-formation and the legal system of the Republic of Hungary.

IV. Conclusion

1. The relationship between the Constitution and the EU-Accession is a complicated issue, in which *three problems* so far highly disregarded by the Hungarian Constitution are linked. In our view, *a "tripod", closely and inseparably related regulation, which needs to be codified simultaneously, is an essential precondition* of the accession. Its settlement—or at least its „full preparation"—cannot be further postponed.

2. The proposed amendment of the constitution, however, opens up „a new chapter" in the history of Hungarian constitutionalism and Hungarian constitutional law and of the constitutional structure of the Republic of Hungary. The amendments would facilitate that the Constitution *constituted a public authority beyond its scope*. By this „opening-up", the Constitution would have significance beyond itself, because thereby, it would crosscut and make relative the traditional conception of the nation–state monopoly of the exercise of public authority. Therefore, the currently effective Para. 1 of Article 2 of the Constitution would remain in force, but its content and scope, along with the inner structure of the Hungarian Constitution would radically change in the spirit of a 21st century Europeanism.

It is regrettable that the amendment of the constitution as pursuant to Act LXI of 2002 fails address the questions above, besides, the relationship between the constitution and the EU is made even more ambiguous by the incorporation of the amended Article 2/A. Hence, we assume that a further and broad amendment of the Constitution is inevitable.

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Legal Traditions and Efforts to Unify (Harmonize) the Private Law in Europe

Abstract. The present essay deals with the question of harmonization of private law in Europe. The author gives an overview of the efforts of European states to unify private law, also underlining the results and shortcomings of these activities. He highlights the importance of Roman law in the unification of private law. The author mentions — *inter alia* — the role of Roman law in the development of the non-antique, „modern" natural law by referring to the term of *Entzauberung der Welt* by Max Weber. In addition, he analyzes the influence of the historical school of jurisprudence (*Pandektistik*) on the development of European private law. The study presents a short summary on the activity of the Academy of Pavia. The members of this Academy, among whom one may find experts of Roman law, Common Law and private law make efforts to codify the European law of contracts, which should be regarded as a great step towards a unified European private law.

Keywords: private law, comparative law, harmonization of private law

I. Recent efforts regarding unification (harmonization) of the private law in the Member States of the European Union

Resolution of the European Parliament (EC OJ 1989, C 158.400), adopted on May 26, 1989, requires that Member States make steps toward the codification of European private law (both civil and commercial law).[1] Accordingly, the European Communities, pursuant to this resolution, established a Commission charged with developing the framework for the codification of European

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[1] With regards to the harmonization in the field of private law and the background of harmonization in classical antiquity, see, Maroi, F.: *Tendenze antiche e recenti verso l'unificazone internazionale del diritto privato.* Roma, 1933. 7 sq. and 15. With regard to the importance Theophrastos' Peri nomon, which, in essence, also serves the objectives of law harmonization, see, Hamza, G.: *Jogösszehasonlítás és az antik jogrendszerek* [Comparative Law and Legal Systems of Antiquity], Budapest, 1998. 17 sqq.

contracts law.[2] In 1994, another resolution of the European Parliament (EC OJ C 205.518, April 27, 1994), once again called on the Member States to harmonize certain sections of their private law to provide for a uniform internal market.[3] At its conference, held on 15–16 October, 1999 in Tampere, the European Council discussed the question once again. Article 39 of the declaration accepted by the European Council emphasizes the necessity of the harmonization of certain areas of the Member States' private law.[4] Resolution of the European Parliament (EC OJ 2001, C 327.255), adopted on November 15, 2001, reaffirmed the necessity of the approximation of the civil and commercial law of the Member States.

In 1980, almost ten years prior to the adaptation of the 1989 Resolution, a working group, led by Professor Ole Lando of Copenhagen and called the *Commission on European Contract Law*, was formed, which, sponsored by the European Communities, has undertaken the task of developing the principles of European contract law.[5] The Academy of European Private Lawyers *(Académie des Privatistes Européens, Accademia dei Giusprivatisti Europei)* with the seat in Pavia and consisting of mostly Roman law experts (including among others professors Peter Stein of Cambridge, who is the Vice President of the Academy, Theo Mayer-Maly of Salzburg, Fritz Sturm of Lausanne, Dieter Medicus of Munich, and Roger Vigneron of Liège), was founded in October 1990. Within this Academy, comprising European civilists and Roman law scholars, enjoying great international reputation and working on the creation of a common European private law system, exists the *Group d'étude pour le droit européen commun* (GEDEC) which is currently drafting the a Code of European Contracts Law *(Code Européen des Contrats)*.[6] The proposed Code is modeled after the fourth book (regulating obligations) of the Italian *Codice civile* of

[2] See, Großfeld, B.—Bilda, K.: Europäische Rechtsangleichung, *Zeitschrift für Rechtsvergleichung Internationales Privatrecht und Europarecht* 33 (1992), 426.

[3] See, Staudenmayer, D.: Perspektiven des Europäischen Vertragsrechts. In: *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (hrsg. von R. Schulze und H. Schulte-Nölke), Tübingen, 2001. 419.

[4] See, Sonnenberger, H. J.: Privatrecht und Internationales Privatrecht im künftigen Europa: Fragen und Perspektiven. *Recht der Internationalen Wirtschaft* 48 (2002), 489.

[5] See, Lando, O.: Principles of European Contract Law. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 56 (1992), 261 sqq.

[6] Gandolfi provides an overview of the activities and achievements of the Academy of Pavia and the working group. G. Gandolfi: Pour un code européen des contrats. *Revue trimestrielle de droit civil,* 1992. 707 sqq. Compare with, Gaggero, P. G.: Il progetto di un codice europeo dei contratti: l'attività del gruppo di lavoro pavese. *Rivista di diritto civile* 43 (1997), 113–120.

1942 (which incorporates many aspects of the tradition of the French *Code civil* and the of German *Bürgerliches Gesetzbuch*) and the *Contract Code*[7] drafted in the 1960s and 1970s by Harvey McGregor from Oxford for the *English Law Commission*.[8] Professor Giuseppe Gandolfi of Pavia, whose achievements in the field of Roman law research are also significant, has played a major role in establishing the Academy.[9]

Harmonization efforts, of course, are not without opposition. Professor Peter Ulmer of Heidelberg, for example, is quite skeptical regarding to the question of urging harmonization (unification) of law among the EU Member States.[10] Jean Carbonnier, who doubts the urgency and even the necessity of harmonization, expresses similar views with relation to France. It seems that we are witnessing the codification debate between Anton Friedriech Justus Thibaut (1772–1840) and Friedrich Carl von Savigny (1779–1871)—though, under historical conditions substantially different from the social and legal realities of the 1810s.

Although, it is, certainly, undecided whether Europe, at present, needs a unified legal system at all, it is obvious that harmonization in the field of civil (private) legislation—even if not to the same extent in every aspect of private law—is unavoidable. However, the way to realization of legal harmonization is uncertain. It could take the form of regulation or policy, and also could be realized via coordinated national legislation.[11] The failure of England and Scotland in 1970 to adopt the unified Law of Contracts that would have been binding in both countries does not contradict the tendency toward efforts of

[7] See, McGregor, H.: *Contract Code drawn up on behalf of the English Law Commission*. Milano–London, 1993.

[8] Until now, the debates of the Academy and working group of Pavia were published in two volumes. *Incontro di studio sul futuro codice europeo dei contratti* (Pavia, 20–21 ottobre 1990). *A cura di P. Stein* (Milano, 1993) and *Atti accademici* (1992–1994), *A cura di P. Stein* (Milano, 1996).

[9] The preliminary project plan of the Code Européen des Contrats (Avant-projet) was published in the edition of Professor Gandolfi. See, *Code Européen des Contrats–Avant-projet* (ed.: Gandolfi, G.), Milano, 2001. Compare with, Gandolfi, G.: Der Vorentwurf eines Europäischen Vertragsgesetzbuches, *Zeitschrift für Europäisches Privatrecht* 10 (2002), 1–4.

[10] See, Ulmer, P.: Vom deutschen zum europäischen Privatrecht. *Juristen Zeitung*, 47 (1992), 1 sqq.

[11] See, Remien, O.: Rechtseinheit ohne Einheitsgesetze? *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 56 (1992), 30. and Illusion und Realität eines europäischen Privatrechts. *Juristen Zeitung* 47 (1992), 277 sqq. Compare with, Herber, R.: Deutsche Zivilrechtskodifikation und internationale Rechtsvereinheitlichtigung. *Rechtsdogmatik und Rechtspolitik* (hrsg. von K. Schmidt), Berlin, 1990. 269.

European legal harmonization.[12] Roman law *(ius Romanum)*, which constitutes the historical foundation of the unity of European law, might have a crucial role in this undeniably long-term process, which could require perhaps decades of hard work.[13] One circumstance ensuring that Roman law prevails is the application of the legal principles of private autonomy and freedom of contract, among other things, in European relations.[14] Doubtless, however, these legal principles, stemming from Roman law, could become relatively important and materialized in certain areas. This is the situation, for example, in the field of consumer protection. The more emphasized and better founded legal protection of the consumer, who is the more disadvantaged participant in civil legal commerce, doubtlessly materializes in private-autonomy and the legal principle of freedom of contract within a given private law system. That is, the *droit communautaire*, without doubt, indicate certain tendencies that seem to jeopardize the freedom of contract.

In our view, Roman law may play an important role in the standardized, or at least in a tendency toward standardization, of European jurisprudence, and, more precisely, in the development thereof. Throughout Europe, in the age of *ius commune*, a uniform "legal working method," the so-called *stilus curiae* predominated precisely through Roman law, which was considered the *lingua franca* of lawyers. The uniform *stilus curiae* following the "nationalization" of legal systems became part of the past. The training of legal professionals, which is becoming international once again, may eventually result in a harmonization similar to the *stilus curiae*.[15]

II. Roman law traditions and unity of private law in Europe in a historical context

Roman law played a significant role in both the secular and ecclesiastical sectors of medieval societies. It served as a foundation for the 16th century legal humanism and as a wellspring for the rationalist Natural Law doctrines.

[12] See, Tilman, W.: Kodifikation des Privatrechts in der Gemeinschaft. In: *Für Recht und Staat, Festschrift für H. Helmrich zum 60. Geburtstag*, München, 1994. 441.

[13] Knütel, R.: Rechtseinheit in Europa und römisches Recht. *Zeitschrift für Europäisches Privatrecht* 2 (1994), 244 sqq.

[14] See, Hommelhoff, P.: „Europarechtliche Bezüge" im Zivilrecht, Überlegungen zur Gestaltung des akademischen Unterrichts. In: *Für Recht und Staat. Festschrift für H. Helmrich zum 60. Geburtstag*, München, 1994. 340.

[15] Ranieri, F.: Der europäische Jurist. Rechtshistorisches Forschungsthema und rechtspolitische Aufgabe, *Ius Commune* 17 (1990), 10 sqq.

In the 19th century, Roman law was molded in the sprit of scientific positivism primarily through *Pandektistik (Pandektenwissenschaft)*, and, finally, was also an eminent material source of the great private law codices. The role of Roman law in the 20th century political sphere is not negligible, the most conspicuous sign of which is Article 19 of the party platform of NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei*, the German National Socialist Labor Party) adopted on February 24, 1920 and supported by the interpretation of Alfred Rosenberg which may be viewed as an *"interpretatio simplex"*. The reception of Roman law, characterized—or rather, stigmatized—as foreign by the German people, and also seen as individualistic, cosmopolitan, materialistic, liberal, and advocating solely private interests, appeared as a national catastrophe *("nationales Unglück")* and tragic event *("Tragik")* in the legal literature of the 1930s' Germany. It is worth mentioning that Carl Schmitt, in his study entitled *„Aufgabe und Notwendigkeit des deutschen Rechtsstandes"* (Deutsches Recht 6/1936/), labels Article 19 of the 1920 NSDAP party platform as something that demands the overshadowing of neglected Roman law through the initiation of *"deutsches Gemeinrecht"*, as *„verfassungsrechtliche Bestimmung ersten Ranges"* (sic! G. H.). Carl Schmitt, however, fails to support his rather peculiar view with legal arguments. Reading the literature of the era in question, it might seem that, quoting the ironic lines of Rusztem Vámbéry regarding the NSDAP's proposed legislative reform, "the influence of Roman law had infected the puritan intellect of Teutons sipping *Meth* (honey-beer) sitting on bear hides in caverns of lost times."

The trend of "antike Rechtsgeschichte" completely ignores the afterlife of both the jurisprudential and political aspects of Roman law. The advocates of the trend of "antike Techtsgeschichte," hallmarked by the name of Leopold Wenger, fail to consider the fact that for centuries, Roman law has had a major influence on the evolution of European law and jurisprudence. In the case of Roman law, which can be rightly viewed as the *"ius commune Europaeum"*, the followers of this school, still represented by a few existing advocates today, completely disregard the role that Roman law plays, as a consequence of *interpretatio multiplex*, in the development of European law, and more precisely, in the legal systems and jurisprudence of European nations. In essence, this view narrows the possibility of comparison of legal systems of states or peoples on the same socio-economic level, but reaches similar conclusions. The undeniable advantage of this approach is, however, the sound foundation of the background of its synoptic view. On the other hand, this concept limits the possibility of comparison in such a degree that it nearly reaches the outermost boundaries of rationality. The frustration with this view

is manifested especially clearly in the works of Ernst Schönbauer, who restricted the possibility of comparison to the rather narrow territory of comparing the legal systems of ancient peoples that were on the same level of civilization or were ethnically related. This view relates in many aspects to the schools of thought according to which certain institutions of Roman law are incomparable with certain institutions of modern legal systems, because the former is the legal system of a slave-holding socio-economic formation. The followers of this school tend to forget about continuity, which plays an especially important role in the sphere of legal phenomena.

In the last quarter of the 20th century, Professor Uwe Wesel of Berlin polemicizes in his writing titled Aufklärungen über Recht, published in 1981, about the notion of legal structures reappearing from time-to-time—Theo Mayer-Maly writes aptly about *"Wiederkehr von Rechtsfiguren"*. This viewpoint, concurring with the possibility of accepting reoccurring legal structures, is, naturally, not so radical as to deny the existence of legal structures exclusively linked to a single given socio-economic formation, such as, for example, feudal relationships, which, in itself excludes accepting Roman law as a timeless *ratio scripta*. Of course, it is the sign of *déformation professionelle* when lawyers overstate the facts, according to which legal transactions—the expression, legal transaction *(negotium juridicum)*, is attributed to Johannes Althusius (1557/63–1683)—, or at least a fairly substantial fraction of these transactions could be performed by applying the same legal constructions regardless of the time factor. Fundamentally, however, this does not change the fact that the legislation and jurisprudence of recent years, in many countries within and outside Europe, returned more than once, even in concrete forms, to the constructions as well as the institutions of Roman law.

The fact of the expanding influence of tradition should not excuse the scholar from the requirement of analyzing the substantive differences and the prevailing economic functions. This is true, for example, although it might seem extreme at first sight, with respect to the examination of the regulations pertaining to cartels and monopolies or trusts. Roman cartel and monopoly or trust regulation, which is densely woven with the elements of *ius publicum,* obviously differs, for example, from modern cartel law, yet, the socio-economic forces working in the background—independently from the socio-economic system—doubtlessly intersect at certain points.

The expression 'reception', as it relates to Roman law, the meaning of which, if interpreted correctly, is not some sort of "cultural occupation", but, at least in Germany, more like a notion that is equivalent to some kind of a "scientification" *(Verwissenschaftlichung)* of law. Reception cannot be connected

neither to the *Reichskammergerichtsordnung*, adopted in 1495, or to the mythical decree of emperor Lothar III, fading in the dimness of legends. The reception of Roman law means an intellectual tradition built on Roman legal foundations that only marginally relates to a well-defined positive legal system, *ius positivum*. Reception, defined in this manner, can be traced back centuries, with a good example being the conveyance of German lawyers who studied law at the universities of Northern Italy.

The signs of reception, i.e., the subsidiary prevalence of Roman law, associated with positive law, appeared fairly early, in the 11th century. And, in the 13th century, elements of Roman law can be found especially in the practice of ecclesiastical courts that often litigated disputes having the nature of private law. According to our view, the influence of the Commentators appears in the latter area, while Roman law, defined as "legal literature," has already been accepted in Germany as made evident by the conveyance of the Glossators. Naturally, the division of the influence of Roman law into these two categories does not mean the denial of the importance of the Commentators' work, that is, the acceptance of Savigny's concept of viewing them merely as post-Glossators. Reception, however, was not limited to Roman law material but also extended to the acceptance of canon law and feudal law of the Langobards (or Lombards) as well. That is how *the ius commune = gemeines Recht* evolved, as a body of law pertaining to both Common law and private law, but divergent from, and competing with, the *Landesrecht*. The harmonization of the *ius commune* with local legal systems, or, in other words, the task of adapting the *ius commune* to local conditions was resolved by the so-called Practicals.

The readiness for the reception of Roman law, in the function of objective conditions, substantially differs in individual European countries. The level of sophistication of a given country's (region's) jurisprudence and political system is crucial with regard to reception. In significant parts of the Iberian peninsula, for example, the conditions in the 13th century were such that Roman law could become the subject of reception in the seven-volume codex, the *Siete Partidas*, of Alfonso X (the Wise). In Switzerland, in contrast, for reasons that could be attributed primarily to unique political conditions, reception of Roman law in its entirety *(reception in globo)* was out of the question. There is a close connection between Roman law and the so-called imperial law, *ius caesareum*, or *Kaiserrecht*. Roman law serves as the ideological foundation of *renovatio imperii*, which attains extraordinary importance during the reign of the dynasty of Hohenstaufen. Roman law, more precisely the *ius publicum Romanum*, is the instrument of the legitimacy of *"Weltkaisertum"*. The work best representing the Cameralist school both in its title and substance is

Samuel Stryk's *"Usus modernus pandectarum"* from the turn of the 17th and 18th centuries.

Although, on the one hand, a characteristic feature of the school of Practicals is that they put special emphasis on German legal practice—which results in a distancing from the original Roman sources—; on the other hand, another characteristics is the casuistic analytical methodology, nonetheless, we can talk about the "science of the Pandects", for the first time, in connection with the Cameralists. Connecting the expression "science of the Pandects" to this school is correct in spite of the fact that the school itself—especially, because of the increasing prevalence of particularity in its views—is not capable for progress. Only Natural Law, unfolding in the 17th century, would be fit to further improve the unproductive "science of the Pandects" implemented by the Practicals.

We have to emphasize that Roman law plays an important role in the development of natural law doctrines. The evolution of non-antique, "modern" Natural Law, aptly described by Max Weber as "Entzauberung der Welt", is inseparable from the concept of *"ius naturale"* of the Romans.[16] The aspiration of Roman law scholars to trace *ius civile* back to *ius naturale* is a basic feature of the Natural Law of the 16th and 17th centuries. The influence of Roman law also can be found in the Christian-scholastic Natural Law. In the case of Hugo Grotius, who may be counted as a follower of the rationalist Natural Law jurisprudence, the *"auctoritas"* of Roman law is associated with the *ius Romanum* as *"imperium rationis"*. Roman law plays a cardinal role in the work of Samuel Pufendorf, the author of the highly influential *De iure naturae et gentium libri octo* (1672), who may be regarded as a follower of another secularized school of Natural Law. The fusion of "science of the Pandects" and Natural Law had not taken place, which could be explained, on the one hand, by the Common law-like approach of Natural Law, and, on the other hand, by the philosophical, in other words, non-legal, interests of Natural Law professors, a fact that demonstrated with the example of Christian Wolff (1679–1754), the only disciple of Gottfried Wilhelm Leibniz, whose studies focused primarily on moral philosophy.

[16] Regarding the Romans concept of *ius naturale*, see, Hamza, G.: A természetjog értelmezésének problémái: Cicero és a ius naturale [The Problems of the Interpretation of Natural Law: Cicero and the *Ius Naturale*], *Jogtudományi Közlöny* 50 (1995), 523–529.

III. Historical school of jurisprudence (Pandektistik) and its role in the development of the European private law

The fundamental conflict between *Usus modernus pandectarum* and Natural Law could have been only resolved by the *Pandektistik* developed in the work of the followers of the school of historical jurisprudence. The characteristics of *Pandektistik*, the intention of which was the creation of "the philosophy of positive law" (Wieacker), include the historical point of view, building on the original, Justinianus' sources, the desire for systematization, the development of legal theories, and, finally—as a hoped-for result of all the aforementioned—the partition from particularism. In the light of the aforementioned, the pandect law of the 19th century, "heutiges römisches Recht", should be sharply separated from *Usus modernus pandectarum*, which was dominated by the elements of particularism.

The pandectist law of the 19th century,[17] which after the work of Georg Friedrich Puchta (1798–1846), "Pandecten", published in 1838, is also called "Pandects" *(Pandekten)*, as phrased by the German legal scholar, is the general theory of German private law based on Roman law principles, the function and importance of which is the development and expansion of the bases of the private law system.

Despite the fact that it was developed on German soil, it is not practical to talk about German *Pandektistik* exclusively, because this school i.e. trend is not equivalent only to the "doctrine of gemeines Recht" (Koschaker), but from the beginning of its development, it gained significant influence outside the borders of Germany.

In this respect, it is sufficient to consider the influence of *Pandektistik* in England. John Austin (1790–1859), who adopted Jeremy Bentham's legal theories, in the analysis of legal terminology, follows the German *Pandektistik*. Characteristically, he regards Savigny's Das Recht des Besitzes as a masterpiece and as the most perfect among all legal works ever written. Thibaut's work, the first edition of which was published in 1803, titled *System des Pandektenrechts* also had a great influence on him. This work of Thibaut, of which eight editions were published between 1803 and 1834, influenced English legal scholarship

[17] Regarding the *Pandektistik*, see, Hamza, G.: *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján* [Trends in the Development of Private Law in Europe. The role of the civilian tradition in the shaping of modern systems of private law], Budapest, 2002. 99 sqq. and *idem: Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn.* Budapest, 2002. 85 sqq.

tremendously. Nathaniel Lindley's book titled *Introduction to the Study of Jurisprudence*, published in 1845, is the translation of the general part of Thibaut's aforementioned work. We further refer to the fact that in Sir Henry Maine's *Ancient Law*, published in 1861, the influence of *Pandektistik* also seen.[18]

The members of the Academy of Pavia, among whom we can find experts of Roman law, Common law, and modern (codified) private law, in their efforts to codify the European law of contracts, view as their mission the creation of a compromise between the Roman law-based continental private law, and the contract constructions of Common law.

It is a fact that similarities may be found among numerous institutions and constructions of Roman law and English law. It is without doubt, at the same time, that essential differences appear between the views of Roman law and English law, which are the result of unique historical conditions. One of the attributes of Roman law is that it is jurisprudential law, so-called *diritto giurisprudenziale*[19] that generally is not associated with the binding authority of preceding juridical decisions (sentences). The interpretation of jurisprudential law, however, could differ depending on what scientific discipline the interpreting scholar follows. According to Friedrich Carl von Savigny, the unique notion of *Juristenrecht* is systematization, or more precisely, a tendency-like aspiration for systematization. This view is especially clearly expressed in his work titled *System des heutigen römischen Rechts*. Rudolph von Jhering (1818–1892), who is a declared opponent of legal positivism, examines this problem from a very different angle. According to Jhering—primarily in his book titled *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*—Roman law, viewed as basically jurisprudential law, has an contemporary significance with regard to methodology and ideology.

The jurisprudential law-quality of *ius Romanum* was given particular emphasis by Koschaker in his work titled *Europa und das römische Recht*. In Roman law, Koschaker sees an effective category of counter-ideal to legal positivism "elevated to absolute heights." Koschaker, viewing Roman law as *Juristenrecht*, stresses its sharp opposition to English law. English law, clearly, is *judge made law*, which makes the difference between the two legal systems obvious. *Ius Romanum* could never be viewed—in any of the phases of its evolution—as precedent law. In the literature, this is pointed out—mentioning only a few examples—by Buckland, McNair, Schiller, Dawson, Van Caenegem, Pringsheim, and Peter.

[18] See, Lombardi, L.: *Saggio sul diritto giurisprudenziale*. Milano, 1967.

[19] See, Hamza, G.: Sir Henry Maine és az összehasonlító jog [Sir Henry Maine and the Comparative Law], *Jogállam*, 1998–1999. 326. sqq.

IV. The historical background of the convergence of Roman (civil) law and Common law

The jurisprudential quality of Roman law can be demonstrated in every phase of the development of this legal system.[20] The basis for this, among other things, is that there is an obvious continuity between the pontifical law or jurisprudence and the lay jurisprudence. Examining its judge-made or Common law-like attributes, we have to point to the unique historical development, and not the least, to the unique ideological characteristics of this legal system. With relation to the doctrine of *stare decisis*, we may refer to some characteristics of the English *ius consuetudinarium*. It deserves emphasis that in English law (see, e.g., leg. Henr. IX. 9.), the interpretation of statutes takes place in a fairly elastic manner. The judge is less bound by the statutes, or more precisely, by the texts thereof, than by previous judicial decisions. Bracton, the author of *De legibus et consuetudinibus Angliae*, is in effect the first—although previously there are signs of this view at Glanvill—to provide the theoretical support of the vigor of binding precedent. This is shown studiously in the doctrine of *"...Si tamen similia evenerint, per simile iudicentur, dum bona est occasio a similibus procedere ac similia"* (De leg. f. 1 b).

An important difference between Roman law and English law is the Roman *iurisperiti*'s so called *ars distinguendi*, expressed in some *responsa* of them as the "art" that is capable of distinguishing between the relevant, the legally relevant, and the irrelevant. As the result of this ars distinguendi, the high level abstraction capability of Roman *iurisperiti (iurisconsulti)*, which was always separated from Roman law by the *communis opinio*, is clearly demonstrable. Here, we wish to refer to the fact that, oddly, even Fritz Schulz writes about the Romans' aversion to abstraction.

In some of the *responsa*, indeed, only the legally valuable elements submerge, which is in diametric contrast to the relation of *ratio decidendi* and *obiter dicta* that melt together and are practically inseparable in the decisions of Anglo-Saxon courts. The "ars abstrahendi," already affecting legal scholars working in the last centuries of the pre-classical era, constitutes the real demarcation line between the mentality of Romans and the legal thinking of Anglo-Saxons. We have to point out that in some relations, —it is especially valid for "stare decisis," arising in relation to the *ius respondendi*, that is a clearly

[20] Regarding the jurisprudence of Roman law, see, Földi, A.—Hamza, G.: *A római jog története és insitúciói* [The History and Institutions of Roman Law]. 8th, revised and extended edition, Budapest, 2003. 84 sqq.

mutatis mutandis characteristic of Roman law—even within Roman law, there are certain signs of the guiding authority of precedent legal-scholarly opinions.

In the domain of Roman law, the question of judicial precedents is significant in the field of its comparison with English law. We may examine the significance of precedents based on both legal and non-legal sources. The law of inheritance—besides the law of gift[21]—, is extremely important in this relation, and what is more, it has explicit paradigmatic significance. In the law of inheritance, the weight of previous decisions can especially be ascertained in connection with *querela inofficiosi testamenti.* In the domain of contract law we may mention *compensatio*, in which the *responsa* originated in earlier times are given greater weight. This weight, naturally, is expressed through the recognition of the normative authority of certain legal principles. Furthermore, the problem of ius singulare is also important with regards to the examination of precedents. Namely, in the case of *ius singulare*—for example, in relation with a privilege—*in aliis similibus* can be interpreted, cautiously, obviously, in light of previous cases.

Stare decisis plays a prominent role in the development of modern English law. Naturally, in modern judicature, there is a sharp distinction between *ratio decidendi* and *obiter dicta*, that frequently allots a difficult task to those applying the law, which fact is often referred to in the legal literature of for example, Montrose, Simpson, Derham, Allen, Cross, and Paton. *Stare decisis*, after all, is attributable to the fact that the most essential element of English law is the decision-making activity of the judge, whom Dawson rightly calls, in this respect, the "oracle of law."

V. Concluding remarks

In the development of European private law, convergence plays an increasing role. In the new legal literature, many authors, for example, James Gordley[22] and Paolo Gallo,[23] writes about the materialization of the differences between Common law and *civil law* (Roman law), and, what is more, about the disappearance of differences in the sphere of many legal institutions. In the

[21] See, Dawson, J. P.: *Gifts and Promises, Continental and American Law Compared.* New Haven–London, 1980.

[22] See, Gordley, J.: «Common law» v. «civil law» Una distinzione che va scomparendo? In: *Scritti in onore di R. Sacco I.* Milano, 1994. 559.

[23] See, Gallo, P.: La recezione dei modelli continentali nel diritto inglese delle obbligazioni. In: *Scritti in onore di R. Sacco I.* Milano, 1994. 473–494.

field of contract law, many institutions and constructions of continental law are subject to reception in English law. It deserves attention that with regards to terminology, certain English authors, in connection with *English private law*, explicitly refer to the role of Roman law tradition.[24]

The private law of European countries, no doubt, to a different extent and building on different historical traditions, is connected to Roman law. This is more and more obvious in a period of decreasing or even disappearing differences, often motivated by political interests, between certain "legal fields" and "legal families." Not even differing traditions of culture and civilization constitute obstacles to the differing extent of the reception of Roman law. It follows from the foregoing that it is justifiable to consider the significant role of Roman law in the efforts to unify the private law in Europe.

[24] See, *English Private Law*. I–II. (ed.: P. Birks), Oxford, 2000.

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A Conception of a New Act on Insolvency

Abstract. The author—being a well-known expert of the field of law of bankruptcy and liquidation—gives a critical analysis of the present status of the Hungarian bankruptcy law. It is a commonplace to say that this field of the law is in very tight connection with the economy. Therefore the changes and the changing trends of the economy may have huge influence on the law of liquidation and bankruptcy, as well.

As it is known the effective act on bankruptcy, liqudation and voluntary dissolution was adopted in 1991 in Hungary. Nevertheless there have been modifications on this act since then, the new economic conditions require a more appropriate regulation of this field.

The author presents a thorough summary on the critical points of the valid regulation. The author applies a comparative method by referring to the legal solutions of different European countries concerning this branch of law. The author underlines that there are even significant terminological differences between the Hungarian regulation and e.g. the regulation of the EU-countries. This circumstance itself would demand modification of the law of bankruptcy in Hungary with respect to the join of Hungary to the European Union.

The author mentions examples of the everyday practice of bankruptcy and liquidation, which can also prove the necessity of creating a new act on this issue. The author puts high emphasis on the role and activity of the liquidator (trustee in bankruptcy). Finally the author attempts to outline those essential elements of this branch of law, which should be taken into consideration during the codification of the new act on bankruptcy, liquidation and insolvency.

Keywords: bankruptcy, insolvency, liquidation, regulation, modification

I. On the ncessity of ceating a new act

During the process of legal harmonisation, the reconciliation of norms governing specific areas of Hungarian law with the legal materials of the European Union has become an established practice. This, in a certain cases may imply the adoption of a new act, while in other cases, some sort of adjustment is sufficient.

Directive no. 1346/2000, which created the international bankruptcy law on the level of the European Union was promulgated in Hungary on 15th May, 2002 and shall be effective law on the accession of Hungary to the EU. By reason of the content of the directive, this implies the possibility of subjecting

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the debtor's assets scattered on the territory of several EU member states to one main procedure, permitting that supplementary procedures on the territory of one member state are pursued according to the substantive law of the specific country. Therefore, the fundamental amendment of bankruptcy law is not necessary since only procedural issues are concerned.

As opposed to the above, it is obvious that the common system of procedural law shall lead to the advance of the rules of substantive law and it can be assumed that substantive bankruptcy law, even if no measures were taken, would be adjusted to the norms followed and established by the majority of the member states within 4 or 5 years after accession of Hungary to the EU. This circumstance, in our point of view, according to our view, evokes the reformation of our bankruptcy law, which has been a practical problem since the bankruptcy act of 1991 came into effect.

It is nearly a cliché that bankruptcy law is a major instrument of the actual economic policy, which the legislators actually resorted to as it is marked by several minor amendments besides two amendments to supplementary law, which are equally designed to ameliorate the respective law. At this moment, we cannot endeavour to assess the impact of these amendments, which, has already been manifested both in legal practice and in expert literature. In this respect we should mention that legal practice even today has to deal with four different groups of legal materials, which significantly differ from one another. This obviously imposes disproportionate and unnecessary workload on the actors and encumbers the completion of the procedures.

It is fortunate that Hungarian legal codification has already employed a new legislative method (competition act, act on business associations) of framing formally new and unified law instead of greater amendments and thereby facilitated jurisdiction and made the Hungarian legal system more transparent.

The facts outlined above justify our proposal for *drafting a new bankruptcy law*, instead of the mere amendment of the old one.

II. Conceptual definitions

As it is widely known, the terminology of our effective law is in compliance neither with domestic legal traditions nor international practice. This, in itself would not pose a problem since the basic content-ased criterion of the applicability of a term is that it should define the respective legal institution markedly and distinctly. At the same time, safeguarding that content-ased aspect when translating the term into other languages should be observed.

The present phrasing, however, does not meet any of these requirements. In 1986, the use of the term of "bankruptcy" was impossible for political reasons, therefore we assigned the term of liquidation to the law-ecree in a quite adverse way. Unfortunately, this terminology following the transition period prevailed, hence, the strange situation has occurred that we use such widely known notions, which are juxtaposed to our historical traditions with different implications, which create a different impression in the non-ungarian reader and may result in a greater problem.

Let's illustrate the case above with an example: what we denominate as liquidation proceedings is termed bankruptcy proceedings in Austrian law, whereas Hungarian bankruptcy proceedings is designated as prejudicial action or reorganisation procedure in Austrian terminology, while full settlement is designated as liquidation proceedings in the legal terminology of our Western neighbours. As a result, the Austrian reader will find something quite different from what would be expectable under the term of *Konkurs* in the German translation of a Hungarian text.

Therefore it is obvious that the terminology, also on the grounds of the international directive for bankruptcy law as referred to above, has to be rendered approximately the same content.

Our recommendation for terminology is as follows:

In the title of the act we propose the application of the term of insolvency. The underlying reason is that the German insolvency act, which came into effect at the 1st January, 1999 made a significant impact in the sphere of influence of German doctrines, thereby also in Hungary, both on account of its broad scope and its extraordinarily thorough, 20-ear-ong preparation period, furthermore, by reason of the fact that it was adopted and promulgated already in 1994. We can safely state that insolvency law has become an established term in the course of the recent 5–6 years.

We propose to replace the present term of liquidation proceedings for bankruptcy proceedings. It is undeniable that the German insolvency act referred to above does not use this term any longer, while other German-speaking countries, i.e., Austria and Switzerland do, and the term of bankruptcy proceedings has also integrated into the established legal terminology in other countries of the Union. By means of this modification, we could join the sweeping majority.

We propose however, to maintain the term of full settlement. On the one hand, it has become fully established in Hungarian legal terminology, on the

other hand, doctrinally, it does not fall under the competence of insolvency law. Hence our worries concerning the terms of bankruptcy and liquidation do not pertain to the term of full settlement. From a strict doctrinal point of view, it should not be included in this act, nevertheless, since we propose radical changes in the regulation area of this procedure, it can be retained under the scope of the act on the grounds of the principle that "we should not incur unnecessary trouble".

III. The objectives of the act

In a significant segment of domestic jurisdiction we grave deficiencies occur from the economic point of view. That's why the new act needs to be relatively simple, which has to be matched by expeditiousness, transparency and accountability. In a given case, the automatism of procedures also has to be taken into consideration.

In the present Hungarian economic situation, in our view, the major emphasis needs to be put on the priority of creditors' interests. This, from a theoretical point of view, means that it is obvious that bankruptcy law crosscuts normal liability relations, which shall be replaced by specific procedural rules in the moment of the adjudication of bankruptcy. It is natural in itself, therefore, we cannot forget that a special legal relation obtains here, since the debtor does not deny that the legal title of debt or the amount are valid, therefore, the creditors' claim is valid and it is merely the debtor's incapability of compliance with his liabilities that underlies the fact of non–payment.

It is an undeniable fact that upon the considerations of the interest of national economy, the legal development of the recent 100–150 years has shifted in the direction of solutions protecting the debtor, which, understandably, could only be accomplished at the damage of creditors. However, the systematic overshadowing of creditors, on the one hand, does not correspond to the fundamental principles of the legal system, on the other hand, it may cause disturbances in the functioning of the economy under normal liability relations. Economic analyses also to support the fact that the new Hungarian act has to be fundamentally creditor-friendly, whereas the creditor's interest needs to be construed in a broad scope. This not only implies that the creditor should be capable of obtaining the greatest possible share of the demand, but also that the creditor could achieve this purpose, it also has to play an active role in the reorganisation of the debtor if possible and necessary.

IV. Conceptual modifications

1. The pragmatic analyses positively support the fact that extraordinarily many liquidation proceedings are initiated. In several cases, the creditors resort to this legal institution only as a psychic threat, and thereby produce unnecessary workload for the courts as well as undermine the credit of the legal institution. Hence in the future the statutory encumbering of the conditions of the commencement of bankruptcy proceedings seems to be expedient. The amendment, which came into force as of 1st September, 2001 was framed in this spirit, since, with the termination of the right of the prenotation of dues, the commencement of the proceedings shall cost 40.000.- HUF in each case.

Proceeding with this line of argument, we propose on the one hand, that in some cases a mandatory procedure is initiated by the debtor, on the other hand, that the limit of the claimed amount for the creditors is prescribed.

2. The present effective solution fundamentally undermines the role of securities protected with *ius in rem*, which leads to an imbalance of the economy. With respect to the fact that a hinge of our conception is the protection of creditors' interests, we propose the division of the assets of the debtor into two parts. The items of property secured under *ius in rem* for the creditor shall be indemnified directly. (Separate right of indemnification.) Supposing the sale of the security covers the claim, the creditor status entailing a separate right of indemnification shall be terminated and the potential residue shall be added to the other segment of bankruptcy assets. In an opposite case, the creditor with an unsatisfied claim shall be determined as a normal bankruptcy creditor and shall be included in the creditors' indemnification sequence.

3. In a number of cases, due payment of the employees causes a grave problem. Even if there is adequate coverage available for that purpose, the claims of secured creditors cannot be fully satisfied. In case our recommendations are accepted, the settlement of employees' lawful claims will be even more endangered, since it may well be the case that a more substantial part of the debtor's assets would be fused into funds for separate indemnification. In order to secure that both employees get their due emolument and the primacy of creditors' interests is not curbed, we recommend that a monetary fund is set up. This monetary fund could be managed by the Hungarian Treasury, and its resources would spring from the payment of a certain percentage of the wages paid. In the event of the provisional exhaustion of the fund, additional resources could be arranged for by means of the provisional redistribution of the state budget with the prescription of a refund liability.

Of course, this would further put up the price of labour, whereas, since claims with security coverage are essentially guaranteed in the system, what can be expected is either a greater tendency for the provision of loans on the part of banks or the decrease of credit interest rates. In this later case, the extra costs that burden the employer would return.

4. According to our effective law, the liquidator shall be designated *ex officio* by the court. The scope of those to be liquidated shall be determined in a government decree. The government shall invite tenders for entering the liquidators on the rolls. The government decree on liquidators does not require special amendments. The method however, by which the liquidators or the trustees in bankruptcy are appointed should be definitely changed in the future. The courts shall have to consider only one circumstance when appointing the liquidators, namely, that the liquidator to be appointed is included in the list of those registered to proceed as such. At the moment this list encompasses 120 or 130 liquidators.

According to IM–Directive no. 123/1983 on the rules of judicial procedure, the appointment of the liquidator (assets supervisor) shall be administered by a computer program in the event of the adjudication of liquidation (bankruptcy proceedings). The computer program shall offer a list of liquidators registered and operating in the competency area of the court for appointment with special respect to the order of importance as specified in the liquidation registry and the work pressure on the respective liquidator.

The directive on the rules of judicial procedure raises several problems concerning the appointment of the liquidators, since the referred code of practice pertains to the liquidator registered in the competency area of the court, which as a legal term is not positive or distinct under any circumstances. According to the referred government decree, any liquidator included in the supplement may be appointed by any court in Hungary, therefore, such a nomenclature as liquidators registered in specific areas of competence does not prevail in any statute. Such statutory authorisation does not exist.

In practice, what happens is that the courts in charge of liquidation shall register 10 or 30 companies arbitrarily out of more than 100 liquidators in the competency area of the court and further liquidators shall not be concerned in the course of the proceedings. A number of methods are available for the appointment of liquidators at courts. One of these is the so-called automatism, which in practice means that the liquidators shall be appointed in a specific order but in a contingent manner. In this case, the experience and the expertise of the liquidator shall not be taken into consideration. As a consequence of such automatic appointment, the factors of expert knowledge, the work pressure and

the potential special professional skills of the liquidators shall be disregarded, since the computer system appoints the liquidators on a schematic and linear basis. In this framework, we can't assume that the court or the liquidating judge, after due consideration of all circumstances of a specific case, shall appoint the liquidator with the greatest expertise and professional skills.

Another option is that the court, considering all circumstances of the case, including the particular circumstances of the business association and the preparedness of the liquidator, endeavours to appoint the most adequate liquidator in the given case. Unfortunately, this system also has its disadvantages, so far as we tend to encounter the ungrounded charges that the courts give preference to certain liquidators in the liquidation proceedings.

Therefore, on the appointment of the liquidator (trustee in bankruptcy), even the appearance that the court in the course of the appointment procedure would favour certain liquidators (trustees in bankruptcy) should be avoided, hence, in the future, instead of the application of the automatic system or the systematic appointment by the court, a new and adequate system should be developed in all respects.

In practice, the option that the debtor requests the appointment of a specific liquidator (trustee in bankruptcy) that it deems as favourable has also occurred. This fact, however, does not seem a proper solution, since in some cases the debtor is interested in the withdrawal of further stakes from the residue of the assets. So far as the debtor recommends and decides on the entity of the trustee in bankruptcy, we might face the threat that the debtor and the trustee in bankruptcy appear to collaborate in the procedure.

In our viewpoint, the following pattern of the appointment of the trustee in bankruptcy would be the most adequate and objective solution.

With respect to the confidentiality of the matter, either the creditor or the creditors' board should be put in charge of the appointment of the trustee in bankruptcy, implying that the trustee in bankruptcy would be appointed by the creditor or the creditors' board and the only agency of the court in its ruling that affirms the case of insolvency would be to appoint the entities of the trustees in bankruptcy as designated by the creditor or the board.

We also mention as a viable option that the creditor or the board could make a recommendation for the entity of the trustee in bankruptcy with the consent or the approval of the National Association of Liquidators.

So far as this construction seems reasonable, the potential ways of the implementation of the recall of the liquidator in the course of the procedure also need to be considered. According to the present regulation, the liquidator cannot be recalled unless the procedure has finished.

In case the legislator's intention in the course of the potential amendment of the statute is to allow for a broader scope for the creditors' board, a decision needs to be reached whether to facilitate for the creditors or the creditors' board to recall the liquidator under definite and strict conditions, in case the reasons as specified in the act obtain.

5. In our viewpoint the most neuralgic points or terms of the present liquidation proceedings are the following: the determination of the insolvency of the debtor by the court, the appointment of the liquidator and subsequently, the appeal for a review of the ruling of the court by the debtor. The sweeping majority of appeals for review, according to some surveys a rate of up to 90 p.c., are formal. By filing such an appeal, the debtor's intention is to gain time and within this time, with special respect to the exceptions, the debtor will make an attempt to withdraw the remaining assets of the association. Such procedures seriously violate the creditors' interests and the jurisdiction is unable to handle this problem according to the present practice.

The analysis of cases appealed so demonstrates that on an average it takes one or one and a half years for the Supreme Court to reach a firm decision, which, in practice means that a crucial majority, i.e., 90 per cent of the appealed rulings shall be affirmed. Whereas, in that term of one or one and a half years or in an even longer period the unscrupulous proprietors or the officials of the debtor's association may incur grave damages to the creditors, who stand by helplessly.

As we see it the emergence of this adverse situation may be prevented by the introduction of a single new institution of law, i.e., the designation of a provisional guardian *ad litem ex officio* by the court immediately after liquidation proceedings have commenced.

The task of the provisional guardian *ad litem*, without aiming at completeness in its agency, would be the protection of the creditors' interests and monitoring the economic activities of the debtor until the court appoints the ultimate trustee in bankruptcy on the basis of the creditors' request. The task of the provisional guardian *ad litem* would be to survey the debtor's assets, which implies an overall inspection of the debtor's financial situation, including the inspection of bookkeeping and of the cashier's book, as well as of the securities and the goods stock, contracts and bank accounts. The provisional guardian *ad litem* could request information from the leading officials of the business association, about which the creditors and the creditors' board shall be continuously provided information.

In our assumption, it is reasonable that the provisional guardian *ad litem* affirms the pecuniary covenants of the debtor that emerge after the commencement of the bankruptcy proceedings.

The debtor would actually not suffer damages by reason of the appointment of the provisional guardian *ad litem* and consequently, would not be more disadvantaged. So far as the bankruptcy proceedings are instituted by the debtor or the Court of Registration, the limitation of the rights of the debtor as outlined above would obviously not be hindered. So far as it is the creditor that initiates the bankruptcy proceedings, the theoretical possibility arises that it is exactly the market rival, which initiates the proceedings against the debtor so as to incur an awkward market situation, since the provisional guardian *ad litem* necessarily impedes the operation of been determined as insolvent, the creditor, who initiated the bankruptcy the debtor. In that case, our recommendation is that if the bankruptcy proceedings were not instituted by the court, since the debtor has not proceedings, shall be obligated to indemnify the debtor. The provisional guardian *ad litem* would by all means proceed with its activity until the appointment of the ultimate trustee in bankruptcy, and thereby, the unjustified marking time and the appeals that are designated to play for time would be eliminated.

6. The present regulation of the activity of the creditors' board can't secure that the objective the legislator intends to attain is accomplished. In the majority of cases, the creditors' boards are not operative or they are not established, while in other cases the established boards are designated to implement merely formal tasks. According to our standpoint, the establishment of the boards in the future should be mandatory under the new regulation. So far as the number of creditors does not reach the minimum limit of three, each creditor shall automatically become a member of the creditors' board. In our view, the trustee in bankruptcy should be appointed by the creditors' board or the creditors under specific conditions, but the dismissal of the trustee in bankruptcy should also be permissible. The role of the creditors' board in the procedure should be definitely reinforced. Hence, the introduction of the Anglo-axon practice would be reasonable, according to which, it is the creditors' board that assigns the task of the sale of the assets to the creditors. In that case, the role of the trustee in bankruptcy would be restricted to an assessment, adequate sequencing and categorisation of the creditors' claims. So far as the reorganisation of the debtor is deemed necessary, the trustee in bankruptcy shall ensure that the tasks the reorganisation entails are fully complied with and the collection of outstanding debts is accomplished. All functions however, related to the sale of assets would be transferred to the powers of the creditors or the creditors' board. Of course, it is not impeded legally that the creditors' board instructs the liquidator or any other party to sell the assets. Our proposed solution, in our conviction, would facilitate that the procedures related to the

sale of the assets become more simple, expeditious and efficient. Thereby, the rumours and assumptions implying that liquidators tend to spin out the procedures or obtain undesirable financial advantage would be refutable. Hence the inadequate practice, which the liquidators resort to almost without exception could also be ended, namely, that the majority of liquidators systematically makes use of the debtor's physical assets, primarily, the vehicles under liquidation without financial compensation, and thereby, causes considerable damage to the creditors. By the regulation, the creditors or the creditors' board should be granted substantially more entitlements in the course of the entire procedure, while the liquidator (or the trustee in bankruptcy) would be perpetually obligated to report to the creditors on the specific stages of the bankruptcy proceedings according to a certain scheme.

7. In our present practice, several problems arise from the fact that the debtor's assets prove to be so insufficient after the commencement of the liquidation proceedings that they shall not even cover the costs of the procedure. This means, that thereby we impose not only superfluous workload on the courts, but also incur groundless or non–or slowly remunerative, basically unnecessary costs for the liquidators. Therefore, we propose that the well-known solution as pursuant to Act XLIX of 1991 on Bankruptcy Proceedings, Liquidation Proceedings and Voluntary Dissolution is employed, which, in the light of contemporary practice, has proved suitable, namely, that the insufficiency or deficiency of assets should be determined as an impeding factor of the commencement of the procedure. In that case, we would save the actors from doing ... a lot of superfluous work, whereas, the possibility, that the debtor withdraws the assets in the last minute, can be impeded by the establishment of the institution of the provisional guardian *ad litem*.

8. As it is known, the definition of pledge as specified under Article 266 of the Civil Code was re-codified under Act CXXXVII of 2000, which introduced a new concept of pledge on real property. The core of that legal institution is defined as follows: "The creation of a pledge on real property is permissible on the entire assets or part of the assets (operated as a self-contained economic unit without the determination of its constituents, rights and liabilities, i.e., real property) of a legal entity or a business association without a legal entity via a pledge contract, which shall be documented in front of a notary public and this pledge shall be recorded in the pledge property register. The pledge on real property, after the conclusion of the pledge contract, shall pertain to the real property that shall be included in the obligee's assets when the obligee obtains the concerning right of disposal, however, shall be terminated when the real property is removed from the obligee's assets."

In the event of the introduction of a separate indemnification law, it is logical that the creditor who holds a pledge on real property stands basically alone, since it shall seize hold of the assets obtainable until the claim is satisfied. So far as the bankruptcy proceedings are commenced by one creditor, the procedural rules modelled primarily on several creditors would lose their relevance. Therefore, we propose that in such a case no bankruptcy proceedings are instituted, but only and exclusively a reorganisation procedure according to the decision of the creditor. Whereas, the creditor can be expected to take additional care to monitor the activity of the debtor, which can possibly entail a financial benefit consisting in the accomplishment of the financial reorganisation and consolidation of the company. In that case, of course, the facilitation of the creditor's actual influence on the debtor's usual economic activities must be reinforced, possibly in other cases of reorganisation, too.

In that case, the ranking of the creditor in the indemnification sequence also has to be addressed. If the obligee of the lien on real property is preceded by one or several creditors in the sequence, they can't be disadvantaged, so the obligee of the pledge on real property shall be obligated to ensure that the indemnification of the creditors preceding in the sequence is accomplished. This is implemented by redemption from the assets of the debtor in the reorganisation procedure, but we think that it is also doctrinally feasible that the obligee of the pledge on real property reaches an agreement with the creditors preceding in the sequence via the instruments of civil law.

9. As already mentioned under the point above, bying to our view, granting more management entitlements in the reorganisation procedure to the creditor would be expedient. In this respect, we may choose between two conceptual options, i.e., on the one hand, the contemporary system, which works based on the joint management by the debtor and the asset supervisor, on the other hand, the creditors become entitled to appoint the reorganisation-trustee, who shall be responsible for the implementation or effecting the implementation of the reorganisation.

10. The provisions of Act IV of 1997 on Business Associations have principally transgressed the institution of limited liability with respect to bankruptcy cases. Whereas, in case of associations with legal entities, it was not only the factor of inflation that evoked the determination of higher nominal capital and authorised capital, but also the more powerful enforcement of the protection of creditors. On that basis, as far as bankruptcy proceedings are concerned, in our view, when the nominal capital or the authorised capital are not actually available and the company shall not initiate proceedings against itself, its limited liability should be terminated.

11. With respect to full settlement, it can be definitely asserted that at the moment the proceedings are unnecessarily complicated, so that the proprietors of an association with minor capital shall be advised to reconsider their concerning decision. Contrary to the established legal regulation and Hungarian jurisdiction, we can state that on the one hand, full settlement in the European Union member states does not fall under the competence of bankruptcy law, which is doctrinally justifiable, on the other hand, it is essentially covered under financial and company law and shall be handled accordingly without a special procedure. As for our view, the adoption of that practice is by all means reasonable. Therefore, in our draft the regulations of substantive law concerning the decision on full settlement would be sustained, whereas both the practice of the appointment of the trustee in full settlement and the mandatorily prescribed order of procedures would be terminated. Accordingly, the decision on full settlement shall be announced to the Registry Court by the management, which shall request its publication in the Company Gazette. Subsequently, the daily balance sheet and the recommendation for the division of assets shall be prepared within the term as defined by the proprietors without any formal procedures, which shall be filed to the Registry Court by the management in line with a request for the liquidation of the company. As a result, the entitlements for full settlement would be terminated, which are subject to our effective law. This standpoint is tenable since full settlement is a sovereign proprietor's decision in itself, which does not concern the public. On that basis however it can be concluded that an intervention into normal liability relations with the instruments of law cannot be substantiated. To shed light on the issue from another viewpoint, that implies that full settlement in the future can only and exclusively be realised if, on the one hand, the case of insolvency or its threat does not obtain, or on the other hand, the company can settle all its liabilities deriving from contract law with the instruments of civil law.

Of course, it cannot be excluded either, that such a claim arises, which the company managers have not been aware of in spite of their greatest care. These extreme cases also have to be taken into consideration. Therefore, in our recommendation, the proprietors of the company cancelled under the legal title of full settlement shall bear one year's liability for such claims, which have an effect on the distributed assets for one year after cancellation. This, however, is a forfeiting deadline. In an opposite case, the principle of the security of circulation would be damaged.

V. The structure of the law

The objectives that the legislator sets have to be framed in the introduction of all significant codes, i.e., in the preamble. In this respect, we propose the extension of the preamble with a definition of the basic principles to be followed in both procedures, according to their substance, content and objectives, with reference to the fact what attitude the parties are obligated to demonstrate in the course of the procedures. The relevance of this extended preamble would be that both procedures allow for grave financial abuse and even the strictest legal regulations cannot offer protection against these. Therefore, it is uncertain if the general notions of the Civil Code are satisfactory in terms of the notion of liability, since it is obvious that in these cases the parties have to comply with the norm of increased care.

1. The definition of the concept and norms of substantive law

Similarly to our effective law, the new act initially provides *a definition of the concept* or *basically, the norms of substantive law.*

a) The effect of the act

With respect to the effect, a recurrent pragmatic problem is that, on the one hand, bankruptcy law uses the *terminus technicus* of economic organisations, on the other hand, it separately enumerates the entities that qualify as economic organisations. This, in case of all formations that the lawmaker intends to include under the effect of the law, entails that a direct amendment of the act is necessary. With respect to the circumstance that it already crystallised in the course of the codification of the Civil Code that the term of economic organisation was deemed to be exiled from Hungarian law, we propose that this notion was revoked under the act of insolvency. As a consequence of which, since bankruptcy law regulates business activities, we could apply the definition below: the effect of the law pertains to *legal and non-legal entities engaged in business activities.* One can highlight, this notional definition seems to be adequate to include all those associations under the effect of the law, which are engaged in business activities only as a supplementary activity. Primarily societies and foundations need to be mentioned. The administration of the bankruptcy situation of these associations poses a recurrent problem for Hungarian lawmaking, however, the acceptance of our draft could solve this problem. Of course, adequate amendments shall be necessary in the relevant statutes, and a responsibility regulation has to be integrated in the Civil Code, which prescribes

the full and unlimited liability of those legal entities that have been in the position to make decisions in those foundations and societies, in which as a consequence of its business activity, a bankruptcy situation occurred. The term of "business activity" has to be rendered an economic content as an auxiliary rule.

b) Debtor

The debtor as a term with all its legal implications is applicable in the bankruptcy proceedings or the reorganisation procedure. Therefore, the uphold of the contemporary effective regulation also seems adequate, according to which the debtor is the entity that was not able to, or presumably will not be able to settle its debt (debts) on the due date.

c) Creditor

The creditor is the party, who has money or property claims expressed in monetary terms against the debtor and has been registered so by the liquidator in the bankruptcy proceedings.

The creditor, who has security protected with *ius in rem* against the debtor, is entitled to separate indemnification.

d) Assets

All property that the debtor's proprietary rights obtain for as pursuant to the Civil Code. Both the right of lease, which is effective for more than ten years or an indefinite term and the usage rights attached to a particular item of property are applicable under the definition.

e) The Bankrupt's estate

The bankrupt's estate is that part of the debtor's assets, which is not burdened with securities protected with *ius in rem*.

2. Bankruptcy proceedings

a) The commencement of the proceedings

In accordance with our effective law, the proceedings can be commenced upon the initiation of the debtors or the creditors. The difference however, consists in when and on what conditions this is conceivable.

We recommend that the debtor is obliged to commence the proceedings if it is a legal entity, and if, on an average of the previous financial year, the nominal or the authorised capital was not at the debtor's disposal, or if the debtor's public liabilities approximate the amount of the debtor's capital. In

that case the basis of reference versus the APEH (Hungarian Financial and Tax Administration Authorities) would be the balance of the annual current account including those "hiding" nominal liabilities not shown on the current account balance of the APEH (Hungarian Financial and Tax Administration Authorities). Furthermore, those cases can be also applied, when the given firm has not settled the payment of the due general sales tax or the personal income tax. The non-payment of the personal income tax by the debtor's association could also be considered as a case subject to criminal law, since under private law, the amount of the personal income tax is a legal due of the employee, i.e., a third party, and its non–payment on the part of the company can be considered as fraud.

The debtor can apply the commencement of the bankruptcy proceedings in a case when, according to its discretion, it shall presumably not be able to meet its foreseen liabilities. The creditor is entitled to commence the proceedings, if the due claim expired and the conditions of the debtor's insolvency obtain and the amount of the claim reaches ... HUF.

b) Insolvency

Classical bankruptcy law in this respect provides significant scope for judicial discretion, since the initial supposition was that such economic-tructural problems underline the fact of pecuniary non-ayment, which cannot be remedied. At the same time, it was publicly known that bankruptcy proceedings implied a basically drastic intervention into economy and it was a long and expensive process, therefore, its avoidance was by all means expedient and reasonable. It would be very easy to assume that a return to this principle would be favourable and the judges should be granted discretionary powers. This, however, by reason of the current workload on the courts, would obviously not be an advantageous decision. Whereas, the three currently regulated cases in bankruptcy law seem to adequately and relatively normatively secure the reassuring solution of the case, as this is justified by practice. Therefore, we recommend the uphold of the a)–b)–v) framework of conditions as pursuant to Para. 2 of Article 27 of Act XLIX of 1991 on Bankruptcy Proceedings, Liquidation Proceedings and Voluntary Dissolution with the relevant amendment of terminology that the debtor did not comply with the agreement as framed in the reorganisation procedure.

c) The proceedings of the provisional guardian ad litem

The immediate appointment allows that the provisional guardian *ad litem* offers a general insight into the financial situation of the debtor before its office

expires. In this respect, it shall make a declaration if the transactions within a year preceding the commencement of the proceedings can be challenged and in the event of their challenge what rate of return can be expected. So far as the provisional guardian *ad litem* is capable of implementing this activity efficiently, upon the appointment the ultimate liquidator, the proceedings can enter into a more active phase, since the ultimate trustee in bankruptcy shall start the activity in possession of such preliminary information, the determination of which has to be devoted more time.

d) The activity of the liquidator (trustee in bankruptcy)

In compliance with classical law and contemporary international legal practice, the trustee in bankruptcy receives direct entitlement to manage and dispose of the bankrupt's estate or the creditor is entitled to separate indemnification. On the one hand, the trustee in bankruptcy controls the actual property that was sold, therefore, shall be entitled to challenge and stop the process.

One neuralgic point of our present act is that neither the creditors, nor the proprietors of the debtor's association are supplied with continuous information on the present status of the liquidation, since the liquidator is obligated to do this on request. We think that in the future a system of the provision of constant information should be established as a consequence of which both the creditors and the creditors' board, and the proprietors can receive meritorious information on the actual financial situation. Therefore, the prescription of a 15-day-deadline is expedient.

The registration of the creditors' claims would follow the present system so far as the liability of the creditors to pay registration fees would be sustained. Although this solution can be strongly debated doctrinally, we still propose its sustenance, since there are no other liquid resources available, from which the activity of the liquidator could be remunerated. Whereas, it is a basic market principle that any economic activity is due its equivalent.

This is the period, when it is actually decided whether the liquidation proceedings continue or do not, since the ultimate liquidator has been appointed, the financial situation has been clarified, the scope of the creditors securing substantive additional obligation has been shaped. Disregarding the activity of the liquidator, we propose that the act stipulates that the creditors' board shall be summoned within 30 days of the commencement of the bankruptcy proceedings, which later will have a major role.

According to one view, the creditors' board should include the creditors with the three most outstanding claims, while in another view this circle should also involve the representative of the financial institution that keeps the account

of the debtor. The creditors' board, after it has been set up on a mandatory basis, would supervise the activity of the liquidator. The liquidator would be obliged to provide information to the creditors' board on the continuation or cessation of sub-ransactions and on the actual sale of assets, and would be permitted to administer any asset flow, which equals or exceeds 10 per cent of the bankrupt's estate, exclusively if the consent of the creditors' board has been guaranteed. Of course, the scope of the competence of the creditors' board also encompasses the supervision of the economic activity of those creditors entitled to separate indemnification.

So far as the creditors' board is unsatisfied with the activity of the liquidator, the creditors would be entitled to replace him, but the normative conditions for that measure shall have to be set forth. This implies that it has to be outlined in what cases and after what warning the board shall be entitled to resort to this measure. The replaced liquidator would be entitled to the equivalent of its activity, except when the creditors' board can prove that the liquidator did not proceed according to the requirement of increased care and breached that. After the closure of its economic procedures, the liquidator shall prepare a general balance sheet and a recommendation for the division of assets. Until that time the creditors' board can initiate the conclusion of the bankruptcy agreement with the purpose that the completion of the bankruptcy proceedings, that is, the actual liquidation of the debtor can be avoided. As for the present situation, at that point the creditors' board on behalf of the creditors is entitled to negotiate with the debtor's representative. In that case however, it is advisable, whereas this is contrary to the present practice, to consult the experts of the liquidator, since that is the legal entity that managed the debtor's association up to that date.

A classical task of the bankrupt's trustee is the classification of the creditors of the estate. In our framework, the method of classification would undergo significant changes, therefore, it deserves explanation in a separate sub-section. So far as the court accepts the general balance sheet or the recommendation for the division of assets, the liquidator (trustee in bankruptcy) shall be absolved from responsibility, and it shall provide for its due payment.

e) Indemnification sequence

In our framework, the indemnification sequence would undergo basic changes, since secured creditors' claims have been transferred to a different branch of indemnification, therefore, they do not burden the estate any longer. With respect to this factor, and on the grounds of the sustenance of basic principles of bankruptcy law, i.e., no creditors shall receive indemnification unless full satis-

faction of the creditors ranked as preceding in the sequence have been fully indemnified, our proposed indemnification sequence can be outlined as follows:

1. Cost: this category includes all costs of the judicial procedure and the overall fees of the liquidator,

2. Mass liabilities: a continuous and well-established institution of bankruptcy law. All payments, practically without a legal title, are covered by this term, which have arisen on the grounds of the provision of the trustee of bankruptcy, in which the mass was involved either in the position of the obligee or of the obligor. Since it is easy to understand that in a given case the suppliers are exclusively willing to make external tools, which are necessary for the completion of semi-manufactures, available on condition that they are paid the equivalent and do not become the bankrupt's creditors. As a result of this category, these payments shall be made in the course of the proceeding, therefore, these payments shall already be settled in the moment of the judicial proceedings.

3. Claims made upon the warranty or guarantee: according to contemporary notions these are claims, which arise from the non-economic activities of the individual person. Classically, we distinguish between two categories, which are obviously applicable with respect to debtors engaged in such activities, whereas, the classification of the obligees into the creditors' first group seems expedient by reason of the relevance of the interest to be protected. In this case, which special regard to the type of payments, the liquidator shall determine a separate amount, which shall presumably cover these liabilities until the expiration of warranty. So far as the separated fund is not exhausted, the indemnification basis of other creditors shall be extended.

4. A share of public liabilities calculated with capital—and transaction interest: as it is known, in terms of public liabilities, several types of fines or interest surcharges may be charged. It however is not unusual that the obligors because of the contingent discrepancies of data—flow only subsequently receive the concerning information. It would be contrary to the objective of the bankruptcy proceedings that other creditors bear the costs of the extraordinarily great interest surcharges and fines that have to be paid on certain outstandingly enormous public liabilities, which sometimes exceed the total of the capital claim itself. Therefore, the mere calculation of the normal transaction interest seems logical in the event of indemnification of the creditor on a privileged ranking.

5. The capital claim calculated with normal transaction interest of the creditors qualifying as small or micro-ventures: The subsidising of small and micro-ventures is an objective of economic policy, which is relevantly

manifested as pursuant to Act XCV of 1999 on small and medium-size enterprises and on the subsidy of their development adopted in this scope. This act provides a brilliant notional definition of small and micro-ventures, according to which a venture, in which the total of employees does not reach 50 and the annual net revenue does not exceed HUF 700 million, or the balance-sheet total does not exceed HUF 500 million and the stake held by the state and the self-government jointly or separately does not exceed a rate of 25% in the proprietors' group, shall qualify as a small venture. A micro-venture is a venture, which employs less than 10 employees and the annual net revenue or the balance sheet total does not reach the upper limit as specified for small ventures.

6. Other capital claims.
7. Interest fines and bonuses.

Obviously, the overall calculation of the transaction interest may be accomplished before the proceedings are commenced.

f) The court, after the acceptance of the general balance sheet and a recommendation for the division of the assets, as we already noted, shall recall the liquidator and transfer the power to manage the existing assets to the creditors' board. Subsequently, the creditors' board shall be entitled to sell the assets on the market and since it is basically and definitely interested in obtaining the highest possible price for the assets, the present complicated regulation of the sale of the assets is deemed necessary.

g) The regulation of the bankruptcy proceedings as outlined above entails the overall reconsideration of the charge of liquidation and liquidation costs. With respect to the fact that it is not the liquidator that shall sell the assets at the closure of the proceedings, the basis for the calculation of the charge won't equal the amount of the sold assets. We think, however, that the level of the consultation market price as developed recently adequately facilitates the determination of the real price by the court, in the course of which it shall take the opinion of the creditors' board into consideration. The principle of the formation of the charge as well as the itemised enumeration of the type of costs that can be utilised by the liquidator needs to be established in a decree issued by the Ministry of Finance, since in that case the legislator could take into consideration the price changes in Hungary more effectively than today. Of course, as a basic principle we have to assert that the activity of liquidation is a business venture like any other venture, therefore, a decent profit needs to be secured for that specific activity.

3. The reorganisation procedure

The commencement of the procedure may be requested without limitation by the debtor or the creditor, who holds a pledge on real property on the debtor's assets under Article 266 of the Civil Code and any other creditor, the worth of whose assets secured under right *in rem* equals half of the property the debtor disposes of.

The procedure shall be commenced by registration at the court. The court may only investigate the personal particulars, and if the procedure is instituted by the creditor, it may examine the legitimacy of the claim, and consequently, provide for the commencement of the reorganisation procedure in its ruling. This also entails that the debtor shall be entitled to three months' moratorium on payment, in the course of which the claims put forward shall bear normal "transaction" rates without late payment surcharges and fines. If the procedure was instituted by the debtor, it shall be obligated to recommend a binding reorganisation program within two months of the institution of the proceedings, to which it should request the consent of the creditor in the course of the conciliation. As an alternative to securing a valid approval, reverting to the solution effective between the period of 1991–1993 is conceivable, when the consent of all the creditors present was necessary for the adoption of the reorganisation scheme, or the solution of a legal settlement technique, which has been basically non-operative since 1993, could also be followed.

So far as the creditors initiated the bankruptcy proceedings, it is subject to their decision whether they appoint a reorganisation-trustee with full competence to manage the debtor's association.

In case an agreement is concluded, the debtor shall be obligated to proceed in full compliance with the reorganisation agreement and any essential deviation from the scheme (what qualifies as essential deviation shall be determined in the agreement) would entail the entitlement to an automatic commencement of the bankruptcy proceedings. Therefore, the debtor is sufficiently encouraged to implement the scheme developed or approved of jointly with the creditors. The accomplishment of the scheme can take a maximum period of 3 years and after the expiration of the period, the court must stay the procedure or proceed with it in the scope of bankruptcy proceedings.

So far as no agreement is reached and otherwise the conditions of insolvency obtain, the reorganisation procedure should be remitted to bankruptcy proceedings, which is not necessary in every case, since the commencement of the reorganisation procedure, according to special literature in economics, is advisable in case insolvency is merely a remote threat. Therefore, it may well be likely that the debtor is still solvent in the moment of an unfruitful agreement.

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The Legality of Unilateral Humanitarian Intervention Re-examined

Abstract. This article aims to reconsider the controversial issue of the lawfulness of unauthorised humanitarian intervention. After providing a definition of humanitarian intervention and outlining its legality under contemporary international law, it examines the most common arguments raised in the literature for the purpose of justifying unilateral humanitarian intervention. The analysis covers such topics as the powers of the UN General Assembly to pass resolutions on the use of force, the theories on implicit or *ex post facto* authorisations by the Security Council, the text of the UN Charter, customary international law, as well as an alleged conflict of peremptory norms of international law.

Keywords: humanitarian intervention, UN Charter, unilateral use of force

I.

The prohibition of the use of force has been a fundamental principle of international law since the end of the Second World War. The principle forbids the use or threat of armed force with peremptory character for all subjects of international law. To the prohibition framed under Article 2, paragraph 4, of the Charter of the United Nations (UN)[1]—which exists with a similar content in customary law[2]—only two exceptions prevail.[3] Therefore, the use of force in

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[1] Article 2, paragraph 4, of the UN Charter: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[2] Cf., Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement of 27 June 1986, I.C.J. Reports 1986, para. 188, at 99.

[3] A former third exception, the "enemy state" clause under Article 107 of the Charter has since become entirely and perpetually inapplicable.

our age is lawful exclusively in two cases: if the UN Security Council gives a prior and express authorisation under Chapter VII thereto, or if it is employed in exercise of the inherent right to individual or collective self-defence.[4] Evidently, the emergence of the prohibition of the use of force resulted in decisive changes in the direct legal environment of humanitarian intervention, one of the most ancient institutions of international law, as well. Owing to a lack of positive legal sources in this field, it is extremely difficult to define this phenomenon of international relations, and its description can hardly claim general recognition. In my view, the definition of humanitarian intervention valid under contemporary international law can be summarised—on the basis of the relevant literature—within the framework of the following set of criteria:

The subject of humanitarian intervention is one or more "willing" state or international organisation. Other actors—for example, non-governmental organisations—cannot carry out such actions. The intervener acts in a relatively disinterested and unbiased manner. The target of intervention can only be a state, which does not request or consent to the intervention. The beneficiaries of the action are, from the viewpoint of the intervener, foreigners, as they are always nationals of the target state. The ground for intervention is a grave and widespread violation of the most fundamental, first generation human rights of non-political character, or guarantees of international humanitarian law applicable to non-international armed conflicts. Unfortunately, a fairly large number of victims of atrocities or of imperilled persons are also indispensable for the credibility of humanitarian intervention. The target state might be guilty of such violations either as a result of an active or a passive behaviour, but it may also come about that the intervention is necessitated by a state of anarchy developing in the wake of the collapse of state power. Furthermore, humanitarian intervention is of an *ultima ratio* nature, restricted in its goals, and proportional to the violations constituting its ground both with regard to its means and its duration. The relevant norms of international humanitarian law—that is, the norms relative to armed conflicts of an international character—have to be rigorously observed during the action. Last, but not least, the internal right to self-determination of the people of the target state has to be respected in the course of intervention, which—in my opinion—does not automatically rule out the possibility of an overthrow of the oppressive regime.

It can be observed that the definition as outlined above does not contain the legality of the initiation of humanitarian intervention. I think that the legality of commencement cannot constitute a conceptual element, since both the renowned representatives of the science of international law and states consider—besides

[4] See, Articles 42 and 51 of the UN Charter.

the lawful instances—several conducts of rather questionable legality or of manifest unlawfulness as humanitarian interventions. In other words, an unlawfully launched armed action may also be humanitarian in nature, provided that the essential, conjunctive conditions required for such qualification exist. It might be misleading that—even though the legality of commencement, and therefore the overall lawfulness of the intervention is not an element of the concept—some of the criteria mentioned in connection with the definition of humanitarian intervention valid in the present era of international law bear a legal character and presuppose a law-abiding behaviour. Such elements are, for example, the obligation to respect norms of humanitarian law governing international armed conflicts or the internal right to self-determination of the people of the target state. The existence of these legal conceptual elements, however, does not legalise an unlawfully instigated humanitarian intervention. These are merely preconditions for the qualification of an action as humanitarian, and as such, are eligible to establish maximum its legitimacy. As the quality of humanitarian intervention is *per se* not a legal title, a self-contained analysis of its legality, which, however, does not concern the exact content of this category, appears to be sufficiently justified.

In line with the explanation above, it is obvious that a humanitarian intervention is lawful, if it is commenced in possession of a prior and express authorisation by the Security Council.[5] The pattern of adoption of these authorisations is basically the same as the general scheme of adoption of other resolutions authorising the use of force, albeit the process carries a few special features at some points. The most important among these is probably that an authorisation to humanitarian intervention—owing to the nature of the ground of the action—is imaginable solely in case of a threat to international peace and security, the existence of which has to be, at least implicitly, by a reference to Chapter VII, determined by the Security Council under Article 39. Since humanitarian intervention is necessitated by events taking place within a state, the two further categories under Article 39—that is, a breach of the peace or acts of aggression—are irrelevant in this regard, in view of the fact that these imply forms of conduct arching over borders of states.[7] States and

[5] On the lawfulness of authorisation, see, Blokker, N.: Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing." *European Journal of International Law*, Vol. 11. No. 3. (September 2000), 541–568.

[7] Since the Charter does not define any of these notions, the Security Council has an extraordinarily broad discretion in the determination of the existence of a threat to the peace, a breach of the peace, or an act of aggression. (Although the definition of aggression

international organisations may likewise be recipients of an authorisation, however they are not obliged to carry it out. Furthermore, the authorisation can assume the form neither of a recommendation, nor of a provisional measure, even though these types of action, along with non-forcible enforcement measures under Article 41, may be able to establish the *ultima ratio* character of humanitarian intervention. Consequently, the direct grounds, on which humanitarian intervention is considered lawful, are Articles 39 and 42 of the Charter. These may be supplemented by a reference to Chapter VIII, in the event of an authorisation to regional arrangements or organisations.

Nonetheless, the Security Council is, by reason of the lack of unanimity of its permanent members, often incapable of taking action for the protection of an oppressed population in a timely and efficient manner. Since humanitarian intervention, which involves the offensive use of force, cannot be classified as self-defence, the chance for lawful action on the part of the states willing to intervene is thereby extinguished. Such states face the alternative of either contemplating the atrocities in inertia or intervening, in knowledge of the fact that, in spite of their noble intentions, they will violate international law. It is therefore not at all surprising that a recurrent question of international law is, whether a so-called unilateral or unauthorised humanitarian intervention can nevertheless be justified, and if so, by what legal arguments. In the following, I shall make an attempt to provide an exhaustive answer to this question.

II.

At first sight, it seems to be possible to derive the legality of unauthorised humanitarian intervention from a recommendation by the General Assembly on the use of force, though it must be noted that this issue, in fact, raises a number of serious legal concerns. Two methods are available for the purpose of justifying that the General Assembly—even if it bypasses the Security Council—can lawfully make a recommendation to states on the use of force, including armed humanitarian intervention. One of these theories is based on

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is available in the form of a General Assembly resolution, its content does not bind the Council.) This may be the reason why, according to some views, humanitarian intervention is admissible in the case of a breach of the peace, as well. See, Hilpold, P.: Sezession und humanitäre Intervention — völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte? *Zeitschrift für Öffentliches Recht*, Band 54. Heft 4. (1999), 591.; Simma, B.—Verdross, A.: *Universelles Völkerrecht. Theorie und Praxis*. Berlin, 1976. 584.

the Charter itself, whereas the other rests upon the procedure envisaged by the controversial "Uniting for Peace" Resolution.

The General Assembly is the most representative principal organ of the UN, given that that all member states of the Organisation are represented in it.[9] Simultaneously, it is also the organ with the largest scope of powers, although its activity is primarily deliberative and critical.[10] The general description of the powers and functions of the General Assembly is set forth in Article 10 of the Charter.[11] As the provision reflects, there is practically no segment of international relations, which the General Assembly is not competent to deal with. It should be added that the powers guaranteed under this article—as a consequence of Article 2, paragraph 6—exist also with respect to non-members. In this regard, the sole substantial limitation is specified under Article 2, paragraph 7, concerning the prohibition of intervention. Therefore, the General Assembly is not competent in issues, "which are essentially within the domestic jurisdiction of any state". As it is known, neither human rights, nor fundamental guarantees of international humanitarian law qualify as matters being within the scope of domestic jurisdiction, thus the attending to these matters does not manifest itself as an intervention by the Organisation. The demonstration of the legality of humanitarian intervention based upon a recommendation by the General Assembly is, therefore, "half-accomplished". However, the verification of the remaining "half" is much more difficult, as it needs to be proven that the General Assembly can lawfully make recommendations on the use of force, despite that the Charter attributes the power regarding such enforcement measures to the Security Council in an apparently exclusionary manner.[12]

Article 10 mentions the scope of the Charter, which incorporates such purposes as the maintenance of international peace and security and the taking of "effective collective measures" to that end, as well as the promotion and encouragement of respect for human rights and fundamental freedoms for all.[13] Furthermore, according to the same article, the General Assembly may

[9] Cf., Article 9, paragraph 1, of the UN Charter.

[10] Cf., Kelsen, H.: The Law of the United Nations. A Critical Analysis of Its Fundamental Problems. London, 1950. 199–200.

[11] Article 10 of the UN Charter: "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

[12] Cf., *ibid.*: Article 24, paragraph 2. (The second sentence of this paragraph *expressis verbis* refers to Chapter VII.)

[13] See, *ibid.*: Article 1, paragraphs 1 and 3.

not only "discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter", but may also make recommendations on any such questions or matters. The provision contains merely one restriction, which is described under Article 12: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."[14]

One may easily conclude from the wording of Article 10, that the General Assembly can indeed make a recommendation on humanitarian intervention directly to the members. (Obviously, a recommendation can also be addressed to the Security Council and in the event of its acceptance, the Council will authorise the use of force in a binding resolution.) Merely on the basis of Article 10, it looks as if the General Assembly has to refrain from the making of such a recommendation, only if the Security Council is simultaneously dealing with the same matter. Moreover, the adoption of a recommendation is permitted as a sub-exception even in this case, provided that the Council requests the General Assembly to proceed accordingly.

At this point, the question pertaining to the interpretation of the phrase "exercising ... the functions assigned to it" as contained by Article 12, paragraph 1, arises, since the duration of this activity indicates the beginning and the end of the prohibition for the General Assembly to make recommendations. In the beginning, the exercise of functions by the Council was deemed equivalent to having a specific matter on the agenda, therefore, it is probably not accidental that the last sentence of each substantive resolution usually reads as follows: "Decides to remain seized of the matter". On the other hand, the view that exercising functions entails "simultaneous, actual, and active consideration" on the part of the Council has gradually gained ground, which, as an interpretation, seems to be justified by the practice of the General Assembly, as well.[15] Consequently, Article 12 contains a provisional procedural limitation that is immediately terminated if the Security Council so requests in a resolution, or convokes a special or an emergency special session of the General Assembly, or ceases or adjourns to deal with the matter.[16]

[14] *Ibid.*, Article 12, paragraph 1.

[15] See, Hailbronner, K.—Klein, E.: Article 12, *in*: *The Charter of the United Nations: A Commentary* (ed.: Simma, B.). Oxford, 1995. 256. Concerning Article 12, paragraph 1, see also, Blum, Y. Z.: *Eroding the United Nations Charter.* Dordrecht–Boston–London, 1993. 103–132.

[16] See, Hailbronner—Klein: Article 12, 259–261.

However, by making a preliminary conclusion from the interpretation of the text of Article 10, we have not found the ultimate answer to the question whether or not the General Assembly can recommend enforcement measures, including the use of force, under the Charter. Even though the answer is *prima facie* in the affirmative, it does not follow that other provisions of the Charter, or other sources of interpretation support it. Our preliminary conclusion seems to be contrary to Article 11, paragraph 2, which specifies the text of Article 10.[17]

The well-known second clause of this paragraph leaves no room for doubt that "action", that is, the taking of enforcement measures,[18] is admissible exclusively by the Security Council; consequently, the General Assembly cannot make such a recommendation. Furthermore, the submission of a dispute or a recommendation to the Council does by no means oblige it to actually take the action deemed necessary by the General Assembly.[19] Nevertheless, Article 11, paragraph 2, is related to Article 10 as the specific to the general. This is indicated by the fact that while Article 10 contains only one limitation (Article 12), Article 11, paragraph 2, specifies not less than three restrictions: the requirement of an adequate request, as a result of which the General Assembly cannot proceed on its own motive under this paragraph; Article 12; and in case action is necessary, the obligation to refer the dispute to the Security Council. But pursuant to Article 11, paragraph 4, "the powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10". This provision can be interpreted in several ways. One of the interpretations implies that the General Assembly is not bound by the limitations under Article 11, so far as it proceeds and makes a recommendation under Article 10.[20] But a contrary interpretation is also acceptable, considering that paragraph 4 refers to

[17] Article 11, paragraph 2, of the UN Charter: "The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided under Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. *Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.*" (Emphasis added.)

[18] See, Kelsen: *op. cit.* 204.

[19] See, Hailbronner, K.—Klein, E.: Article 11, *in* Simma: *The Charter of the United Nations. op. cit.* 250.

[20] See, Kelsen: *op. cit.* 204, 207.

powers defined under Article 11, whereas the obligation to refer the dispute to the Council does not constitute a power, but rather is a procedural norm.[21]

As a further counter-argument, one could mention that the debates in the course of the wording of the Charter likewise reveal that the General Assembly cannot recommend the taking of enforcement measures. This argument corresponds to the position of the International Court of Justice (ICJ) expressed in its famous advisory opinion of July 20, 1962.[22] Nevertheless, according to a remarkable point of view, this advisory opinion does not make it absolutely clear whether or not the General Assembly can make such a recommendation. According to this view, the meaning of the second clause of Article 11, paragraph 2, is determined by the term "enforcement", since the word "action"—as confirmed by the ICJ—refers to enforcement measures. In line with the formal definition of this phrase, "the existence of an 'enforcement action' is not determined by the character of the action itself but by the binding nature of the measure taken". Hence, the clause under deliberation limits the power of the General Assembly to make recommendations exclusively in case, if it considers that a resolution on *mandatory* enforcement measures has to be adopted by the Security Council for the settlement of a situation. Upon these premises one can easily draw the conclusion, supported to some extent by the practice of the General Assembly, that: "Therefore a non-binding recommendation is not to be considered as 'action', so that the GA is not prevented by Art. 11(2) cl. 2 from recommending coercive measures. This norm only recalls the fact that the GA shall not take any enforcement measures binding on all member states."[23] In a certain way, even the ICJ affirmed this position, when it stated that the responsibility conferred upon the Security Council was "primary, not exclusive", thus, the General Assembly was also to be concerned with international peace and security, what is more, its functions and powers were not merely hortatory.[24]

[21] See, Hailbronner—Klein: Article 11, 252.

[22] "The word "action" must mean such action as is solely within the province of the Security Council. [...] The "action" which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely "Action with respect to threats to the peace, breaches of the peace, and acts of aggression." Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, 165.

[23] For the theory and the cited opinion, see, Hailbronner, K.—Klein, E.: Article 10, *in* Simma: *The Charter of the United Nations. op. cit.* 233. For a summary of the relevant practice of the General Assembly, see, *ibid.*, 234.

[24] See, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, 163.

Pursuing this train of thought, one arrives at the conclusion that, even though the Security Council bears primary responsibility in the field of the maintenance of international peace and security, as illustrated by Article 12, nothing in the Charter prohibits the General Assembly to recommend the use of force, including the commencement of a humanitarian intervention, in exercise of its "secondary" or "supplementary" responsibility.[25] (It is worth noting, however, that according to all indications, not even the Council is entitled to make a *recommendation* on the use of force, since the authorisation must assume the form of a binding resolution.[26]) At the same time, it also follows from the relevant provisions of the Charter that recommendations under Article 10 can be made directly to the member states, whereas recommendations under Article 11, paragraph 2, are addressed to the states "concerned", that is, both members and non-members. The General Assembly can make a recommendation to international organisations only indirectly, via states.

The derivation of the legality of humanitarian intervention from the "Uniting for Peace" Resolution is a solution with an equally controversial outcome. According to the central provision of the resolution, the General Assembly:

> "Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations."[27]

[25] On residual powers, see, e.g. Prandler, Á.: *Az ENSZ Biztonsági Tanácsa.* [The UN Security Council] Budapest, 1974. 298–300.

[26] Cf., Frowein, J. A.: Article 42, *in* Simma: *The Charter of the United Nations. op. cit.* 614–615.

[27] Uniting for Peace. G.A. Res. 377A, 302nd plen. mtg., 3 November 1950, U.N. Doc. A/RES/377A (V), para. A. 1. Since the number of the members of the Security Council has been raised to fifteen, at present nine votes are necessary for the convocation of an emergency special session of the General Assembly.

At first sight, the "Uniting for Peace" Resolution seems to be an appropriate ground of the lawfulness of a humanitarian intervention, and it is frequently reflected by the relevant literature.[28] Two factors, however, contradict the unconditional applicability of this resolution. On the one hand, its legality and conformity with the Charter is at least dubious, so its adoption has triggered extremely fierce debates both in practice and in scientific circles. Although the charges brought up against the resolution were to a large extent attributable to the international context of the Cold War, such an extension of the powers of the General Assembly seems somewhat perilous even from a clearly legal point of view. Without providing a detailed presentation of the arguments and counter-arguments raised in the course of these disputes,[29] it can be stated that the "Uniting for Peace" Resolution can be taken into consideration with respect to the justification of humanitarian intervention, only if it qualifies as a lawful instrument. To put it briefly, its legality can only be demonstrated, if one proves that the General Assembly is entitled to recommend the use of force

[28] See, e.g. Abiew, F. K.: *The Evolution of the Doctrine and Practice of Humanitarian Intervention.* The Hague–London–Boston, 1999. 100. (Footnote 106); Advisory Council of International Affairs—Advisory Committee on Issues of Public International Law: *Humanitarian Intervention.* No. 13. The Hague, 2000. 26.; Arias, I.: Humanitarian Intervention: Could the Security Council Kill the United Nations? *Fordham International Law Journal*, Vol. 23. No. 4. (April 2000), 1026.; Independent International Commission on Kosovo: *The Kosovo Report.* New York, 2000. 166, 174.; Nagy, B.: Hadban állunk? [Are We at War?] *Élet és Irodalom*, Vol. XLIII. No. 15. (16 April 1999), 3.; Pellet, A.: Brief Remarks on the Unilateral Use of Force. *European Journal of International Law,* Vol. 11. No. 2. (2000), 390.; Reisman, W. M.: Humanitarian Intervention to Protect the Ibos. (With the collaboration of McDougal, M. S.), in *Humanitarian Intervention and the United Nations* (ed.: Lillich, R. B.). Charlottesville, 1973. 175, 190. For an opposing view, see, Gowlland-Debbas, V.: The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance. *European Journal of International Law*, Vol. 11. No. 2. (2000), 374.; Valki, L.: A koszovói válság és a humanitárius intervenció. [The Kosovo Crisis and Humanitarian Intervention] *Acta Humana*, No. 46–47. (2002), 157–158. For an intermediary view, according to which it is questionable if the unilateralism manifested in the "Uniting for Peace" Resolution is a legitimate substitute for collective measures, see, Dupuy, P.-M.: The Place and Role of Unilateralism in Contemporary International Law. *European Journal of International Law*, Vol. 11. No. 1. (2000), 27.

[29] On this issue, see, Andrassy, J.: Uniting for Peace. American Journal of International Law, Vol. 50. No. 3. (July 1956), 563–582.; Kelsen, H.: Recent Trends in the Law of the United Nations. A Supplement to the "The Law of the United Nations". London, 1951. 953–990.; Prandler: *op. cit.*, 271–276.; Woolsey, L. H.: The "Uniting for Peace" Resolution of the United Nations. American Journal of International Law, Vol. 45. No. 1. (January 1951), 129–137.

even beyond the scope of this resolution, that is, on the basis of the Charter. Otherwise, the document qualifies as an unlawful amendment to the Charter,[30] and its adoption is to be considered an *ultra vires* act. As it follows from the previous part, the Charter allows for both interpretations in the context of such recommendations by the General Assembly, nevertheless, if the permissive interpretation had been absolutely correct, the adoption of the "Uniting for Peace" Resolution probably would not have been necessary. At the same time, one cannot fail to observe that the once so fierce debates have almost entirely diminished, and despite the concerns regarding lawfulness, the resolution has been integrated into the practice of the UN. Although, the instrument had been used to confront an aggression during the Korean War, afterwards it has rather served the purposes of peace-keeping or the convocation of emergency special sessions.[31] Notwithstanding, it can reasonably be assumed that in case the resolution was applied for the justification of the use of force, the debates would flare up again.

The applicability of the "Uniting for Peace" Resolution for the justification of humanitarian intervention is also undermined by the following phrase of the cited provision: "including in the case of a breach of the peace or act of aggression the use of armed force when necessary". A recommendation on the use of force is, consequently, permissible exclusively in the gravest situations, in case of a breach of the peace or acts of aggression, whereas in the event of a threat to the peace, which embraces the violations of human rights or humanitarian law necessitating humanitarian intervention, it is inadmissible.[32] In view of this conclusion, the "Uniting for Peace" Resolution, regardless of the issue of its legality, seems to be entirely inapplicable. One "escape route" is, nevertheless, conceivable: if the emergency special session is convoked at a time, when the Security Council, due to the lack of the unanimity of its permanent members, is not even able to adopt a resolution on the determination of a situation under Article 39. Owing to the fact that the Security Council has exclusive power to determine the existence of a threat to the peace, a breach of the peace, or an act of aggression in an authentic and binding manner, a decision

[30] Cf., Articles 108 and 109 of the UN Charter.

[31] See, Hailbronner—Klein: Article 10, 235–236.; Higgins, R.: *The Development of International Law Through the Political Organs of the United Nations.* London–New York–Toronto, 1963. 227–228.

[32] For a similar position, see, Danish Institute of International Affairs: Humanitarian Intervention: Legal and Political Aspects. Copenhagen, 1999. 61.; Murphy, S. D.: Humanitarian Intervention. The United Nations in an Evolving World Order. Philadelphia, 1996. 300.

of similar effect cannot be adopted by any other principal organ, not even the General Assembly. In absence of a determination under Article 39, it is after all irrelevant how the Council would qualify the given situation, therefore, the General Assembly can recommend the use of force in the event of a violation of human rights or fundamental guarantees of international humanitarian law. However, if the Council has previously qualified the atrocities as a threat to the peace, the "Uniting for Peace" Resolution cannot establish the legality of humanitarian intervention. It has to be emphasised that this "escape route" is presumably contrary to the requirement of *bona fide* exercise of rights; nevertheless, state practice does not completely refrain from solutions of such nature. Still I believe that if the states willing to intervene cannot obtain the indispensable authorisation from the Security Council, they should resort to the "Uniting for Peace" Resolution before they launch the attack. Despite that a recommendation adopted by a two-thirds majority of the members of the General Assembly will not necessarily secure legality, it would guarantee a great deal of legitimacy for the use of force.

III.

As I already mentioned above, the condition of the lawfulness of use of force is a prior and express authorisation by the Security Council under Chapter VII of the Charter. However, at the end of the 20th century, as a *quasi* abstraction of state practice, the idea according to which the authorisation does not have to be prior and express, but it can also appear in an implicit or an *ex post facto* form, gained ever increasing ground in the relevant literature. It is not astonishing that these "two variants" of Council authorisation not contained by the Charter have acquired great significance in connection with the legality of humanitarian intervention, as well.

Implicit authorisation, as the phrase itself indicates, does not assume an express form and is not issued in a separate resolution, but it does not imply total silence on the part of the Security Council either—its existence can be deduced from certain conclusive facts. But which facts attest that such an authorisation has been granted? First of all, one can infer from the text of earlier resolutions adopted with respect to the crisis concerned that this principal organ has implicitly authorised the use of force. An extremely important precondition is that the crisis, as expressly determined by the Council under Article 39, qualifies as a threat to international peace and security. Without such determination, furnishing evidence for an implicit authorisation is an

attempt committed to failure, since the bottom line for the adoption of measures under Chapter VII is the existence of a threat to the peace. Thus, despite the fact that on the basis of the theory of implicit authorisation, the "real" authorisation for the use of force is tacit, the determination under Article 39 has to be explicit.

The determination of a threat to the peace by itself obviously constitutes an insufficient basis for proving that the Security Council has implicitly authorised the use of force. The chance of a successful argumentation is, consequently, greater in case the Council—following the determination—has taken provisional measures or non-forcible enforcement measures, as well. If recourse to Article 41 has been inadequate, one may reasonably assume that the next logical step to be taken by the Council would be the application of Article 42. Sometimes even the Council itself stresses that it will consider "additional measures", if non-forcible actions turn out to be inefficient.[33] There is rational ground to believe that these "additional measures" refer to action pursuant to Article 42, although it cannot be excluded either, that by this phrase the Council speaks of other, more intensive coercive measures under Article 41, which—of course—do not involve the use of force.

It can be seen that the resolutions of the Council leave room for divergent interpretations in this respect. For this reason, it can be useful to support the argument concerning the existence of an implicit authorisation with other sources, such as the statements of leading politicians of great powers, and acts of other organs of the UN, including the statements of the Secretary-General. As such, the demonstration of an implicit authorisation implies the enumeration and systematisation of a complex network of arguments. As a consequence, the argumentation can easily diverge into "arbitrary interpretation" and the construction of far-fetched theories. It needs to be admitted that the theory of implicit authorisation cannot be considered as being particularly persuasive, and accordingly, it receives little theoretical and practical support.[34]

The theory of *ex post facto* authorisation, according to which the authorisation by the Security Council to use force is not secured prior, but rather subsequent to the commencement of the military action, seems to be more

[33] For instance, regarding the Kosovo crisis, see, S.C. Res. 1199, 3930th mtg., 23 September 1998, U.N. Doc. S/RES/1199 (1998), para. 16.

[34] For a rejecting view, see, Chinkin, C. M.: Kosovo: A "Good" or "Bad" War? *American Journal of International Law,* Vol. 93. No. 4. (1999), 842–843.; Gray, C.: After the Ceasefire: Iraq, the Security Council and the Use of Force. *British Yearbook of International Law* (1994), 149.; Independent International Commission on Kosovo, *op. cit.*, 173.

plausible. It must be noted that an alleged *ex post facto* authorisation also takes an implicit form, as if it were express, it would be considered as a "standard" authorisation. (As a result, these two "forms" of authorisation are sometimes treated in the literature as closely correlated,[35] although, in my view, they can be distinguished theoretically on a temporal basis.) An ex post facto authorisation does not imply absolute idleness either; just as in the case of an implicit authorisation, its existence can be derived from conclusive facts or circumstances. Such facts are, for example, the absence of a resolution by the Council condemning the unauthorised use of force,[36] possibly its express acceptance,[37] or the recognition of a situation arising in the wake of the use of force.[38]

The last one might be the most significant argument, as it is endowed with special authority by a fundamental norm of international law, according to which no territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful.[39] Therefore, it cannot be disregarded if the Security Council—the sole organ capable of authentically determining that an act of aggression occurred—in a way recognises a situation created by an unauthorised use of force, that is, a *prima facie* act of aggression as lawful. This is closely related to the following provision of the General Assembly resolution on the Definition of Aggression:

> "The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be

[35] Cf., Simma, B.: NATO, the UN and the Use of Force: Legal Aspects. *European Journal of International Law,* Vol. 10. No. 1. (1999), 10.; Wedgwood, R.: NATO's Campaign in Yugoslavia. *American Journal of International Law,* Vol. 93. No. 4. (October 1999), 832.

[36] See, e.g. Security Council: Belarus, India and the Russian Federation: Draft Resolution, 26 March 1999, U.N. Doc. S/1999/328. The draft resolution condemning the NATO intervention in Kosovo was dismissed by the Security Council by a 12:3 majority.

[37] Concerning Liberia, see, e.g. Note by the President of the Security Council, 22 January 1991, U.N. Doc. S/22133 (1991); Note by the President of the Security Council, 7 May 1992, U.N. Doc. S/23886; S.C. Res. 788, 3138th mtg., 19 November 1992, U.N. Doc. S/RES/788 (1992), preamble.

[38] Concerning Kosovo, see, S.C. Res. 1244, 4011th mtg., 10 June 1999, U.N. Doc. S/RES/1244 (1999).

[39] Cf., Definition of Aggression. G.A. Res. 3314, 2319th plen. mtg., 14 December 1974, U.N. Doc. A/RES/3314 (XXIX), Annex, Article 5(3).

justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."[40]

In other words, the Security Council may qualify a unilateral humanitarian intervention both as an act of aggression and as its opposite. Since the Definition of Aggression does not specify what form this determination should take, one might as well conclude that it could be implicit and *ex post facto*. It should be borne in mind that it is only the determination of the existence of an act of aggression that Article 39 of the Charter binds to the form of a resolution, whereas it does not provide for the determination of the absence thereof. Framing the absence of an act of aggression in a separate resolution is not only an unnecessary, but also a hazardous step. Hazardous, since the adoption of such resolution—in view of the fact that it is a substantive resolution—presupposes the unanimity of the five permanent members. It is easy to predict what would happen, if a permanent member vetoed—or at least nine members of the Council, including the permanent members did not approve of—the draft resolution concerned. Such result could easily be interpreted in a way that the rejection of the draft resolution equals the determination of an act of aggression, although this distorted interpretation would scarcely be in compliance with the content of Article 27, paragraph 3, or with Article 39.

The determination of the absence of an act of aggression by the Council probably implies "constructive" silence, or recognition of the situation thus arisen in a resolution. It does not imply, however, that the unilateral use of force was lawful. The Security Council may also qualify lawful actions as threats to the peace, breaches of the peace, or acts of aggression, therefore, its position does not necessarily reflect—albeit strongly indicates—the unlawfulness of a conduct. Reversing this statement, one arrives at the conclusion that stillness on the part of the Council is not equal to the recognition of the legality of an action.[41] This, to some extent, limits the plausibility of both the implicit and the express forms of *ex post facto* authorisation as means of subsequent acceptance of a unilateral action. This might be one of the reasons why the idea of *ex post facto* authorisation is not widely supported in the science of international law either.[42]

[40] *Ibid.*, Article 2.

[41] Cf., Gray: *op. cit.*, 163.

[42] See, e.g. Charney, J. I.: Anticipatory Humanitarian Intervention in Kosovo. *American Journal of International Law,* Vol. 93. No. 4. (October 1999), 835.; Gray: *op. cit.*, 163.; McWhinney, E.: *The United Nations and a New World Order for a New Millennium. Self-determination, State Succession, and Humanitarian Intervention.* The Hague–London–

IV.

In the literature concerning humanitarian intervention we often encounter the view that the Charter does not forbid, on the contrary, it generally allows for such interventions even in absence of an authorisation by the Security Council. W. Michael Reisman expressly submitted that "the advent of the United Nations neither terminated nor weakened the customary institution of humanitarian intervention", what is more, "the Charter strengthened and extended it".[43]

The derivation of a right of humanitarian intervention from the Charter is primarily based on the restrictive interpretation of Article 2, paragraph 4, according to which this provision does not ban each and every form of the use or threat of force, as opposed to the generally accepted construction implying a comprehensive prohibition.[44] The restrictive interpretation is, on the one hand, supported by the idea that Article 2, paragraph 4, "was never an independent ethical imperative of pacifism" and it gained its cogency "in the context of the Organization envisaged by the Charter and not as a moral postulate",[45] and on the other hand, by the circumstance that this particular section constitutes merely one of the elements of a complex collective security system, so it must be interpreted accordingly. For that reason, both the text of the article and the spirit of the Charter have to be taken into consideration in the course of interpretation.[46]

According to the restrictive interpretation, references to territorial integrity, political independence and the purposes of the United Nations in Article 2, paragraph 4, are not meant to secure the comprehensive nature of the prohibition, but to qualify and define the manifestations of force outlawed under the provision.[47] Namely, these references can barely have a different function, assuming that the concerned parts of the text are not superfluous. Therefore, the three phrases cover three restrictions, as a consequence of which Article 2,

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Boston, 2000. 74.; Ress, G.: Article 53, *in* Simma: *The Charter of the United Nations. op. cit.* 733–734.

[43] Reisman: Humanitarian Intervention to Protect the Ibos. *op. cit.* 171.

[44] See, e.g. Abiew: *op. cit.*, 93–95.; Brenfors, M.—Petersen, M. M.: The Legality of Unilateral Humanitarian Intervention—A Defence. *Nordic Journal of International Law*, Vol. 69. No. 4. (2000), 466–468.; Reisman: Humanitarian Intervention to Protect the Ibos, 177.; Tesón, F. R.: *Humanitarian Intervention: An Inquiry into Law and Morality.* Second Edition. Irvington-On-Hudson, 1997. 149–151.

[45] Reisman, W. M.: Coercion and Self-Determination: Construing Charter Article 2(4). *American Journal of International Law,* Vol. 78. No. 3. (July 1984), 642.

[46] See, *ibid.*, 645.

[47] Cf., Stone, J.: Aggression and World Order. A Critique of United Nations Theories of Aggression. London, 1958. 95.

paragraph 4, qualifies "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" as unlawful, but it does not encompass the forms of force beyond that scope. The argument would sound as follows: since humanitarian intervention is designed to stop grave and massive violations of human rights, it is conceptually excluded that it is directed against the territorial integrity or the political independence of the target state. If an intervention forcefully modifies the borders, or it is obviously directed at the destruction of the prevailing political order, it does not qualify as humanitarian intervention. The exemption of an intervention from the "political independence" clause can also be derived in another way. As human rights issues are no longer within the domestic jurisdictions of states as pursuant to Article 2, paragraph 7, the treatment of individuals by a state does not constitute a segment of "political independence" under Article 2, paragraph 4. Because both provisions are parts of the same whole, that is, the Charter, the modification of one notion obviously affects the other, as well.[48] On that basis, humanitarian intervention does not fall within the effect of the first two qualifying phrases of Article 2, paragraph 4.

A similar conclusion can be reached upon the examination of the third phrase. The commitment to the "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"[49] is mentioned among the purposes of the United Nations spelled out in Article 1 of the Charter. This commitment is also framed under Article 55(c) and Article 56, as well as in the Universal Declaration of Human Rights, especially, if it is construed as an authentic interpretation of the Charter. The British Prime Minister, Mr. Clement Attlee, likewise affirmed the importance of this undertaking while opening the first plenary meeting of the General Assembly on January 10, 1946.[50]

The conclusion, therefore, that humanitarian intervention does not contradict the third phrase of Article 2, paragraph 4, seems believable, although the maintenance of international peace and security and the peaceful adjustment or settlement of international disputes or situations which might lead to a breach

[48] Cf., Reisman, W. M.: Kosovo's Antinomies. *American Journal of International Law,* Vol. 93. No. 4. (October 1999), 861.

[49] See, Article 1, paragraph 3, of the UN Charter.

[50] See, Verbatim Record of the First Plenary Meeting, 10 January 1946, U.N. Doc. A/PV.1, 41. In a similar manner, see, Annan, K. A.: Standing Up for Human Rights. Address to the United Nations Commission on Human Rights, Geneva, 7 April 1999, *in* Annan, K. A.: *The Question of Intervention. Statements by the Secretary-General.* New York, 1999. 19.

of the peace are equally included among the purposes of the Organisation.[51] As a matter of fact, humanitarian interventions explicitly promote the effective implementation of the purpose concerned, because they may prevent future acts of aggression.[52] Finally, there exists a further, but less convincing theoretical way to prove that the use of force does not contradict the purposes of the United Nations. As Julius Stone submitted, Article 1 of the Charter does not necessarily establish additional legal obligations for the member states, but merely sets forth the purposes of the Organisation itself.[53]

A further interesting point is that the restrictive interpretation of Article 2, paragraph 4, has emerged not only in literature, but also in practice. Belgium, for instance, made the following statement in the proceedings before the ICJ with regard to NATO air operations against the Federal Republic of Yugoslavia in 1999: "The purpose of NATO's intervention is to rescue a people in peril, in deep distress. For this reason the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State."[54]

As I have already indicated, such interpretation of Article 2, paragraph 4, is an isolated view in the science of international law, and is not really supported by state practice either. Furthermore it is equally incommensurate with the *travaux préparatoires*, and the spirit and letter of the Charter. The most serious deficiency of the argument is that it identifies the territorial integrity of a state with the obligation to respect its borders. The reference to territorial integrity, however, must be interpreted as non-violability of the territory; consequently, an act of aggression, which transgresses the borders of a state, is in no case consistent with Article 2, paragraph 4.[55] In view of such content, the whole theory is practically refuted—at least with respect to humanitarian inter-

[51] See, Article 1, paragraph 1, of the UN Charter.

[52] Cf., Murphy: *op. cit.*, 292–293.

[53] See, Stone: *op. cit.*, 96.

[54] Case concerning Legality of Use of Force (Yugoslavia v. Belgium), Public sitting held on Monday, 10 May 1999 at 3 p.m. at the Peace Palace, Verbatim Record, CR 99/15 (translation, uncorrected).

[55] See, Randelzhofer, A.: Article 2(4), *in* Simma: *The Charter of the United Nations. op. cit.* 117–118. This is confirmed by Article 3(b) of the General Assembly resolution on the Definition of Aggression, according to which aggression is, *inter alia*: "Bombardment by the armed forces of a State *against the territory* of another State or the use of any weapons by a State *against the territory* of another State." Definition of Aggression. G. A. Res. 3314, 2319th plen. mtg., 14 December 1974, U.N. Doc. A/RES/3314 (XXIX), Annex, Article 3(b) (Emphasis added.)

vention. (Even though the violation of territorial integrity does not occur in the hypothetical case of an intervention carried out in a *res communis omnius usus* territory, the injury arising from the coercion employed against the political independence of the target state, the attack against its armed forces, or a potential violation of the *res communis omnium usus* status all entail the unlawfulness of the action.)

Although, the restrictive interpretation of Article 2, paragraph 4, can be sufficiently challenged by the aforementioned counter-arguments concerning territorial integrity, the two other segments—that is political independence and the purposes of the UN—has to be briefly dwelled upon, as well. Whether or not political independence is violated by an intervention, depends on the meaning one attributes to this notion. If political independence is construed as the freedom of a government from external pressure or interference, all forms of humanitarian intervention will violate it, since it coerces the government into such behaviour, which contradicts its will. But if the concept is interpreted as the right of a people to freely determine the political system and the form of government, one is likely to arrive at a divergent conclusion.[56] Faced with such a dilemma, an adequate answer is subject to the following, partly morally, partly legally implicated question: Is the despotic government satisfactory to the population and, primarily, to the victims of atrocities? In exercise of their right to a free choice of government, do they wish to sustain the oppressive regime? If the answer is positive, the intervention will violate political independence; if the answer is negative, it will not. (In the latter case, humanitarian intervention can with good reason be seen as "an extension of the domestic right to revolution".[57]) Finally, if political independence is interpreted generally, as the existing political system of a state, the conclusion will, once again, be ambivalent. Although, humanitarian intervention is not meant to reshape the political system, and it merely wishes to impose certain behaviour on the target state, this objective cannot always be achieved without the overthrow of the government. It is worth noting that assuming the violation of political independence in a so-called "failed state"—that is, a state sunk into total anarchy—is senseless, since in such an entity no state power or political system, which could be violated by the use of force, exists. (Nevertheless, the territorial integrity of the target state and, therefore, Article 2, paragraph 4, of the Charter, still remain violable. The reason is that "territorial integrity" and "political independence" stand in a disjunctive relation in the text of the article.)

[56] For these two alternative interpretations of "political independence", see, Fawcett, J. E. S.: Intervention in International Law. *Recueil des Cours*, Tome 103 (1961-II), 354.

[57] See, Tesón: *op. cit.*, 91.

By a logically constructed hierarchy among the purposes of the UN, one can effortlessly challenge the reasoning, according to which humanitarian intervention is compatible with these purposes. As Eduardo Jiménez de Aréchaga wrote: "The context of the Charter demonstrates however that in the field of security, and with regard to the use of force, all other purposes of the United Nations are to be subordinated to the dominant one stated in Article 1, paragraph 1, which is "to maintain international peace and security."[58]

Peace in a broader sense is certainly not equal to the absence of the use of armed force, as it also requires, *inter alia*, the observance of human rights. Nevertheless, it would be extremely risky to interpret this relationship in a way that the use of force for humanitarian purposes promotes peace, and thereby, the purposes of the UN *in all cases*. A mechanical presumption of this relation is admissible exclusively with respect to interventions authorised by the Security Council.

The contradictions residing in such reference to the purposes of the UN are excellently illustrated by the argument, according to which, if a deviation from Article 2, paragraph 4, is admissible in order to promote the protection of human rights as provided for under Article 1, paragraph 3, along the same logic, armed interventions for economic, social or cultural purposes would likewise qualify as lawful, since these potential grounds are also listed among the purposes of the Organisation and, in fact, set forth in the same section.[59] The sole deficiency of this counter-argument is that economic, social and cultural matters, as opposed to human rights, have remained predominantly a part of *domaine réservé*.

The Preamble of the Charter is also frequently invoked for the justification of humanitarian intervention. The second sentence of the Preamble states that "the peoples of the United Nations" are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women". In the subsequent paragraphs, the intention to prevent the use of armed force is also framed, but with an important exception: "save in the common interest". To ensure respect for fundamental human rights, primarily by reason of their connection to international peace and security, is probably a legitimate "common interest". Since the Preamble contains the general purposes of the Charter, a number of authors think that the legality of the use of force for humanitarian purposes can be derived from its formu-

[58] Jiménez de Aréchaga, E.: International Law in the Past Third of the Century. *Recueil des Cours*, Tome 159 (1978-I), 91.

[59] See, Danish Institute of International Affairs. *op. cit.*, 82. For an opposing view, see, Österdahl, I.: *Threat to the Peace. The Interpretation by the Security Council of Article 39 of the UN Charter.* Uppsala, 1998. 26–27.

lation.[60] Such actions, as a result of the connection referred to above, seem to simultaneously promote the enforcement of the purposes of the UN, both in terms of the maintenance and restoration of international peace and security, and of the promotion and encouragement of respect for human rights.

The opinion, according to which the lawfulness of intervention can be grounded on the Preamble, is very poorly supported, thus, it chiefly serves as a supplementary argument, for instance, to the restrictive interpretation of Article 2, paragraph 4. Despite that the Preamble is an integral part of the Charter, it does not stipulate independent obligations for the members, but enumerates the reasons, motives and general ends necessitating the adoption thereof. Accordingly, the practical relevance of the Preamble is extremely insignificant; so far it has barely been referred to.[61] The theory also fails to answer the question: Who or what is entitled to establish that a case of "common interest" exists with respect to the use of force? In view of the spirit and letter of the Charter, this power seems to be assigned to the Security Council. Therefore, recourse to the use of force on grounds of "common interest" is permissible only in possession of a prior and express authorisation by the Council.

Since Article 106 of the Charter[62] frequently appears in analyses concerning the legality of the use of force,[63] I think it also needs to be investigated, if this provision can justify humanitarian intervention in the absence of an authorisation by the Security Council. In spite of the fact that its deletion has also

[60] See, Reisman: Humanitarian Intervention to Protect the Ibos. *op. cit.* 172.

[61] See, Wolfrum, R.: Preamble, *in* Simma: *The Charter of the United Nations. op. cit.* 48. According to Kelsen, the Preamble constitutes an integral part of the Charter, so it virtually has "the same legal validity" as other provisions of the Charter. However, by reason of its content, the Preamble does not establish obligations, and "has rather an ideological than a legal importance". See, Kelsen: *The Law of the United Nations. op. cit.* 9.

[62] Article 106 of the UN Charter: "Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security."

[63] Cf., e.g. Schachter, O.: Authorized Uses of Force by the United Nations and Regional Organizations, *in* Damrosch, L. F.—Scheffer, D. J. (ed.): *Law and Force in the New International Order.* Boulder–San Francisco–Oxford, Westview Press, 1991. 65.; Scheffer, D. J.: Commentary on Collective Security, *in* Damrosch—Scheffer: *op. cit.*, 108.

arisen as a demand,[64] under certain circumstances, Article 106 could ground the lawfulness of humanitarian intervention. Though it merely establishes an obligation for the permanent members of the Security Council to consult, it can theoretically lead to the taking of a "joint action". As both the context of the article and references to Articles 42 and 43 therein reflect, joint action implies military action.[65]

The permissibility of the use of force under Article 106, however, has several conditions. In the first place, one should mention the time factor, because the stipulation, as a result of the conditions incorporated therein, is of provisional nature: it expires as soon as the Security Council, after the conclusion of agreements envisaged in Article 43, has sufficient armed force—both in quantity and in quality—at its disposal to take enforcement measures under Article 42. The determination of this circumstance presupposes a resolution by the Security Council, and at least one agreement concluded under Article 43. Since such agreements have not been concluded so far, Article 106 has been in force since 1945, although, it barely has practical relevance.

The next, implicit condition, which is the most difficult to comply with, is the unanimity of the five permanent members. The use of force under this article can take place only in case of a consensus among the permanent members of the Security Council; thus Article 106 does not prevent veto. This conclusion can be drawn from the fact that such actions would be implemented "on behalf of the Organization". The requirement of unanimity, however, does not entail that the five states would be bound to actively participate in a joint action.[66] Again, it has to be emphasised that Article 106 only establishes an obligation for the permanent members to consult, not "to agree" or "to act". A further implicit condition is that the use of force necessitates a determination by the Security Council under Article 39, and a conviction that the maintenance or restoration of international peace and security requires such an extreme measure. Therefore, joint action, despite its *prima facie* self-authorising character, does not constitute an independent exception to the prohibition of the use of force. Nevertheless, Article 106 is inapplicable if the Council authorises the members or international organisations to use force.[67]

[64] See, Geiger, R.: Article 106, *in* Simma: *The Charter of the United Nations. op. cit.* 1151.

[65] See, *ibid.*, 1150, According to Kelsen, the text of Article 106 does not confine joint actions to military actions. See, Kelsen: *The Law of the United Nations. op. cit.* 760.

[66] See, Kelsen: The Law of the United Nations. *op. cit.* 759.

[67] Cf., Geiger: Article 106, 1150–1151.

V.

The demonstration or refusal of customary lawfulness is a permanent element of scientific disputes concerning humanitarian intervention. It is not at all accidental that this issue has gained outstanding relevance. In view of a possible veto in the Security Council, as well as the challengeable nature of other methods or theories aimed at the demonstration of the legality of humanitarian intervention, customary law can be considered the sole source of international law, from which the derivation of a right of humanitarian intervention seems to be feasible. The scientific significance of views based on customary law is remarkably enhanced by references to traditional international law, that is, by arguing that such right had existed in customary law for centuries. So far as an author resolves to prove the customary lawfulness of humanitarian intervention in the post-Second World War period, the most evident solution is to derive it from the variously explicable and extremely vague traditional law. If he also manages to prove that the entry into force of the UN Charter has not affected the continued existence of this customary right, his endeavours are likely to end in success. If, however, someone wishes to demonstrate that a customary right of humanitarian intervention no longer prevails in the present era of international law, he should claim that it either never constituted a segment of international law, or, even if it did, its relevance and *raison d'être* completely vanished as a result of the development of law in the first half of the 20th century. As such, the customary law of the past can barely be construed as a mere curiosity of legal science in this respect.

Naturally, both extremes are represented in the literature. Several eminent scholars claim that the customary right of humanitarian intervention has "survived" the beginning of the new era marked by the adoption of the Charter, and it still exists. Therefore, humanitarian intervention is lawful, even if it is carried out in absence of a prior and express authorisation. But the overwhelming majority of international lawyers believe that such right does not exist, and if it had ever existed, the Charter ultimately terminated it. In my view, a definitive conclusion pertaining to the lawfulness of humanitarian intervention under traditional customary law can scarcely be drawn, because the essential *opinio iuris* cannot be unequivocally demonstrated. The *spirit* of 19th century international law suggests the legality of humanitarian intervention; however, this spirit is most likely to have gradually altered at the beginning of the 20th century. Thus, one cannot exclude the possibility that a customary right of humanitarian intervention, which had prevailed for over a century, ceased to exist in the period between the two World Wars. By reason of the uncertainties concerning traditional international law, I do not consider

the derivation of a contemporary customary right of intervention from the past as an expedient solution. Furthermore, I think that even if such right had been in existence prior to 1945, it could by no means "survive" the entry into force of the Charter.

However, it is not only traditional international law from which a contemporary customary right of humanitarian intervention might be drawn. Given that one encounters such interventions even in the UN-era, it has to be contemplated, whether the practice of states and international organisations could have created a new customary right of humanitarian intervention, either "from nothing" or by reviving the relevant norm of traditional international law.[68] (It has to be noted that in the latter case the continued existence of an alleged past customary right of humanitarian intervention cannot be conceived, since the present hypothesis implies that lawfulness, if it had existed, was disrupted after the Second World War. Accordingly, there must have been a period, in which humanitarian intervention qualified as an unlawful action, even if one assumes that previously it had been a lawful conduct.)

Naturally, the simultaneous coexistence of the two constitutive elements of customary law—notably, state practice and *opinio iuris*—is indispensable for the evolution of an old-new customary right of intervention. The demonstration of the existence of state practice seems less problematic, since the use of force for humanitarian purposes has occurred several times since 1945 (e.g., in East Pakistan, Cambodia, Uganda, the Central African Empire, Liberia, Northern and Southern Iraq, Bosnia-Herzegovina, Somalia, Rwanda, the Federal Republic of Yugoslavia). Yet, the question here is how we assess these actions. Obviously, the practice of humanitarian intervention exists only if it is constituted by *such* interventions. Due to the absence of a generally accepted definition of humanitarian intervention, opinions vary regarding the humanitarian quality of particular interventions. It is always easier to prove that a military operation has "dishonest"—for example, political or economic—goals, than to show that its commencement was indeed dictated by humanitarian considerations. So it appears that the presumption is against the altruistic nature of the use of force, so far as unauthorised actions are concerned. It is,

[68] Cf., e.g. Glahn, G., von: *Law Among Nations. An Introduction to Public International Law.* Fifth Edition. New York–London, 1986. 160.; International Law Association: *Report of the Fifty-Fourth Conference* (The Hague, 1970), 598–599, 611.; Lillich, R. B.: Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, *in* Moore, J. N. (ed.): *Law and Civil War in the Modern World.* Baltimore–London, 1974. 234–235.; Reisman: Humanitarian Intervention to Protect the Ibos, 171.

therefore, not accidental that states apparently refrain from the designation of their unilateral actions as humanitarian interventions, even if these could be qualified as such. On the other hand, in the context of undoubtedly humanitarian and lawful interventions, the issue of differentiation may be a source of significant problems. A large segment of the practice of humanitarian intervention can be effortlessly disregarded, if one does not classify the given actions as such, but consider them as enforcement measures under Chapter VII of the Charter, or as peace-keeping—more precisely, peace-enforcement—missions. The classification is appropriate even in this case, however, these broader categories are able to dissolve the category of authorised humanitarian interventions, which relates to them as a part to a whole, and thereby to reduce the number of such actions. Last, but not least, the demonstration of state practice is impeded by the selectivity and the sporadic nature of interventions, as well. The latter circumstance can be attributed not only to the reluctance of the states to act, but also to the infrequent occurrences of exceptionally blatant human rights violations necessitating the use of force.

One has to take a negative position concerning the existence of *opinio iuris*.[69] This is the only conclusion that can be drawn from the peremptory character of the prohibition of the use of force, and from the fact that the content of this principle is essentially equivalent to the content of Article 2, paragraph 4, of the Charter. Furthermore, both the behaviour of members of the international community and the declarations made by various international bodies indicate the absence of *opinio iuris*.[70] Consequently, it is more likely—as opposed to what I have submitted above—that the reason why states are reluctant to qualify their unilateral actions as humanitarian interventions is that they are convinced that such quality, by itself, is not a legal title, and cannot establish lawfulness.

The evolution of customary law is, however, a fairly long process. The fact that *no* customary right of humanitarian intervention exists today does not

[69] Cf., e.g. Joyner, D. H.: The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm. *European Journal of International Law,* Vol. 13. No. 3. (June 2002), 602–603.

[70] The UN General Assembly declared in 1981 that states must refrain from "the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States". See, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. G.A. Res. 36/103, 91st plen. mtg., 9 December 1981, U.N. Doc. A/RES/36/103, Annex, para. 2(II)(l). Five years later, the ICJ also held that "the use of force could not be the appropriate method to monitor or ensure [respect for human rights]". Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement of 27 June 1986, I.C.J. Reports 1986, para. 268, at 134. (Insertion mine.)

imply that it may not develop in the future. If respect for human rights received such distinguished attention in the future as nowadays and, according to all indications, it will, I would not venture to state that a right of humanitarian intervention will never constitute an exception to the prohibition of the use of force. However, I would not declare it with absolute certainty either. On the one hand, the direction of future development of international law is uncertain, but state sovereignty will always be a determining element. On the other hand, humanitarian intervention can arise as an exception to the prohibition of the use of force only on condition that it acquires a cogent nature, as peremptory norms of general international law can be modified only by a subsequent norm having the same character—but this is an extremely unlikely possibility for the time being. Thirdly, and I think, this is the main counter-argument, *no such exception* is necessary. Today, there are more or less adequately operating mechanisms applicable to remedy "common" violation of human rights. But a similar statement surprisingly seems valid even with respect to extremely grave and widespread violations: according to my opinion, Chapter VII of the Charter contains the solution. The legal framework is given; its utilisation is merely a question of political will. Besides, it is a mistake to assume that the emergence of a customary right of humanitarian intervention would solve the problem once for all. Firstly, it would establish merely a right, but not an obligation to enforce respect for human rights by the use of force, so it would be unable to eliminate selectivity. Secondly, it would inescapably create several opportunities for abuse.

At the same time, it cannot be excluded that a customary right of humanitarian intervention has entered the first phase of its evolution. Antonio Cassese was presumably referring to that, when he stated that the *opinio necessitatis* concerning the NATO intervention in the Kosovo crisis—typically considered as a humanitarian intervention—"has been widespread and seems to be in the process of crystallizing; however this has not gone unopposed".[71] It is noteworthy that Cassese does not imply either that a customary right of humanitarian intervention has emerged (he emphasises that international law, outside the framework of the Charter, does not authorise such actions), however, there is general agreement concerning the necessity of the institution. The UN Secretary-General, Kofi Annan, similarly expressed himself rather cautiously, when he said: "Emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must

[71] Cassese, A.: A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*. *European Journal of International Law*, Vol. 10. No. 4. (1999), 791.

take precedence over concerns of State sovereignty."[72] But the Secretary-General did not say either that this norm would grant states *carte blanche* for the use of force for humanitarian purposes. On the contrary, in his speeches, he consistently argues for the indispensable role of the United Nations, and particularly, the Security Council.[73]

VI.

With the acquisition of a cogent character by a few human rights and by the fundamental guarantees of international humanitarian law, such peremptory norms of international law have come into existence, the significance of which can reasonably be compared to that of the "traditional" norms of *ius cogens*, including the prohibition of the use of force and the principle of non-intervention.[74] Therefore, it is understandable that the idea of a conflict of cogent norms has also emerged with respect to the lawfulness of humanitarian intervention. Namely, the possibility that, at the core of the problems related to unilateral humanitarian intervention, there is a conflict between the cogent obligation to respect human rights and fundamental guarantees of humanitarian law and the equally cogent prohibition of the use of force. So far as this alleged conflict is resolved in favour of the obligation to respect human rights, it seems that the prohibition of the use of force cannot prevent the commencement of unilateral military actions for humanitarian purposes.

Prima facie, the theory is undoubtedly pleasing and, in view of the statements in literature and in practice concerning the primacy of human rights over state sovereignty, it might appear to be sufficiently grounded. In fact, such conflict does not exist, and cannot even come into existence. The principal reason is that the groups of subjects respectively obliged by the peremptory norms concerned are different in the case of humanitarian intervention. The obligation to respect human rights and guarantees of international humanitarian law binds the potential target state, whereas the prohibition of the use of force

[72] Annan: Standing Up for Human Rights, *in* Annan: *op. cit.*, 24.

[73] See, e.g. Annan, K. A.: Unifying the Security Council in Defence of Human Rights. Address delivered at the centennial of the First International Peace Conference, The Hague, 18 May 1999, *in* Annan: *op. cit.*, 29–34.

[74] It is necessary to note that I refer here only to specific human rights and fundamental guarantees of international humanitarian law, not to the overall cogency of human rights or humanitarian law. Although the cogency of the latter field of law can hardly be debated, respect for human rights—although I use this broad term for the sake of simplicity above—as a comprehensive category does not bear a peremptory character.

binds the states or international organisations willing to intervene in absence of an authorisation by the Security Council. Furthermore, a conflict is also ruled out by the fact that these peremptory norms similarly prescribe an obligation to refrain from a certain conduct, so they cannot interfere with one another. The first norm obliges subjects of international law to refrain from the infringement of human rights or international humanitarian law, whereas the second norm obliges them to refrain from the unauthorised use of force, with the exception of self-defence. One could speak of a conflict of norms only if an obligation to *enforce* respect for human rights and fundamental guarantees of humanitarian law—that is to say, an active conduct—appeared instead of the obligation to respect these rights and guarantees. (In this case, even the groups of subjects obliged would be the same.) However, none of the peremptory norms of international law oblige states or international organisations to secure respect for these rights and guarantees in another state by the use of force. Neither does a norm of *ius cogens* providing a right for that exists.

But a conflict of norms would not be likely, even if such a rule existed. If a cogent obligation to enforce respect for human rights and fundamental guarantees of international humanitarian law emerged, the content of the prohibition of the use of force, rather than the obligation to respect these rights and guarantees would change. In other words: a new and independent peremptory norm would not come into existence, but an already existing norm would be modified. The modification would occur within the framework of one single norm, that is, the prohibition of the use of force, thereby excluding the possibility of a conflict of different norms. The normative effect of the prohibition of the use of force is not affected in any way by the obligation to respect human rights and fundamental guarantees of international humanitarian law applicable to non-international armed conflicts. As a result, the argument under deliberation cannot ground the lawfulness of unilateral humanitarian intervention.[75]

[75] Among arguments aimed at the demonstration of the legality of humanitarian intervention, the 1948 Genocide Convention and the doctrine of necessity are also frequently raised, however, by reason of the lack of scope, I cannot engage in their detailed examination. For similar reasons, I do not have the opportunity to analyse three further and relatively rarely appearing theories (i.e., the erosion of the Charter, the so-called *link theory*, and the application of collective self-defence by analogy), which can be also applied for the justification of humanitarian intervention. Nevertheless, it can be stated that *none* of these arguments or theories can establish the lawfulness of an unauthorised humanitarian intervention.

Conclusions

As a short summary of the present analysis, it can be stated that an adequate recommendation by the General Assembly might be suitable to ground the lawfulness of an unauthorised humanitarian intervention, although this presumption is far from being unchallengeable, as the Charter also allows for an interpretation, which categorically excludes this alternative. The applicability of the "Uniting for Peace" Resolution is equally dubious, partly by reason of the debates concerning its legality, partly due to the criteria set for the adoption of a recommendation on the use of force. Furthermore, neither an alleged implicit, nor an *ex post facto* Security Council authorisation can legalise a unilateral humanitarian intervention, because both lacks sufficient basis in the Charter. Comparing these two theoretical constructions, *ex post facto* authorisation seems more convincing, since it is more or less firmly justifiable, as opposed to an implicit authorisation. Nevertheless, it would be a daring statement that either of these could substitute a prior and express authorisation, and ground the legality of humanitarian intervention.

A similarly negative conclusion can be drawn upon the examination of the text of the Charter. A thorough study of the document reveals that a right to unilateral humanitarian intervention cannot be derived from any of the provisions of the Charter—the only possible exception being Article 106 concerning "joint actions", although its relevance is rather theoretical, than practical. It explains why the proponents of intervention on the grounds of humanity, who generally resort to all possible instruments and arguments to support their case, remarkably ignore this article. Finally, the lawfulness of unilateral humanitarian intervention can neither be justified on the basis of present customary law, nor by a hypothetical conflict of peremptory norms of international law.

Hence humanitarian intervention by no means constitutes a "third" exception to the prohibition of the use of force, and is not to be classified as an autonomous legal title. It is undoubtedly lawful in only one case: if it is commenced in possession of a prior and express authorisation by the Security Council. In the rest of the cases, however, the presumption is in favour of illegality. Given the sometimes unsatisfactory activity of the Council and the constant risk of a veto, this "orthodox" conclusion may appear to be disillusioning and insufficient. From another point of view, however, both the necessary legal framework—that is, Chapter VII of the Charter—and the required state and organisational capacity seem to be present for the use of force by the international community against governments, which tread upon human rights. An effective utilisation of these means, nevertheless, depends on

the actual political will of states, therefore it would be unwise to attribute anomalies thus emerging exclusively to a fault of legal regulation, but it would be an even greater error to seek a solution in its fundamental and irresponsible modification.

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The European Public Prosecutor: Waiting for Godot?[1]

Abstract. This article offers an excursion into the world of fraud-fight in the European context. The first part introduces a hypothetical case on the *modus operandi* of perpetrators of trans-national fraud cases. On the basis of this case, shortcomings of the current legal mechanisms protecting the financial interests of the European Community will be analyzed. Then the article deals with the establishment of the office of the European Public Prosecutor (EPP) as a proposed legislative response to the challenges posed by EC fraud.

Keywords: European Community; European Anti-Fraud Office (OLAF); European Public Prosecutor; EC fraud; European anti-fraud policy; European Judicial Area; Corpus Juris; criminal law protection of the Community's financial interests

Introduction

EC fraud does not only lead to heated debates in expert circles but also excites media attention. It is, and it must be, of great public concern. Less welcomed is the interest of organized criminal networks in benefiting from the shortcomings of the current legal mechanisms intended to protect the Community institutions and the Community citizens from fraud. These perpetrators do not wait to exploit the possibilities in the internal market until the burdensome European decision-making machinery finds the solution to the challenges posed by trans-national EC fraud cases. While the frontier-free Europe became a reality, the problems due to the fragmentation of the criminal law enforcement area in the EU remained. Seven magistrates launched therefore the

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This essay forms part of a monograph on EC Fraud expected to see the light of day in 2004. An already published part of this monograph can be found in Managerial Law, Vol. 44. No. 4. 2002, 59–76., under the title "The Evolution of Anti-Fraud Policy in the European Community from a Constitutional Law Perspective".

Geneva Appeal in 1996 drawing attention to the legal deficiencies burdening the fight against international financial crime.[2] One year later was the Commission initiated Corpus Juris study published opening up a public debate on the role and forms of criminal law protection in the European Judicial Space.[3] In light of the Corpus Juris study further assessments of national legislation on the protection of the financial interests of the European Community both in the Member States[4] and in the candidate countries[5] appeared. While most of these proposed rules belong yet to the category of *lex desiderata*, the message is clear: reshaping the fragmented criminal law-enforcement area of the EC.

In this process gained the idea of the establishment of the office for a European Prosecutor its significance. The enforcement of the measures proposed by the Corpus Juris study would be the duty of a common European Prosecutor acting on the single European judicial territory.[6] In practical terms this would enable the European Public Prosecutor to carry out investigations within the European Community and prosecute perpetrators before national courts of law. The media response was not fully welcoming to the EPP.[7] Nor was the Nice IGC that did not finally adopt the proposal of the Commission to establish the office of the EPP. Hence the latter published its Green Paper to encourage further reflection and debate on the idea of a European Public Prosecutor.[8] Meanwhile, following the Presidency Conclusions adopted after

[2] Select Committee on the European Communities. House of Lords. "Prosecuting Fraud on the Communities' Finances-The Corpus Juris. With Evidence." Session 1998/99. Report 9. HL Paper 62. London, HMSO, 1999. 27.

[3] *"Corpus juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne."* sous la direction de M. Delmas-Marty. Economica. Paris, 1997.

[4] "La mise en oeuvre du Corpus juris dans les États membres." Delmas-Marty, M. et Vervaele, J. A. E. Utrecht, 2000.

[5] Study on "Penal and Administrative Sanctions, Settlement, Whistle Blowing and Corpus Juris in the Candidate Countries". The Protection of the Financial Interests of the EU in the Candidate Countries. By Van Den Wyngaert. Final Report. 11 September 2001. published in *ERA-Forum*. 3–2001. 2–59.

[6] "Contribution complémentaire de la Commission à la conférence intergouvernementale sur les réformes institutionelles — La protection pénale des intérêts financiers communautaires : un procureur européen". 29. 9. 2000, COM (2000), 608.

[7] See for example „Alibi-Staatsanwalt für Europa". Financial Times Deutschland. 10. 8. 2000. 9. or „Ein EU-Staatsanwalt kommt zu früh." von Helmut Bünder. *Frankfurter Allgemeine*. 8. 9. 2000. 13.

[8] Green Paper on Criminal-Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor (hereinafter Green Paper), 11. 12. 2001, COM(2001)715 final

the summit in Tampere[9] pro-Eurojust was set up[10] to coordinate prosecutions. Furthermore, the Commission introduced an ambitious proposal for a directive on the criminal law protection of the Community's financial interests.[11]

The emerged proposals would lead to harmonized criminal substantive and procedural rules and to the institution of a European prosecutor responsible for the enforcement of these rules. The idea is not an absolute innovation but harmonization of criminal law was always a very sensitive political topic in the course of European integration.[12] There is an evident tension between the interests of Member States to preserve traditional prerogatives of state sovereignty[13] and those of the Community to acquire the necessary means to tackle fraud on the European level.

In light of the above said, and in particular concerning the reforms of criminal codes in the candidate countries,[14] it is useful to overview before the next intergovernmental conference following the European Convention what specific changes EC fraud necessitates in the *acquis*. To this aim, a hypothetical case puts into a very practical perspective the *modus operandi* of perpetrators of trans-national EC fraud in the first part of this article. On the basis of this

[9] Conseil Européen de Tampere: Conclusions de la Présidence. Point 46. http://ue.eu.int/en/Info/eurocouncil/index.htm

[10] Council Decision of 14 December 2000. Official Journal, L. 324, 21. 12. 2000.

[11] Proposal for a Directive of the European Parliament and of the Council on the criminal law protection of the Community's financial interests. 23. 5. 2001. COM(2001)272 final.

[12] Noteworthy is in this regard a Commission proposal for a draft treaty, submitted to Council in 1976, to amend the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of the named Treaties. (Official Journal, Vol. 19. C222, 22 September 1976. 2–18.) As early as in 1976 the Commission reasoned the approval of the proposal as follows: '...the criminal law of the Member States cannot usually guarantee the protection of the financial interests of the Community nor ensure effective punishment of infringements of the provisions of the Treaties establishing the European Communities' (*ibid.* 2.). The proposal was later defeated.

[13] "Corpus Juris is neither realistic nor practical and would be incompatible with national legal traditions."—reaction of a high ranked civil servant from the Home Office quoted by Spencer, J. R.: "The Corpus Juris Project-Has it a Future?" *Cambridge Yearbook of European Legal Studies*. 355.

[14] It is worth noticing that in Hungary, for example, the criminal code had been amended since 1990 almost forty times! See Farkas, Á. and Petró, R.: Problematic Issues of Hungarian Criminal Law related to the Protection of the Financial Interests of the European Communities. *Agon*. No. 31. 2001. 2–4.

imaginary case will the second part tackle selected major problems in the fight against EC fraud. The last part of the article deals with a key institution in the recent proposals to counteract the perpetrators of trans-national fraud, the European Public Prosecutor.

Part I.

The phenomenon of EC Fraud: The case of defected wheel bicycle industry corporation

The European Commission publishes every year its annual report on the Fight against fraud including an analysis of data on fraud cases and of recent trends. As a consequence of Article 280 (5) of the Amsterdam Treaty, which came into force on 1 May 1999, the annual report on 2000 contained for the first time a report on the Member Sates activities with a view to protecting the Community's financial interests. Moreover, various Community legislative instruments oblige the Member States to report periodically on their investigative activities in certain sectors of Community policies. These reports represent a regular source of information for researchers on EC fraud.

To provide a detailed typology of reported fraud cases goes far beyond the limits of this article. What I have tried below is to give account for one type of fraud schemes, more precisely, of revenue fraud cases. My aim was to shed light on the *modus operandi* of perpetrators in a case where everything is the product of my imagination.[15]

The case

Defected Wheel Bicycle Industry Corporation is a Chinese enterprise specialized in bicycles. One of its target areas is the European market. From 1990 onwards this enterprise, together with other Chinese firms, sold loads of bicycles in Europe at a relatively cheap price. The reaction of the European Community was to protect its market by adopting Council Regulation (EEC) No. 2474/93 of 8 September 1993. The regulation imposes a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China.[16] The consequence of the regulation is that Chinese traders

[15] Hypothetical fraud cases prepared by the Commission can be found in the Green Paper. See Annexes 1–3.

[16] Official Journal, L. 228, 09/09/1993, 1–9.

must pay an additional duty to customs if they want their products penetrate into the European internal market. Article 1 (2) of the regulation fixes the rate of the anti-dumping duty at 30,6%.

Mr. A. M. C. van Dyck, a Dutch trader, who incorporated the Defected Wheel Bicycle Industry Corporation in China in order to spread cheap bikes in the Dutch market, became furious as the regulation entered into force. He sat together with his partners from Germany, the United Kingdom, Portugal and Belgium to discuss how to avoid the payment of the anti-dumping duty and to maximize profit. They decided that they ship their bikes first to Thailand where they set up a new entity, the Flying Golden Wheels Bicycle Manufacturing and Trading Corporation. According to their plan, this latter enterprise should transport the bikes to the EC under its own name. The reason behind this plan was the lack of anti-dumping measure against Thai bikes in the Community at that time. In summary, the traders wanted to disguise the Chinese origin of the bikes because of the anti-dumping duty imposed on Chinese bicycles by Regulation No. 2474/93. Under the name of the Thai company the bikes will be sent in five different consignments to five different European ports (Rotterdam, Porto, Hamburg, Ostende, Hull) in order to make it more difficult for the various customs authorities to connect the crimes and to trace back the true origin of the bicycles. In all ports representatives of five different companies of the partners of Mr van Dyck would wait the merchandise. These five companies are incorporated in five different Member States. The perpetrators were aware of the obstacles to controlling transnational EC fraud in the 90-ies, notably of the problems flowing from divergent procedural rules and substantive norms in each Member State, the division of responsibility for enforcement, insufficient cooperation among Member State and Community authorities and the weaknesses of collecting and providing information among national and Community authorities.[17]

[17] There is an extensive literature on these problems. On behalf of the European institutions the Court of Auditors criticized in a number of its reports throughout the 90-ies the Commission for inadequate control. A comprehensive critical assessment of the workings of UCLAF can be found in Special report No 8/98 on the Commission's services specifically involved in the fight against fraud, notably the "unité de coordination de la lutte anti-fraude" (UCLAF) together with the Commission's replies. O.J. 1998 C230 of 22 July 1988. The reports of the European Parliament, particularly of its Budgetary Control Committee, represent also very critical views on the functioning of the mechanisms against EC fraud. An example is the Bosch Report of the Committee on Budgetary Control of the European Parliament of 22 September 1998, A4-0297/98. Outstanding analysis from academic circles can be found in Vervaele, J. A. E.: *Fraud against the Community: the Need for European Fraud Legislation.* Deventer, 1992., Delmas-Marty, M.: *Pour un droit*

To understand better the complex procedures that the authorities carry out only the route of one consignment will be traced. The first consignment arrives in Rotterdam. The merchandise, from the time of their entry into the customs territory of the Community, is subject to customs supervision. The procedure is governed by Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code,[18] and in addition, by its implementing Regulation (EEC) No. 2454/93 of 2 September 1993.[19] First, goods must be presented to customs either by the person who brought them into the customs territory of the Community or by the person who assumes responsibility for carriage of the goods following such entry. In our case, the manager of Two Wheels Inc., a Dutch company, takes further care of the bicycles.

The Community Customs Code determines what steps the trader have to take before the bicycles obtain the "customs status of Community goods".[20] The amount for the customs duties depends on the value of goods for customs purposes as set out in Chapter 3 of the Community Customs Code, the tariff position of the goods and in certain cases the origin of the goods. The following rates would apply for example to bicycles, with product code CN871200, originating from China: applicable rate 15% according to Regulation No. 2261/98 of 26 October 1998,[21] tariff preference 10,5% pursuant to Regulation

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commun. Seuil, Paris. 1994., Simone White: Protection of the Financial Interests of the European Communities: The Fight against Fraud and Corruption. European Monographs. 1998., Sieber, U.: Euro-fraud: Organised Fraud against the Financial Interests of the European Union. Crime, *Law and Social Change* 30. 1998. 1–42.

[18] Official Journal, L. 302/1 of 1 October 1992.

[19] Official Journal, L. 253/1 of 11 October 1993.

[20] Customs status of Community goods results in the same status as if the goods were provided in a Member State of the Community, that is to say, they can circulate freely within the internal market. Not all the goods arriving into the customs territory of the Community receive this status and then circulate freely in the single market. After some goods no customs are paid. Some of these cases fall under the transit procedure, others under the inward processing procedure again others under customs warehousing. Collectively, these procedures are called suspensive arrangements. The name indicates that the payment of customs is suspended as a consequence of non-marketing within the Community but transiting, processing and the like. Our trader in the imaginary case wants however to gain for the bikes equal status with Community goods in the internal market and thus he places non-Community goods under the release for free circulation procedure and pays customs duties.

[21] Official Journal, L. 181, 16/07/1999, 38.

No. 2820/98 of 21 December 1998[22] and anti-dumping duty 30,6% as set out in Regulation No. 2474/93.[23]

Chapter 3 and its implementing provisions regulate in detail how the value of a certain product is determined for customs purposes. The calculated value most often serves as a basis to count the customs that are computed as a percentage of this value.

The tariff position is a defined place in a list, i.e. tariff, containing the percentage of customs duties to be imposed on products. Products are classified in this list and the customs authorities have to find the appropriate position for each merchandise in question. In practice, the manager of Two Wheels Inc. makes a summary declaration when he presents the bikes to customs. According to his declaration, the customs authority finds the appropriate tariff position.[24]

This is the important stage where detection of falsified stamps could lead to investigation. However the sheer volume of transactions and the high number of legitimate stamps could make even a weak attempt to falsify a stamp a successful one.[25] So the Dutch authorities did not discover fraud this time. Should they have initiated proceedings, a web of multilateral and bilateral conventions with third countries would govern their cooperation with competent authorities abroad. Even to find the competent authorities for requesting cooperation is difficult due to the diversity of the rules from one convention to another, not to mention the problems arising from the application of various procedural and substantive norms. Part II of the article tackles some of these problems with a restriction to the European context.

Happy end or rather Pyrrhic Victory?

National customs officers run the day-to-day administration, they face first fraud *sur le terrain* and control consignments. They are responsible for transmitting cases to specialized investigating organs too. The national authorities

[22] Official Journal, L 61, 10/03/1999, 55.

[23] Official Journal, L 320, 28/11/1998, 60.

[24] The volume and complexity of rules on the value of goods often lead to errors. Only the Common Customs Tariff contains over 4000 product codes for agricultural products alone, a further 932 product codes exist for processed goods, and 1416 standard recipes and 14000 non-standard recipes. (House of Lords 5th Report 1989. 12.) Officials at the local customs stations learn for years the rules and still turn repeatedly to central offices specialized in giving advise in certain cases. Sometimes the characteristics of the goods are such that expert aid in a laboratory is needed for determining the nature of the product.

[25] See Sieber: *op. cit.* 10.

are obliged to take all the measures necessary to protect the Community budget equally as they take all necessary measures to counter fraud affecting the national budget. A further obligation is to inform the European Commission of national inspection activities and their results[26]. Moreover, Member States prepare an annual inspection report in the light of Article 17(3) of the above regulation. These reports make it possible at the European level that the authorities can carry out systematic analysis of the data provided.

To finish this hypothetical case with an optimistic note, I refer to a legislative instrument. On the information flowing from national authorities the Commission took appropriate counter measures against companies like Defected Wheel Bicycle Industry Corporation by legislating a new regulation. It proposed shortly after the introduction of anti-dumping duties on Chinese bicycles a new regulation[27] that imposes anti-dumping duties on bicycles originating from Thailand. The regulation came into force on 13 April 1996 and terminated fraudulent businesses like the Defected Wheel Bicycle Industry Corporation was pursuing. The prevention of a certain type of fraudulent activities does not necessarily guarantee that similar pattern do not reoccur in new disguise.

Part II.

Challenges posed by the phenomenon of EC Fraud

EC fraud necessitates legislative reform on substantive and procedural measures on the European level as well as on detection and follow up investigation leading to prosecution and sanctioning of perpetrators of cross-border financial crime. The aim of this part of the article is not to give a full account of problems related to EC fraud-fight, rather to indicate in an easy-to-grasp-framework selected shortcomings that must necessarily be eliminated should the fight against fraud be stepped up in the Community.

The completion of the single market and the removal of frontiers eased in many aspects the functioning of organized criminal networks in Europe. Transnational EC fraud cases such as the case of Defected Wheel Bicycle Industry Corporation reveal this phenomenon and represent a particular challenge to effective anti-fraud action. The Commission proposed in its opinion "Adapting

[26] Article 6(5) of Regulation No. 1150/2000 requests Member States to report fraud cases where the amount involved is higher than 10000 euro.

[27] No. 0648, 12 April 1996 OJ L91.

the institutions to make a success of enlargement"[28] that a legal basis be created for the powers and duties of a European Public Prosecutor responsible for detecting fraud offences throughout the EU.

The first and most obvious effect of trans-national EC fraud is on the number of proceedings. In our hypothetical case the customs authorities may initiate five different procedures, which are competing and partial in comparison with a single procedure run by the European Public Prosecutor in a single European Judicial Area. Equally damaging is if only one or two consignments are caught in the hypothetical case and the others can operate freely and harm the budget of the European Communities. Later stages of the process may bring even more unacceptable results. This is due to the various substantive and procedural norms in the national systems. The worst example is impunity.[29] The divergent national rules on the validity of evidence could for example easily prove in the court phase that long years of investigations were simply wasted.[30] Perpetrators—with the aid of expert lawyers—could draw up plans how to exploit the shortcomings of the system of criminal law protection against EC fraud long before the criminal activity takes place.[31] Various causes result in severe delays in the proceedings. A famous example is the testimony of a prosecutor from a Member State before the European Parliament.[32] He

[28] COM (2000) 34 of 26 January 2000 http://europa.eu.int/omm/igc2000/offdoc/opin_igc_en.pdf

[29] See the shortcomings of the traditional methods of judicial cooperation between Member States. Green Paper. p.13.

[30] Professor Spencer explains in his paper delivered in the Conference on the European Public Prosecutor, Trier, 24–25 June 2002, the problems flowing from the diversity of national rules on evidence. Here two illustrations of these issues are provided that could be applicable in the "bike"-case. Scenario No 1. The British customs authority took the case to court after fraud was detected in Hull. The Prosecution wanted to use evidence gathered in France by letters rogatory issued by an examining judge but the Court in the UK considered it as hearsay and hence inadmissible. Spencer, J. R.: Diversity of national rules on evidence—is the mutual admissibility of evidence feasible? 2–3. *Scenario* No 2. The case is brought before a Belgian court. Evidence obtained abroad legally but not in accordance with Belgian laws would lead to exclusion of the evidence. Belgian law has a strict approach to illegally obtained evidence, while in Sweden it would be admissible almost irrespective of how it was obtained. England and Germany represent again another group regarding acceptance of illegally, improperly or irregularly obtained evidence because in certain cases it is admissible and in other cases not. *ibid.* 1–2.

[31] Recognized aim of the Community is that "criminals must find no ways of exploiting differences in the judicial systems of Member States". Conseil européen de Tampere: Conclusions de la Présidence. Point 5.

[32] Green Paper. 79.

declared that he had to deal with more than 50 successive actions in a single case brought before him to slow down proceedings and benefit from the time needed by the judge to dismiss them. Consequently, by the passage of time the execution of the international letters rogatory would generally be of no real use, not to mention that delays would help the suspects to disappear. Besides efforts to obstruct the process, traditional international cooperation inherently results in delays. Two examples are provided. On the one hand, Article 125 of the Royal Decree of December 28, 1950 states that no documents (or copies thereof) pertaining to criminal investigations or similar matters may be issued or supplied to others without specific authorization of the procurator-general of the Court of Appeal or the auditor-general. Hence Belgian police is not authorized to transmit independently information from criminal records or current investigations to colleagues in other Member States.[33] On the other hand, if a judge handles an inquiry in one Member State but administrative authorities deal with the same offence in another Member State, direct contact would generally be impossible between them.[34] The traditional judicial cooperative mechanisms have a defect concerning efficiency and timely work. Furthermore, specific problems such as the secrecy of tax and business information are so acute that they may lead to the refusal of mutual assistance.[35]

The Van Dyck scheme described in the first part of this article resulted in no judicial action against the perpetrators. Let me change here a bit the hypothetical case and examine in the European context what would have most likely happened if, say the Belgian, authorities discover a valuable source of information indicating fraud. Customs officers in Oostende—after a tip—learn that the bike import is accompanied by falsified documents to avoid customs duty. After examination of the accounts of Three Wheels Minus One Inc., a Belgian company, the authorities suspect a massive and long standing practice of deliberative breach of EC norms. The case is referred to the Belgian *juge d'instruction.* He initiates criminal investigations by police to interrogate

[33] Vermeulen, G.: A Judicial Counterpart for Europol: Should the European Union Establish a Network of Prosecuting and Investigating Officials? 2 *UCLA Journal of International Law and Foreign Affairs*, Fall/Winter 1997–1998. 225.

[34] "Contribution complémentaire de la Commission à la conférence intergouvernementale sur les réformes institutionelles — La protection pénale des intérêts financiers communautaires : un procureur européen". 29. 9. 2000, COM (2000), 608. 5.

[35] The Final report on the first exercise devoted to judicial assistance in criminal matters, approved by the Council on 28.5.2001., states: "The evaluations showed that the issue of tax offences remained such a sensitive one that mutual assistance could, on this basis be limited and slowed down or at worst be refused.". Tax offences (Heading III.e) Official Journal, C216, 1. 8. 2001.

employers of the Three Wheels Minus One Inc. Investigation in Belgium leads to a criminal network, notably with the involvement of a British company, Four Wheels Minus Two Inc. and a Portugal one, Five Wheels Minus Three Inc. A German company whose name is up to your imagination, dear Reader, is also suspected to be part of the criminal network.

As evidence is transferred to the United Kingdom the British authorities note that the written statements of a Belgian citizen will not be admissible before a court of law because evidence was gathered in Belgium under *commission rogatoire* and lacking certain preconditions a court in the UK would consider this as hearsay and hence inadmissible.[36] The manager of the German company disappears together with the funds of the company before the authorities could take action, thus enforcement will be impossible in case of the German company. In Portugal the prosecutor realizes after having received the files that criminal investigation police gathered evidence and not a prosecution service or examining judge. Consequently, the evidence was not collected in response to the international *letters rogatory* in compliance with Portuguese law, and it will not be admissible in Portugal either.

Moreover, supposing that the authorities detect a deliberate attempt to breach Community law in all five Member States, official action would be governed by five different systems of substantive and procedural laws. In fact, as the number of Member States involved in the case increases, the problems of national police and judicial authorities grow.[37] Particularly difficult would be to run the current mechanisms in an enlarged Union. In our imaginary case only five countries are involved. If the connection between the five consignments were at all discovered, cooperation between the authorities of five nations would already be severely hampered by the territoriality principle of national criminal laws. The traditional cooperative methods do not suit anymore in an ever more integrated Europe as the national authorities are empowered to act on their own territory. From the conflicts of jurisdiction and the *forum regit actum* principle to the cumbersome mutual judicial cooperation the fragmented European law enforcement area signifies such residual problems that are

[36] Professor Spencer clarifies that English law was changed in 1988 to enable foreign witnesses to give evidence at fraud trials from abroad by means of a live video link. As the foreign witness abroad can not be forced to cooperate, this solution is based on the good intention of the foreign witness. Spencer, J. R.: Diversity of national rules on evidence—is the mutual admissibility of evidence feasible? Conference on the European Public Prosecutor, Trier, 24–25 June 2002. 2–3.

[37] Currently there are seventeen different legal regimes in the EU due to the distinct legal systems in England and Wales, Scotland and Northern Ireland. Green Paper. Footnote 24. 12.

leftovers while European integration deepened in other areas. Those are the perpetrators who could move without restriction in the Community territory and not those responsible for the suppression of crime.[38]

Even such a brief and selective overview within the limits of this article indicates that the creation of a European Judicial Area is indispensable. To this aim, common European rules are necessary that change both substantively and procedurally the current mechanisms of fraud fight. The enforcement of such rules would be the responsibility of the European Public Prosecutor.

Part III.

The European public prosecutor: Response to the challenges posed by the phenomenon of EC Fraud[39]

As indicated above, severe shortcomings restrict the work of law enforcement bodies in Europe in the field of fraud fight. An Italian prosecutor quoting tragic statistical data on international cooperation burst out: "International cooperation in judicial matters does not work".[40] The necessity of finding a legislative response on the European level motored the European Parliament and the European Commission to sponsor a comprehensive study on the criminal law protection of the financial interests of the Communities. Essential part of this project was to elaborate rules on the elimination of the dispersion of the prosecution function against cross-border organized networks harming the budget of the European Communities.

After a decade-long preparation[41] the Commission submitted its proposal to the Nice IGC with the recommendation on the creation of a European Public Prosecutor.[42] His responsibility would be detecting, prosecuting and bringing to judgment perpetrators of offences detrimental to the financial interests of the

[38] Delmas-Marty, M.: Combating Fraud—Necessity, Legitimacy and Feasibility of the Corpus Juris. *Common Market Law Review* 37: 247–256, 2000. 248.

[39] See for detailed analyses conference papers of the Conference on the European Public Prosecutor, Trier, 24–25 June 2002., Part II of The Implementation of the Corpus Juris in the Member States, eds. Delmas-Marty, M. and Vervaele, J. A. E. Intersentia. Utrecht. 2000. Vol. 1. 305–327. and Proceedings of the conference organized by Robert Schuman University of Strasburg on the European Public Prosecutor. 19–20 October 2000.

[40] "La mise en oeuvre du Corpus juris dans les États membres." Delmas-Marty et Vervaele: *op. cit.* 305.

[41] See the Corpus Juris study. Footnote 3.

[42] See footnote 34.

Community as well as exercising the prosecution function in the national courts of Member States.

Its organizational status would be set out in a new Treaty article, 280a. The first paragraph of this new article states that the Council appoints the EPP acting by a qualified majority. The Commission with the assent of the Parliament proposes a list of candidates to the Council. Its term of office is six years and its appointment is non-renewable.[43] Concerning the removal mechanism, the European Court of Justice may, on application by the European parliament, the Council or the Commission, remove the EPP. The Treaty provides on the reasons of removal: serious misconduct or not meeting the requirements for the performance of his duties.[44]

His independence must be beyond doubt. Secondary legislation would determine organizational issues such as the structure of the office or its location on the basis of Article 251 of the Treaty.[45] Similar treaty basis is provided for the adoption of (1) rules defining the facts constituting criminal offences relating to fraud and any other illegal activity prejudicial to the financial interests of the Community, (2) rules of procedure applicable to the activities of the EPP and rules governing the admissibility of evidence, and (3) rules applicable to the judicial review of procedural measures taken by the EPP in the exercise of his functions.[46]

The basic duty of the EPP would be to exercise the prosecution function across the Community territory in relation to a precisely circumscribed set of offences. A harmonized body of criminal law on the European level would reduce the problems indicated in the first parts of this article, including the clearing up of conflicts of jurisdiction, conflicts of the application of national substantive laws and the complexities of international judicial cooperation. Furthermore, the European Public Prosecutor would be able to combine information from national sources. Thus a more coordinated and centralized administration of information would offer a broader picture for the EPP than for isolated national prosecution services. On the basis of the so gained information the EPP would be able to direct investigations in the European Judicial Area. European Arrest Warrants recognized throughout the Community territory would aid his work in a single European investigation area concerning fraud fight. It is hoped that the introduction of the institution of the European

[43] Proposed new Article 280a, para.1. Green Paper. 85.
[44] Proposed new Article 280a, para.2. Green Paper. 85.
[45] Co-decision procedure with qualified majority in the Council.
[46] Proposed new Article 280a, para.3. Green Paper. 85-86.

Public Prosecutor will significantly increase the efficiency of law enforcement against perpetrators of EC fraud.

The reference above to the Draft Treaty, submitted to Council in 1976, to amend the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of the named Treaties, signaled the long-standing cumbersome tension on the allocation of criminal powers between the Community and the Member States. The lack of political will would damage any effort to constitutionalize the EPP. The highly problematic ratification process of third pillar conventions in the area of protection of the financial interests of the Community shows already bad signs.

The failure of the Nice IGC did not let the adopted Treaty be nice for the ones that expected a breakthrough in regard to fraud fight. The proposal of the Commission on the establishment of the office of the EPP was turned down. The questions arise naturally how long we can wait for the European Public Prosecutor and how many funds must de defrauded until the fight against fraud is stepped up. Or, keeping in mind the failure of the Draft Treaty of 1976[47], will the question be after Samuel Beckett: Waiting for the European Public Prosecutor?

Conclusions

In the course of European integration anti-fraud activities gradually became a primary issue on the political agenda. The Maastricht Treaty incorporated the assimilation principle into the EC Treaty while the Amsterdam Treaty created a first pillar legal base for anti-fraud action and extended the co-decision procedure to the prevention of and fight against fraud.

Pursuant to Article 280 the European Parliament acquired legislative authority in the field of anti-fraud policy on an equal footing with the Council. In the Council the voting procedure changed from unanimity to qualified majority. The Commission gained new capacities and strengthened its autonomy vis-à-vis the member states. The recent shift to a horizontal anti-fraud policy articulated in the adoption of cross-sectoral legislative instruments.

The europeanization of anti-fraud policy is a clear tendency from a historical point of view. The decisive step to transfer penal power to the European level is still not made though. The European Public Prosecutor to enforce the

[47] See footnote 12.

harmonized rules of the Corpus Juris became indispensable in an ever more integrated Europe. Without a harmonized legal framework for the Single European Judicial Area the puzzle still misses its basic pieces. At the next crossroads concerning the power balance between the Community institutions and the Member States will be the prospective incorporation of certain parts, particularly the European prosecuting authority, of the Corpus Juris into the treaties. The next IGC in deciding what features the European Judicial Area takes will have to concentrate on transparency and legitimacy of, and politico-legal responsibility for anti-fraud measures. Only this way can the values of European integration be protected together with the financial interests of the European Communities.

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Portrait-Sketches from the History of Hungarian Neo-Kantian Legal Philosophical Thought

The mid-1980s signalled the revival of Hungarian legal philosophy. By this time the Soviet type Marxism has lost ground in legal philosophical literature. Further confirmation of the previously unquestionable paradigms have not put researchers' existence into risk any longer. For jurists concerned with legal theory, it was only a choice of values to decide which paradigm would be fundamental for them. One of the forms of finding new ways was provided by studies in Hungarian traditions of legal philosophy before the year of change, which were carried out by the concerned researchers still alive and the younger generations who view this kind of tradition as a neglected value and take responsibility for the rehabilitation of their predeccessors' work.[1]

A key precondition for us for being included in the European scientific life again is to know our traditions in legal philosophy and to apply all the research finds that our predeccessors have accumulated. However, we also have to be

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[1] See from the literature on the subject: Loss—Szabadfalvi—Szabó—H. Szilágyi—Ződi: *Portrévázlatok a magyar jogbölcseleti gondolkodás történetéből* [Sketches from History of Hungarian legal philosophy], Miskolc, 1995; Perecz, L.: A belátásos elmélettől a mező-elméletig. A magyar jogfilozófia fél évszázada: Pikler, Somló, Moór, Horváth [From the theory of discretion to the theory of law field. Half century of Hungarian legal philosophy: Pikler, Somló, Moór, Horváth], *Századvég*, (1998) 10, 73–94; Szabadfalvi, J.: *Moór Gyula. Egy XX. századi magyar jogfilozófus pályaképe* [Gyula Moór. A sketch of a 20th-century Hungarian legal philosopher], Budapest, 1994; *Jogbölcseleti hagyományok* [Traditions of legal philosophy], Debrecen, 1999; Bibó István és a szegedi iskola [István Bibó and school of Szeged], in: Iván Zoltán Dénes (ed.): *A szabadság kis körei.* Budapest, 1999; Transition and Tradition. Can Hungarian traditions of legal philosophy contribute to legal transition? *Rechtstheorie*, 33 (2002) 2–4, 167–185.; Some Reflections on the Anglo-Saxon Influence in the Hungarian Legal Philosophical Traditions, *Acta Juridica Hungarica*, 42 (2001) 1–2, 111–119.; Zsidai, Á.: A Tiszta Jogszociológia. (Bevezető tanulmány) [Pure legal sociology. An introduction], in: Horváth, B.: *Jogszociológia*, Budapest, 1995. 11–58.

careful about fragmented oeuvres and they are to be compared to the scientific level of the concerned period. If we realise that there is a lack of original ideas and the theories only belong to the second line, we have to express this. On the other hand, however, we should be proud of what is valuable even today.

We describe below five representatives of 20th century Hungarian Neo-Kantian legal philosophical thinking in a few words:

1.

Bódog [Felix] Somló[2] *(1871–1920)*

Bódog Somló is the most reputable representative of Hungarian legal philosophy of the turn of the 20th century whose oeuvre greatly contributed to the development of the Neo-Kantian legal philosophy, the dominant trend prevailing in Central Europe et the time, a development that eventually resulted in modernisting the legal scholarship and theoretical thought in law in Hungary. Somló is a classic authority of social theorising in Hungary. His professional activity, relatively limited in time, spanning about a quarter of a century, can be divided into two phases.

His paper on *A jog értékmérői* [Value standards of law], published in 1910, marks the end of his first creative period. This first period of activity is characterised by the unconditioned acceptance and re-assertion of Herbert Spencer's doctrines, concomitant with personal adherence to his one-time professor Gyula [Julius] Pikler's theoretical approach based on natural science and psychology within the framework of a slightly materialist version of the philosophy of history. In co-operation and co-authoring with Pikler,[3] Somló

[2] Bódog Somló's main works of legal philosophy: *Állami beavatkozás és individualizmus* [State intervention and individualism], Budapest, 1900; *Jogbölcseleti előadások* [Lectures in legal philosophy], Kolozsvár, 1906; Masstäbe zur Bewertung des Rechts, *Archiv für Rechts- und Wirtschaftsphilosophie*, 3 (1909–10) 508–522.; A jog értékmérői [Value standards of law], *Huszadik Század*, 11 (1910) 1–14.; Das Wertproblem, in: *Zeitschrift für die Philosophie und philosophische Kritik*, (1912) 66–95.; A szokásjog [Customary law], in: *Farkas Lajos emlékkönyv*. Kolozsvár, 1914, 339–369.; *A helyes jog elméletéről* [On the theory of right-law theory], Kolozsvár, 1914; *Juristische Grundlehre.* [2. ed: 1927, and reprinted: Aalen, Scientia Verlag, 1973] Leipzig, 1917; *Jogbölcsészet* [Legal philosophy], Budapest, 1920; *Prima philosophia. Gedanken zu einer erster Philosophie.* Berlin, Lepzig, 1926; *Schriften zur Rechtsphilosophie.* Budapest, 1999.

[3] Pikler, J.—Somló, F.: *Der Ursprung des Totemismus: Ein Beitrag zur materialistischen Geschichtstheorie.* Berlin, 1900.

focused his attention mainly on sociological problems taken from a naturalistic perspective. During this period Somló became—together with Ágost Pulszky and Gyula Pikler—the third outstanding figure determining the future of positivist philosophy of law in Hungary.

The second phase of Somló's scholarly career is defined by his Neo-Kantian turn, heralding maybe the most prosperous period that has ever existed in Hungarian legal philosophy which—reprezented mostly by his successor, Gyula Moór and, later, the renown legal sociologist Barna Horváth—lasted until World War Two, when the Soviet military occupation replaced local traditions with 'Soviet-type' Marxist theory as an all-substitutive panacea. Despite that for early Somló legal philosophy and legal sociology were equal instanding, his Neo-Kantian conceptualisation led to revision and separation of these inter-connected areas of legal inquiry. The outcome of this period founded and substantianed Somló's scholarly reputation in legal philosophy in Hungary and especially in German-speaking territories. Nowadays he is duly regarded as a classic authority of Neo-Kantian philosophising on law in Central Europe, among thinkers like Rudolf Stammler, Gustav Radbruch, Hans Kelsen and Alfred Verdross.

In his writings published around the turn of the century, he criticised the scholarly ideals established by his contemporaries, from the perspective of natural-science-inspired positivism and evolutionism. His positivist theoretical outlook was all the way through complemented by scholarly interest and personal involvement in public affairs. One of his major works characteristic of this period is the book-size treatise on *Állami beavatkozás és individualizmus* [State intervention and individualism] published in 1900. The greater role the state was to play and the formation of monopol capitalism both demanded reformulation and adaptation of the respective roles and institutions of law, state and politics. In 1906, in his *Jogbölcseleti előadások* [Lectures in legal philosophy], he already advanced–preserving, however, his early positivist ties–quite a number of considerations he later developed systematically in his magisterial work *Juristische Grundlehre*. A point of interest in Somló's work is that the first edition in 1917, published by Meiner in Leipzig, was promoted by Hans Kelsen. Due to favourable welcome and wide interest, the same publishing company published the work ten years later again, then in 1973 Scientia Verlag found Somló's main work worth having a third edition too.

By differentiating pure and applied sciences (including normative sciences in the latter), he laid the foundations of Neo-Kantian philosophising in law, in which he proposed to investigate basically two issues: (1) determination of the preconditions of law (standing for a research aimed at the concept of law

within the framework of the basic doctrine of law), and (2) the search for just law or *richtiges Recht* (standing for the axiology of law). He turnd to Neo-Kantian philosophising when he was seeking—to Rudolf Stammler's influence—thepotentialities of investigation into *richtiges Recht*, which he completed in his *Juristische Grundlehre* in 1917. Based upon theoretical traditions cultivated, among others, by John Austin's *Province of Jurisprudence Determined* and Karl Bergbohm's *Jurisprudenz und Rechtsphilosophie*, Somló's *Juristische Grundlehre* offers the analysis of the concept and conceptual elements of law regardless of the contents, keeping the outlook of the contemporary predominant Neo-Kantian philosophy. The enthusiastic reception the German-language book encountered in the region urged him to continue his studies by laying the foundations of a legal axiology as well in a similarly methodical and comprehensive manner. When preparing for the job, he started the inquiry by formulating his own philosophical foundations in a comlex ontological, epistemological and axiological perspective, but this came to be published only as posthumous fragments after his early death, in 1926.

2.

Gyula [Julius] Moór[4] *(1888–1950)*

Gyula Moór, the most recognised figure of Hungarian legal philosophy between the two World Wars, was considered by one of his colleagues in the early 1920s

[4] Gyula Moór's main works of legal philosophy: *Stammler „Helyes jogról szóló tana"* [Stammler's „right-law theory"], Budapest, 1911; *Macht, Recht, Moral. Ein Beitrag zur Bestimmung des Rechtsbegriffes*, Szeged, 1922; *Bevezetés a jogfilozófiába* [Introduction to philosophy of law], Budapest, 1923; Das Logische im Recht, *Internationale Zeitschrift für Theorie des Rechts*, (1927–1928) 3, 157–203.; *Zum ewigen Frieden. Grundriss einer Philosophie des Pazifismus und des Anarchizmus*, Leipzig, 1930; *A jogi személyek elmélete* [Theory of legal entity], Budapest, 1931; Reine Rechtslehre, Naturrecht und Rechtspositivizmus, in: *Gesellschaft, Staat und Recht. Festschrift gewidmet Hans Kelsen zum 50. Geburtstag*, Wien, 1931, 58–105.; Creazione e applicazione del diritto, *Rivista Internationale di Filosofia del Diritto*, 14 (1934) 653–680.; Das Problem des Naturrechts, in: *Archiv für Rechts- und Sozialphilosophie*, 28 (1935) 3, 325–347.; *Szociológia és jogbölcselet* [Sociology and philosophy of law], Budapest, 1934; *Jogfilozófia* [Philosophy of law] (Budapest, 1936); Was ist Rechtsphilosophie?, *Archiv für Rechts- und Sozialphilosophie*, "Ungarn-Heft", 37 (1943) 3–49.; *A szabad akarat problémája* [Problem of free will], Budapest, 1943; *A jogbölcselet problémái* [Problems of philosophy of law], Budapest, 1945; *Tegnap és holnap között* [Between yesterday and tomorrow], Budapest, 1947.

the founder of a 'new Hungarian legal philosophy'. The innovation of Moór's philosophy can best be captured in his 'comprehensive attitude', which was called by his critics, not without reason, an eclectic theory.

Being attached to Neo-Kantian philosophy of law, Moór was mainly influenced by Rudolf Stammler, with whom he became acquainted with at the university of Berlin and his one-time professor, the Hungarian Bódog Somló. Hans Kelsen's theory must also be mentioned as a permanent base of comparison to Somló's philosophy of law even if they often had divergent views. When forming his own philosophical system, Moór is characterised by a complex approach to the problems raised by his philosophical and legal philosophical antecedents that exerted influence on him. In his first comprehensive work *Bevezetés a jogfilozófiába* [Introduction to the philosophy of law] published in 1923 he mentions three independent fields of investigation: (1) definition of the concept of law (fundamental doctrine of law), (2) scientific investigation of general causality in law (sociology of law) (3) the question of correctness of law (value doctrine or legal axiology). In this basic work he worded the 'methodology of statutory law' as the fourth field of legal philosophy in a wider sense.

From the late 1920s on Moór wanted to elaborate his legal philosophical system on the basis of paradigms of 'Baden' or 'value doctrine school' represented by Wilhelm Windelband and Heinrich Rickert, seeking new paths in Neo-Kantian philosophy. Meanwhile Moór was seeking connection between the world of reality (Sein) and that of value (Sollen)—which as the central problem of Neo-Kantian legal philosophy—instead of strictly separating the two spheres as some thinkers did by stating an antagonism between them. Consequently, he interpreted law as phenomenon belonging to the realm of 'reality of values'. In the 1930s he thought he could mostly rely on Heinrich Rickert's philosophy, but then at the beginning of the 1940s he turned to Neo-Hegelian philosophical theses of Nicolai Hartmann. In the works published in the early 1940s he saw the opportunity to renew the philosophy of law in a 'new tendency of cultural philosophy', which was a sort of synthesis of Neo-Kantian and Neo-Hegelian philosophical thoughts. In consequence, he sees in law not only a system of statutes containing abstract regulations but also the realities of human activities in which the intellectual content of law becomes reality. It is regrettable that because of the war and the years of upheaval following it, he had no opportunity to elaborate his system of legal philosophy based on new philosophical ideas. The most everlasting and also the most cited

part of Moór's work is the investigation of the concept of law. It is the issue that brought his teacher's, Bódog Somló's most considerable influence. Among abundant theories of power and force, Moór carried out a sophisticated investigation of the concept of law by transferring the idea of social reality to the realm of law and thus he opened up new possibilities for the investigation of characteristic features of the regime behind law.

3.

Barna Horváth[5] *(1896–1973)*

From the early 1930s, in the prevailing Neo-Kantian philosophy Barna Horváth created a new colour in the Hungarian traditions of legal philosophy. His career was first promoted by Gyula Moór in the 1920s and then became famous as professor of Szeged university, In his view of legal theory, which he preferred calling legal sociology or even '*pure legal sociology*' according to Hans Kelsen's terminology, his originality was mainly revealed in his so called synoptic attitude and the functionally related processional legal view. He has created something new by conforming two paradigms that were considered antagonistic in contemporary legal philosophy. (See about: *Rechtssoziologie, A jogelmélet vázlata* [Sketch of legal theory]) A parrallel existence of Neo-Kantian (Lask, Rickert, Verdross, Kelsen, etc.) and pragmatic-empirical attitudes (Pound, American realism, psychologism, etc.) and their relation to each other was regarded as a breakthorough not only in Hungarian but also in European

[5] Barna Horváth's main works of legal philosophy: Die Idee der Gerechtigkeit, *Zeitschrift für öffentliches Recht*, 7 (1928) 508–544.; Természetjog és pozitivizmus [Natural law and legal positivism], *Társadalomtudomány*, 8 (1928) 212–247.; Gerechtigkeit und Wahrheit, *Internationale Zeitschrift für Theorie des Rechts*, 4 (1929) 1–54.; Die Gerechtigkeitslehre der Vorsokratiker, in: *Studi Filosofico-Giuridici dedicati a Giorgo Del Vecchio*. Modena, 1930, 336–372.; Hegel und das Recht, *Zeitschrift für öffentliches Recht*, 12 (1932) 52–89.; *Bevezetés a jogtudományba* [Introduction to jurisprudence], Szeged, 1932; *Rechtssoziologie. Probleme des Geselschaftslehre und der Geschichtslehre des Recht.* Berlin-Grunewald, 1934; Sociologie juridique et Théorie Processuelle du droit, *Archives de Philosophie du droit et de Sociologie Juridique*, 5 (1935) 181–242.; *A jogelmélet vázlata* [Sketch of legal theory], Szeged, 1937; Der Sinn der Utopie, *Zeitschrift für öffentliches Recht*, 20 (1940) 198–230.; Der Rechtsstreit des Genius. I. Sokrates, in: *Zeitschrift für öffentliches Recht*, 22 (1942) 126–162.; Der Rechtsstreit des Genius. II. Johanna, in: *Zeitschrift für öffentliches Recht*, 22 (1942). 295–342.; Der Rechtsstreit des Genius, II. Johanna, in: *Zeitschrift für öffentliches Recht*, 22 (1942). 395–460.; *Angol jogelmélet* [English legal theory], Budapest, 1943.

legal thinking. The consideration of these two influential paradigms is not by chance. While between the two World Wars Neo-Kantian paradigm is to be considered evident in Middle Europe, pragmatism appeared as a new idea mainly in the Hungarian public view of legal philosophy. Barna Horváth's susceptibility to empirism can be attributed to two reasons. On one hand, he as practising lawyer realised contradictions in norms and reality, which was neglected by Neo-Kantian philosophy. On the other hand, during his journey to England in the late 1920s, Anglo-Saxon legal culture made a great impact on him. After coming home from England, Horváth reported in a number of papers on the achievements of both American and English jurisprudence. The experiences and impressions he gained in England urged him to complete the history of English legal philosophy. (See about: *Angol jogelmélet* [English legal theory].)

The synoptic method elaborated by Horváth is an original interpretation of one of the fundamental questions of Neo-Kantian legal philosophy, namely the connection between value and reality. The most significant representatives of 'contemporary' Hungarian philosophy of law, including Moór, Somló and Horváth, all concerned themselves with finding a solution to this problem. Horváth's starting point was the essence of legal activity, and considered law as a pattern of thoughts in a judge's mind, which is nothing else in this way but a 'reflexive theoretical product'. The procedure by a lawyer becomes synoptic through his applying a legal case to a legal norm, and at the same time, *vica versa*, relating a legal norm to a legal case. The lawyer, therefore, relates normative matters of fact to real matters of fact. In order to do this job, the lawyer needs a knowledge of facts selected according to legal rules, and also a knowledge of laws selected according to matters of fact. While a practising lawyer focuses his attention mainly on a legal case, a theoretical lawyer concentrates on statutes of law, but both consider the legal case and the law at the same time.

According to Horváth's processional legal attitude, closely related to his synoptic method, law cannot simply be regarded as norm but as an abstract behaviourial pattern and relating actual behaviour, or in other words, a connection between norm and behaviour, which is the procedure itself. Procedure is the 'genus proximum' of law. That is to say, a continuous relation (of synoptic structure) of a legal case to the legal norm will create a procedural process. In Horváth's opinion, law as the most developed social procedure establishes the most advanced stage of procedures by establishing the most developed procedural institution.

Barna Horváth's role lies in the fact that traditional German-Austrian ties of the 20th century Neo-Kantian Hungarian legal philosophical thoughts were 'tailored' by him through transferring Anglo-Saxon theories of jurisprudence and created new perspectives for further development in Hungarian legal theory. Regretfully, the Second World War and the following political changes forced him to emigrate in 1949 and there he did not have the opportunity to continue developing his theory.

4.

József Szabó[6] *(1909–1992)*

József Szabó graduated from the faculty of law at the University of Szeged and he was a student of Gyula Moór, an outstanding legal philosopher of Neo-Kantian philosophy in the inter-war period. Szabó was a prominent representative of the gifted and promising generation, who achieved brilliant careers during the Second World War, and who were involved in the intellectual and scientific renewal of the country after the war. After graduation he became acquainted with Barna Horváth, founder of school and an exceptional personality of Hungarian legal philosophy. Horváth's personality and his legal philosophical approach representing the influence of Anglo-Saxon jurisprudence and legal culture gave rise to Szabó's enthusiasm. It was the period in the Hungarian legal philosophical thinking when, besides the achievements of Austrian, German and French legal philosophy, those of English and American jurisprudence were also considered. Apart from this, Alfred Verdross, professor of international law and legal philosophy at the university of Vienna greatly influenced him, and they became friends for life. Szabó's papers were frequently published in the *Österreichische Zeitschrift für öffentliches Recht*, a journal edited by Verdross

As a result of Barna Horváth's aim to establish a school, the 'school of Szeged' was founded, and it included, besides Szabó, István Bibó, who later abandoned legal philosophy, and also Tibor Vas, who became Marxist in the 1950s and renounced the mentality of the school. Szabó's legal philosophical

[6] József Szabó's main works of legal philosophy: *A jog alapjai* [Bases of law], Budapest, 1938; *A jogászi gondolkodás bölcselete* [Theory of lawyer's thinking], Szeged, 1941; Hol az igazság? A bírói lélektan problémái [Where the justice? Problems of judge's psychology], *Társadalomtudomány*, 22 (1942) 1, 1–55.; Wahrheit, Wert und Symbol im Rechte, *Archiv für Rechts- und Sozialphilosophie*, "Ungarn-Heft", 37 (1943) 101–121.; Der Rechtsbegriff in einer neutralistischen Beleuchtung, *Österreichische Zeitschrift für öffenliches Recht*, 1 (1948) 3, 291–331.

thinking bears the strongest marks of the master's irradiant influence. He began to elaborate his independent legal philosophical doctrine in the late 1930s. He was also deeply involved in issues on constitutional and international laws.

In his writings on legal philosophy—*A jog alapjai* [Bases of law] in 1938, *A jogászi gondolkodás bölcselete* [Theory of lawyer's thinking] in 1941, *Hol az igazság?* [Where the justice?] in 1942, *Wahrheit, Wert und Symbol im Rechte* in 1943, and *Der Rechtsbegriff in einer neurealistischen Beleuchtung* in 1948—Szabó attempts to discredit the Neo-Kantian model by using the outcomes of criticism, according to David Hume, and the American legal realism. Szabó, in his works published in the early 1940s, attempted to create a 'neo-realistic' approach to the concept of law. Applying the method common in Anglo-Saxon professional literature, he modelled the essence of legal thinking with describing legal cases. With this kind of approach, he seemed to discover a number of similar features between English and Hungarian 'traditional' legal attitudes. Citing the ideas of Jerome Frank, Edward Robinson and Thurman Arnold, the most outstanding personalities of American legal realism, Szabó abandoned belief in legal security, which was, in his opinion, revived by a faulty logical philosophy of law. In his theory he also used Frank's doctrine of 'fact-sceptics' and 'rule-sceptics'. Szabó claimed that in law enforcement it is not merely the legal norms one is to consider when looking for justice, since the statement of facts is as important a precondition for a righteous judgement as the interpretation of the corresponding law. He believed that legal decisions are influenced by 'psychological circumstances'.

When reading Szabó's works, one can clearly perceive the ideas of American legal realism. At that time, in the early 1940s, this kind of theory was considered rather exceptional in the Hungarian literature of legal philosophy. The influence exerted by the classical representatives of legal realism is undeniable. When appreciating Szabó's work one can suggest that, in a similar way to the evaluation of Horváth's work, he also gave particular pragmatic explanations to the classical Neo-Kantian problems. Doing so, he created the possibility for a prolific interrelation of two legal cultures, and abolished the previous one-sided Austrian and German orientation in the Hungarian legal philosophical thinking. This is considered very important even if we sometimes come across rather eclectic explanations. Neither the master nor his student is an exception to this. Regretfully, however, Szabó was not able to work out further systematic explanations to his theory of legal philosophy called 'neo-realistic'.

During the after-war years he was involved in reorganising the legal faculty of the university in Szeged. After the 'decisive year' (1949) like the reputation of many of his contemporaries, his reputation was also ruined. After his long imprisonment, with a short interruption after the revolution in 1956, Szabó lived in intellectual exile for a number of decades. Some of his papers and reviews were published only abroad. Only the last years of his life, after his restitution, brought him the opportunity to be involved in the professional public life of the country for a brief period.

5.

István Bibó[7] *(1911–1979)*

István Bibó graduated as a student of Barna Horváth—a representative figure of Hungarian Neo-Kantian legal philosophy—from the faculty of law at the University of Szeged. Bibó was a prominent representative of the generation, who had a successful career during World War Two and the subsequent period, and he was involved in the intellectual and scientific renewal of the country after the war.

Bibó, as a law student and then as a member of the 'school of Szeged' established by his one-time professor, was concerned with legal philosophy and issues of international law. In the early 1930s he visited, on several occasions, the university of Vienna where he listened to lectures delivered by Alfred Verdross, Adolf Merkl and Felix Kaufmann, and later he, as student of the Institut des Hautes Études Internationales in Geneva, became acquainted with Hans Kelsen, Paul Guggenheim, Maurice Bourquin and Guglielmo Ferrero. Subsequent to his study trip in Switzerland, he translated, with the approval of the author, Kelsen's work titled *Reine Rechtslehre* into Hungarian.[8]

With the aim of working out his own system of legal philosophy, he published his work under the title *Kényszer, jog, szabadság* [Compulsion, law, liberty] in 1935. He started to elaborate his own theory with thoroughness and moderation contrary to his age. From the starting point of the Neo-Kantian

[7] István Bibó's main works of legal philosophy: *Kényszer, jog, szabadság* [Compulsion, law, liberty],Szeged, 1935; Le dogme du „bellum justum" et la theorie de l'infaillibilité juridique. Essai critique sur la théorie pure du droit, *Revue Internationale de la Theorie du Droit*, 10 (1936) 1, 14–27.; Rechtskraft, rechtliche Unfehlbarkeit, Souveränität, *Zeitschrift für öffentliches Recht*, 17 (1937) 5, 623–638.

[8] Kelsen, H.: *Tiszta Jogtan* [Pure theory of law], trans. István Bibó, Budapest, 1988

paradigm, Bibó examined the functional link between constraint, liberty and law, and completed this with Henry Bergson's thoughts on spontaneity as well as with Nicolai Hartmann's theses on onthology and ethics. One of the cornerstones of his theory was his independent criticism of Kelsen's doctrine and that of Barna Horváth's legal attitude. Nevertheless, Bibó considered his master's 'synoptic' method suitable for solving the essential Neo-Kantian problem, the contradiction between 'Sein' and 'Sollen', in which the law of spontaneity plays a major role. Besides this, he borrows his one-time professor's idea of objectivism, which he uses as a key concept in his doctrine.

Bibó claims that there exists a certain balance of the elements of constraint and freedom in the experimental material of law. As a result of the old legal philosophical debate on constraint, Bibó claims that the essence of law is to be found in constraint, either physical or intellectual. In his argument, it is the degree of objectivity that makes the legal sanction different from sanctions of other social norms. An essential thesis of his, saying that law is considered as one of the most objective constraints, is based on this approach. The other key paradigm of his legal philosophy declares that law is to be viewed as the most essential tool of ensuring human freedom, since the area left free from constraint is 'the realm of the most objective freedom'. According to his comprehensive definition, law provides the most objective constraint parallel with the most objective freedom. Completing his frequently cited thesis on the Janus-faced law, Bibó argued that the real power of law is ensured by this dual tension, and this fact makes law different from all other social rules.

In the second half of the 1930s Bibó attempted to describe certain issues of legal philosophy. His problem-raising appeared as criticism of Kelsen's theory, which exerted an effect of revelation at that time. Among his works written in that period, *Le dogme du 'bellum justum' et la théorie de l'infaillibilité juridique,* an essay published in 1936, and his paper titled *Rechtskraft, rechtliche Unfehlbarkeit, Souveränität,* which was published in 1937, are worth mentioning. In this latter work he attempted to find new paths in elaborating his legal philosophy by extending and making radical changes in his one-time professor's synoptic doctrine.

Regrettably, from the early 1940s Bibó abandoned legal philosophy and became more and more deeply involved in issues of political sciences and historical philosophy. In 1946, owing to his ouvre in legal philosophy, he was selected member of the Hungarian Academy of Science, but at that time he had already detached himself from the philosophy of law. His university career was finally disrupted after the 'decisive year' (1949). Neither the following period

of his intellectual exile, nor his long imprisonment after the revolution in 1956 could prevent him, a former legal philosopher, from being concerned with legal issues.

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Current Issues in Criminalistics

(Criminalistics as Both as a Branch of Science and as a University Subject)

1. Defining the notions of Criminalistics in international terms

It appears that the differences between the continental and Anglo-Saxon legal systems also extend to Criminalistics, a field based mainly on natural sciences. Géza Katona showed not long ago that "criminalistics never took hold in the United Kingdom as a scientific concept. The concept of forensic science was partly identified with continental criminal technology. The literature of the field used the terms 'forensic' and 'scientific' interchangeably.

The kinds of skills used in the course of investigating and solving crimes were not considered to be a part of 'forensic science'. Until very recently British literature of the field understood the scientific examination or investigation of crimes in terms of natural scientific methods."[1]

In addition to the classic fields of forensic biology, chemistry, ballistics and photography, we can add the recently-arrived fields of forensic computer technology (including, for example, the computerised examination of the human voice and intonation), anthropology (with emphasis on archaeological references), analysis of evidence, forensic nursing, engineering failure, fire science and the investigation of explosions, all of which are the legal responsibility of the experts.[2]

In the United States the use of the phrase 'forensic science' has been in use for many decades. Under the heading of 'forensic science'[3] we typically find

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[1] Katona, G.: *A kriminalisztika és a bűnügyi tudományok (Criminalistics and Forensic Science).* Budapest, 2002. 39.

[2] In terms of teaching Criminalistics in higher education, the study of Forensic Science in Law courses and Criminal Justice courses at most British universities is continuously supplemented by research findings—which are often international. Katona: *op. cit.* 55.

[3] "One of the anomalies of the American legal system is that it does not draw a clear distinction between the expert evidence used in criminal and civil trials. The 'Federal Rules of Evidence' apply equally to both legal areas while also leaving the subject and method

the kinds of scientific knowledge used for the investigation, examination and assessment of physical evidence. Its main branches are criminalistics and forensic medicine.[4]

These days ever more volumes are being published under the heading of *Criminalistics*. The trend began in the 1960s and comes close to the continental terms.[5] A fine example of this is *Lab Manual* which was published in 2001. Its subtitle still uses the old terminology—*An introduction to forensic science,* its main title, however, is *Criminalistics.*[6]

There are also special branches of criminalistics to be found that are perhaps useful and which can be considered methodologically. Into such a category we can put personality profiling, molecular genetics and biology, and safety management.[7]

Looking at the continental countries, in France (and in Belgium[8]) the study of areas of criminal investigation is connected to texts such as *Police Scientifique* (scientific policing) and, after Locard, *Manuel de technique policiere* (policing techniques),[9] although nowadays parallel use is also made

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of the expert's statement open. Hence the 'Federal Justice Centre' which as a branch of government acts as a publisher of legal literature for the purposes of informing and expanding the knowledge of judges and justice system officers." Katona: *ibid.* 40.

[4] Katona: *ibid.* 41.

[5] As for the teaching of Criminalistics in the United States, the maintenance of independent research institutions by several universities (e.g. Florida International University) or research faculties of 'criminal' forensics within the framework of organised departments (John Jay University, NY; George Washington University, Washington D.C.) has caused a shift in the organisation of research into forensic science, while the results are made use of in the taught courses.

Multi-disciplinary courses are common, e.g. Forensic Science and Criminalistics, Chemistry with Forensic Science and Toxicology, or Analytics and Forensic Science. The complex tuition of courses indicates the bringing together of 'criminal' justice or criminalistics with law. Katona: *ibid.* 55–57.

[6] Meloan, C. E.—James, R. E.—Saferstein, R.: *Criminalistics an Introduction to Forensic Science.* New Jersey, 2001. A similar process can be also seen in the works of several other authors, for example in the case of O'Hara. In two of his basic works signs of both strands appear, see O'Hara, C.—Osterburg, J. W.: *An Introduction to Criminalistics.* New York, 1960. and O'Hara, C.—O'Hara, G.: *Fundamentals of Criminal Investigation.* 6th edition, Springfield. 1994.

[7] Forensic Nursing and Fire Studies are to be found in the USA as well as in the UK.

[8] See Goddefroy, E.: Manuel élémentaire de police technique. Brussels, 1931.; Louwage, F. E.: Technique et tactique de la police criminelle. Ninove, 1948.

[9] Locard, E.: *Manuel de technique policiére.* Paris, 1923.; Gayet, J.: *Manuel de police scientifique.* Paris, 1965.

of the term 'criminalistics'.[10] In 2001 the University of Paris published *Manuel de criminalistique moderne* (Manual of modern criminalistics), the subtitle of which is *la science et la recherche de la preuve*[11] (Science and the research of proof).[12]

In German–speaking areas and in Eastern Europe criminalistics has always been accommodated and accepted as a term. In Germany it is chiefly the scientific institutions of the police force that carry out criminalistic research, according above all to the directions and research goals of the Federal Criminal Office (BKA) in Wiesbaden.[13]

2. Innovations in criminal technology and criminal tactics

Under this heading I will be discussing innovations that we would wish to consider in university courses in Criminalistics and in textbooks on the subject. We cannot afford to ignore these innovations, all of which should appear in any up-to-date university course in Criminalistics, if only as part of a lecture.

Criminal technology and criminal tactics comprise the following, listed briefly below, without the kind of detail it is the job of the textbook to supply: the growing use of spectroscopic procedures, particularly in the case of voice identification with the use of a spectogram (the computerised examination of

[10] See Ceccaldi, P. F.: *La criminalistique. "Que sais-je?"* Paris, 1962.; Chevet, G.—Marand, Ph.: *Cours de criminalistique* Préfecture de police. Paris, 1981.; Fombonne, J.: *La criminalistique.* Paris, 1996.

[11] Buqoet, A.: Manuel de criminalistique moderne (La science et la recherche de la preuve). Paris, 2001.

[12] The title refers to the important fact that there is a very close link between proof and criminalistics, and in my view it refers not only to proof in criminal procedures but to proof as it occurs in all branches of law and all areas of legal practice, e.g. state administration law, employment law, civil law.

[13] The explanation for this is that the only German university offering courses in Criminalistics is Ulm. Before German reunification Criminalistics could be studied at several universities in East Germany, notably at Humboldt, but the courses were discontinued following reunification in keeping with the structure mentioned above. I note here that the library of the Max Planck Institut für Auslander und Internationalen Strafrecht in Freiburg im Breisgrau has one of the most extensive criminalistics collections in the world, all of which are accessible to researchers of the subject. The University of Lausanne is one of the bases of the tuition of criminal sciences in Switzerland. The university's "Institute of Police Science and Criminology" conducts a wide range of criminalistic research. A volume outlining 'police science' also appeared at the beginning of the last century in Italy. For more details, see Ottolenghi, S.: *Polizia scientifica.* Rome, 1910.

the human voice and intonation); the spread of DNA testing; the widespread availability of genetic identification; the appearance and development of computerised techniques for identifying individuals; the use of mathematics-based Bayes analysis in identification tests; the growth of crime analysis methods for mapping evidence, crimes and data; the appearance of specific profiling techniques; identification based on computer script and computer printers; judicial fire science, including the investigation and examination of explosions.

3. Possible areas of further development for Criminalistics textbooks

It is the task of the textbook writer to introduce, describe and expound the areas of innovation listed above. In the face of this constantly updating field it is apparent that current textbooks—which are mostly general university Criminalistics textbooks of techniques and tactics, such as the *Textbook and Atlas of Criminalistics*[14]—need to be broadened in scope to include a concise overview of the most important crimes (the most common and most significant), together with a criminal-methodological description. I believe the following should be considered: crimes against life, especially homicide; crimes against property, including burglary and theft; robbery; sex crimes, especially violent ones; the category of 'special investigations' which includes the areas of finance; computers (including identification based on computer script; arson and explosions; organised crime; crimes in connection with terrorism.

4. The role of the laboratory in the teaching of Criminalistics

There are several arguments to support the view that Criminalistics is the 'odd man out' in Law departments in Hungarian universities. Firstly, it is not a branch of law but belongs decidedly among the factual sciences, not having either legal codices nor detailed laws, but at most a legal framework largely because of legislation for criminal procedure. Secondly, it is based mainly on natural sciences, whereas law is steeped in principles of sociology. Finally, it is a practical area of science, one in which knowledge that has been acquired can soon be 'cashed in'; such a step is duly expected, as only then can the required

[14] Tremmel, F.—Fenyvesi, Cs.: *Kriminalisztika tankönyv és atlasz (A Textbook and Atlas of Criminalistics).* 2002. The 'atlas' part of this successful and useful guide needs to be updated to include actual examples and illustrations of the crime methods listed.

results and success be achieved. The Department of Criminal Procedures of the Faculty of Law of the University of Pécs has set up a laboratory of criminalistics in conjunction with Baranya County Police Department in order to legitimise and activate this last argument. Here—as can be seen from the Latin origins of its name—criminalistic work and practice can be dealt with and are dealt with on a regular basis. In an ideal situation each student would himself carry out at least the most basic criminalistic—mainly technical—tasks (e.g. investigating, developing and securing prints; analysing and recording matter remains; carrying out basic identification tests; criminal photography; computerised photofits, etc.) in addition to seeing a demonstration.

Further reforms are required before such an ideal situation can be attained, for the moment we will have to breathe life into the key moments of contact teaching by using auxiliary materials as well as pictures, objects and video recordings in connection with all the branches of Criminalistics.

5. The 'Pécs Criminal Workshop' and its planned literature for teaching and research

In addition to updating the aforementioned textbook and atlas of Criminalistics as well as the laboratory, over the next ten years we plan to publish the following materials as teaching resources: lexicon of Criminalistics;[15] bibliography of Criminalistics;[16] Criminalistics case studies;[17] annual periodical containing

[15] There are some works of this type already in print, e.g. Gross, H.: *An Encyclopaedia of Criminalistics,* 1990.; Hamacher, H. W.—Herold, H.—Schreiber, M.—Stümper, A.—Vorbeck, A.: *Kriminalistik Lexicon. 1986.*; Modly, D.: *Pirucni kriminalisticki leksikon.* Sarajevo, 1998.; Siegel, J.—Saukko, P. J.—Knupfer, G. C.: *Encyclopedia of Forensic Sciences.* (Vol. 1–3), San-Diego–San Francisco–New York–Boston–London–Sydney–Tokyo, 2000., and Modly, D.—Korajlic, N.: *Kriminalisticki Rjecnik.* Tesanj, 2002.

[16] The last work of this type published in Hungary was edited by the Criminalistics Working Group of the Institute of Legal and Administrative Sciences of the HAI (*Állam- és Jogtudományi Intézet Kriminalisztikai Munkaközössége*) in 1956 and was en-titled "A Bibliography of Hungarian Literature on Criminalistics" (*A magyarnyelvű kriminalisztikai szakiradalom bibliográfiája*).

[17] To the best of my knowledge such a publication—broad in scope, systematically compiled, based on scientific criminalistics results—does not exist in the realm of university teaching resources.

articles by the staff of the Pécs Criminal Workshop, on the subject of Criminalistics, amongst other things.[18]

The need is for the last one is the greatest, given that the number of new publications on Criminalistics has declined in recent years. As far as I am aware titles such as *RTF Figyelő (RTF Observer), Magyar Rendészet (Hungarian Security)* and *Technikai Közlemény (Technical Bulletin),* all of which covered the area in question, have unfortunately ceased to be published. Submitted articles to *Belügyi Szemle (Home Affairs Review)* meanwhile hardly ever deal with Criminalistics; in the rare cases that the subject is covered the questions of tactics and methods are typically focussed on, not techniques.

Unfortunately even such a famous scientific workshop as the National Criminological Institute *(Országos Kriminológiai Intézet)* has removed the word *Criminalistic* from its title; researchers and publications have to align themselves to the profile that is left in its place.

Closing thoughts

The change in attitude towards the teaching of Criminalistics at universities which can be found among more and more heads of department appears encouraging. In keeping with international tendencies and, as our research findings of two years ago showed, Criminalistics is the kind of factual science which is not exclusively the domain of investigators, in other words it is not 'policing science' for police officers. In fact because of its methodology it is an area of science that is relevant in the teaching of all branches of law that deal with proof, and as such it should be included in the structure of the taught curriculum of all law students, future legislators and legal practitioners.

The common responsibility of all tutors dealing with Criminalistics now and in the future is also clear: to write updateable teaching materials and resources that reflect modern attitudes.

[18] The series began with the two commemorative yearbooks published in 2001 and 2002.

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MIKLÓS HOLLÁN*

Trilateral Conference on More Harmonized Criminal Law in the European Union**

The trilateral (Austrian-Finnish-Hungarian) seminar devoted to the topic "*Towards more harmonised criminal law in the European Union*" took place in Budapest from 1st to 3rd September 2003. The seminar was organized by the Hungarian National Group of the International Association of Penal Law (IAPL)[1] and by the Institute for Legal Studies of the Hungarian Academy of Sciences. The predecessors of such events, held at every third year in Helsinki and in Budapest in turn, were founded upon the bilateral agreement between the Finnish and the Hungarian Academy of Sciences. The co-operation, however, was never limited to academician researchers, but from the beginning representatives of other institutions (e.g. universities, courts) also participated at the seminars.[2] The sixth seminar was completed to a trilateral one, because besides the Finnish and Hungarian scholars, it was attended by two university lecturers from Estonia as well.[3] The successive seminars remained in the framework of the bilateral co-operation,[4] but in 2003 besides Finnish colleagues Austrian scholars were also invited to the ninth seminar. The choice has fallen naturally on Austria, considering the traditional connections between the (criminal) lawyers of the two country reach back as far as the Austro–Hungarian Monarchy, but flourish recently as well.

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[1] Official web site: www.penal.org

[2] *See*, Fehér, L.: Hungarian–Finnish seminary in Budapest on criminal law. *Acta Juridica*, Vol. 23 (1981) Nos. 1–2. 225–230.

[3] *See*, Mohácsi, P.: Finn–magyar–észt büntetőjogi szeminárium (Finnish–Hungarian–Estonian Seminar on Criminal Law). *Állam és Jogtudomány*, Vol. 36 (1994) Nos. 1–2. 180–192.

[4] See, *e.g.*, Hollán, M.: Eight Finnish-Hungarian Seminar on Criminal Law. *Acta Juridica Hungarica*, Vol. 41 (2000) Nos. 3–4, 167–170.

The Austrian delegation was composed by Professor *Manfred Burgstaller,* Professor Helmut Fuchs and Honorary Professor Fritz Zeder from the University of Vienna. Professor *Raimo Lahti*, Professor *Kimmo Nuotio*, Researcher *Sakari Melander* and Researcher *Ohisalo Jussi* attended the seminar from University of Helsinki. The Hungarian side was represented by Professor *Imre A. Wiener*, Professor *Lenke Fehér*, Researcher *Katalin Ligeti*, Researcher *Réka Végvári* and Researcher *Miklós Hollán* from the Institute for Legal Studies of the Hungarian Academy of Sciences on the one hand, and Associate Professor *Balázs Gellér and* Adjunct Professor *Norbert Kis* attended the seminar from the University of Győr on the other.

The patron of the seminar *Péter Bárándy* (Minister of Justice, Hungary) gave the *opening reception.* In his speech he commemorated the most important stages of the co-operation between Hungarian and Finnish lawyers on the one hand, and the long-standing connections between Austrian and Hungarian colleagues on the other. He expressed his special thanks to *Professor Lahti* and *Professor Wiener* for their ongoing engagement and support in setting up and making flourish the Finnish–Hungarian co-operation. With regard to the Austrian–Hungarian co-operation after the Second World War he emphasised the importance of the bilateral university exchange programs. In this respect Minister *Bárándy* referred to the inevitable role of *Professor Tibor Király* and *Associate Professor Kálmán Györgyi* (from Eötvös Loránd University of Sciences, Budapest, hereinafter: ELTE) for organising and directing the scientific relationships between the two countries from the Hungarian side. He also emphasised the significant role of *Professor Manfred Burgstaller* who was given by the title of *Doctor Honoris Causa* appreciating his merits by the ELTE in 1998. He was pleased to note that the younger generation of Austrian and Hungarian criminal lawyers continues this fruitful co-operation.[5] He referred especially to the bilateral seminar in 2001 organised by the Austrian National Group of the IAPL, and to the international colloquium held in Budapest in

[5] On Young Penalist in general see, Ligeti, K.: Young Penalist in the Association. In: *Csemegi Károly emlékkönyv* "Association Internationale de Droit Penal XVI[E] Congress Internationale de Droit Pénal, Budapest, 5–11 Septembre 1999, Actes du Congress" (ed.: Imre A. Wiener). MTA Jogtudományi Intézet, Budapest, 127–130. On the Hungarian Young Penalist see Hollán, M.: A Fiatal Büntetőjogászok Fórumának első tudományos tanácskozása. Visegrád, 2000. április 14–16. (The First Seminar of Young Penalist, Visegrád, 14–16 April 2000). *Magyar Jog,* Vol. 47 (2000) No. 11. 669–675.

2002 under the auspices of the Young Penalist Section of the Hungarian National Group.[6]

In his *message of greetings Helmut Epp* (Secretary General of IAPL) commemorated the importance of the Hungarian National Group in the scientific life of the Association by organizing various seminars and conferences, especially the XIth and XVIth International Congresses of Penal Law held in Budapest respectively in 1974 and 1999. He also conveyed to us the best regards of the President of the Association, Professor *Cherif M. Bassiouni*. The Secretary General took advantage of the opportunity and commented substantive issues of European criminal law. He argued that taking into account the sensitivity of criminal law influenced by national traditions it was wise to keep this area within the third pillar. He also pointed out to the constitutional problems posed by the framework decision on European arrest warrant agreed upon prematurely only to proof that the Council was able to react in a speedy manner to security challenges.

In recognition of his laudable activity for having organized the Finnisd-Hungarian Seminars during more than two decades *Professor Raimo Lahti* was awarded with an honorary diploma by the Hungarian National Group of the IAPL.

The seminar was divided into five sessions, each of them contained two or three presentations which will be summarized in the following.

I. Session

1. The first session was devoted to the topic of the criminal liability of legal persons and that of the heads of business. In his lecture *Prof. Lahti* made a distinction between the *criminal liability of legal persons and the criminal liability within legal persons*. He analysed various international instruments adopted under the auspices of the United Nations (UN), the Council of Europe (COE), and last but not least the European Union (hereinafter: EU). He highlighted the fact that although criminal liability of legal persons had already been introduced in 1995 into the Finnish Penal Code (Chapter 9), the application of these provisions has been limited to ten cases approximately. Professor *Lahti* outlined the special provisions on criminal liability of heads of business had been included in the Finnish Penal Code since 1995. In the beginning this form

[6] The material of the second seminar was published in: *Young Penalist Conference on Corruption and Related Offences in International Business Relations* (ed.: Katalin Ligeti). "Közlemények /No 18./ Working Papers" MTA Jogtudományi Intézet, Budapest, 2003.

of liability has been limited only to labour and environmental offences, but from 1 January 2004 a more general provision on this subject will come into force in the reformed general part of the revised Finnish Penal Code.

2. In his lecture Professor *Manfred Burgstaller* summarized the current discussions in Austria on *liability of legal persons for criminal offences.* In accordance with European continental tradition only natural persons are presently subject to criminal liability in Austria. The Austrian criminal law in its current form is, therefore, clearly not in accordance with the global and European instruments, which oblige states to ensure that legal persons can be held accountable for specified criminal offences. Professor *Burgstaller* pointed out that the controversies have not only referred to the details of corporate liability, but also, and even primarily, to the basic issue which area of law the direct liability of legal persons for criminal offences should actually be located in. Several proponents wanted to implement corporate liability for criminal offences into the body of Austrian administrative penal law. There are, however, convincing objections against solving the related matter within administrative law, *e.g.* according to decisions of the Austrian Constitutional Court only judges are allowed to impose sanctions above a certain level of severity. Therefore the criminal law approach is preferred by the prevailing view of Austrian experts. He pointed out that according to the final draft of the new Austrian legislation the liability of legal persons should not be integrated in the Penal Code and the Criminal Procedure Act, but should be framed in a separate statute. Professor *Burgstaller* also analyzed several details of the legislation, *e.g.* the types of criminal offences, the inclusion of unincorporated associations, the exclusion of corporations with governmental functions, the connection of the legal entity to the offence and the applicable sanctions (organizational fine, ban to carry out determined business activities etc.).

3. The presentation of Professor *Imre A. Wiener* concerned the *negligence and omission of heads of businesses.* He pointed out that criminal liability of heads of business had been introduced into the Hungarian Criminal Code by Act CXXI of 2001 with reference to the Convention on the protection of the European Communities' financial interests (Article 3) and to the Convention on the fight against corruption (Article 6). He pointed out that criminal liability of heads of businesses differs in several respects from traditional criminal liability known to Hungarian law. According to the offence description *actus reus* of the criminal liability of heads of businesses comprises the following elements: the fraud or active corruption of the employee committed acting on

behalf of the business organization, omission by the head of business (breached of duty element) and the relevance of the omission. The *means rea* of the criminal liability of heads of businesses is either intentional or negligent. Professor Wiener outlined the common elements equally applicable both for the protection of the financial interests of the European Communities and for the fight against corruption, but he also paid attention to the considerable differences in the way criminal liability occurs in connection with the two offences. While fraud related to the administration of the European communities' financial interests could and must be controlled by the higher-ranking managers, because it is not the entire activity which is secret, but only the falseness of documents presented. Opposite to fraud, however, corruption is a hidden and concealed behaviour, the detection of which is rather difficult even for the law enforcement bodies. In the opinion of Professor Wiener it is unreasonable and unrealistic to set up a control mechanism to prevent active bribery, therefore criminal liability of higher-ranking managers should not have been established for omitting to set up such a system.

II. Session

4. Professor *Kimmo Nuotio* gave his lecture with the title "*Third Pillar of the European Union—and Beyond.*" He referred to the relatively recent but increasing interest of the EU in criminal-law related issues not only to enhance the intensity of legal co-operation between the Member States, but also to harmonize the contents of substantial criminal law. He noticed, however, that the sphere of direct harmonization of criminal legislation is restricted to some specific fields of transnational or cross-border criminality. Therefore the divergences of the domestic systems of law should not be underestimated. Professor *Nuotio* pointed out that institutional side of harmonization (e.g. European Public Prosecutor's Office in the Corpus Juris proposal) is also related to the more general issues of the identity and structures of the EU, and often they would not be realizable without renegotiating the Treaty framework. Professor *Nuotio* examined the criminal policy assumptions behind common European proposals and also the possibilities of different approaches in different geographical parts of the European Union in the future.

5. Honorary Professor *Helmut Zeder*'s presentation dealt with two recent developments accompanying the approximation of penal law in the EU: strengthening the *ne bis idem principle* on the one hand, and the introduction

of the *European arrest warrant* on the other. With regard to the *ne bis idem principle* he referred, *inter alia*, to the debate whether the same fact or the same offence should be an obstacle of the second prosecution. He also analyzed the exceptions to the international validity of the *ne bis in idem* principle, provided e.g in Article 55 of the Schengen Convention. Honorary Professor *Zeder* also dealt with various aspect and details of the European arrest warrant, e.g. the relevant offences and the problems related to grounds for mandatory and optional non-execution.

6. In her lecture Researcher *Katalin Ligeti* undertook to give an overview of the major developments in the law of *mutual legal assistance in the European Union*. She focused to the fact that within an area of freedom, security and justice (as proclaimed by Title IV of the TEU) traditional requirements and grounds of refusal to mutual legal assistance should be cut down. Researcher *Ligeti* also pointed out that the simplification and acceleration of the procedure, which enjoys absolute priority in the European Union, does not only increases the efficiency of mutual legal assistance, but also serves the interest of the individual affected by mutual legal assistance. She also make us acquainted with the intricacies of the new forms of mutual legal assistance in the European Union connected with new telecommunication possibilities, like videoconference or the interception of telecommunication. She emphasized that the scope of mutual legal assistance has been considerably expanded in the European Union. Besides judicial authorities, which were the traditional actors of mutual assistance in criminal matters, police authorities and administrative bodies become to play an important role. She pointed out that the latest instruments on mutual legal assistance included a growing number of provisions on police and administrative cooperation. She put the question whether this development was an evasion of the rule of law or a mere emergence of a transprocedural approach.

III. Session

7. Professor *Helmut Fuchs*'s presentation dealt with the *economic criminal law in the EU*. He posed and analysed the question whether and to what extent economy should be regulated by market or by (criminal) law. He offered two explanations for the necessity of control of economy through criminal law: law as a means of the protection of the weaker or as a means of establishing equality of competition. Both approaches could be relevant in the EU, because

this is an economic community based on free trade in order to promote prosperity of the citizens. He outlined and analysed the main fields in the EU where economy controlled by criminal law, namely by anti-trust laws, by environmental offences, and by the prohibition of insider dealing. Professor Fuchs also pointed out the deficiencies of EU rules, namely the lack of democratic legitimisation and judicial control, the vague offence descriptions and the strong dependence of criminal provisions on administrative law. With reference to the proposal of Professor *Tiedemann* on the so called "*Europa-Delikte*", he also outlined those fields of economic criminal law which in the near future should have been regulated by European law, e.g. insolvency law (bankruptcy offences).

8. Professor *Lenke Fehér* presented her lecture on a *comprehensive European policy against trafficking in human beings*. In the very beginning of her presentation she made us acquainted with the fact that one hundred and twenty thousands women and children a year were lured from the countries of Central Europe to the European Union. She identified trafficking in human beings as a grave and multiplied violation of human rights, which renders huge profit for the offenders, who at the same time face only low risk. She pointed out to the fact that besides UN instruments, there are considerable European efforts to combat this phenomenon. She stressed in this respect not only the Council Framework Decision of 19 July 2002, but also the Brussels Declaration on Preventing and Combating Trafficking in Human Beings (2002). She also referred to the fact that Council of Europe will start drafting of a European Convention on this issue in 2003. The presentation of Professor *Fehér* thoroughly highlighted various definitions of trafficking in human beings in the relevant international instruments, and provided a brief insight into the Hungarian situation in this respect.

9. Associate Professor *Balázs Gellér* scrutinized the results and prospects of *fighting terrorism with criminal law in the EU*. He analyzed the various approaches conceptualizing terrorism in the most important international conventions adopted by UN bodies. He focused especially to the problem inherent in the approach of the International Convention for the Suppression of the Financing of Terrorism which refers to other international instruments, e.g. to the Convention for the Suppression of Unlawful Seizure of Aircraft (1970). He also analyzed the intricacies of the Council of Europe solutions, especially the political offence exception in the light of the Convention on the Suppression of Terrorism (adopted in 1977 and amended in 2003). Associate Professor *Gellér* paid also considerable attention to the provisions of the Council

Framework Decision on Combating Terrorism (13th June 2002). Besides the intricacies of the above mentioned international instruments he also dealt with the question whether torturing terrorist in order to save the life of the abducted victims is in line with fundamental human rights, enshrined e.g. in Article 3 of European Convention on Human Rights and Fundamental Freedoms.

IV. Session

10. The presentation of Adjunct Professor *Nobert Kis* dealt with the *principle of culpability in European criminal law systems.* Adjunct Professor *Kis* pointed out that the European harmonization and comparison of criminal law have paid very little attention on the principle of culpability, which is not a necessarily corollary of the requirements of individual responsibility. He argued that we have to rethink the concept of culpability on which the European instruments of harmonization have been and will be founded. He stressed that the principle of culpability had been facing a deep regression in certain fields of criminal law. a) Certain European countries (France and Belgium) apply an objective and abstract assessment of negligence in the judicial practice, without applying to individualized conditions of liability. b) The objective approach is also relatively widespread in the case law of recklessness according to which it is sufficient to prove it that the risk of damage would have been obvious to any reasonable person in the defendant's position. He explained these facts by a recent judicial approach focusing primarily on the prevention rather than retribution. *c)* European criminal justice systems, as he mentioned, apply purely objective standards (so called strict liability) for some harm in almost identical groups of crimes, e.g. with regard to regulatory offences.

11. Researcher *Sakari Melander* chose framework decisions, instruments described in Article 34 of the Treaty of European Union, as an example to illustrate the *implementation of EU instruments on criminal law in Finland.* He pointed out that with regard to EU-connected criminal law issues the role of the domestic law drafters has been changed: After taking part of the law drafting process in the EU Council Working Committees, they should also implement the adopted framework decisions into national law. He emphasised that since framework decisions leave open the method by which the result described in them is achieved, their implementation process in the Member States is very important. Ultimately Researcher *Melander* illustrated the above mentioned thesis with examples from the implementation provisions of the

council framework decisions in Finland with regard to substantive criminal law issues.

12. In her presentation, Researcher *Réka Végvári* analysed the *implementation of EU instruments concerning the fight against corruption in Hungary.* She outlined the main criminal law conventions in this field adopted under the auspices of various international organisations, including the EU. Researcher *Végvári* pointed out that the concept of criminal corruption expanded considerably in the last two decades at the international level. The notion comprises not only the offence of bribery, but also trading in influence. According to the international conventions not only bribery with regard to domestic public officials should be penalised, but national criminal law provisions should also cover cases committed by or involving foreign and international officials. She emphasised that considerable number of international instruments, *inter alia* the new council framework decision adopted on 22 July 2003, concern the penalisation of corruption in the private sector. She concluded that these extensions of criminal liability are necessary to provide protection for proper functioning and integrity of these social values in the context of increasing international cooperation and economic integration. Finally Researcher *Végvári* analysed the implementation of the relevant international treaties in Hungary, referring both to the developments and weaknesses of the Hungarian criminal law in this field.

V. Session

13. In his presentation Researcher *Ohisalo Jussi* examined how in fact the Finnish public administration (namely the Ministry of Agriculture and Forestry) had controlled agricultural *subsidies from the Community budget.* He scrutinised whether the demands for increased use of criminal law sanctions emanating from the European level (from the Commission) had mirrored in the day-to-day work of the officials in the Ministry and the related administrative bodies. Researcher *Ohisalo* introduced us the result of a brief empirical study comprised of interviews of a small number of relevant officials. He concluded that the different objectives behind the agricultural subsidy schemes (development of certain underdeveloped regions or the regulation of the harvested field) affect how stringent control and scrutiny is possible and preferable. He emphasised that one should not merely look at the matter as furthering the legitimate goal of protecting the Community budget, but also take into consideration what

happens in practice. Therefore the strategies should also be adapted to some degree to the characteristics of the various systems in the Member States. This is a formidable challenge, he concluded, especially on the eve of enlargement.

14. Researcher *Miklós Hollán* held the last presentation on the topic of *confiscation in the European Union*. At the beginning he made a distinction between fragmental provisions on confiscation in various conventions on particular wrongful behaviours on the one hand, and instruments adopted solely on the deprivation of instruments and proceeds of crime on the other. He emphasised that the second form of international instruments on confiscation has been adopted firstly at the European level, namely the COE Convention on Confiscation of the Proceeds from Crime (1990). The EU Joint Action and Framework Decision on confiscation of instruments and the proceeds from crime followed this approach, but contain stricter obligations than their COE counterpart. The presentation also examined whether the various EU provisions on confiscation form not a mere "mass", but a system of rules. Researcher *Miklós Hollán* concluded that only nucleuses of the intentional system building are present in the EU provisions on confiscation. Finally he scrutinised the limits of domestic jurisdiction set by European law in the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Commission and Court of Human Rights (Cases of Salabiaku, Welch and Phillips).

Remarks of Professor Wiener, followed by the acknowledgements and comments of the participants, closed the final session of the seminar. It was announced that written forms of the presentations would be published in the near future.

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Considering the atmosphere and the spirit of the sessions it is certain that the co-operation among Austrian, Finnish and Hungarian criminal lawyers will be remained at least as fruitful as recently.

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BOOK REVIEWS

GÁBOR HAMZA: **Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján** [Trends in the Development of Private Law in Europe. The Role of the Civilian Tradition in the Shaping of Modern Systems of Private Law]. Nemzeti Tankönyvkiadó, Budapest, 2002, 362 p.

It was the end of year 2002 when the monograph *Az európai magánjog fejlődése* (*Trends in the Development of Private Law in Europe*) was published by *Gábor Hamza*. *Gábor Hamza* is full professor of Roman Law and Comparative law at the Faculty of Law, Eötvös Loránd University of Sciences, and he is the head of the Department of Roman Law, as well. The aim of this monograph is to describe the formation of the private law-systems of today based on the Roman Law traditions. Being the editor of this book I intend to give a short presentation, which might be encouraging for further reading of the book.

Gábor Hamza purposed to present the formation and the structure of the modern private law systems with the method of the comparative private law with special emphasis on the subsequent fate of Roman Law. It has to be taken into account that there are several studies in the international literature, which deal with the general presentation of the universal history of private law. There are also numerous general introductions to the comparative law (*droit comparé*), too. I refer hereby—as examples—to the works of *René David*[1] and *Franz Wieacker*.[2] Taking into consideration these studies one has to underline the specific methodological basic-principle of Professor *Hamza's* book. To sum it up one can say that the author attempts to compound those scientific approaches, which are applied by the international legal literature. As a consequence of this it is not only the *historia externa* of private law, which can be found in the book, but one may also collect several pieces of information on the dogmatical questions and the history of institutes of private law in the present book. Nevertheless one can find useful datas on the history of the science of private law, as well.

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[1] David, R.—Jauffret-Spinosi, C.: *Les grands systémes de droit contemporains*. Paris, 2002.[11] In English: David, R.—Brierley, J. E. C.: *Major Legal Systems in the World Today. An Introduction to the Comparative Study of Law*. New York, 1978.

[2] Wieacker, F.: *Privatrechtsgeschichte der Neuzeit*. Göttingen, 1967[2].

If one pays attention to the essence of this methodology it may not be surprising that the author puts high emphasis on Roman law and on the subsequent fate of Roman law. It is absolute beyond doubt that Roman law can function as a possibility for integration among the national legal systems. Overwhelming as it may be but Roman law can be regarded as a *lingua franca* of law.

If one takes a short look on the title of the present book, one may think that the monograph concerns only the European countries. If one takes the table of contents under close inquiry one may see that this book is not exclusively on the development of law in Europe. Nevertheless we may find the short legal history of private law of every European country. Additionally the book gives detailed analysis on the impact of the European civilian tradition on countries outside Europe. One can read chapters on the legal development of North America, Central America and South America, South Africa and some countries of Asia, as well.

Professor *Hamza's* book is divided into four large parts, as follows:

1. The Origins of European Private Law;
2. The Development of European Private Law in the Middle Ages;
3. The Development and Codification of European Private Law in Modern Times;
4. The Influence of the European Civilian Tradition on Countries Outside Europe.

I think that the titles of the parts themselves testify upon the historical and comparative approach of the book. This may result that one can regard this monograph as legal history, although I am convinced that the book itself is more than a summary of history of private law.

The first part of the book gives a very useful introduction to the beginnings of the European private law. The very first paragraphs of the book are on the fate of Roman law after the demise of the West-Roman Empire. This chapter also contains an analysis on the codification of Roman law in the Roman (Byzantine) Empire during the reign of Justinian. This codification can be regarded as the most important and most famous codification-process of the antiquity. I refer hereby to *David Dudley Field,* the famous American jurist in the 19th century who said that the code of Justinian is "*a great achievement of human genius*".[3] It is absolutely beyond any doubt that the Code of Justinian had a huge impact on the codifications of Europe in the modern times.

The second part of Professor *Hamza's* book begins with a theoretical definition on the term of *ius commune.* As it is well-known there are many interpretations of *ius civile* in the legal literature. In the favor of a better

[3] Cf.: *David Dudley Field Centenary Essay* (ed.: A. Reppy). New York, 1949.

understanding it's worth quoting the definition of *ius civile* applied by the author:

> *"Ius civile is nothing else but the surviving Roman law, which is functioning as a common legal system of the Europe of the Middle Ages and the very beginning of the Modern Times, including the countries having particular legal systems. This legal system is followed by the civil codes and other acts of the nations from the middle of the 18th century to the 19th century."*[4]

This chapter gives a very detailed analysis on the development of law in Europe in the Middle Ages. Nevertheless one finds very useful pieces of information on the legal development of bigger countries, such as France or the Holy Roman Empire, but one can gather really important datas on the smaller countries, as well. For instance we can read some paragraphs on the law of Wales, which became the part of England in 1283. It may be interesting to pay attention to the fact that the English legal system was introduced in Wales no sooner than in 1536 and 1543, based on the *Acts of Union*.

The book contains outstanding information on the field of history, too. We can make out that it was *Ivan*, the Third (1462–1505) in Russia who used the title '*tsar*' in international relations for the first time. The title '*tsar*' is in very tight connection with the well-known theory of the '*third Rome*'. (We can also find very detailed bibliography on the theory of third Rome.)[5]

It is absolutely beyond any doubt that the most sophisticated part of the book is chapter 3, "*The Development and the Codification of European Private Law in Modern Times*". Incredible as it may seem this chapter includes every European country without any exception. The first point of the chapter introduces the development of the European jurisprudence at the beginning of the modern era by sketching the most important scientific tendencies. Nevertheless we can also read about the history of the science of law in the legal history of the countries, as well.

The first part of chapter 3 deals with countries of German language in Europe. *Gábor Hamza* gives a very detailed picture on the codification of the German Civil Code, BGB, which was put into force on the 1st of January, 1900. This Civil Code had huge influence on the codification of other European and non-European countries. Concerning Roman Law this code has particular relevance. As this code became effective in Germany the force of the previous law, the so-called *law of Pandects*—which is a subsequent version of classical and post-classical Roman law—ceased to exist.

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[4] Cf. Hamza: *op. cit.* 45.

[5] Cf. Hamza: *op. cit.* 89.

Upon reading this chapter one gets familiar with the background of the German Civil Code, i.e. with the German science of private law, *Historische Rechtsschule, Begriffsjurisprudenz*, etc.

As it is wide-known after the second World War Germany was separated into two parts, *Bundesrepublik Deutschland* (BRD) and *Deutsche Demokratische Republik* (DDR). DDR belonged to the socialist world, therefore its legal system had to be taken into accordance with the socialist theory and economic structure. As a consequence of this there were many modifications on the legal system after the changes. It is worth mentioning that DDR adopted its own Civil Code, called *Zivilgesetzbuch* in 1976. After the reunification of the two parts of Germany, BGB became effective on the territory of the former DDR, as well.

One has to take into account as well, that Professor *Hamza's* book—which was published in 2002—pays attention to the very important modifications of BGB, which were adopted at the very beginning of 2002.

Chapter 3 gives a very thorough description on the law of Switzerland, containing private law doctrine and the codification of private law, too. One can clearly see how ZGB and OR was composed with regard to the law of the cantons in Switzerland.

It is not only BGB, which had huge impact on the codification of smaller countries. Under no circumstances can we underestimate the influence of the French Civil Code, *Code civil*, adopted in 1804. This Code declares in Art. 1732 that damages, which are caused against law, should be compensated by the liable person:

> "*Art. 1382. — Tout fait quelconque de l'homme, qui cause á autrui un dommage, oblige celui par la faute duquel il est arrivé, á le réparer.*"[6]

This principle is the very basic of the *delictual liability*.[7] This principle shows up in the modern civil codes, too.[8]

Gábor Hamza analyses the composition of the French *Code civil*, as well. He clarifies that the codificators of *Code Civil* paid attention to the prior French written law (*droit écrit*) and customary law (*droit coutumier*), as well. As it is known, *Code civil* had four fathers ("*Pères du Code civil*"), two of them were experts of Roman law (*Jean-Etienne Marie Portalis* and *Jacques de Maleville*), while two of them were specialists of French customary law (*Félix-Julien-Jean Bigot de Préameneu* and *François-Denis Tronchet*).

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[6] *Code civil*, 1990. (red.: Lucas, A.). Paris, 1990. 629.

[7] The term of delictual liability is pretty much equivalent with the term tort liability applied by Common Law countries.

[8] Cf. § 339 of the Hungarian Civil Code of 1959.

French law is also in effect in the oversea-counties and oversea parts of France, as well: *départements d'outre-mer* (French-Guyana, Guadeloupe, Martinique and Réunion), *collectivité départementale* (Mayotte), *collectivité territoriale* (Saint Pierre, Miquelon) and *territoires d'outre-mer* (French Polinesia, New-Caledonia, Wallis and Futuna). One has to take into account that there are several differences of legal and administrative nature between these territories.

Professor *Hamza* gives a good introduction to the law of the so-called mini-states in Europe. Hence, we may get information on Monaco, as well. It is not widely known that at the present day Monaco does have its own civil code—called *Code civil*—, consisting of 2100 articles, which is not equivalent with the French *Code civil*.

One can learn a lot about such mini-states, as the Channel Islands or the Isle of Man. These parts may be very interesting or useful for businessmen, hence these islands are really good opportunities for *off-shore* companies in Europe.

I figure out that the Hungarian lawyers and researchers may find extremely interesting those parts of the book, which deal with the Central-Eastern European countries (Hungary, the Czech Republic, etc.), the former Yugoslavian territories (Slovenia, Croatia, etc.) and the Soviet-successor states (Estonia, Armenia, Ukraine, etc.). It is not overwhelming to declare that many important historical and economic changes have happened in these territories, which have immeasurable legal significance, as well. Professor *Hamza's* book is the first to report about them in Hungarian language. Being the modifications in the legal system of these countries in close connection with the historical changes Professor *Hamza* provides a thorough historical and political introduction. These parts might have relevance for historians and political scientists, as well.

I am sure that without a good view to the historical changes one would not be able to understand those legal changes of high relevance, which were able to build the very basic of the market economies in these former Socialist countries. Of course this transition has not been put into practice to the same extent in each country. It has many reasons of political, social, economic nature. We have no possibility to analyze them, because that would need very detailed study on these countries. To sum it up having read this part of the book one may see the common legal roots of these countries and may find ideas how they will find their place in Europe of the future. As it is widely known, some of these countries—e.g. Hungary—are going to be members of the European Union in the short run, while others join the EU in a longer run.

The fourth and last part of Professor *Hamza's* book deals with the influence of the European civilian tradition on countries outside Europe. This chapter

makes known what kind of impact the European tradition of private law had on states, which are not located in Europe.

Hence, we find very relevant information on the legal development of North America, Central America and South America, South Africa and some countries of Asia.

The author gives full particular of the role of the European private law in legal development of Louisiana. Louisiana does have a very specific situation among the member-states of the USA, hence this state was bought by the USA from France in 1803. The first civil code of Louisiana, *Louisiana Civil Code* was adopted in 1808. This code, which was originally composed in French is based on the French *Code civil* of 1804, but it has also many connections to Roman law, as well.[9] In the present days Louisiana does have its third civil code, which was adopted in 1870. The *travaux preparatoires* to modify this Code began in 1979. This Code still maintains the characteristics of the European civil law, but one may also realize the influence of the *Common Law*, as well. All things considered the legal system of Louisiana—being *mixed jurisdiction*—is unique among the member-states of the USA.

One has to take into consideration that the legal system of Canada is also very similar to the European—mainly the French—law from many aspects.

It is not only the legislation where European civilian traditions had influence in North-America. There are very important connections between the American and the European jurisprudence, as well. Professor *Hamza* provides a good summary on that.

The author summarizes the legal development of the Central American and South-American states. It is very important to pay attention to the efforts to unify private law in the Central American and South American states. These trends for unification are rooted in the common legal traditions, which are undoubtedly based on Roman law.[10] From this point of view the *conference of Arequipa* (Peru), which was held between 4–7, of August, 1999 with the participation of Argentina, Bolivia, Peru and Puerto Rico, has particular significance. On this conference the *Acta de Arequipa* was passed, which contains the basic principles for unification private law in Central America and South America.

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[9] Herman, Sh.: Der Einfluß des römischen Rechts auf die Rechtswissenschaft Louisianas vor dem amerikanischem Bürgerkrieg. *ZSS RA* 113 (1996) 293–345.; Palmer, V. V.: Two Worlds in One: The Genesis of Louisiana's Mixed Legal System, 1803–1812. In: *Louisiana: Microcosm of a Mixed Jurisdiction* (ed.: Palmer, V. V.). 1999.

[10] Garro, A. M.: Unification and Harmonisation of Private Law in Latin America. *AJCL* 40 (1992) 587–616.

From the aspect of the Romanists the part, dealing with South Africa is extremely interesting. It is not hard to find out the reason for that. In the South-African Republic the so-called *Roman-Dutch Law* is still valid. The expression Roman-Dutch Law comes from Simon van Leeuwen who used it first in Latin then in Dutch. In Afrikaans language Roman-Dutch Law is *Romeins-Hollandse reg*. Nowadays, with regard to the influence of Common Law the legal system of the South-African Republic can be considered as a mixed-jurisdiction, as well.

Although we cannot find the legal history of every Asian country in this book, we may gather very interesting information on the legal development of several Asian states. For instance it is very fascinating to keep in mind that the German law, especially BGB had huge impact on the legal development of Japan and South-Korea. It is in connection with the very strong economic relationship between the countries mentioned. *Gábor Hamza* puts high emphasis on the scientific emphasis on *Roscoe Pound* who played very important role in the spread of Roman law traditions and comparative law in China.

One has to pay attention to the fact that Professor *Hamza* provides a very rich bibliography to his book. To be clear the bibliography can be divided into two parts. On the hand one can find bibliography by each country. On the other hand one can read a twenty-five-page long general bibliography at the end of the book, which may serve as a perfect guide for further researches. The list of abbreviations, the index and the table of contents in six languages (Hungarian, English, French, German, Spanish and Italian) makes the entire work easy and quick to use. It is very likely that the English edition of this book is to appear soon.

Professor *Hamza's* book can be regarded as a course-book and handbook, as well. I find it very important to highlight that the monograph assumes the basic knowledge of history and institutes of Roman law. Hence it is advisable to use it together with the textbook of Roman law by Professor *András Földi* and Professor *Gábor Hamza,* which was published in the fall of 2002 in its seventh revised and extended edition.[11]

I am convinced that Professor *Hamza's* monograph on the development of private law in Europe is outstanding in international measures, as well. This book is strongly recommended for law-students or for researchers. Not only does have the book an extremely rich database on the development of private law but it also does analyze the most important trends of the present and future in a very logical and clear system. Therefore this book might be also useful for practicing lawyers, as well who often meet problems of conflicts of law or

[11] Földi, A.—Hamza, G.: *History and Institutes of Roman Law.* Budapest, 2002.

international commercial law. The book is especially current in our days, when the composition of the *ius commune (privatum)Europaeum* is in progress. All in all one can offer this book to those who intend to have a general but very deep summary on the development of private law in Europe and countries outside Europe with special emphasis on the trends of the future.

Ádám Boóc

FRANÇOIS GENDRON: **L'interprétation des contrats.** Montréal, 2002. 225 p.

It was the year 2002, when the book *L'interprétation des contrats* was published by *François Gendron* in Montréal. The author is attorney-at-law and also professor at the *Collége militaire royal du Canada.* In the past he wrote books on historical issues.[1] *François Gendron* is also doctor of history at the University of Paris. This book of him however deals with a typical civil-law topic. The interpretation of a contract ot agreement is undoubtedly a classical question of private law, no matter if we regard national legal systems or international private law. Therefore it is always useful to have a good summary on this key-issue of civil law. To begin with I may affirm that *François Gendron* did compose a really important and interesting work in this matter. In the followings I try to present a short summary of the book with the intent to encourage the reader to study the entire work of *François Gendron.*

The preface of the book is written by *Jean-Louis Baudouin* who is a judge at the Court of Appeal in Québec (*Cour d'appel du Québec*). *Baudouin* really trusts that the work of *Gendron* is to become a classical one on this topic soon.

Gendron's book is divided into seven chapters as follows:

1. *L'acte d'interprétation;*
2. *La règle des règles: l'intention;*
3. *La méthode textuelle*;
4. *La méthode logique*;
5. *La méthode objective*;
6. *L'interprétation du contrat d'adhésion;*
7. *Conclusion.*

Nevertheless, the author presents a wide view of the dogmatic questions with reference to legal history and legal systems of several countries. He focuses however on the civil law of Canada. Therefore he refers very often to the *Code*

[1] La jeunesse sous Thermidor. Paris, 1983.; The Gilded Youth of Thermidor. Montréal, 1993.; Dictionnaire historique de la Révolution française. Paris, 1989.

civil du Québec (hereinafter *C.c.Q.*), and quotes many expressive examples from the Canadian jurisdiction.

As it is known the first Civil Code of Canada came into force in 1866 with the title *Code civil de la province de Québec.* Originally the official title of the code was *Civil Code of Low Canada.* The editors of this code put extremely high attention to the French *Code Civil* of 1804, concerning especially the first three books of the code. Nevertheless the so-called *Coutume de Paris*—which used to be considered as effective law in Québec—and the works of *Robert-Joseph Pothier*, the great French jurist from Orléans did have huge influence on the Canadian Civil Code.[2] One can also find the impact of the *Common Law* in the Canadian civil law, as well.

It was the year 1994, when the new Canadian Civil Code, the *Code civil du Québec* (*Code civil of Québec*) was put into force. The new Canadian Civil Code consists of ten books, and safeguards traditions of Roman law, as well. *Gendron* quotes the provisions of the new Canadian Civil Code many times, by marking it as new law. All in all one can remark that the Canadian legal system can be regarded as a *mixed jurisdiction.*[3]

The book of *Gendron* begins with an introduction to the three terms of high importance on the field of the interpretation of contracts. In *Gendron's* opinion when one interprets a contract one has to pay attention to the *qualification* of the contract. One has to take into consideration those proofs and elements of each case, which may be helpful to the appropriate qualification of the contract. In many situations it is also the task of the judge to qualify the contract and there are also many cases, when the qualification is not obvious.

There are cases however when there is only one possible way of interpretation. For cases with only one possible interpretation one can find good examples in Canadian law, too. Let me refer nonetheless to the law of the European Community, in which the principle of the *acte claire* is laid down, as well.[4] To be very short the principle of *acte claire* regulates that there are provisions of law, which can be interpreted only in one way. It is known that the contract can be viewed as a *law* of the parties—I refer hereby to the Latin regula: *contrahentibus contractus legem ponit*—hence the principle of the *acte*

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[2] About Pothier see esp.: Montmorency, J. E. G.: Robert Joseph Pothier and French Law. In: *Great Jurists of the World* (ed.: By Sir J. Macdonell and E. Manson). Boston, 1914. reprint: New Yersey, 1997.

[3] Cf. Hamza, G.: *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján.* Budapest, 2002. 273–274.

[4] Cf. the following cases: *Wienand Meilicke c. ADV/ORGA F. A. Meyer A.G. (C/83/91.)*, and *SRL CILFIT et al. c. Ministero della Sanitá (C-283/81).*

claire can be applied for the interpretation of the contracts, too. In this context *Gendron* refers to a famous statement of the French *Cour de Cassation* from the 15th of April, 1872:

> *"Il n'est pas permis aux juges, lorsque les termes des conventions sont clairs et précis, de dénaturer les obligations qui en résultent et de modifier les stipulations qu'elles renferment."*[5]

Of course, *Gendron* is aware of the fact that there are limits of the qualification of the contract. As qualification does have major influence on the entire interpretation of the contract, the qualification should be in accordance with the mandatory law, depending obviously on the law of the contract.

As it can be seen from the titles of the chapters, *Gendron* puts special emphasis on the intent of the parties. The intent of the parties should be the most important element for the correct interpretation of the contract. When one is about to interpret a contract one has to take under close inquiry the *common will* of the parties. The Art. 1425 of *C.c.Q.* gives the following regulation for this:

> "Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arreter au sens littéral des termes utilisés."

In this aspect I refer to the paragraph 207 of the Hungarian Civil Code, regulating as follows:

> *"207. § (1) The contractual declaration in case of debate should be interpreted as the other party had to interpret it according to the generally accepted meaning of the words with regard to the supposable intent of the declaring party and the circumstances of the case."*

As wee see it the Hungarian Civil Code puts really high emphasis on the so-called *Erklärungstheorie*, which is based on the declaration of the party. The opposition of the *Erklärungstheorie* is the *Willenstheorie*, which rather highlights the will of the party. I refer hereby to the different opinions of the German Pandectists of the 19th century.[6] *Gendron* himself also deals with question on page 63 of his book. On page 63 he states generally that when interpreting the contract the French tradition supports rather the inner will, while the German tradition favours the declaration, i.e. the German tradition is based on the *Erklärungstheorie*.

I would like to emphasize hereby that the Hungarian legal system is in quite tight connection with the German law, based on historical grounds.[7]

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[5] Gendron: *op. cit.* 28.

[6] Cf. Földi, A. — Hamza, G.: *A római jog története és institúciói*. Budapest, 2002[7]. 588.

[7] Cf. Hamza, G.: *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn*. Budapest, 2002. 131–147.

Gendron also purports that this general statement regarding French tradition and German tradition can be debated, because the German BGB (*Bürgerliches Gesetzbuch*) from 1900 contains also provisions, which strengthens that one should take into account the inner will of the party, as well. *Gendron* refers to par. 133 of BGB, which rules, as follows:

> "*133. §. Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften*".

Gendron's opinion seems to be shared by *Helmut Köhler* who has the following point of view about this paragraph of the BGB:

> "... *§ 133* (d.h. des BGB) *verlangt, daß bei der Auslegung einer Willenserklärung der wirkliche Wille zu erforschen ist*".[8]

As I have mentioned the Canadian law is in very close connection with French law. Therefore it may be useful to quote the relevant article of the French *Code Civil*, which contains the following provision:

> "*Art. 1156. On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens litteral des termes.*"

According to the Commentary of the French Civil Code the judge—interpreting the intents of the parties—should also pay attention to the ultimate behaviour of the parties, as well:

> "*Pour déterminer quelle a été la commune intention des parties, il n'est pas interdit aux juges du fond de relever leur comportement ultérieur.*"[9]

Gendron also mentions that the behaviour of the contracting parties should be thoroughly analysed when one interprets a contract.

Gendron underlines that we should be aware of the fact that the natural meaning of the words can be absolutely important during the interpretation of a contract. In this context (*La méthode textuelle*) he refers to a case, in which the Court of Appeal stated that the English word '*to ship*' can mean '*expedier*' and it is not relevant that the item of transportation was not boot.[10]

The author shows and describes many important ways of the interpretation and draws the attention to several principles to follow. As an example I refer hereby to the *règle de l'effet utile*. *Gendron* leads back the origin of this principle to Ulpian the Roman *iurisconsultus* from the 3rd century, A.D.:[11]

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[8] Köhler, H.: *BGB. Allgemeiner Teil.* Ein Studienbuch. München, 1983. 166.

[9] Code Civil (ed.: A. Lucas.). Paris, 1990. 531.

[10] Gendron: *op. cit.* 68.

[11] About Ulpian, see esp.: Honoré, A. N.: *Ulpian.* Oxford, 1982.

"*Quotiens in stipulationibus ambigua oratio est, commodissimum est id accipi, quo res, qua de agitur, in tuto sit.*"[12]

Gendron also describes the diverging opinions of *Domat* and *Pothier* in this matter.

The author provides a very deep analysis on the objective method (*la méthode objective*) of the contract. *Gendron* finds the root of this method in the intellectual mainstreams of the Great French Revolution. He deals with the question of the *good faith* (*bonne foi*, *bona fides* in Latin), as well. He cites the Article 6 of the *C.c.Q.*, which is a provision of the new Civil Code. This principle creates an obligation for the persons to act in good faith. Article 1375 of the *C.c.Q.* regulates that the good faith has to govern the parties during their contractual relationships, as well:

"*Art. 1375. La bonne foi doit gouverner la conduite des parties tant au moment de la naissance de l'obligation qu'á celui de son exécution ou de son extinction.*"

One can also take into consideration that the Hungarian Civil Code in par. 277 also creates an obligation for the parties to cooperate when performing their contractual obligations. *Gendron* underscores that *C.c.Q.* does not contain any definition for the term good faith. Therefore the question arises that this term may be interpreted in the so-called *subjective* and *objective* sense. The good faith has to do a lot with the so-called *culpa in contrahendo* and also with the behaviour of the '*honest man*' in *Gendron's* wording. (The term *reasonable person* may be used as a sort of synonym for the honest man.) The author thinks that the good faith is an element of high importance during the process of interpretation:

"*La bonne foi constitue un principe directeur d'interprétation, principe d'application universelle, et qui commande d'interpréter le contrat d'après le sens qui, normalement, s'imposerait á l'honnête homme.* "[13]

It is worth mentioning that a very comprehensive, comparative and historical analysis of the term good faith (*bona fides*) was published by a Hungarian Professor of Roman law, *András Földi* in 2001.[14]

Gendron gives many important advices to the right interpretation of a contract. His work can be considered as a fine guide for the appropriate interpretation of the contract. His final conclusion is that the most important aim of the interpretation is the search for the common intent of the parties (*la*

[12] Quoted by: Gendron: *op. cit.* 87.

[13] Gendron: *op. cit.* 113.

[14] Földi, A.: *A jóhiszeműség és tisztesség elve. Intézménytörténeti vázlat a római jogtól napjainkig.* Budapest, 2001.

recherche de l'intention commune des parties). In his point of view every contract can be regarded as a way of the reconciliation of several interests of the parties. They provide services to each other in other to satisfy their different needs. *Gendron* refers back to Roman law, in which the *contractus innominati* were categorised, as follows: *do ut des; do ut facias, facio ut, des, facio ut facias.*[15] According to the author these categorisations can abridge the entire purpose of the contracts in general. *Gendron* attached a very useful index to the book, including recommended bibliography to this issue and the twelve regulations of *Pothier* to the interpretation.

I am convinced about the fact that the book of *François Gendron* is an extremely useful, constructive and valuable analysis and summary of the interpretation of contract, which can be regarded as an *evergreen* question of private law. On the one hand this book can be recommended to the researchers of civil law, researchers dealing with theoretical problems of civil law. On the other hand the present work of *François Gendron* can be additionally applied by practising lawyers who meet often problems of interpretation during their everyday job, no matter if they are active in Canada or in other countries.

Ádám Boóc

GÁBOR JOBBÁGYI—JUDIT FAZEKAS: **Law of contract in Hungary.** Kluwer Law International, The Hague–London–New York, 2003. (From the series: International encyclopaedia of laws; general editor: Prof. Dr. R. Blanpain)

We had to wait for a long time to finally have the whole Hungarian law of contract available collected in a single book. The Kluwer Law International publisher released the handbook especially written for foreign lawyers who work in this field or are simply interested in Hungarian private law. The book is updated to July 2002—it is to be mentioned that since then the law has been changed. The authors are both university professors who have been working in the area of private law not only in the scientific field but also as practising lawyers for decades.

Gábor Jobbágyi, whose main research topics are medical law, law of life and family law, is the Head of the Private Law Institute at the Pázmány Péter Catholic University in Budapest. Judit Fazekas, currently working as an under-secretary at the Ministry of Justice, is a professor of law both at the Pázmány

[15] Cf.: Kaser, M.: *Römisches Privatrecht.* Ein Studienbuch. München, 1968. 179.; Földi—Hamza: *op. cit.* 504.

University and at the University of Miskolc; she is also an expert in European and international law.

The book begins with a general introduction in which the reader obtains an overall view of Hungary's geography and population, political system and the short history of the country as well as the history of the constitutional development and Hungarian law as an independent legal system with Roman and Austrian-German influences. This chapter is followed by a bibliography which collects the most important works written about the law of contract in Hungary in the last hundred years and also an updated and operative collection of the major sources of law.

The first part (written by Gábor Jobbágyi) deals with the general rules of the law of contract. The different chapters analyse the most relevant issues of the topic. The set-up of the book follows the system and order of the Civil Code of Hungary in order to ease its usage. These most significant issues are: formation of contract; invalidity of contract; collateral obligations securing contract; modification of contract; performance of contract; termination of contract without performance; prescription; breach of contract; faulty performance; delivery; contract for delivery of agricultural products; contract for public utility subsequent impossibility; several parties to a contract.

The second part (written by Judit Fazekas) deals with the most frequent specific types of contracts. Among these are: contract of sale; contract of services; contract of locatio conductio operis; contract of lease; lease of living quarters; tenancy; concession; contract of financial lease; franchise contract; deposit; agency; contract of commission; contract of carriage; contract of forwarding; financial obligations; insurance contract; contract of donation; contracts for maintenance and life annuity.

The main characteristic of the book is that it manages to summarise the law of contract in not more than 284 pages. It is needless to say that this extent cannot cover all the areas and details of the area neither the judicial practice. It offers an introduction, comments and explains the rules of the Civil Code.

The book, published also in Hungarian, is the coursebook of the law students at the Pázmány University. Its English version is a useful handbook for all the lawyers and for anybody showing an interest. Hopefully it can break new ground for more English-written handbooks about the Hungarian law to be published in the near future.

András Koltay

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