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CHUN HUNG LIN*

Developing Countries and the Practicality of Multilateral Investment Agreements on Telecommunications

Abstract. During the past few decades, foreign investment has rapidly increased worldwide and has enhanced economic growth in developing countries. Although foreign investment brings huge economic benefits, many developing countries fear that by opening up markets to competition and foreign investment without restriction, they will lose control of their strategic industries. Among those industries, telecommunications is a sector with substantial impact and influence on national security, social stability and economic development. Therefore, the balance between economic gains from foreign investment and national telecommunications sovereignty presents a challenging task. A proposed international investment agreement has been negotiated in international community to possibly solve many of the disputes between foreign investment and national sovereignty. However, is foreign investment a necessary mechanism for developing countries to promote their economic growth? With different developmental models and a myriad of different economic difficulties, is a uniform global investment instrument suitable to meet the different demands for developing countries? This article will examine current international investment regime *and their relation with telecommunications as an influence in developing countires. Assessing these critical issues, this article hopes to find a new poisition for telecommunications in a formingly integrated global market.*

Keywords: Foreign Direct Investment (FDI), Multilateral Agreement on Investment (MAI), Developing Countries, Telecommunications, Technology Transfer, Markets Competition, Organization for Economic Cooperation and Development (OECD), Multinational Enterprises (MNEs), Bilateral Investment Treaties (BITs)

I. Introduction

Telecommunications sector plays a dual role in economic activities, not only itself a distinct circle in economic system but also a supplying mean for other sectors. Having this kind of special characters, telecommunications cover and relate to many other industrial and economic sectors such as manufacture, entertainment, and communication sectors. Foreign investment has been one

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of the most important driving force in the exploration of natural resources and improvement of economic conditions in underdeveloped and developing countries for centuries. Recently, foreign investment has not only increased rapidly but also covered a wide spectrum of industries around the world. The role of foreign investment has played a more and more important role in the world's economy. Generally speaking, foreign investment money will spur economic growth and create a better living standard in the newly invested countries. From an economic standpoint, international investment mutually benefits both sides of the investing and invested countries; however, there is still not an international investment regime or thorough international agreement that fairly addresses both sides. Although foreign investment brings abundant funds and advanced technology, many developing countries fear that by opening up their markets to competition without any restriction, they will be forfeiting economic guiding power and lose control of strategic industries.

Among FDI, telecommunications is one of the most strategic industries of national economic control. Even though foreign investments on telecommunications will bring advanced technological skills, large amount of funds, as well as market competition and will benefit national telecommunications development, many countries guide policy and legal requirements to control foreign investment to correspond to their economic and developmental demands. Telecommunications have a substantial and important influence on national security, social stability and economic development, as well as many industrial sectors. Due to its particular character, telecommunication industries are often state-operated and monopolized in many countries. Therefore, the balance between economic gains from foreign investment and national telecommunications sovereignty presents a challenging task.

This article will be divided into four parts to discuss business aspect of telecommunications on investment. This article will examine international investment regimes including the meaning of Foreign Direct Investment (FDI), the proposed Multilateral Agreement on Investment (MAI), and their relation with telecommunications as an influence in the global economic market. From the standpoint of foreign investment, this article hopes to find a new poisition for telecommunications in a formingly integrated global market.

II. Foreign Direct Investment (FDI) and Telecommunications

1. Meaning and Economic Benefits of FDI

Over the past two decades, FDI has been one of the most important driving forces for the world's economic growth. According to the US Department of Commerce, FDI is a direct investment which "implies that a person in one country has a lasting interest in, and a degree of influence over the management of, a business enterprise in another country."[1] The US Commerce Department defines FDI as "ownership or control by a foreign person of 10 percent or more of an enterprise's voting securities or the equivalent", which is deemed enough to influence management decisions.[2] At a Global Investment Forum hosted by the United Nations Conference on Trade and Development[3] (UNCTAD), it was reported that "there was a strong feeling among ministers from some developing countries that more research and analysis was needed about the critical issues at stake in a multilateral framework on investment ... and many speakers stressed the complexity of the issues related to the effects of economic policy liberalization on the quantity, quality and distribution of FDI, and its impact on development."[4]

Requiring sufficient economic information and abundant funds, foreign investment is always accompanied by higher risks. With such risks, foreign investment also comes with the possibility of much greater returns. Traditionally, foreign investment has been very closely related either with trade or with an international development agency. Most current foreign investment thus has either been the result of someone taking a huge risk or the result of an international organization such as the World Bank underwriting that risk. Meanwhile, international developmental agencies often pursue the more enlightened goal of helping countries develop properly rather than seeking the greatest return.[5]

[1] US Department of Commerce, Economics and Statistics Administration, Bureau of Economic Analysis, Foreign Direct Investment in the U.S.: 1992 Benchmark Survey, M-3.

[2] *Ibid*, Foreign Direct Investment in the U.S.: 1992 Benchmark Survey, M-3.

[3] Established in 1964, the UNCTAD aims at the development-friendly integration of developing countries into the world economy. UNCTAD is the focal point within the United Nations for the integrated treatment of trade and development and the interrelated issues in the areas of finance, technology, investment and sustainable development. Source available on http://www.unctad.org

[4] Foreign Direct Investment and Economic Development—Lessons from Six Emerging Economies; This report was presented at an OECD-DNME Workshop on Foreign Direct Investment held in Mexico City 1997. The information has been updated up 1998.

[5] Stan Ng: *"Background Information on the Multilateral Agreement on Trade"*; see http://darwin.bio.uci.edu/~sustain/issueguides/MAI/MAI-Background.htm

The benefits of foreign investment include promoting economic growth, technology transfer and job-creation in the local economies. It is assumed that exports would increase since a large part of exports is comprised of shipments from domestic companies to their foreign affiliates. Technology transferred from foreign investment projects will improve the efficiency of local firms as well. These effects become the major attractions for developing and underdeveloped countries seeking foreign investment.[6] In addition, FDI can serve to integrate domestic markets into the global economic system far more effectively than could have been achieved only by traditional trade flows. The benefits from FDI will be enhanced in an open investment environment with a democratic trade and investment regime, active competition policies, macroeconomic stability and privatization and deregulation.[7] Under such conditions, FDI can play a key role in improving the capacity of a country to correspond to global economic integration and future national developmental strategies. In practice, the greater the openness and freedom toward FDI, the more economic reforms and potential benefits that receiving countries will reap.[8]

2. Policy Requirements of FDI and Multinational Enterprises

Although FDI implicitly brings large economic benefits and potentially attracts numerous business opportunities, many countries are only partially open to foreign investment or even refuse business with foreign enterprises. Those countries believe they will be losing the control power over the local economy by inviting foreign investment. They often use performance requirements such as exporting requirements or technology transfer agreements to control the categories and sizes of FDI. For many countries, performance requirements on foreign investment were considered necessary and desirable to ensure that the activities of foreign capitals are consonant with local countries' developmental strategies.[9] The same decline in effectiveness can be seen in terms of policies designed to maximize the potential benefits from inward investment. However, since it has been acknowledged that FDI can stimulate economic growth and national development, there remains a tremendous diversity in countries'

[6] Sforza, M.—Nova, S.—Weisbrot, M.: *Writing the Constitution of a Single Global Economy: A Concise Guide to the Multilateral Agreement on Investment—Supporters' and Opponents' Views,* also see http://www.preamble.org/MAI/maioverv.html

[7] *Ibid.*

[8] See http://www.preamble.org/MAI/maiweb.html

[9] Thompson, H. B.: Investing in the Global Information Infrastructure. *Telecom '99 Keynote Panel: Investing in Communications Companies;* Geneva, 1999.

approaches on their policies towards FDI. Countries can also screen incoming investment and retain control on foreign participation in particular sectors.[10] Those measures are designed to certify local government can still retain the final decision on economic policies and ensure foreign investment will not cause negative effects on national development.

Due to the increase of international trade and the advent of internationalization, more and more industrial firms from different countries are expanding their business scale through foreign direct investment, and these cross-nation companies have gradually formed as multinational enterprises (MNEs). Different from traditional small-scale foreign investment, direct investment by MNEs has the potential to restructure local industries rapidly and to transform local economies into prodigious exporters of manufactured goods or services to the global market.[11] Targeted at huge benefits of the international market, almost all economies now compete to attract huge investments from those MNEs. Integration with the global economy does not merely come through direct exports from foreign-owned companies, but it also derives from the presence of foreign MNEs in sectors providing goods and services to exporters. As foreign affiliates of MNEs become more oriented toward the global market and less dependent on the domestic market, and as the number of countries eager to attract FDI grows, the tolerance of foreign investors for barriers and restrictions on their operations is likely to be much less than in the past.[12] When more and more economies tend to compete for FDI and MNEs, foreign investors now consider not only economic conditions of invested countries such as the location of natural resources or labor force, but also local economic policies. Other relatively new factors include whether distort investment exist, where corporations are chartered, and how real estate and other fixed assets are regulated. Under this trend, the policy requirements of FDI gradually deregulated in many countries and a more open attitude toward FDI has been adopted.

3. Arguments about FDI in the Global Economy

The economic problems of underdeveloped and developing countries are fundamentally different from those of developed countries and require different measures and policies. Since the 1950s, it was recognized that "late industrialization countries" required even greater protection and state intervention than even the most developed countries had relied upon during their early

[10] *Ibid.*

[11] See http://www.oecd.org/daf/cmis/fdi/fdisix.htm#execsum

[12] *Ibid.*, also see *supra note* Thompson, 1999.

development.[13] For underdeveloped or developing countries, FDI would undermine many of their development strategies and developmental processes. For example, in Mexico, most people seemed to be economically better off under a more authoritarian regime.[14] Prior to international trade and investment liberalization, Mexican economic growth was fairly rapid, at a real per capita rate of 3.9% in the 1960s and 3.2% in the 1970s. Since the 1980s, after liberalization began, per capita income has stagnated and real wages have actually fallen.[15] Economists have pointed out that the instability of international financial markets was a major cause of the previous 1994 financial crisis in Mexico.[16] The effect of such disinvestments with Mexico, therefore, should be questioned whether or not the deregulation of international capital flows is in the best interest of "emerging market" economies.[17]

Likewise, in South Korea, many economic regulations that were prohibited by the national treatment provisions were essential to economic growth and development. The Korean government used measures like subsidized credits, tax and tariff exemptions and export subsidies to intervene against foreign investment. They targeted industries such as cement, fertilizer, steel, chemicals, and consumer goods, etc. FDI was restricted and played a minimal role in South Korea's industrialization and economic development.[18] After Asia's financial crisis in 1997, the IMF required the Korean government to take measures for internationalization and deregulation, including the removal of a number of restrictions on foreign ownership of domestic stocks and bonds, residents' ownership of foreign assets, and overseas borrowing by domestic financial and non-financial institutions.[19] The sharp reduction in government planning and industrial policy has caused problems such as overcapacity in the petrochemical industry, over-investment, and corporate failures in industries.[20] Meanwhile, the

[13] Gerschenkron, A.: *Economic Backwardness in Historical Perspective: A Book of Essays*. Cambridge, Harvard University Press, 1966.

[14] See Maddison, A.: *Monitoring the World Economy 1820–1992*, 1995, 78–79.

[15] *Ibid.*

[16] Calvo, G.—Mendoza, E.: Reflections on Mexico's Balance of Payments Crisis: A Chronicle of a Death Foretold. *Journal of International Economics*, 1995, 235.

[17] See *supra note* Weisbrot, 1998.

[18] See Westphal, L.: Industrial Policy in an Export-Propelled Economy: Lessons from South Korea's Experience. *Journal of Economic Perspectives*, Vol. 4, No. 3, Summer 1990, 41–59.

[19] Chang, Ha—Joon, Hong—Jae Park—Chul Gyue Yoo: 1998. Interpreting the Korean Crisis—Financial Liberalization, Industrial Policy, and Corporate Governance. Draft of forthcoming article in *Cambridge Journal of Economics*, Vol. 22, No. 6, 9–14.

[20] See *supra note* Chang, Ha—Joon, Hong—Jae Park—Chul Gyue Yoo, 1998.

1997 Asia Financial Crisis, one of the world's worst economic crises since the Great Depression. The crisis engulfed much of Asia including South Korea, Thailand, and Indonesia caused by the set-off of hot money prior to August 1997, and then a true panic when the Thai baht began to fall. The liberalization of international investment was struck by the Asian financial crisis and economists pointed out that the liberalization of international borrowing and investing in those countries over the last decades created the instability from which the crisis was born. One economist has noted, "The Asian crisis cannot be separated from the excessive borrowings of foreign short-term capital as Asian economies loosened up their capital account controls and enabled their banks and firms to borrow abroad. It has become apparent that crises attendant on capital mobility cannot be ignored."[21] The reversal of capital flows amounting to eleven percent of the regional GDP was a result of foreign and domestic investors stampeding for the exits for fear of being caught with greatly depreciated local currency and assets.[22] Economists who supported increasing deregulation of international investment have recently begun to concede that a large number of workers have indeed been hurt by such a process. On the other hand, foreign investors take into account all relevant information affecting asset returns when deciding their market positions and would be hard pressed to explain future disinvestments from these countries.[23] The OECD has just issued a report intended to make the case for international investment liberalization where they contend that such negative impacts are "at most, modest".[24]

4. Meaning of FDI on Telecommunications

Foreign direct investment on telecommunications comprises the ability to establish a commercial presence in a foreign territory, or the purchase of telephone companies by foreign investors or joint ventures between local and foreign partners to establish new telecommunication service companies. Historically, the opportunities for foreign investment in the telecommunication services sector have been limited by the fact that most countries had state-

[21] See Jagdish Bhagwati: The Capital Myth: The Difference Between Trade in Widgets and Dollars, *Foreign Affairs*, 1998, 8. Jagdish Bhagwhati, one of the world's leading international economists and the Economic Policy Adviser to the Director-General of the GATT (1991–93).

[22] Weisbrot, M., 1998: Globalization for Whom? *Cornell International Law Journal*, Symposium Issue, Vol. 31, No. 3.

[23] See *supra note* Weisbrot, 1998.

[24] *Open Markets Matter: The Benefits of Trade and Investment Liberalization*, OECD, 1998, 11.

owned monopoly telecommunication carriers. Since 1984, however, forty-four Public Telecommunication Operators (PTOs) have been privatized raising 159 billion US dollars with about one-third of this investment coming from outside the home countries.[25] Obviously, fueling the operation of old PTOs, foreign investment has gradually played a more important role in either domestic or international telecommunication market. For increasing the proportion of foreign investment on telecommunication sectors, foreign capital now has raised either through a share offering or the sale of a minority share of a PTO to foreign partners. Under the process of privatization of telecommunication industries, there are increasing numbers of opportunities for foreign investors to establish foreign subsidiaries or to combine with others in joint ventures.[26]

On the other hand, because telecommunications covers many other industrial sectors including the sectors of manufacture, entertainment, and communication, it has a dual role as both a traded product and service, and as a facilitator of trade in other products and services. Liberal foreign investment on telecommunications will promote more economic gains including new and improved telecommunication products and services with lower prices and additional investment on other industrial sectors. Opening foreign investment on the telecommunication services sector should result in more competition, lowering prices for most businesses and for many consumers and providing both with a choice of different service providers.[27] FDI brings not only new technology and developmental funds to telecommunications industries; it also brings innovation and competition for telecommunications providers. These positive effects promote the capacity of telecommunication in underdeveloped and developing countries and benefit the formation of "world village."

5. FDI and Global Telecommunication Development

Telecommunication development represents not merely expanding the number of telephone lines per hundred inhabitants, but it enhances the heightening of culture exchange, business opportunities, education promotion and new technology invention. However, many countries still have fewer than 10 telephones per 100 inhabitants while about half of the population are waiting

[25] *Public Telecommunication Operators for Sale*; Value of privatizations of PTO's, by region, 1984–1996 and over time, 1990–1996; ITU Telecommunication Privatizations Database.

[26] 1996/97 World Telecommunication Development Report, Trade in telecommunications, Executive Summary; also see http://www.itu.int/plweb-cgi/

[27] See *supra note* 1996/97World Telecommunication Development Report.

for a telephone, and the other half waiting for a dial tone. They live in rural and often isolated areas where most of the natural resources are located. Access to information and telecommunications is essential for development of such areas but is still inadequate or non-existing. It was reported that there are still 43 million people on registered waiting lists for telephone connections in emerging markets with the average waiting time longer than a year.[28] By introducing foreign investment into those areas, waiting lists can be sharply reduced. At this point, the role of foreign investment on telecommunications is not a market competitor but a basic service provider.

For most developing and developed countries, foreign investment on telecommunications is not merely a provider for improvement of local telecommunication equipments but also a driving force for telecommunication market competition and transformation. Seeing the huge benefits from foreign investment in telecommunications, a large portion of the world hopes to attract foreign investment to pursue a schedule of projects to improve the basic telecommunications infrastructure. First, to attract more foreign investment and making market competition, developing countries privatized their public telecommunication operators at the start of the 1990s.[29] By deregulating domestic telecommunication regimes, it is expected that local telecommunication markets will be more efficient and attractive for foreign firms especially those MNEs. Second, to attract more foreign investment and to operate toward an integrated global economy, countries have to make more available high-speed data networks, cellular radio, mobile satellite services, Internet access and facsimile for foreign firms. By deregulating domestic telecommunication regimes and upgrading the level of telecommunication methods, these countries expect that FDI or MNEs would have more willingness to choose them as a base for future global telecommunications competition. In developed countries, they have concentrated more on recognizing telecommunications trends and have tried to satisfy the complex requirements of multinational enterprises. Both developed and developing countries face the same pressure to upgrade and diversify the telecommunications sector, but developing countries typically have less financial, technical and operational resources to do so, particularly in light of

[28] Integrated Rural Development and Universal Access; Brief description of ITU's Buenos Aires Action Plan Programme Nos. 9 & 12 (Valetta Action Plan Programme 3) 1998; also see http://www.itu.int/ITU-D-UniversalAccess/reports/ PPstatus981016.htm

[29] See *supra note* 1996/97 World Telecommunication Development Report.

an incomplete basic infrastructure.[30] The best way to resolve this dilemma and to attract foreign investment for business and basic telecommunication infrastructure will be through upgrading the technology skill of the labor force and the privatization of public telecommunication regimes.

In the Asia-Pacific region, telecommunications market reform has continued apace with developing countries such as the Philippines, Taiwan and Thailand, and has opened up their markets to foreign investment. In Latin America, several countries that first privatized their domestic operators at the beginning of the decade are now preparing for a second round of market-openings. Even Africa, which has long been the last bastion of telecommunication monopolies, is leading the way by attracting foreign partners investing in their telecommunication sectors.[31] Foreign private investment has entered the developing markets through joint ventures with local telecommunication operators, the award of licenses to foreign companies, or the sale of equity stakes in state-owned telecommunication entities to private foreign investors. Private investment was initially permitted mostly in value-added services, but increasingly, it is entering the basic services as well.[32]

In Latin America and Africa, privatizations have been conducted through the sale of an equity interest in the company to foreign strategic investors such as France Telecom, Telekom Malaysia and SBC of USA.[33] Privatization and increased foreign investment in telecommunication markets has resulted in substantial progress in meeting developing countries' basic telephony upgrading goals. It is also expected that market competition as a the provision of international and domestic telecommunication services will bring a significant reduction in prices and more parity between domestic and international telephone services. Where markets have been liberalized, the level of investment, particularly foreign investment, has generally increased and telephony and network development has proceeded more rapidly. This combination of competitive markets, private ownership and foreign investment has created an appropriate environment for next generation global telecommunications development.

[30] Sir Maitland, D.: *'The Missing Link': Still Missing 8 Years Later?* Proceedings of Seminar on Telecommunications and Its Role in Socio-Economic Development, ISBN 87-9844[illegible]1-0-1, 5. (Copenhagen, 1992).

[31] Dr. Tarjanne, P.: *Telecommunications and World Development: Forecasts, Technologies and Services,* ITU Forum ITA, Moscow, 1997.

[32] Dr. Chasia, H.: *Forum De Crans Montana*, Deputy Secretary-General ITU; Session of Saturday 27th June Crans Montana, Switzerland, 1998.

[33] See *supra note* Dr. Chasia, H.: Forum De Crans Montana.

6. FDI on Telecommunications and International Organizations

The telecommunications sector is currently undergoing a transition from a global market system for telecommunication services that has been based on multilateral arrangements. This should foster a suitable international environment where investment and entrepreneurship can prosper, including the development of new forms of electronic commerce. For FDI in the Telecommunications sector, the WTO and ITU are two of the most important international organizations. The WTO agreement hopes to promote foreign and domestic investment in the telecommunication sector and, as a consequence, the development of each country's telecommunication infrastructure and services.[34] Under the WTO, GATS on Telecommunication which was concluded on February 1997 and which entered into force on February 1998, commits 72 countries to a program of progressive opening of their basic telecommunication service markets to competition and increased foreign investment.[35] Those agreeing countries made commitments to liberalize their telecommunication market and to open up to foreign investment in basic telecommunication services. That is, the provision of voice telephone, telex, telegraph, data transmission and privately leased circuits.[36]

On the other hand, the ITU provides great benefits in terms of telecommunication infrastructure construction and the development of information processing industries. The ITU allocates a global spectrum to particular services and manages scarce communications resources among countries that benefit trade liberalization and the prevention of discrimination between domestic and foreign suppliers. The ITU also promotes global telecommunication development and plays the role of providing the information to let developing countries understand the benefits that liberalization and trade in telecommunications can bring, as well as the measures necessary to protect national interests.[37] Both WTO and ITU encourage the development of global telecommunication infrastructure and the formation of an integrated global telecommunication market. Global telecommunication development tends to strengthen the leadership role of the private sector in the development of a

[34] Second Draft of the Secretary-General's Report to the Second World Telecommunication Policy Forum on Trade in Telecommunications; ITU Geneva, 1997.

[35] Third Draft Of The Secretary-General's Report To The Second World Telecommunication Policy Forum on Trade in Telecommunications; ITU Geneva, 1998.

[36] First Draft of the Secretary-General's Report to the Second World Telecommunication Policy Forum on Trade in Telecommunications; ITU Geneva, 1998.

[37] See *supra note* Dr Tarjanne: *Telecommunications and Trade.*

diverse, affordable, and accessible information infrastructure around the world. Under this trend, it also hopes to promote the involvement of developing countries in the building and utilization of a truly global and open information infrastructure and facilitate activities and identify policy options that foster the effective global application of telecommunications, broadcasting, and information technologies and services.[38]

7. FDI on Telecommunications and Economic Growth

Investment in telecommunications is a prerequisite for broad based economic development. The dual role of telecommunications as both a traded service and a vehicle for trade in other service sectors means that price reductions, improvements in the level of investment and the development of infrastructure and services brought about by liberalization should also have an impact on other sectors of the economy.[39] In addition, efficient, low-cost telecommunication networks will provide the necessary platform for the growth of electronic commerce. The implementation of liberalized telecommunication investment should produce significant benefits not only within the country's telecommunication sector but also for the national economy as a whole. The opening of telecommunication markets has facilitated the entry of domestic and foreign private capital and technological skills that have in turn accelerated network build-out, the provision of new services and improvements in the quality of service. Market liberalization also has a profound effect in promoting development in other sectors such as information technology and computing, which depend heavily on good, reliable and low-cost telecommunications.

Economic development in these sectors indeed has been constrained in many countries because of the lack of an adequate telecommunication infrastructure to service them.[40] Inadequate telecommunications also reduces efficiency throughout the economy, diminishes the effectiveness of investments and development programs, causes a comparative disadvantage in attracting investment, and lowers the quality of living standard as well as personal access to communication. The evidence leaves no doubt that there was indeed a correlation between economic development and investment on telecommunications.[41] Throughout

[38] See *supra note* Thompson, 1999.

[39] See *supra note* Third Draft of the Secretary-General's Report to the Second World Telecommunication Policy Forum.

[40] *Ibid.*

[41] Frieden, R. M.: *Social, Logistical and Development Issues in The Global Information Infrastructure.* Penn State University, USA.

economic developmental history, telecommunication infrastructure has played an important role in supporting the economic development of counties. There are numerous documented examples about the direct relationship between investment in telecommunication infrastructure and economic growth. The growth of global telecommunication development will bring rapid expansion of new and advanced information services, attract more domestic and foreign investments, and improve economic development and global competitiveness, as well as a better living standard of health care and education.

III. Multilateral Agreement on Investment (MAI) and Telecommunications

The MAI is a new international investment agreement currently being negotiated at OECD that establishes rights for foreign investors. It is designed to make it easier for individual and corporate investors to move capital across international borders. The MAI is mainly based on the investment provisions of the North American Free Trade Agreement (NAFTA) and expands these provisions into all economic sectors in the 29 members of OECD.[42] Non-OECD members will also be asked to join this agreement. The major aim of the MAI is to ensure that foreign investment from individuals and multi-national corporations can move capital in and out of countries without governmental interference.

1. Historic Overview – OECD and MAI

a) Organization for Economic Cooperation and Development (OECD)

Founded in Paris, France, the OECD was originally established as the Organization for European Economic Cooperation (OEEC) to help rebuild the European economies after World War II.[43] In 1961, after economic reconstruction in Europe was mostly accomplished, USA, Canada and the European countries decided to form OECD in place of OEEC to serve as a forum to conduct research and negotiations on global trade and investment.[44] Currently, there are 29 members representing the most high-income countries in OECD.[45] The

[42] See http://www.preamble.org/mai/bits.html

[43] See http://www.oecd.org/about/origins/index.htm

[44] See http://www.oecd.org/about/general/index.htm

[45] See http://www.oecd.org/about/general/member-countries.htm. OECD member states include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxemburg, Mexico,

OECD has previously created two codes on investment liberalization: the Code of Liberalization of Capital Movements and the Code of Liberalization of Current Invisible Operations.[46] Unlike the UN, OECD is not a quasi-parliamentary body, and has no supranational legal authority over individual members. Instead, OECD members have relied upon "peer pressure" to encourage compliance with the Codes.[47]

b) Brief History of MAI Negotiations

The seeds of the MAI can be traced back to the 1960s, when member countries adopted two binding OECD Codes on investment liberalization.[48] Since 1995, formal discussions and negotiations were initiated at OECD, but the MAI was opposed by many developing countries.[49] In 1997 OECD held a ministerial meeting to discuss the MAI and had set a deadline of May 1998 for completion. However, after several negotiations, the Ministers still could not complete the MAI by the deadline and had to delay further talks. At the end of 1998, French withdrawal from the latest round of discussions and the failure to make progress made the future of the MAI at OECD doubtful.[50] It was believed that there was very little chance that the MAI negotiations would make further progress at OECD.[51]

2. Future Development – WTO and MAI

Since the demise of the MAI negotiations in the OECD, some supporters of the MAI model have stepped up efforts to move the negotiations to the WTO. In January 1999, the EU and Japan formally proposed that they would push the MAI negotiations into WTO to be completed by 2003.[52] However, because a WTO agreement would likely be much weaker than the draft that was emerging at OECD, the US has currently opposed the MAI negotiations moving to the WTO.[53] But if OECD process continues to falter, the US may accede to the

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Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States.

[46] See http://www.preamble.org/mai/oecd.html

[47] See http://www.preamble.org/mai/maihist.html

[48] *Ibid.*

[49] See http://www.preamble.org/mai/maiinwto.htm

[50] See http://www.preamble.org/mai/maifact.html

[51] See http://www.preamble.org/mai/maihist.html

[52] See http://www.citizen.org/pctrade/Shell-Game/Cover.htm

[53] See http://www.citizen.org/pctrade/Shell-Game/Wto.htm

change in venue.[54] Many developing countries and non-governmental organizations have stated that WTO is neither democratic nor transparent and that an MAI in the WTO would be more unacceptable than in the OECD.[55] There have been other attempts to suggest that future MAI negotiations may take place at the UNCTAD instead of OECD or WTO. UNCTAD is considered to be a better forum for developing countries, but critics still have charged that UNCTAD has tended to favor the interests of multinational corporations in recent years.[56]

Many developing country members objected to the WTO intervention in the area of investment policies. The WTO prohibitions on Trade Related Investment Measures (TRIMS) require its members to eliminate certain policies that impose conditions on foreign investment. TRIMS is a precursor to the MAI and eliminates requirements that foreign investors use local materials or suppliers when doing business in developing countries. Full-fledged investment rules in WTO would prevent its members from adopting policy requirements designed to ensure that local businesses, workers and citizens enjoy the benefits of foreign investment.[57] Unlike OECD that lacks the power to enforce regulations, WTO is an institution with dispute settlement instrument that addresses issues that many least-developed and developing countries worry about. Its appalling track record on the critical issues of labor rights, environmental and public health protection, and sovereignty and democratic accountability constitutes ample evidence that those countries will protest against an MAI negotiated under WTO auspices.[58] In addition to WTO and UNCTAD, there are many venues where they are simultaneously pursuing similar agendas such as the proposed Free Trade Area of the Americas (FTAA), the International Monetary Fund (IMF), the Transatlantic Economic Partnership (TEP), and the Asia-Pacific Economic Cooperation (APEC) forum.[59]

3. Main Provisions of MAI

The MAI is designed to ease the movement of capital—both money and production facilities—across international borders by limiting the power of

[54] See http://www.preamble.org/mai/maiinwto.htm

[55] OECD News Release: *Informal Consultations on International Investment*, 12/3/98 Agence France-Presse: *OECD reaffirms need for international investment rules*, Dec, 3, 1998 Consultation at the OECD; also see http://www.preamble.org/mai/dec98update.htm

[56] See *supra note* Opposition Building to MAI at the WTO; Nov. 9, 1998.

[57] See http://www.preamble.org/mai/maihist.html

[58] See http://www.citizen.org/pctrade/Shell-Game/Wto.htm

[59] See http://www.citizen.org/pctrade/Shell-Game/Cover.htm

governments to restrict and regulate foreign investment. The investment provisions of MAI are based on those of NAFTA. Unlike NAFTA that only applies to the U.S., Mexico and Canada, the MAI will amplify and apply its provisions worldwide.[60]

These basic rules of the MAI include[61]:

National Treatment—It requires countries to treat foreign investors and investments no less favorably than domestic ones. Under National Treatment, countries may not place special restrictions on what foreign investors can own, or maintain economic assistance programs that solely benefit domestic companies or require that a corporation hire a certain percentage of managers locally.[62]

Most Favored Nation—It requires governments to treat all foreign countries and all foreign investors the same with respect to regulatory laws. Laws prohibited by MFN would include economic sanctions that punish a country for human rights violations by preventing corporations from doing business there.[63]

Limitations on Performance Requirements—Performance requirements are laws that require investors to invest in particular channels of a local economy or to meet social or environmental goals in exchange for market access. Under the MAI, these requirements would be banned where they discriminate against foreign investors.[64]

A Ban on Uncompensated Expropriation of Assets—The MAI would require governments, when they deprive foreign investors of any portion of their property, to compensate the investors immediately and in full. Expropriation would be defined not just as the outright seizure of a property but would also include governmental actions "tantamount to expropriation." Thus, certain forms of regulation could be argued to be expropriation, potentially requiring governments to compensate investors for lost revenue.[65]

A Ban on Restrictions on the Repatriation of Profits or the Movement of Capital—Countries could not prevent an investor from moving profits from

[60] The Multilateral Agreement on Investment: A "Bill of Rights" for International Investors? See http://www.preamble.org/mai/4-pager.html

[61] See http://www.oecd.org/daf/cmis/mai/maitext.pdf

[62] The Multilateral Agreement on Investment: Content III. Treatment of Investors and Investments; The MAI Negotiating Text of OECD, 14 Feb. 1998; OECD, Main Features of the MAI 37; Working Group A, in OECD Documents 118; also see http://www.preamble.org/mai/keyprovs.html

[63] See MAI Working Group A, in OECD Documents 122.

[64] See NAFTA Art.1106, 1106.2 & 1106.4.

[65] See 1998 MAI: Content IV. Investment Protection; OECD Main Features of the MAI 20; Working Group C, in OECD Documents 138.

the operation or sale of a local enterprise to that investor's home country. Nor could countries delay or prohibit investors from moving any portion of their assets, including financial instruments like stocks or currency. It ensures that corporations and individuals can move their assets more easily. However, there are some exceptions that will be made in the case of national financial crises.[66]

Investor-to-State Dispute Resolution Mechanism—Under the MAI, it gives corporate or individual investors the right to sue local governments and seek monetary compensation in international court in the event that a law violates investor rights as established in the agreement. International investors would have the option to sue a country before an international tribunal rather than in the country's domestic courts. This investor-to-state dispute mechanism is a significant departure from previous international economic agreements like GATT, which allow only governments to bring complaints against other governments.[67]

Moreover, the MAI includes "Roll-back" and "Standstill" Provisions[68] that require nations to eliminate laws that violate MAI rules and to refrain from passing any such laws in the future. Currently, the MAI does not contain language on the responsibilities of corporations regarding treatment of employees, environmental protection, fair competition or other issues. There is discussion of including an existing OECD code of corporate responsibility in the MAI, but these provisions would be non-binding.[69]

4. Differences between MAI and Bilateral Investment Treaties

Bilateral Investment Treaties (BITs) are investment agreements negotiated by two countries to establish equal or preferential investment treatments for each other. Most BITs are signed by a developed and lesser-developed country. Unlike the BITs, the original MAI signatories are capital-rich countries and major exporters of international investment. Those countries can lever the dispute process to their advantage and challenge local governments' policies on health, safety and environment, etc. Under the MAI, the investor-state dispute mechanism will be exercised to challenge local regulatory regimes perceived by

[66] See OECD, Main Features of the MAI 12–15; Working Group C, Investment Protection; MAI Report; Working Group D, Dispute Settlement, in OECD Documents 155.

[67] See Content V. Dispute Settlement, 1998 MAI.

[68] See MAI Working Group B, New Issues, in OECD Documents 129.

[69] *Ibid.*

investors as onerous barriers to investment.[70] In addition, the MAI will apply to more economic sectors than the BITs. The MAI's provision on expropriation goes further than that of the BITs, and could force local governments to compensate investors for regulations that cost investors money.[71] The MAI will also ban a wider range of performance requirements than the BITs concern such as mandatory local job creation, mandatory joint ventures with local firms, and so on.[72] Based on these differences, several critics have focused on the MAI's negative potential impacts on state sovereignty over economic development.

5. Influences of MAI in Global Economy

a) Arguments of MAI's Proponents

The most prominent non-governmental proponents for the MAI are business groups. They claim that the agreement will provide needed protections for international investors against discrimination and expropriation, reduce the distortions and inefficiencies caused by excessive regulation, increase access to foreign markets on favorable terms and help businesses, consumers and workers. Increasing foreign direct investment will also benefit developing countries through the transfer of technology and improve the efficiency of the global economy.[73] The MAI will protect the rights of investors to free, equal and safe access to markets, and resolve the conflicts that are inevitable between governments and transnational corporations (TNCs).[74] Proponents also regard investment, like trade, as an engine of economic growth, employment, sustainable development and rising living standards in both developed and developing countries. The MAI would establish mutually beneficial international rules that would not inhibit the nondiscriminatory exercise of regulatory powers by governments, and ensures such exercise of regulatory powers would not amount to expropriation.[75]

b) Arguments of MAI's Opponents

There are, however, substantial concerns of opponents against the MAI from a large numbers of environmental, labor, consumer, and women's organiza-

[70] See http://www.preamble.org/mai/bits.html

[71] *Ibid.*

[72] *Ibid.*

[73] See http://www.preamble.org/mai/procon.html

[74] The Multilateral Agreement on Investment: A "Bill of Rights" for International Investors?; also see http://www.preamble.org/mai/4-pager.html

[75] See http://www.preamble.org/mai/maistat.html

tions.[76] They claim that the MAI will accelerate an economic and environmental "race to the bottom." This could hasten job flight from industrialized countries and increase the pressure on all countries to compete for investment capital by lowering wages, labor and living standards, as well as weakening environmental and consumer-safety standards. In addition, the MAI will allow investors to challenge legitimate regulatory safeguards that enjoy widespread public support but are viewed by investors as impediments to the free flow of capital.[77] The MAI provides legal protections for the rights of investors, but imposes no obligation for investors regarding labor rights, environmental standards, or anti-competitive business practices. The MAI allows investors to sue governments for compensation if they believe that any national, or local law violates their rights or poses a barrier to investment. Based on this point, it will undermine national sovereignty by requiring the roll-back of laws that violate MAI rules. Many laws and policies that could be challenged are designed to protect the public interest such as local economic development programs, laws designed to conserve valuable natural resources or land, community reinvestment laws, and bans on the production of dangerous products.[78]

Opponents have argued that the only real provision of the MAI is its nondiscriminatory basis for investors. Weighted toward business, it will cause difficulty for local governments to protect their environment, health, or safety of its citizens.[79] The OECD also has been strongly criticized for its failure to include developing countries in negotiations. Developing countries, led by India, Egypt, Pakistan and Malaysia, have expressed strong suspicions and oppositions toward the MAI agreement and its presumed bias towards developing countries.[80] The MAI would spell an end to boycotts and trade sanctions against countries or businesses violating environmental, labor, and human-rights standards.[81] The MAI would make it more difficult to implement

[76] See The Sinking of the MAI, *The Economist*, 1998; De Jonquieres, G.: Network Guerillas, *Financial Times*, 1998; and Drohan, M.: *How the Net Killed the MAI.* One World News Service, 1998.

[77] *Ibid.*

[78] *Ibid.*

[79] See Boulder opposes international investment treaty; Threat to local authority seen, *Denver Post*, 1998.

[80] Opposition Building to MAI at the WTO, *Bridges Weekly Trade News Digest,* Vol. 2, No. 43. 1998.

[81] See http://www.sierraclub.org/sierra/199807/LOL1.html; Trade Secrets, *Sierra Magazine,* 1998.

these kinds of self-reinforcing actions in the future.[82] The MAI would also make it more difficulty for governments to prevent or regulate international mega-mergers like BP Amoco or Daimler-Chrysler that will the interests of multinational corporations ahead of the public interest.[83]

Customarily, under international law, only countries have rights arising under the treaties they negotiate. The MAI creates rights that can be invoked directly by individuals or corporations, as a legitimate precedent for protecting very broad investor rights. A corporation need no longer persuade any government of the legitimacy of its complaint before seeking enforcement under an agreement to which it is not even a party. Such panels would operate under international law and according to procedures established for resolving international disputes arising under commercial contracts, but not by local legal principles and procedures. These MAI procedures are in many ways antithetical to the principles of open, participatory and democratic decision-making that are the hallmarks of contemporary legal systems.[84]

6. MAI and Telecommunications

Unlike the GATS on telecommunication under the WTO, the MAI lacks any related regulations on telecommunications. In addition, the MAI is a proposal under negotiation; therefore, its influences on telecommunication industries are not yet visible. Due to the importance of information and communication, most telecommunication industries are state-operated and monopolized in many developing countries. Many developing countries fear that by opening up their markets to competition and foreign investment without restrictions will cause the loss of control of this strategic industry. The MAI forbids governments to compel foreign corporations to transfer technology. This rule will deprive developing countries of an avenue to access technology in telecommunications and reap economic benefits from the foreign country's economic activities.[85] It will also constitute an obstacle for national telecommunication infrastructure and universal service in underdeveloped as well as developing countries. The

[82] Weisbrot, M.: A Corporate Bill of Rights? Distributed by Knight-Ridder/Tribune Media Services, 1998; also see http://www.preamble.org/mai/mwmai998.htm

[83] Weisbrot, M.: Megamergers and the MAI, *USA Today*, 1998; also see http://www.preamble.org/columns/weisbrot/megamergers.htm

[84] Shrybman, S.: The Rule of Law and Other Impediments to the MAI, *West Coast Environmental Law*, 1998.

[85] Lim, K.: *Arguments Against the Multinational Agreement on Investments*; also see http://darwin.bio.uci.edu/~sustain/issueguides/MAI/MAI-Con.html

dilemma is that, on the other hand, foreign investment in telecommunications generally will bring increased technological skills, funds and market competition that will benefit national telecommunications development. Adopting the MAI rules such as national treatment will provide an opportunity to benefit from an emerging "single market" for telecommunication services. Those countries not making commitments under the agreement may find difficulty in attracting foreign capital for infrastructure investment.[86] The rapid technological development in the field of communications has necessitated the development of global telecommunication marketplace.

Under the MAI, industries will have access to technologically advanced methods of manufacturing, which will be produced more efficiently and result in less waste.[87] Though, with a more open foreign investment regime in telecommunications, we risk possible damage to national telecommunication sovereignty and universal access for citizens. Telecommunications have substantial and essential influences to national security, social stability, and economic development and also encompass many industrial sectors. Considering the particular character of telecommunications, some regulations of the proposed MAI should be exempted. Performance requirements are essential safeguards in local laws for market access and foreign investment commitments to be effective. Rules pertaining to competitive safeguards, interconnection, universal service, licensing, the establishment of an independent regulator and the use of scarce resources like the radio spectrum are necessary for local telecommunications development.

IV. Conclusion

During the past few decades, foreign investment has rapidly increased among countries and has enhanced global economic growth. The evidence shows us that there was indeed a correlation between economic development and investment in telecommunications. FDI brings the promotion of economic growth, the obtainment of technology transfer and the creation of employment. Although FDI brings huge economic benefits, many countries are still only partially open to foreign investment. Developing countries fear that by opening up markets to competition and foreign investment without any restrictions,

[86] See *supra note*, Third Draft of the Secretary-General's Report to the Second World Telecommunication Policy Forum.

[87] Lam, J.: *Arguments In Favor of the Multilateral Agreement on Investments*; also see http://darwin.bio.uci.edu/~sustain/issueguides/MAI/MAI-Pro.html

they will lose control of their strategic industries. They have used performance requirements to control the categories and sizes of FDI, such as exporting requirements or technology transfer agreements. Balancing economic gains from FDI with the power to control national economic sovereignty is a dilemma with substantial history. To possibly solve many of the disputes between foreign investment and national sovereignty, a proposed MAI has been negotiated at the OECD.

The MAI is potentially a model of international investment agreement based on non-discrimination and is designed to make it easier for individual and corporate investors to move capital across international borders. The MAI will provide needed protection for international investors against discrimination and expropriation, and will reduce the distortions and inefficiencies caused by excessive regulations. Increasing foreign direct investment will benefit developing countries through technology transfer and economic gains. However, this study has shown that the MAI could hasten job flight from industrialized countries and could increase the pressure on all countries to compete for FDI capital with related fears pertaining to lower wages, lower living standards, and weakened environmental standards. The MAI also creates a new investor dispute mechanism that could undermine national sovereignty and challenge legitimate regulatory safeguards based on widespread public interests. Developing countries worry that a loosened environment for FDI through the MAI would supersede many of their developmental strategies and industrialization processes. Economic differences between developed and developing countries necessitate a level of sovereignty in developing countries that would allow them to attain their economic developmental plans and industrial strategies in parallel with the MAI's pro-investment environment.

The discussion throughout this article has also pointed out that a more open foreign investment environment does not always violate national economic sovereignty. Although developing countries need stronger control to guide their developmental directions and industrial strategies, such countries often lack necessary capital and technological skills to attain their industrialization goals. Foreign investment brings abundant capital, advanced technologies and huge economic profits, which can easily resolve developing countries' economic problems. However, a stable, transparent and non-discriminatory regulatory system is the best way to attract more foreign investment. Because of increased global economic competition, more and more developing countries already relax control over foreign investment and provide a more favorable investment environment and accompanying laws to foreign investors. Since there will be more countries competing to attract more foreign investment, a mandated

investment agreement, i.e., the MAI, is ultimately not necessary for the global market. With neither transparency nor full-participation, the MAI may ruin many developing countries' economic profits and undercut their national sovereignty.

In sum, foreign direct investment is a necessary mechanism for developing countries to promote their economic growth; however, a uniform global investment instrument, the proposed MAI, is unsuitable to meet the different demands from different countries. With different developmental models and suffering different economic difficulties, underdeveloped and developing countries would be expected to strongly oppose such an international investment agreement. The proposed MAI is simply treated as an unfair attempt by developed countries that is designed to take advantage over developing countries. Moreover, the MAI forbids governments to require foreign corporations to transfer technology. This provision will deprive developing countries of an avenue for accessing technology in telecommunications that would reap economic benefits for the foreign country's economic development. Such a provision will also constitute an unnecessary obstacle for further local telecommunication infrastructure and universal service in developing countries. Considering the particular character of telecommunications, regulations of the proposed MAI should be exempted or set aside in favor of the needs of developing countries. A way to resolve this problem is to combine market competition, privatization and foreign investment in order to create an appropriate environment for telecommunications development that recognizes the special status of developing networks.

Additional investment in telecommunications from aboard should bring technology transfer, more abundant capital, and increased market competition, which should benefit national telecommunications development. By introducing foreign investment into developing countries, a workable local telecommunication infrastructure and universal access can be more easily reached. We have shown that increased foreign investment and privatization in telecommunication markets will result in substantial progress in meeting developing countries' basic telecommunications requirements. Of equal importance, telecommunications also have a substantial and essential influence on national security, social stability, economic development and many industrial sectors. In response, the opportunities for foreign investment in the telecommunication services sector historically have been limited and most developing countries have monopolistic and state-owned telecommunication carriers. An efficient trade and investment regime for telecommunication cooperation will have to recognize these two competing factors for a successful agreement between developing and developed countries.

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Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice

Abstract. The article offers an overview on the forms and contents of the declarations accepting the compulsory jurisdiction of the ICJ made under Article 36. para. 2. of the Statute. The author examines first the provisions of the Statutes of the two world courts, than the forms of declarations and the practice of the two International Courts on the validity and the entry into force of the declarations accepting the compulsory jurisdiction.

Since the states are free to choose what form they please one can find a great variety of the forms and wording of the declarations. According to the Statute the only formality required is that a declaration should be deposited to the UN Secretary General and the intention of the state clearly results from a declaration. The ICJ dealt in several cases with the problem of the entry into force of the declarations and according to the well-established practice of the Court the data of the entry into force of these instruments corresponds to their deposit to the Secretary General.

Keywords: International Court of Justice, Optional Clause, compulsory jurisdiction, declarations under Art. 36. para 2. of the Statute

1. Rules of the two Statutes

The jurisdiction of the International Court of Justice (ICJ) as the principal judicial forum of the United Nations may be accepted by states by, *inter alia*, making unilateral declarations of acceptance under the optional clause as embodied in Art. 36, para. 2, of the Statute.[1] The Statutes of the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), contain very

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[1] The way in which states manifest their consent to the jurisdiction of the Court is defined in Art. 36 of the Statutes. Three possibilities are envisaged here: 1. the parties in a special agreement bilaterally agree to submit an already existing dispute to the court; 2. the parties in dispute concerning treaties or conventions in force conferred jurisdiction to the Court (compromissory clauses); 3. unilateral declarations made under the optional clause.

few provisions concerning the making of such declarations and the texts thereof.

Art. 36 of the Statute of the Permanent Court of International Justice is confined to stating that "The member states of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or of ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory, ipso facto and without separate agreement, the jurisdiction of the Court as being compulsory in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning..."

Under Art. 36, para. 2, of the Statute of the ICJ, "The States parties 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..."

The cited articles of the two Statutes seem rather similar at first sight, suggesting that the provisions set forth in the Statute of the former Court were practically reproduced in this respect during the negotiations on the establishment of the new Court at the San Francisco Conference after World War Two.[2] The San Francisco Conference effected in fact two changes in regard to optional clause declarations.

On the proposal of the Conference's Committee IV/1, it added a new paragraph to Art. 36. (para. 4.) providing that "Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court". Accordingly, the optional clause declarations, which are usually signed on behalf of the state by the foreign minister or the representative to the United Nations, are to be forwarded to the United Nations' Secretary-General, who must transmit them to the member states of the Organization and to the parties to the Statute of the Court, and publish them in the United Nations' Treaty Series, and transmit them to the Registrar of the Court for publication in the Court's Yearbooks.

The other change was that while, at the time of PCIJ, a state had the possibility of accepting the Court's compulsory jurisdiction only in respect of one or more categories of disputes under subparas. a) to d), however, under the new Statute a state should accept the compulsory jurisdiction of the Court in

[2] On the elaboration of the Statute see, Russel, R. M.—Muther, J. E.: *A History of the United Nations Charter.* Washington, D. C. 1958, 864–896.

respect of all the four specified categories of disputes enumerated in a)–d) subparas. of para. 2. Art. 36.[3]

There is, however, an essential difference, apart from the paragraph inserted by the San Francisco Conference, between the aforementioned provisions of the Statutes of the two International Courts concerning declarations made under the optional clause. In effect, under the Statute of the PCIJ, declarations accepting the Court's compulsory jurisdiction could only be made by states, which had at least signed the Statute, meaning that a state could make a declaration of acceptance even before the Statute had entered into force in respect of that state. By contrast, the Statute of the ICJ refers to states that are parties to the present Statute, which allows the compulsory jurisdiction of the new Court to be accepted only by states that are already parties to the Statute, namely they have signed and ratified the Charter of the United Nations, of which the Statute forms an integral part, or by states that are not members of the world organisation but have acceded to it, as Switzerland and Liechtenstein, for example, became parties to the Statute as non-members of the United Nations,[4]

[3] According to the Statute of the PCIJ, the Members of the League of Nations and the States mentioned in the Annex to the Covenant states recognize the compulsory 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 of or extent of the reparation to be made for the breach of an international obligation." The Statute of the ICJ speaks of the acceptance of "the jurisdiction of the Court in all legal disputes concerning:...".

At the time of the PCIJ, Iran was the only state that made a declaration under the optional clause recognizing the Court's compulsory jurisdiction with respect to one of the categories of disputes.

The relevant part of the 1930 declaration reads as follow:

"The Imperial Government of Persia recognizes as compulsory *ipso facto* and without special agreement in relation to any other State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Permanent Court of International Justice, in accordance with Article 36, paragraph 2, of the Statute of the Court, in any disputes arising after the ratification of the present declaration *with regard to situations or facts relating directly or indirectly to the application of treaties or conventions* (my italics—V. L.) accepted by Persia and subsequently to the ratification of this declaration, with the exception of :...".

[4] For the resolution on Switzerland, see: *ICJ Yearbook*, 1946–1947, 105–106. For the resolution on Liechtenstein, see: *ICJ Yearbook*, 1949–1950, 32–33. Also, see: *ICJ Yearbook*, 1953–1954, 36–37.

and concurrently with the acceptance of the Statute they made optional clause declarations.[5]

During the consideration of different cases, both the PCIJ and the ICJ were seized by the problem of whether, pursuant to the cited provisions of the Statute, certain states were at all in a position to make declarations under the optional clause.

At the time of the PCIJ, it was in the Gerliczy case that the question arose of whether a declaration of acceptance by a state which was not included among those mentioned in the Annex to the Covenant of the League of Nations or which was not a member of the League of Nations could be deemed to be valid. In the dispute submitted by Liechtenstein against Hungary in 1939, on the basis of the declarations of acceptance by the two states, the Hungarian Government announced its intention to file a preliminary objection, for Liechtenstein was not among the states listed in the Annex to the Covenant, nor a member of the League of Nations and made optional clause declaration on the basis of the Council's decision of May 17, 1922.[6] However, the decision expressed that, in the absence of special agreement, such a declaration could not be invoked against a member state of the League of Nations which, mentioned in the Annex of the Covenant, had signed or would sign the 'optional clause'. The Gerliczy case remained pending because of the war, so no answer was given to the question relating to Liechtenstein's declaration of acceptance.

More than half a century later, the International Court of Justice was faced with a problem, somewhat similar to that of the Gerliczy case, with regard to Yugoslavia in the context of whether it was possible for a declaration of acceptance to have been made by a state on whose membership in the United Nations was uncertain. The opinion of the international community was rather divided, to say the least.[7]

[5] The declarations by Switzerland and Liechtenstein were dated July 6, 1948, and March 10, 1950, respectively. Both instruments contained, among other things, the statement that the declaration was effective from the day on which the particular state became a party to the Statute.

[6] The decision was adopted pursuant to a request addressed by the Court to the Council and was concerned with, *inter alia*, the conditions under which the states listed in the Annex to the Covenant and states not members of the League of Nations were entitled to resort to the Court. On this point, see: Hudson, M. O.: *The Permanent Court of International Justice*. 1920–1942. Arno Press, New York, 1972, 386–387.

[7] The membership of the Federal Republic of Yugoslavia (FRY) in the United Nations was uncertain from April 27, 1992, i.e., from the date of its establishment. The problem of Yugoslavia's membership in the United Nations was on the agenda of General Assembly from 1992. Long debates and a quasi political compromise led to the adoption of General Assembly resolution 47/1, which stated that the General Assembly "1. Considers that the

During the days of the Milosevic regime, the Belgrade Government made a declaration under the optional clause on April 25, 1999, and a few days later, on April 29, 1999, during the NATO air strikes, it addressed an application to the Court against 10 NATO member states by invoking violations of the prohibition of the use of force and of the Genocide Convention (Cases concerning Legality of Use of Force).[8]

During the consideration of the Yugoslavian request for the ordering of provisional measures, certain responding states, such as Belgium, argued that the FRY was not a successor state to the Socialist Federal Republic of Yugoslavia, nor a party to the Statute and not therefore in a position to make a declaration under the optional clause.

For its part, the Court gave no answer to this question and in connection with declarations of acceptance, it found it sufficient to point out that, in view of the reservation *ratione temporis* (concerning future disputes) included in the Yugoslav declaration, it was without jurisdiction even *prima facie*, for, given this limitation, the Court had jurisdiction only in disputes relating to situations and facts subsequent to the signature of the declaration, whereas the dispute between the parties arose before April 25, 1999, for the air strikes by NATO states had begun on March 24, 1999.[9]

So, while, in the phase of the proceedings concerning provisional measures, the Court endeavoured to sidestep the issues relating to Yugoslavia's member-

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Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and therefore, decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it should not participate in the work of the General assembly." Thereafter, the FRY took part in the activities of only some UN organs. After the downfall of Milosevic and company, FRY's submission to membership was admitted on November 1, 2000.

The dispute about the FRY's membership in the UN was ended by the Court's Judgement of February 3, 2003, after the Court had spelled out, in connection with the Yugoslavian request for a revision of the judgement of July 11, 1996, in the dispute between Bosnia and Herzegovina and the FRY regarding the case on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, that between 1992 and 2000 the status of the FRY was *sui generis* in respect of the UN and the ICJ (para. 71 of the judgement) as the FRY took part in the work of certain UN organs but did not in that of others.

[8] In the case, with six out of the 10 NATO member states—Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom—the FRY also invoked, inter alia, Art. 36, para. 2, of the Court's Statute, notably the optional clause, as the basis for the Court's jurisdiction.

[9] Case concerning Legality of Use of Force (Yugoslavia v. Belgium) request for the Indication of Provisional Measures. Order of June 2, 1999, 134–135.

ship in the United Nations as well as the possibility of Yugoslavia having made a declaration under the optional clause at all, several members of the Court were quite insistent on pursuing this issue further. Judge Kooijmans wrote this: „How can the Court say that there is no need to consider the validity of Yugoslavia's declaration whereas at the same time it concludes that this declaration, taken together with that of the Respondent, cannot constitute a basis of jurisdiction?" According to the Dutch judge, this reasoning implies the presumption that the Yugoslavian declaration is valid, at least in the present phase of the proceedings.[10] Rosalyn Higgins, the British member of the Court, showed some understanding of the Court's failure to have thoroughly examined the rather complicated question of Yugoslavia's status, since the Court constantly has to make extremely speedy decisions on provisional measures.[11] On the other hand, Judge Oda, one of the Court's most experienced members, was clearly of the position that the FRY was not a member of the United Nations and hence had no right to institute proceedings before the Court.[12] Oda maintains that even if the FRY is supposed to be a party to the Statute, with its declaration of acceptance registered as required by law, it in no way acted in good faith as it made its declaration of acceptance under the optional clause a few days before the filing of the application.[13] In other words, Judge Oda, in dealing with the Yugoslavian declaration accepting the optional clause, also raised the question that had been the subject of debate even in the Right of Passage case during the 1950s, namely that of whether a state was entitled to submit an application to the Court a few days after it had made a declaration of acceptance.

These cases and particularly those concerning Legality of the Use of Force go to suggest that the Court is loath to examine whether a given state was or was not entitled to make a declaration of acceptance. Such attitude reflects the Court's view that the declaring state assumes, of its own will, certain extra obligations regarding the Court's jurisdiction and that the Court should take such obligations into account. We may add that the Court must do so all the more as the international community took cognizance of those obligations at the time they were assumed.

[10] *Ibid.*, 117.
[11] *Ibid.*, 167.
[12] *Ibid.*, 145–146.
[13] *Ibid.*, 148.

2. Contents of declarations and relevance of the principle of will

The idea that it would be advisable to elaborate a model document concerning declarations of acceptance had emerged as early as the negotiations for the establishment of the PCIJ. Although the so-called Third Committee did not suggest a model, the elaboration of such a document, a draft of the "optional clause", or declarations was also attached to the Draft Protocol of Signature of the Statute when it was submitted to the Council of the League of Nations on December 14, 1920. In Hudson's opinion, that draft seems to have been approved by the Council and, as a separate protocol, it was opened for signature on December 17, 1920.[14] Called "optional clause", this additional protocol was not a separate document but a subsidiary one intended to serve as a model for declaration to be made under Art. 36, para. 2, of the Statute.[15] At any rate, Hudson emphasises that the said document was only a suggested version for the first part of the text of declarations and that states were free to disregard it in making their declarations.[16]

Thus, in spite of the existance of a certain kind of model document, the states accepting the compulsory jurisdiction of the PCIJ paid little attention to it and developed diverse contents and forms of declarations of submission in the years following the establishment of the Court.

The declarations of acceptance by some states practically reproduced Art. 36, para. 2, of the Statute, stating that the declaring state "recognize as compulsory *ipso facto* and without special agreement, on condition of reciprocity" the jurisdiction of the Court. While others departed from it, with completely different wordings inserted in their declarations. Another group of states declared in a single sentence, quite short and to the point, that they accepted the jurisdiction of the Court. During the interwar period, some states accepting the Court's compulsory jurisdiction incorporated their declarations of acceptance in the instruments of ratification of the Statute of the PCIJ, while others submitted their optional clause declarations to the Secretary-General of the League of Nations in the form of a letter. Considering that, as noted previously, the Statute contained no provision for making declarations under Art. 36. para. 2., any form of optional clause declaration became accepted. This was recognized by the International Court of Justice in the Nicaraguan case through its statement that: "The Statute of the Permanent Court did not lay down any set form or procedure

[14] Hudson: *The Permanent Court ... op. cit.*, 127.
[15] *Ibid.*, 451.
[16] *Ibid.*, 452.

to be followed for the making of such declarations, and in practice a number of different methods were used by States."[17]

The formal questions concerning declarations of acceptance were touched upon by the International Court in several cases. In its very first judgement, in the Corfu Channel case in the preliminary objections, the Court held that "...neither the Statute nor the Rules require that this consent should be expressed in any particular form."[18] The same was spelled out in the Temple of Preah Vihear case, in which the Court sought to answer the question whether Thailand's letter of May 20, 1950, addressed to the United Nations Secretary-General in accordance with Art. 36, para. 2, of the Statute, was to be regarded, in substance and form, as recognizing compulsory jurisdiction pursuant to Art, 36, para. 2, of the present-day Court's Statute.[19] The Court stated: "The precise form and language in which they do this (the declaration—V. L.) is left to them, and there is no suggestion that any particular form is required, or that any declarations not in such form will be invalid. No doubt custom and tradition have brought it about that a certain pattern of terminology is normally, as a matter of fact and convenience, employed by countries accepting the compulsory jurisdiction of the Court; but there is nothing mandatory about the employment of this language. Nor is there any obligation, notwithstanding paragraphs 2 and 3 of Article 36, to mention such matters as periods of duration, conditions or reservations, and there are acceptances which have in one or more, or even in all, of these respects maintained silence."[20]

With regard to the contents of the optional clause declarations, the Court stressed that "... the sole relevant question is whether the language employed in any given declaration does reveal a clear intention, in the terms of paragraph 2 of Article 36 of the Statute, to 'recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same

[17] Case concerning Military and Paramilitary Activities in and against Nicaragua. *ICJ Report,* 1984, 404.

[18] The Corfu Channel, ICJ Recueil, 1948, 27.

[19] In its declaration of September 30, 1929, Thailand originally accepted the compulsory jurisdiction of the PCIJ for a period of 10 years, and in 1940 and 1950 it renewed its declaration with other declarations, containing the previous conditions and reservations, for additional periods of 10 years. In its first preliminary objection in the Preah Vihear case, Thailand advanced the argument, along with others, that in 1950 there was a mistaken view of the status of her earlier declaration of 1940 as it had renewed its declaration of acceptance in respect of a court that no longer existed.

[20] Case concerning the Temple of Preah Vihear. Preliminary Objections. *ICJ Reports,* 1961, 32.

obligation, the jurisdiction of the Court in all legal disputes' concerning the categories of questions enumerated in that paragraph".[21]

As can be seen, the Court attached no importance to formal questions of making declarations and deemed the intentions of the parties to be the determining incident. Relying on private-law examples, it pointed out that international law "... places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it."[22] All this was summed up by Sir Percy Spender in these terms: "No requirement of form are called for paragraph (2) of Article 36. If consent to recognize this Court's jurisdiction in terms of that paragraph is clearly manifested, it matters not in what form the declaration containing that consent is cast."[23]

3. The problem of collective declarations accepting the compulsory jurisdiction

For nearly seven decades since the establishment of the PCIJ, states had made individual declarations of acceptance, and it was not until the end of the 1980s that, in the Case concerning Border and Transborder Armed Actions, the possibility arose of recognizing the Court's compulsory jurisdiction by collective declarations.[24]

In that dispute between Nicaragua and Honduras, the applicant state, Nicaragua, founded the Court's jurisdiction on Article XXXI of the American Treaty on Pacific Settlement,[25] officially known, as the Pact of Bogotá, signed

[21] *Ibid.*, 32.

[22] *Ibid.*, 31.

[23] See Sir Percy Spender's individual opinion in the case concerning the Temple of Preah Vihear. ICJ Reports, 1961, 40.

[24] On this point see Buffet-Tchalakoff, M. E.: La compètence de la Cour Internationale de Justice dans l'affaire des „Actions frontalières et transfrontalières" (Nicaragua-Honduras), *Revue Générale de Droit International*, Tome 93, 1989, No. 3, 623–653.

[25] Art. XXXI of the Bogota Pact reads as follows: „In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arose among them concerning.

The interpretation of a treaty;

Any question of international law;

on April 30, 1948, and on the declarations accepting the jurisdiction of the Court by the two states.[26] These two instruments serving as the basis for the Court's jurisdiction—and the possibility of making collective declarations of acceptance that actually arose in connection with them—highlight the specific feature that Art. XXXI of the Pact of Bogotá is virtually identical, almost word for word, with Art. 36, para. 2, of the Statute.

Before the Court, Art. XXXI of the Pact of Bogotá on judicial settlement of disputes was linked by Honduras with declarations of acceptance under Art. 36, para. 2, of the Statute. According to Honduras, Art. XXXI, which, as mentioned above, is almost literally identical to Art. 36, para. 2, of the Statute, "contains a jurisdiction which can be more precisely defined by means of a unilateral declaration", notably in unilateral declarations, under Art. 36, para. 2, of the Statute, by each party to the Pact.[27] Starting with this, Honduras was of the position that any declaration made under Art. 36, para. 2, of the Statute and the reservations attached thereto applied to Art. XXXI of the Pact of Bogotá as well.[28] In connection with all this, Honduras interpreted Art. XXXI of the Pact in two ways with respect to the present case. First, it argued that, under this Article, the Court had jurisdiction only if a declaration of acceptance was also made under the optional clause, but later it claimed that such a unilateral declaration was not necessary but only possible and that Art. XXXI of the Pact of Bogotá

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

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

[26] The Honduran declaration of acceptance of compulsory jurisdiction was dated February 2, 1948, and was renewed several times, first on May 24, 1954, for a period of six years and on February 20, 1960, for an indefinite period. It was modified by a declaration on May 22, 1986, inserting a paragraph under which the present declaration and the reservations contained therein may at any time be supplemented, modified or withdrawn by giving notice to the Secretary-General of the United Nations. The Nicaraguan declaration of acceptance was made on September 24, 1929, and its legal effect was, according to Nicaragua transmitted to the ICJ by Art. 36, para. 5, of the Statute. This declaration of acceptance by Nicaragua was the same as that which was at issue in the legal dispute between Nicaragua and the United States of America.

[27] Case concerning Border and Transborder Armed Actions, *ICJ Pleadings*, 1988, Vol. I, 65.

[28] *Ibid.*, 74. Honduras relied on this for objecting to the Court's jurisdiction on the ground that, owing to the reservations attached to the 1986 declaration, the Court's jurisdiction did not extend to the present case on the basis either of the optional clause or of Art. XXXI of the Pact of Bogotá.

Pact was valid irrespective of any declaration relating thereto.[29] Then again, it claimed that Art. XXXI was to be seen as recognition of the Court's compulsory jurisdiction under the optional clause understood as implied in the Pact of Bogotá.[30] In other words, according to Honduras, Art. XXXI of the Pact of Bogotá was nothing more than a collective declaration of acceptance.

The Court's opinion on these argumentation was the following: "The first interpretation advanced by Honduras—that Article XXXI must be supplemented by a declaration—is incompatible with the actual terms of the Article. In that text, the parties "declare that they recognize" the Court's jurisdiction "as compulsory *ipso facto*" in the cases enumerated. Article XXXI does not subject that recognition to the making of a new declaration to be deposited with the United Nations Secretary-General in accordance with Article 36, paragraphs 2 and 4, of the Statute. It is drafted in the present indicative sense, and thus of itself constitutes acceptance of the Court's jurisdiction."[31] With regards to the second interpretation, the Court noted that the parties had come forward with two possible interpretations on the relationship between Art. XXXI of the Pact of Bogotá and the Statute: on the one hand, they conceived the said Article as a treaty provision conferring jurisdiction upon the Court under Art. 36, para. 1, of the Statute and, on the other, they deemed it to be a collective declaration of acceptance of compulsory jurisdiction under Art. 36, para. 2, of the Statute and incorporated in the Pact of Bogotá.[32]

Without going too deeply into the case concerning Border and Transborder Armed Actions, we should note that the quotation from the Court's judgement indicates that the International Court did not entirely preclude the *acceptance of its compulsory jurisdiction by a collective declaration of acceptance* but,

[29] Case concerning Border and Transborder Armed Actions, *ICJ Reports,* 1988, 83.

[30] Case concerning Border and Transborder Armed Actions, *ICJ Pleadings*, 1988, Vol. I, 75.

[31] Case concerning Border and Transborder Armed Actions, *ICJ Reports*, 1988, 84.

[32] Honduras advanced the latter interpretation in the Case concerning Border and Transborder Armed Actions. In 1984, in its legal dispute with the United States concerning Military and Paramilitary Actions against Nicaragua, Nicaragua claimed that Art. XXXI should be regarded as a declaration made under Art. 36, para. 2, of the Statute, that is to say that its position was identical to that of Honduras in the case of 1988. On the other hand, in the Border and Transborder Armed Actions case, Nicaragua argued against Honduras that Art. XXXI of the Bogota Pact came under Art. 36, para. 1, of the Statute, providing a reason why it was to be deemed a reservation to the Treaty with regard to the jurisdiction of the Court. Cf.Case concerning Border and Transborder Armed Actions, *ICJ Reports,* 1988, 84.

keeping in mind the consequences of its aforesaid finding, it preferred to point out that

> "There is however no need to pursue this argument. Even if the Honduran reading of Article XXXI be adopted, and the article be regarded as a collective declaration of acceptance of compulsory jurisdiction made in accordance with Article 36, paragraph 2, it should be observed that declaration was incorporated in the Pact of Bogotá as Article XXXI. Accordingly, it can only be modified in accordance with the rules provided for the Pact itself. Article XXXI nowhere envisages that the undertaking entered into by the parties to the Pact might be amended by means of a unilateral declaration made subsequently under the Statute, and the reference to Article 36, paragraph 2, of the Statute is insufficient in itself to have that effect."[33]

The Court concluded by stating that the said silence was all the more significant since the Pact clearly determined the obligations of the parties. The commitments contained in Art. XXXI applied *ratione materiae* to the disputes enumerated in its text and *rations personae* to the American States parties to the Pact, while remaining valid *rations temporis* so long as the present instrument was in force between those states.[34]

With this statement, the International Court has made it abundantly clear that it considers Art. XXXI of the Pact of Bogotá to be a treaty provision conferring jurisdiction on the Court with a text similar to declarations of acceptance of compulsory jurisdiction, to be in fact a *compromissory* clause, one that is deemed to be acceptance of the Court's jurisdiction under Art. 36, para. 1, of the Statute rather than under para. 2.[35]

Thus, in the Border and Transborder Armed Actions case, the Court found that Art. XXXI of the Pact of Bogotá could not be considered to be a collective declaration of acceptance, yet it took no definite stand on whether it was possible

[33] Cf. Case concerning Border and Transborder Armed Actions, *ICJ Reports*, 1988, 84.

[34] *Ibid.*

[35] A similar view was held by Jiménez de Aréchaga, a most prominent international expert of international law of Latin America and a former member of the Court, who wrote that, despite the similarity of terminology, Art. XXXI of the Bogota Pact was a document coming under Art. 36, para. 1, of the Statute. Yet he added that in their mutual relations, the Latin American states, having regard to the close historical and cultural ties between them, placed the Court's compulsory jurisdiction on much stronger foundations than those ensuing from the system of declarations under Art. 36, para. 2, of the Statute.

Cf. Jiménez de Aréchaga, E.: The Compulsory Jurisdiction of the International Court of Justice under the Pact of Bogotá and the optional clause. In: *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (ed. Yoran Dinstein), Martinus Nijhoff Publishers, Dordrecht–Boston–London, 1989, 356–357.

to accept the Court's compulsory jurisdiction by a collective declaration of acceptance.[36]

Without elaborating on problems relating to eventual collective optional clause declarations, we wish to note that recognition of Art. XXXI of the Bogotá Pact as a collective declaration of acceptance of compulsory jurisdiction could have entailed interesting consequences. In the first place, the Court's compulsory jurisdiction would have operated not only in the inter se relations of the states parties to the Pact of Bogotá, but also in relations between the rest of states parties to the regime of the optional clause. Moreover, it would have raised the question of how such a collective declaration of acceptance is related to individual optional clause declarations by the Latin American states parties to the Optional Clause system. This problem should not be treated as a speculative one, for 13 of the states parties to the Pact of Bogotá have made individual declarations, many of them with reservations attached thereto. Consequently, there is a need to answer the question whether the basis for the Court's jurisdiction is provided by individual declarations of acceptance or by the Pact of Bogotá as a collective declaration of acceptance in cases where a state that is party to the Optional Clause system intends to institute proceedings against a state that is a party to the Pact of Bogotá and at the same time has made an individual declaration of acceptance. This may give rise to a problem, particularly when it is borne in mind that certain disputes are excluded from the Court's jurisdiction by reservations attached to individual declarations of acceptance, while such disputes may still happen to come under the jurisdiction of the Court on the basis of a collective declaration of acceptance.

4. Ratification of declarations of acceptance

In relation to the rather few formal requirements for declarations accepting the compulsory jurisdiction of the two World Courts, mention should also be made of the fact that, during the existence of the PCIJ, a number of states made their

[36] However, some members of the Court, including Judge Oda, expressly conceded the possibility of collective recognition of compulsory jurisdiction. According to the Japanese judge, acceptance of jurisdiction under Art. 36, para. 1, of the Statute can, in the case of certain general treaties on dispute settlement, can be equated, in effect, with acceptance of the Court's jurisdiction under Art. 36, para. 2, of the Statute, but such an obligation must be assumed in an unequivocal manner. He instanced the 1949 Revised General Act for the Pacific Settlement of Disputes and the European Convention on Peaceful Settlement of Disputes. See Judge Oda's individual opinion. *ICJ Reports*, 1988, 124.

declarations subject to ratification. In other words, a state did not recognize compulsory jurisdiction under Art. 36 of the Statute as binding on itself until after it had ratified its declaration. Incorporation of such reservations in declarations of acceptance was actually superfluous as declarations of acceptance cannot be deemed to be treaties and there is no rule requiring ratification thereof. Furthermore, as Hudson wrote, "...both the English and French versions of the optional clause refer to the recognition or acceptance of jurisdiction "from this date" (Fr., *dès à présent*), *i.e.*, from the date of the declaration, it would seem that the declaration was intended to take effect at the time of signature."[37] This notwithstanding, a number of states made their declarations subject to ratification, as noted earlier. Interestingly, there were also cases in which a state ratified its declaration, although the instrument did not call for ratification. Some of the relevant cases include Bulgaria's declaration of 1921, Ethiopia's declaration of July 12, 1926, and Lithuania's declaration of October 5, 1921.

The fact that, during the existence of the PCIJ, provisions in declarations of acceptance for ratification thereof were rather frequent, may in all certainty be attributed to unestablished practice concerning the declarations under Art. 36. para. 2. This seems to be confirmed by the fact that, of all the declarations currently in force, only the Belgian declaration of 1958 provides for ratification.

Numerous optional clause declarations expressly requiring ratification were not ratified at the time of the PCIJ and, therefore, did not enter into force. Cases in point are the declarations of Costa Rica, Liberia and Luxembourg in 1921, of Latvia in 1923 and of France in 1924,[38] of Guatemala in 1926, of Czechoslovakia in 1929, of Argentina in 1935, of Iraq in 1938 and of Egypt and Hungary in 1939.

Though not required, inclusion of reservations concerning ratification of acceptance was by all means of great importance as *declarations containing such reservations could not enter into force until ratification thereof.* That situation was further complicated by the fact that—since the Protocol of Signature of the Statute of the PCIJ was to be ratified—the declaration of a state could not come into force until a ratification of the said Protocol. Consequently, if a state ratified its declaration of acceptance earlier than the Protocol of Signature of the Statute, the declaration could not enter into force.

It was nearly four decades after the dissolve of its predecessor that the International Court of Justice was confronted with the problems concerning

[37] Cf. Hudson: *The Permanenet Court ... op. cit.*, 452.

[38] On the reasons for the non-ratification of the French declaration, see Dreyfus, S.: Les déclarations souscrites par la France aux termes de l'article 36 du Statut de la Cour Internationale de la Haye. *Annuaire Francais de droit International,* 1959, 259.

ratification of the Protocol of Signature of the Statute of the PCIJ in the Case concerning Military and Paramilitary Actions in and against Nicaragua (Nicaragua v.United States) in the 1980s. In that case, the dispute centred on, inter alia, the validity of a declaration of acceptance made by Nicaragua between the two world wars. Nicaragua signed the Protocol of Signature of the Statute of the PCIJ in September 1929 and made a declaration under Art. 36. para. 2. of the Statute. However, the Protocol of Signature of the Statute had not yet been ratified, and it was more than 10 years later, on November 29, 1939, that Nicaragua notified the Secretary-General of the League of Nations by cable that "the Statute and the Protocol" had been ratified and that the instrument of ratification would be transmitted to Geneva. However, according to available information, that instrument of ratification did not reach the League of Nations.

In view of all this, the United States contended, in the Case concerning Military and Paramilitary Activities in and against Nicaragua, that Nicaragua had never become a party to the Statute of the PCIJ and was therefore not in a position to make an effective acceptance of the compulsory jurisdiction of the PCIJ.[39] On the other hand, Art. 36, para. 5, of the Statute could not consequently transfer the legal effects of the 1929 Nicaraguan declaration to the International Court of Justice, since the relevant article of the Statute did not cover *but the declarations submitted to the PCIJ and "still in force.*[40]

Contrary to this, Nicaragua construed that the provision of the Statute was designated to exclude from the operation of the article only declarations which had already expired and had no bearing whatever on a declaration like that of Nicaragua, that had not expired, but which had not been perfected for various reasons at the time. In the view of the Nicaraguan Government, Nicaragua was in exactly the same situation under the new Statute as it had been at the time of the old Statute, and in both cases the ratification of the Court's Statute would perfect its 1929 declaration.[41]

On this point, the Court held "...that Nicaragua having failed to deposit its instrument of ratification to the Protocol of Signature of the Statute of the Permanent Court, was not a party to that treaty, Consequently the Declaration made by Nicaragua in 1929 had not acquired binding force prior to such effect as Article 36, paragraph 5, of the Statute of the International Court of Justice might produce."[42]

[39] Case concerning Military and Paramilitary Activities in and against Nicaragua, *ICJ Pleadings,* Vol. II, 11–17.

[40] *Ibid.*, 18–29.

[41] *Ibid.*, Vol. I, 63–74.

[42] *ICJ Reports,* 1984, 404.

On the basis of the findings of the International Court of Justice in the Nicaraguan case, it can be stated that, according to the Court, the ratification of the new Statute had the same effect in the case of Nicaragua as if the Protocol of Signature of the old Statute had been ratified.

The Court's reasoning boils down to the fact that, at the time the new Statute came into force, Art. 36, para. 5, of the Statute transmitted to the ICJ the legal effect of optional clause declarations made to the PCIJ and still in force.

The related arguments adduced by the Court can be questioned in certain aspects, if only for the reason that the English and French texts of Art. 36, para. 5, of the Statute are somewhat different, the English version reading "declarations ... which are still in force" whereas the French "declarations ... pour une durée qui n'est pas encore expirée" is not the equivalent of the former (encore en vigueur), but can be rendered as "declarations ... for a period not yet expired".[43] Both texts refer, in point of fact, to declarations which had not yet lapsed at the time of the entry into force of the new Statute, and as such were still applicable. However, in the case of the Nicaraguan declaration, what was at issue was not the non-expiration of the declaration at the time of the new Court's Statute or the continuing effect thereof, for during the existence of the PCIJ this declaration had never become effective in reality and was therefore inapplicable. In our view, the argument that Nicaragua was for decades regarded by the international community as a state party to the Court's Statute and was recorded in the different publications of the Court as a state party to the optional clause system, would have appeared much more convincing in favour of the applicability of the Nicaraguan declaration in that particular case. Both Nicaragua and the other states parties to the optional clause system agreed with this, that is to say that Nicaragua had the clear intention to be a party to the compulsory jurisdiction of the Court and that the other members of the international community were in agreement on this point.[44]

5. Problems relating to deposit of declarations

As mentioned earlier, the San Francisco Conference inserted a new paragraph in Art. 36 of the Statute, which provides that declarations of acceptance are to be deposited with the Secretary-General of the United Nations, who is to

[43] See the individual opinion of Judge Jennings. *ICJ Reports,* 1984, 537–539.

[44] It should be noted that Judge Jennings rejected this argument, saying that the Registrar of the Court performs a single administrative function by listing the states that are parties to the system of the optional clause in the yearbooks.

circulate thereof to the parties to the Statute and the Registrar of the Court. The Statute contains nothing more and does not specify the date at which declarations of acceptance enter into force or begin to take legal effect.

According to the pertinent literature and the Court, para. 4 of Art. 36 essentially refers to two elements that are practically independent of eachother.[45] On the one hand, declarations accepting the Court's compulsory jurisdiction are to be deposited by the declaring state with the Secretary-General and, on the other hand, there is the duty incumbent on the Secretary-General to transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

Rosenne is of the view that the deposit of declarations of acceptance with the Secretary-General entails the following consequences for the declaring state: 1) the declaration becomes effective *rations personae* on the day of deposit except where the instrument contains a special reservation in this respect; 2) if the declaration requires some additional act, such as ratification, such an additional act is also to be performed through the agency of the Secretary-General, namely the instrument of ratification is to be transmitted to the Secretary-General and its legal effects arise from the date of that deposit; 3) the terms on which the compulsory jurisdiction are accepted by the declaring state at a given moment are those terms last deposited with the Secretary-General; 4) while the said provision of the Statute refers to the deposit of declarations, it also applies to modification, withdrawal and of denunciation, etc. of declarations.[46]

The problems relevant to the deposit of declarations of acceptance with the Secretary-General have been considered by the International Court in several cases. The best-known case of this category is the Right of Passage Through Indian Territory, in which Portugal made a declaration of acceptance on December 19, 1955, and filed an application with the Court against India under the Optional Clause a few days later, on December 22, 1955. India contended that the filing of the Portuguese application violated the generally recognized principle of equality, mutuality and reciprocity to which India was entitled under the optional clause, as the Portuguese application had been filed before the expiration of a period of time—between the acceptance by Portugal of the Court's compulsory jurisdiction and the filing of the application—which, under normal circumstances, would have enabled the Secretary-General to

[45] Cf. Rosenne, S.: *The Law and Practice of the International Court.* A.W. Sijthoff–Leyden, 1963, 381.

[46] *Ibid.*, 382.

transmit the Portuguese declaration to the states parties to the Statute of the Court, including India.[47]

The Court found that the filing of the Portuguese application on December 22, 1955, was not contrary to the Statute and constituted no violation of India's rights. It stated that "...by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declaring States, with all the rights and obligations deriving from Article 36. ... The legal effect of a Declaration does not depend upon subsequent action or inaction of the Secretary-General."[48] The Court pointed out that "...unlike some other instruments, Article 36 provides for no additional requirement, for instance, that the information transmitted by the Secretary-General must reach the Parties to the Statute, or that some period must elapse subsequent to the deposit of the Declaration before it can become effective. Any such requirement would introduce an element of uncertainty into the operation of the Optional Clause system. The Court cannot read into the Optional Clause any requirement of that nature."[49]

Several members of the Court objected to this passage of the judgement. In his dissenting opinion, Judge Badawi stressed the contractual nature of the regime that was established on the basis of the optional clause and tried to prove that "The notification of Declarations to the Secretary-General, or their deposit with him and his obligation to communicate them to other States, are merely intended to take place of direct communication."[50] Since the declaration was made on the day preceding the filing of the application, no one could suppose that the Secretary-General had been able to transmit the declaration to the other states within 24 hours, the result being a situation as if no declaration of acceptance had been made.[51] In his dissenting opinion, *ad hoc* Judge Chagla argues that Art. 36, para. 4, of the Statute consisted of two parts, one making it incumbent upon the declaring states to deposit declarations with the Secretary-General, and the other incumbent upon the Secretary-General for the transmission copies thereof to the states parties to the Statute and to the Registrar of the Court. The *ad hoc* Judge found it objectionable that the Court's decision had deemed only the first element to be mandatory, for, in his view, it would have been absolutely necessary that a certain period of time

[47] See India's second preliminary objection.
[48] *ICJ Reports,* 1957, 146.
[49] *Ibid.,* 147.
[50] *ICJ Reports,* 1957, 155.
[51] *ICJ Reports,* 1957, 156.

should elapse between making the declaration and filing the application.[52] In the 1960s, Rosenne also made the point that, during a future revision of the Statute, it would be worthwhile considering the introduction of a short period between the date of deposit of declarations and the date on which such instruments begin to produce legal effects.[53]

More than 40 years after its decision in the Right of Passage case, the Court was again faced with the problem of a dispute being submitted to it under the optional clause before the respondent state could have been informed of the applicant state's accession to the system of the optional clause.

This problem arose in the second part of the 1990s in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria, because on March 3, 1994, Cameroon made a declaration accepting the Court's compulsory jurisdiction and the United Nations Secretary-General transmitted it to the parties to the Statute eleven-and-a-half months later. Consequently, when Cameroon's application was filed on March 29, 1994, the respondent state, Nigeria did not know or was not in a position to know that Cameroon had acceded to the optional clause system.[54] This led Nigeria to conclude that Cameroon "acted prematurely", had violated "its obligation to act in good faith ..., acted in abuse of the system established by Art. 36, para. 2, of the Statute". Nigeria asserted that the Court's decision in the Right of Passage case was an isolated one and that it was time the Court revised its findings in this case in connection with the making of optional clause declarations. It stressed that the interpretation of Art. 36, para. 4, of the Statute in 1957 should be reconsidered in the light of changes that had since taken place in the law of treaties, and in this context it referred to Art. 78 of the 1969 Vienna Convention on the Law of Treaties, which provides:

"Except as the treaty or the present Convention otherwise provides, any notification or communication to be made by any State under the present Convention shall:

...

c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depository."

[52] *ICJ Reports*, 1957, 169–170.

[53] Cf. Rosenne: *op. cit.*, 381.

[54] The applicant state, Cameroon, founded the Court's jurisdiction on the Nigerian declaration of acceptance of August 14, 1965, and on the Cameroonian declaration of acceptance of March 3, 1994.

No matter how logical the above-mentioned arguments may appear to be, the elements thereof referring to the law of treaties may be strongly questioned, notably on the ground that, during the elaboration of the 1969 Vienna Convention on the Law of Treaties, the International Law Commission, in dealing with deposit of instruments of ratification, accession, etc., referred precisely to the findings of the ICJ in the Right of Passage case, stating that in an analogous situation, notably in respect of the entry into force of declarations made under Art. 36, para. 2, of the Statute, the Court had considered the date of deposit of the relevant instruments to be the determinate factor.[55]

In the judgement on the preliminary objections, the Court notes "...that régime for depositing and transmitting declarations of acceptance of compulsory jurisdiction laid down in Article 36, paragraph 4, of the Statute of the Court is distinct from the régime envisaged for treaties by the Vienna Convention."[56] Then, repeating the findings of the Nicaraguan case, it emphasised "Thus the provisions of that Convention may only be applied to declarations by analogy."[57] Indeed, the Court said nothing more, and it examined Art. 78 of the Vienna Convention on notifications and communications, Art. 16 on exchange of instruments of ratification, acceptance and accession, and Art. 24 on the entry into force of treaties. The Court found that the provisions of the Vienna Convention did not have the scope that Nigeria inferred on them. Regarding Art. 78, the Court held that this article "...is only designated to lay down the modalities according to which notifications and communications should be carried out. It does not govern the conditions in which a State expresses its consent to be bound by a treaty and those under which a treaty comes into force, those questions being governed by Articles 16 and 24 of the Convention."[58] Articles 16 and 24 contain a general rule, notably that, unless otherwise provided by a treaty, a state's consent to being bound by a treaty is expressed by the deposit of the instrument of ratification, accession, approval, etc. and the treaty comes into force in respect of that state on the day of deposit. The Court emphasised that these rules of the Vienna Convention correspond to the solution adopted by the Court in the Case concerning the Right of Passage through Indian Territory and that this solution should be upheld.[59]

[55] Cf. *The Vienna Convention on the Law of Treaties.* Dokumente (Hrsg. Dietrich Rauschning). Alfred Metzner Verlag, Frankfurt am Main, 1978, 159.

[56] Case concerning the Land and Maritime Boundary between Cameroon and Nigeria. *ICJ Reports*, 1988, 293.

[57] *Ibid.*

[58] *Ibid.*

[59] *Ibid.*, 294.

In the dispute between Cameroon and Nigeria, Vice-President Weeramantry, among the members of the Court, voiced his opinion that the Court's decision in the case concerning the Right of Passage through Indian Territory should be revised. He adduced arguments similar to those of Judge Chagla in the Right of Passage case, emphasizing that, of the actions prescribed in para. 4 of Art. 36, the Court attached importance only to one, namely the deposit of declarations with the Secretary-General, and actually disregarded the other, namely the transmission of declarations to the parties to the Statute and to the Registrar of the Court. Judge Weeramantry summed up in 8 paragraphs the reasons why he thought it necessary to revise the findings in the Right of Passage case.[60] Judges Koroma and Ajibola similarly stated the case for revision of the findings contained in the judgement of 1957, saying that international law had developed considerably since the 1950s and that the Court could not choose to ignore that fact.[61]

Thus, for its part in the Land and maritime Boundary case, the Court maintained its view as set forth in the Right of Passage case and stated again that a declaring state should not be concerned with the actions of the Secretary-General or with his performance or non-performance thereof, that "The legal effect of Declarations does not depend upon subsequent action or inaction of the Secretary-General." Unlike other documents, Art. 36 of the Statute prescribes no additional requirement whatsoever, such as the information transmitted by the Secretary-General to reach the parties to the State or the entry into force of a particular declaration after the lapse of a specified period of time.[62] The Court expressed that, in contrast to Nigeria's contention, its decision in the Right of Passage case could not be regarded as an isolated one as its findings in this case had been reaffirmed by those in the cases concerning the Temple of Preah Vihear and the Military and Paramilitary Activities in and against Nicaragua.

Furthermore, in the cases filed by Yugoslavia against 10 NATO member states involving legality of use of force, the Court followed its legal practice that was established in the Right of Passage case.[63] Considering the political background of the applications submitted by the repressive Milosevic regime against the NATO member states, we believe that, if the Court had wished to depart from its earlier legal practice in the least measure, these cases would have offered a good opportunity for it to abandon its position as expressed in

[60] Cf. *ICJ Reports*, 1998, 364–367.
[61] Cf. *ICJ Reports*, 1998, 379–380. and 395–397.
[62] *ICJ Reports*, 1958, 146–147.
[63] See fn. 7 on this point.

the Right of Passage case. In all likelihood, the approval of the international community would have been won by some sort of statement by the Court to the effect that Yugoslavia's being a party to the optional clause system at the time of filing the applications and hence its right to submit disputes to the Court under the optional clause were strongly questionable. However, in the cases concerning the Legality of the Use of Force, in deciding on the interim measures of protection, the Court did not concern itself with this issue and accepted the right of Yugoslavia to file an application against 10 NATO states 4 days after having made its declaration of acceptance in April 1999.

6. The United Nations Secretary-General and declarations of acceptance

In relation to the deposit of optional clause declarations of acceptance with the Secretary-General of the United Nations, it is worthwhile to touch briefly on the Secretary-General's actions connected with declarations and chiefly on how similar his actions are to those associated with treaties.

In this context we should examine two of the said functions related to treaties. The Secretary-General's first function is a general, individual and special one, based on Art. 102. of the United Nations Charter and applies to all treaties deposited with him. Its essence can be said to consist of securing due publicity for treaties.[64] The other function is related exclusively to those treaties of which the Secretary-General is the depositary, is governed by the provisions of the Vienna Convention on the Law of Treaties, and is the same in respect of the Secretary-General as in respect of any other depositary.[65]

The Secretary-General's functions related to declarations of acceptance are similar in some measure to those connected with the deposit of treaties. In both cases, the Secretary-General receives certain documents and transmits them to specified states. His functions related to optional clause declarations are practically fulfilled by these actions, but his functions as depositary involve much more than this and are much more substantive. On this point, it is worthwhile to keep in mind what Humphrey Waldock stated about the depositary's function during the elaboration of the 1969 Vienna Convention on the Law of

[64] For more detail on this point see: Kelsen, H.: *The Law of the United Nations.* Stevens and Sons Limited, London, 1951, 696–705, and Lord McNair: *The Law of Treaties.* At the Clarendon Press, Oxford, 1961, 178–190. Also see General Assembly resolution 97 (1) of 14 December 1946 as amended by resolutions 364 B (IV), 482 (V) and 33/141 A.

[65] The depositary's functions are governed by Art. 77 of the 1969 Vienna Convention on the Law of Treaties.

Treaties, namely that "The regular performance of the duties of the depository is of critical importance to the operation of the modern system of multilateral treaties. Nor does it seem correct to regard the provisions of article 29[66] as purely procedural; for they establish not only the duties of depositories but also the rights of the interested States with respect to the procedure."[67]

The question at issue is whether, in relation to treaties, the depositary also has the function of examining the instruments deposited with him, e.g., from the point of view of whether they are in conformity with the treaty, and if they are not, he may call the attention of states to such deficiencies, etc.[68] The Secretary-General as depositary may likewise have a highly important function in determining the dates at which treaties enter into force. Such is the case particularly with treaties containing reservations whose admissibility is not covered by a particular treaty.[69]

On the other hand, the Secretary-General's functions concerning optional clause declarations are limited to receiving declarations and transmitting them to the Registrar of the Court and to the parties to the Statute. Declarations henceforward pass out from the Secretary-General's purview, for, as mentioned above, the Secretary-General has no additional functions related to declarations of acceptance owing to the fact that reservations or limitations attached to declarations of acceptance need no approval or consent by the other states that are parties to the optional clause system and that, as the Court has emphasized in several cases, the only formal requirement for declarations is that they be deposited with the Secretary-General.

In light of the foregoing, it can be reasonably claimed that the Court was right in upholding its view that declarations of acceptance enter into force on the day of deposit with the Secretary-General.

The Court's position is justified by the fact that an element of uncertainty would be introduced into the system[70] by accepting, as the date of entry into force of declarations of acceptance, the date of receipt of declarations by the parties to the Statute or to the optional clause system, because in that case a

[66] At the time of Waldock's IV. Report, or the draft treaty of 1962, the provisions on the depositary's functions were contained in Art. 29.

[67] *The Vienna Convention ..., op. cit.*, 492.

[68] Cf. Bastid, S.: *Les traités dans la vie internationale.* Economica, Paris, 1985, 77–78.

[69] Cf. Imbert, P.H.: A l'occassion de l' entré en vigueur de la Convention de Vienne sur le droit de Traités. *Annuaire Français de Droit International*, 1980, CNRS, Paris, 524–541.

[70] For a discussion on this point, see the Case concerning the Land Maritime Boundary Line between Cameroon a and Nigeria. *ICJ Reports,* 1998, 395–396. para. 35.

declaration would in fact enter into force in different periods, depending on the date at which the individual states receive the relevant notification.

If, however, declarations were to become effective after the lapse of a reasonable period of time, as was proposed by many, the question naturally arises of what that reasonable period—30 days or 3 months—should be. Yet the example of Cameroon's declaration of acceptance shows that not even a few months is necessarily sufficient for declarations to reach the states that are parties to the Statute. Thus, the significance of the deposit of declarations with the Secretary-General arises due to the fact that, as is suggested by Rosenne, the date at which declarations become effective and hence the Court's jurisdiction, both *rations personae* and *rations material*, are linked to the day of deposit.

It can be stated that the formal questions concerning declarations accepting the optional clause have emerged in a number of cases. The two Courts have recognized as valid declarations of practically any wording regardless of their content, their date of making and other circumstances. Disputes actually arose as to the entry into force of declarations, and, under its latest practice in the dispute between Cameroon and Nigeria, the ICJ reaffirmed the postulate, enunciated in its earlier decisions, that the only formal requisite for declarations of acceptance is that they be deposited with the Secretary-General.

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Vis maior (basic *ius commune* remarks)

Abstract. In 1989 European Parliament declared within its Resolution on Action to bring into line the private of law of the Member States (OJ 1989 C 158/400) a request to start necessary preparatory work on drawing up a common European Code of Private Law. Five years later, European Parliament expressed in Resolution on the harmonisation of certain sectors of the private law of the Member States (OJ 1994 C 205/518) its strong disillusion as far as preparatory works aimed at emergence of European Code of Private Law are considered. In response, in 2001 European Commission outlined in a Communication [COM (2001) 398 final] current and prospective issues relating to such codification. Generally speaking, *ius commune* shall not be accepted as some academic freak, nonetheless, as extremely serious challenge for future of European legal system(s). The aim of the article is to discuss, in comparison to the whole relevant codification bunch, a subtle problem touching a possible emanation of the French concept of *force majeure* in *ius commune* by analysing related solutions under German, English, Czech and Polish Law and selected hard and soft civil and commercial law.

Keywords: ius commune, force major, vis maior, frustration

I. Introduction

Pacta sunt servanda, basic and universally accepted principle of contract law,[1] by *Viktor Knapp* even acknowledged as the highest legal principle[2] means that each contractual party is responsible for nonexecution of its obligations, albeit grounds of the failure are beyond his power and were not or could not be foreseen at the time of celebrating the agreement. In fact, this basic legal principle was never carried through without exception. Strict following of contractual sanctity may lead to the opposite of its aim. It indicates that situation at the moment of the contract's conclusion may afterward have been modified so dramatically that "... parties, acting as reasonable persons, would not have made the contract, or would have made it differently, had they known what was

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[1] Zimmermann, R.: *The Law of Obligations Roman Foundations of the Civilian Tradition.* Deventer, 1992. 576 *et seq.*

[2] Knapp, V.: *Teorie práva* (Theory of Law). Praha, 1995. 84.

going to happen."[3] Character of the *pacta sunt servanda* principle should not have an absolute character. Restriction of that notion is apparent through the existence of *force majeure*, so-called doctrine (*clausula*) *rebus sic stantibus*[4] or good faith.[5] Aforementioned doctrines constitute limitation of obligor's obligation,[6] however, as *Treitel*[7] emphasizes *force majeure* applies to situations where the performance of contract is substantially impossible, and (*clausula*) *rebus sic stantibus* in case of substantially changed economic conditions.

Force majeure does not have its closed-enumerative legal definition and usually means unforeseen and unexpected event outside the control of the parties, which makes performance of the contract substantially impossible. As *Nicholas* remarks, consequence of *force majeure* is exclusion of liability of a party for non-performance of the contract.[8] *Rimke*[9] citing *Puelinckx* states that *force majeure* "...occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible." *Mestad*[10] articulates that a *force majeure* rule ought to have at least four following elements: i) a definition of relevant causes, ii) a requirement that performance is prevented, iii) a requirement of a causal *nexus* between the events and the fact that performance is prevented, and iv) consequences of the

[3] Chengwei, L.: Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL, 2003, not paged, footnote No. 12 citing Schmitthoff, C. M.: *Schmitthoff's Export Trade,* 8th ed., 1986. 146.

[4] Perhaps developed by Baldus, see in Dalhuisen, J. H.: Domestic Contract Laws, Uniform International Contract Law and International Contract Law Principles. International Sales and Contractual Agency. *European Business Law Review*, 2000. 237.

[5] Hasselink, M. W.: *The New European Private Law. Essays on the Future of Private Law in Europe.* The Hague, 2002. 208.

[6] Jones, G. H.—Schlechtriem, P.: Breach of Contract (Deficiencies in Party's Performance). *International Encyclopedia of Comparative Law,* Vol. VII, Ch. 15, J. C. B. 1999. 135.

[7] Cited in: Weitzman, T.: Validity and Excuse in the U.N. Sales Convention. *Journal of Law and Commerce,* Vol. 16, 1997. 265–290, footnote No. 1.

[8] Nicholas, B.: Rules and Terms—Civil Law and Common Law. *Tulane Law Review*, Vol. 48, 1974.

[9] Rimke, J.: *Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts, Pace Review of the Convention on Contracts for the International Sale of Goods.* 1999–2000. 200.

[10] Cited by Southerington, T. in: Ämmälä, T. (*ed.*): *Impossibility of Performance and Other Excuses in International Trade,* Private Law Publication Series B 55, Faculty of Law of the University of Turku, Turku, 2001. not paged, footnote No. 36.

three prerequisites being fulfilled. In addition to these essential elements the rule may pursuant to *Mestad* also include stipulations as to v) foreseeability, vi) avoiding or overcoming the event, and vii) procedural matters the party claiming *force majeure* should follow.

Typical illustrations of *force majeure* events are for instance war, if declared or not (invasion and occupation of Kuwait),[11] state of siege, riots, insurrections, acts of sabotage, strikes or other labour unrests, fire, explosion or other unavoidable accidents, flood, storms, earthquakes, perils, dangers and accidents of the sea,[12] governmental or judicial actions, epidemics[13] or other abnormal natural events.

Force majeure rule is in accordance to *Zimmermann*'s analysis rooted in Roman law. Under Roman law *a priori* and *a posteriori* impossibility of contract performance is distinguished.[14] Contractual party was excused in case the relevant contractual performance was *ab initio*, moreover, for any other contractor—in modern legal expression—objectively impossible, generally speaking, "[i]t must be beyond anyone's power."[15] Fulfilment of contractual obligations could become impossible consequently; party under such situation was liable only in case of his fault, for example lack of ordinary care or most cautious carefulness—*culpa levissima*. In such case party had to demonstrate *vis maior* so the fact that even the most cautious carefulness would not lead to prevention of unwanted state of affairs.[16] Similar clarification is apparent in *Southerington*[17] but not in *Rimke* who perhaps does not realize the difference between the roots of *force majeure* and its first explicit occurrence in contemporary legislature, i.e. in French *Code Civil* (hereinafter "C. civ.").[18]

[11] Governments and International Organizations with Claims Arising out of Iraqi Invasion of Kuwait, Court: Panel of the Commissioners, Panel F1: Recommendation S/AC.26, 23.09.1997.

[12] *J. Lauritzwen A S* v. *Wijsmuller B V*, The Supeservant II [1990] 1 Lloyd's Rep 1, CA *in* Collins, H.: *Regulating Contracts*. Oxford, 1999. 163–164.

[13] Bund, J. M.: *Force majeure* Clauses: Drafting Advice for the CISG Practitioner, *Journal of Law and Commerce*, 1998. Vol. 17. 400.

[14] *Cf.* Zimmermann, R.: The Civil Law in European Codes. In: *Regional Private Laws and Codification in Europe* (eds.: Mac Queen, H. L.—Vaquer, A.—Espiau, S. E.), Cambridge, 2003. 57–58.

[15] Gordley, J.: Contracts in Pre-Commercial Societies and in Western History. *International Encyclopedia of Comparative Law*, Vol. VII, Ch. 2, J. C., Tübingen, 1997. 37.

[16] Zimmermann, R.: *The Law of Obligations Roman Foundations of the Civilian Tradition. op. cit.*, 192–197 and 687.

[17] Southerington, T. in: Ämmälä, T. (*ed.*): *Impossibility of Performance... op. cit.*

[18] Rimke, J.: *Force majeure and hardship... op. cit.*, 199.

Legal systems solve the issue of substantial impossibility to perform the contract in various ways. Aspiration of the following text is to analyse and compare possible emanation of the French concept of *force majeure* in German, English, Czech and Polish Law, within European Union's attempts and selected hard and soft law subsumable under international commercial law.

2. French approach

As stated in Article 1134 C. civ., French law strictly refers to the principle of *pacta sunt servanda.*[19] In French private law just only two possible positions concerning performance of contracts are acknowledged, either contracting party performs contract or contractual relations occurred under such onerous conditions that a contract is impossible to perform and contractor or performer is freed. In reality, French courts are not entitled to moderate a civil law contractual relation.

In view of *force majeure* French jurisprudence was used to differentiate among three legal institutions appointing contractual impossibility, i.e. *cause étrangère* (Article 1147 C. civ.), *force majeure* or *cas fortuit* (Article 1148 C. civ.) and *cas fortuit* (Article 1722 C. civ.). *Tallon*[20] or *Whittaker*[21] declare *force majeure* to be a general term without any distinction, which nowadays applies only, on the one hand, and *Nicholas*[22] or *Zweigert* and *Kötz*[23] still ascribe weight to aforementioned division, on the other hand. Building following on *Tallon*'s attitude in accordance with Articles 1147 and 1148 C. civ., *force majeure* possesses three following elements i) irresistibility, ii) unforeseeability, and iii) externality. *Southerington*[24] does not subsume like *Whittaker* impossibility under irresistibility, but he identifies impossibility as the fourth element of *force*

[19] Sichert, M.: *The Legal Effect of Supervening Events.* Article 2.117 EP—A European Principle Compared with German, English and French Law, European Contract Law, 1994. 415.

[20] Beale, H.—Kötz, H.—Hartkamp, A.—Tallon, D.: *Cases, Materials and Text on Contract Law Ius Commune Casebooks on the Common Law of Europe*, Oxford–Portland, 2002. 592–593.

[21] Bell, J.—Boyron, S.—Whittaker, S.: *Principles of French Law.* Oxford, 1998. 342, footnote No. 270.

[22] Nicholas, B.: Force majeure and Frustration. *American Journal of Comparative Law.* Vol. 27, 1979. 231–245.

[23] Zweigert, K.—Kötz, H.: *Introduction to Comparative Law.* Oxford, 1998. 502.

[24] Southerington, T. in: Ämmälä, T. (*ed.*): *Impossibility of Performance and Other Excuses... op. cit.*, not paged.

majeure, besides, *Weitzmann*[25] speaks of insurmountability and, moreover, Rimke[26] stresses another element grounding in the fact the debtor must not be at fault. Analysing irresistibility, *Whittaker* comes to the conclusion that such requirement has got two aspects, firstly, "the event is not one which the party could have prevented" and, secondly, "once occurring, it renders performance impossible rather than simply more onerous."[27] Thus mere hardship is not sufficient to excuse contractual performance; only impossibility is reckoned as its prerequisite, unless there is a contractual clause to the contrary. Additionally, French courts do not apply an absolute standpoint *via* impossibility. Nevertheless, in case party could have executed any step avoiding relevant event, such situation shall not be viewed as *force majeure*, even if performance has become impossible. Bearing in mind unforeseeability, it shall not be observed as an absolute concept (*cf.* reasonable man's view). Once an event is unavoidable, even though foreseeable, it forms *force majeure* itself. In *Montagnani* v. *Hotel des lices Co.* v. *Concorde Group* Case[28] Cour de Cassation applied unforeseeability test and concluded, "armed robbery ... did not constitute a case of *force majeure*, since not all the possible precautions necessitated by its foreseeability had been taken." In consideration of externality, it can be construed as a fact being outside the sphere of the debtor's responsibility. For instance in *Héliogravure Jean Didier* v. *Electricité de France* Case[29] Cour de Cassation emphasized that externality shall not affect one respective litigant only, but public as a whole, in *Marie-Laure Dupuy* v. *Essonne Clinic Case* and *La Mutuelle d' Assurance du Corps Médical Française* Case[30] Cour de Cassation lined that internal undetectable defect had not been amounted to external event.

Force majeure cancels party's obligation(s) in unilateral contract; conversely, impossibility to fulfil in bilateral contracts is more complex. Mostly, French courts are familiar with the fact that contract under *force majeure* is terminated *ex lege*; therefore an application for the judicial termination is not needed (*cf.* contradiction between Article 1147 and Article 1722 C. civ. in particular on the one side and Article 1184 C. civ. on the other side). According to Article 1148 C.

[25] Weitzmann, T.: Validity and Excuse in the U.N. Sales Convention. *Journal of Law and Commerce.* Vol. 16, 1997. 265.

[26] Rimke, J.: *Force majeure and hardship... op. cit.,* 206.

[27] Bell, J.—Boyron, S.—Whittaker, S.: *Principles of French Law. op. cit.,* 342.

[28] Cass. Civ. 1re, 9th March 1994, RTD civ. 1994. 871.

[29] Cass. civ. 1re, 24th January 1995, RTD civ. 1995. 237.

[30] Cass. civ. 1re, 12th April 1995 (2nd judgment), JCP 1995. II. 22467.

civ. contractor does not have to perform obligation, he is not obliged to pay damages, interest.[31]

Force majeure operates autonomously of parties' will, which means that it will protect any obligee even if the contract does not contain a *force majeure* clause.

French contract law does not provide relief for changed circumstances which make contract performance more onerous but not impossible. So-called doctrine of *imprévision* in administrative law is applied by Counceil d'Etat in cases where private parties enter into the contractual relations with administrative bodies involving public services. This doctrine derives from state practice and is indirectly based on Article 1134 C. civ. Conceil d'Etat in *Compaignie d' Éclairage de Bordeaux* Case[32] based its verdict on the continuity of the public service and protection of contractor's capability to fulfil his obligations through increasing price of supplied gas, otherwise the private contractor would go bankrupt. Nevertheless, French courts and civil law scholars refuse exploiting *imprévision* in standard civil law contracts. In *Canal de Craponne* Case[33] Cour de Cassation rejected jurisdiction, although the solution seemed to be unjust. Only in limited number of cases French courts accepted changed circumstances and subsumed frustration of the contractual purpose under *force majeure*.[34]

3. German approach

Mommsen essentially influencing drafters of German *Bürgerliches Gesetzbuch* (hereinafter "BGB") created so-called impossibility doctrine by conceptualising all cases in which the debtor was unable to perform.[35] BGB maintained Roman law rule pertaining to initial impossibility. Howbeit, concept of *culpa levissima* in the case of subsequent impossibility was disannulled.[36]

Article 275 BGB sets up impossibility of performance, the doctrine of *Unmöglichkeit*, as one of grounds of non-performance conceded by BGB, which implies performance to become impossible due to circumstances for which the

[31] Crabb, J. H.: *The French Civil Code Revised Edition* (as amended to 1st July 1994). Deventer, 1995. 222.

[32] CE 30 Mar. 1916, D 1916. 3. 25.

[33] Civ. 6. 3. 1876. DP 1876. 1. 193.

[34] Jones—Schlechtriem: *Breach of Contract... op. cit.*, 136.

[35] Zimmermann: *The Law of Obligations Roman Foundations of the Civilian Tradition. op. cit.*, 809–810.

[36] Gordley, J.: *An American Perspective on Unidroit Principles.* Centro di studi e ricerche di diritto comparato e straniero. Rome, 1996. 27.

debtor is not responsible. Additionally, Article 323 BGB regulates outcomes of impossibility in two-sided contracts, as for instance rulings by *Amtsgericht Mannheim* in *Budapest Symphony Orchestra* Case[37] or *Oberlandsgericht Düsseldorf* in Illuminated Sign Case[38] brought about impossibility of personal obligation due to conductor's death or refusal for administrative authorization in which finally neither of the parties was condemned. The denotation of BGB sounds in the way that each contract does have its basic purpose stemming from intention of contracting parties not capable to achieve it. The incapability is caused by altered political, social, monetary, fiscal, economic *etc.* conditions. The doctrine of *Unmöglichkeit* signifies that debtor's contractual duties would lapse if their performance was determined as impossible for reasons other than negligence, his own fault or negligence of his employees, since Article 276 BGB reads "debtor is responsible for deliberate acts and negligence" and under Article 285 BGB "debtor is not in a delay provided that the performance does not take place for the reason of a circumstance for which he is not responsible." Debtor is for that reason responsible only for damages caused by him intentionally or negligently.[39] Furthermore, it is worth to stress the doctrine of *Unmöglichkeit* does not require unforeseeability.

Moreover, although at present days its application especially by comparison with hyperinflation period after First World War[40] is reasonably limited, the doctrine covering destruction of the basis of the contract, so-called *Wegfall der Geschäftsgrundlage*, theoretically introduced by Oertmann[41] as one of pillars in *Siebert*'s trichotomy, can be employed.[42] *Wegfall der Geschäftsgrundlage* was erected on Article 242 BGB and pursuant to *Zimmermann*[43] it can be regarded as one of the most famous examples of judge-made legal doctrine.

[37] Amtsgericht Mannheim, 20th October 1990, NJW 1991. 1490 and Oberlandsgericht Düsseldorf, 30th December 1964, NJW 1965. 761.

[38] Beale—Kötz—Hartkamp—Tallon: *Cases, Materials and Text on Contract Law... op. cit.*, 605–606.

[39] Horn, K.—Kötz, H.—Leser, H. G.: *German Private and Commercial Law.* Oxford, 1982. 112.

[40] See Whittaker, S.—Zimmermann, R.: Good Faith in European Contract Law: Surveying the Legal Landscape in: *Good Faith in European Contract Law.* Cambridge, 2000. 20–21.

[41] Zweigert—Kötz: *Introduction to Comparative Law. op. cit.* 522.

[42] Hesselink: *The New European Private Law. Essays on the Future of Private Law in Europe. op. cit.*, 200.

[43] Zimmermann, R.: Remedies for Non-Performance. The Revised German Law of Obligations, viewed against the background of the Principles of European Contract Law. *Edinburgh Law Review*, No. 6, 2002. 183.

Article 242 BGB, as a general clause, but, as *Markesinis* remarkably comments: "[i]n reality ... it is not a general clause but the case law of the courts which produce the rule,"[44] requires contract to be performed in a good faith. When conditions have unforeseeably and significantly altered, basis of the contract has been devastated and parties to the transaction are not bound to original obligations. Corresponding to *Chengwei*, "[r]equesting the original performance of the contract would constitute bad faith...".[45] Accentuating the principle of good faith is obvious in Bad Sugar Beet Harvest Case,[46] in which *Reichsgericht* held that defendant could not be required to do more than he could reasonably perform. The stance of the court represents the idea that the party is released when performance is reasonably impossible and there is no party's fault and "good faith ... which further reinforces the subjective nature of impossibility."[47] Consequently, as *Oberlandesgericht* Hamburg[48] recently ruled that triple rise of market price did not amount to a sacrificial sale price and did not establish "*force majeure*" event. Nowadays, after the *Reform des Schuldrechtes* of BGB effective since 1st January 2002, the doctrine of *Wegfall der Geschäftsgrundlage* has its legislative representation embodied by Article 313 BGB, under the title "Interference with the basis of the contract" (*Störung der Geschäftsgrundlage*).

Finally, a number of judges and academics elaborated about so-called *Opfergrenze* doctrine, by reason of which a debtor could not "be forced to comply with efforts or sacrifices which are beyond what parties reasonably envisaged in good faith."[49]

4. English approach

Till 1863 when *Taylor* v. *Caldwell* Case was released, English courts applied so-called doctrine of absolute contracts established on the idea that any event should not be regarded as an excuse for nonperformance, unless parties to the contract expressly for such cases framed exemption of liability.[50] Conversely,

[44] Markesinis, B. S.: The Legacy of History of German Contract Law. In: *Good Faith in Contract and Property* (ed.: Forte, A. D. M.). Oxford, 1999. 175.

[45] Chengwei: *Remedies for Non-performance... op. cit.*, not paged.

[46] Reichsgericht, 3rd February 1914, RGZ 84.125.

[47] Beale—Kötz—Hartkamp—Tallon: *Cases, Materials and Text on Contract Law... op. cit.*, 604.

[48] Oberlandesgericht Hamburg, 28 February 1997.

[49] Rimke: *Force majeure and hardship... op. cit.*, 207.

[50] Dalhuisen: *Domestic Contract Laws... op. cit.*, 236.

English frustration doctrine accepts circumstances, which have radically changed (subsequent legal changes, destruction of contracted matter *etc.*). Frustrating circumstance(s) must have occurred without fault of either contractor. When a contract is frustrated it becomes by operation of law (*Hirjimujli* v. *Cheong Yue SS Co Ltd* Case[51]) not only void but also parties are released from any liability in damages for non-performance, mere hardship is not *vice versa* recognized as sufficient reason to discharge.

In watershed *Taylor* v. *Caldwell* Case the Queen's Bench decided that strict rule should only be applied when the contract is positive and absolute, and not subject to any condition either express or implied.[52] It has been acknowledged that contracts contain implied condition residing in the impossibility to perform as a consequence of disappearance of the person or thing. Such impossibility then liberates an obligor. Lord Radcliffe in *Davis Contractor Ltd* v. *Fareham UDC* Case[53] formulated implied term doctrine in relation to frustration portraying it as a situation recognized by law without the fault of parties, when occurred circumstance radically differs from that which was undertaken by the contract and incapables its performance. Afterwards, *Taylor* v. *Caldwell* notion was extended to cases of supervening illegality and acts of government,[54] when contract is discharged "even thought its performance might not be impossible."[55] Since *Krell* v. *Henry* Case[56] of 1903 the frustration doctrine finally expanded to cases with frustrated commercial object or purpose of the contract about which the other contractor is aware, thus additionally, to impossibility of performance frustration of the common venture was introduced.[57]

English courts do not have any legal instrument to intervene into contract in order to alter or adapt it. In fact, parties under common law very often *ex contractu* specify in *force majeure* clauses various circumstances to avoid possible liability from non-performance, they cover such events as acts of God,[58] war and strikes,[59] even where the strike is anticipated, riots and embargoes,[60] acts

[51] Hirjimujli v. Cheong Yue SS Co Ltd. [1926] AC 497.
[52] Rimke: *Force majeure and hardship... op. cit.*, 202.
[53] Davis Contractor Ltd v. Fareham UDC [1956] AC 696.
[54] Sichert: *The Legal Effect of Supervening Events... op. cit.*, 414.
[55] Birks, P.: *English Private Law.* Oxford, 2000. 154.
[56] *Krell* v. *Henry* [1903] 2 KB 740.
[57] Atiyah, P. S.: *An Introduction of Law of Contract.* Oxford, 1989. 251–252.
[58] Matsoukis v. Priestman [1915] 1 KB 681.
[59] *Lebeaupin* v. *Crispin* [1920] 2 KB 714, 719.
[60] Whincup, M. H.: *Contract Law and Practice, The English System and Continental Comparison.* Deventer, 1992. 154–155.

of public enemies,[61] civil strife,[62] refusals to grant licenses,[63] abnormal weather conditions,[64] even abnormal increases in prices and wages[65] and others.[66]

To sum up, modern English frustration doctrine, originally applied as "frustration of the adventure" in maritime contracts,[67] comprises frustration by impossibility, frustration of the common venture and illegality.[68] Frustration cannot be claimed where the contract has suddenly become more difficult or expensive for one of the parties, if the party was partly responsible for the intervening event, which for example destroyed the object of the contract or if the event was foreseeable. Furthermore, frustration has to be contrasted with rescission where the contract is treated as if it had never been. Finally, *Fibrosa* Case[69] with the total failure of consideration, where any solution had not been satisfactory, led to introduction of 1943 Law Reform (Frustrated Act).

5. Czech approach

Czech private law is not codified in one act but it is formed by Občanský zákoník[70] (Civil Code, hereinafter "CiC"), Obchodní zákoník[71] (Commercial Code, hereinafter "CCod") and Zákon o rodině[72] (Family Act). CiC distinguishes between subjective liability preconditioned by fault and objective liability where fault is not required but responsible party can claim the existence of *vis maior* disabling performance of obligation. Article 420a Paragraph 3 CiC reads that from liability shall exonerate that party, which proves the damage was

[61] Collins, H.: *Regulating Contracts.* Oxford, 1999. 163–164.

[62] Dunné, J. M.: *'Act of God', Overmacht en onvoorziene omstandigheden in het bouwrecht.* Deventer, 1998. 196.

[63] *Coloniale Import-Export* v. *Loumidis Sons* [1972] 2 Lloyd's Rep 560.

[64] *Toepfer* v. *Cremer* [1975] 2 Lloyd's Rep 118.

[65] *J. Lauritzwen A S* v. *Wijsmuller B V*, The Supeservant II [1990] 1 Lloyd's Rep 1, CA.

[66] *cf. Chitty on Contracts.* General Principles, Vol. 1, London, 1994. 710–711.

[67] Beatson, J.: *Anson's Law of Contract.* Oxford, 1998. 501.

[68] Lord Hailsham in *National Carriers* v. *Panalpina* Case [1981] AC 675 found out 5 theories.

[69] Fibrosa Spolka Akcyjna v. Fairbairn, Lawson, Combe, Barbour Ltd. [1943] AC 32.

[70] Zákon č. 40/1964 Sb., občanský zákoník, v platném znění [Act No. 40 of 1964 Civil Code, as currently in force].

[71] Zákon č. 513/1991 Sb., obchodní zákoník, v platném znění [Act No. 513 of 1964 Civil Code, as currently in force].

[72] Zákon č. 94/1963 Sb., o rodině, v platném znění [Act No. 94 of 1963 about Family, as currently in force].

"caused by unavoidable event without its origin in operation or in own activity of injured party" (*neodvratitelná událost nemající původ v provozu nebo vlastním jednáním poškozeného*), which is generally designated by courts[73] as *vyšší moc* (*vis maior*). To achieve liberation through *vis maior* a party has to prove that event was unavoidable, not originated in the activity of relevant party itself or to counterclaim providing evidence that damage was caused by the activity of injured party. Courts just testify that claimed circumstance should be regarded as *vis maior* event. For instance, in 1933 the Supreme Administrative Court in *Black Ice* Case[74] did not reckon "mood" of weather grounding in a snowfall (finally proved to be a weak one) as *vis maior*. The Supreme Court in *Railway Accident* Case[75] adjudicated that collision with railway vehicle should not be regarded as a consequence of *vis maior* and held Railway Company to be liable.

The concept of CCod emanates from objective liability. Pursuant to Article 373 CCod a party shall not be held liable if "it proves that breach of obligations was caused by circumstances eliminating liability (*okolnost vylučující odpovědnost*)." In Paragraph 1 of following Article 374 lawgiver states that circumstance eliminating liability is such "obstacle, which arose independently of the will of the obligor and prevents from performance of his obligation, if it is not reasonable to presume that the obligor would be able to prevent or overcome this obstacle or its effects, and moreover, that in moment of celebrating the obligation that obstacle anticipated." But liability is not eliminated if such obstacle originated in period during which the obligor had been in a delay or arose from his economic situation. It denotes that obligor has to prove that obstacle caused impossibility to perform contractual obligation is objectively unavoidable and in moment of celebration of the contract unforeseeable. Such impediment can derive not only in standard events as mentioned in introduction but even by refusal by state authorization[76] or administrative prohibition.

Idyllically, regarding consequences of proving that obstacle completes all elements of Article 420a Paragraph 3 CiC in civil law relations or Article 374 CCod in commercial law relations, an obligor is not legally bound to any

[73] 25 Cdo 852/2000, 25 Cdo 1946/2000 or Pl. ÚS 11/01.

[74] [Boh. A 10570/33 (9469/33)].

[75] Rc 7458 Rv II 211/27 [Vážný. 27, IX.b: 1695].

[76] *Cf.* Czechoslovakian reward SG 130/170 (1976) cited in Nassar, N.: *Sanctity of Contracts Revised: A Study in the Theory and Practice of Long-term International Commercial Transactions.* Dodrecht, 1995. 205.

performance. Specific situation initiates, as noted by Bejček,[77] in regulation of contractual penalty by CiC and by CCod. On the one hand, contractual penalty under Article 545 Paragraph 3 CiC is of *ius dispositivum* character, parties are able to settle such covering under any circumstance and not only when fault appears. On the other hand, Article 300 CCod brings in absolute obligation to compensate contractual penalty irrespective of its origin. Article 300 CCod in relation to Article 545 CiC is *lex specialis*, so in commercial relations first mentioned provision absolutely suspends *lex generalis*. Mentioned *lex specialis* is of a dispositive character and again contracting parties can adapt contractual penalty.

6. Polish approach

1964 Kodeks Cywilny[78] in Article 435 Paragraph 1 regulates objective responsibility addressed to entities running business and using for such purpose powers of natural character like stream, gas, electricity, and fuel on gas basis. Such kind of entity is liable for any damage, unless it proves that damage was caused by fault of the third person, for whom it is not responsible or as a result of *vis maior* (*sila wyższa*).[79] *Vis maior* as such is not defined by any Polish legal source. Radwański for instance lays down the existence of two possible concepts, i) subjective, rising from the fact that party could not prevent an unwelcome accident even exerting the most scrupulous care, and ii) objective, established on the idea that none of the parties can influence such event.[80] Polish Supreme Court constantly holds that *vis maior* shall be characterized by following conjunctive factors: i) externality of an event, ii) unforeseeability, which does not mean an absolute improbability but suddenness or strangeness, and iii) practical unavoidability in spite of using accessible technology. For instance in *Coal Mine* Case[81] court decided that although the damage on real estates fulfils two elements of *vis maior* test, i.e. unforeseeability and practical

[77] Bejcekček, J.: Právní úprava a interpretační problémy smluvních pokut a úroků z prodlení [The Regulation and the Problems of Interpretation with Regard to Penalties for Non-performance and Interests on Overdue Payments]. *CPVP*, 1995, No. 1. 31.

[78] Ustawa Kodeks cywilny, Dz. U. z dnia 18 maja 1964 r. [Act Code Civil, Dz. U. 18. May 1964].

[79] Further in Małecki, R.—Karnioł, J.: *The Civil Law of Poland.* Warsaw, 1999. 5.

[80] Radwański, Z.: *Zobowiązania—Część Ogólna*, [Obligations—General Part.] Warszawa, 1997. 77.

[81] Wyrok II CR 620/72 OSNC 1973/12/212, 1973. 01. 05.

unavoidability the externality element was not accomplished and hence the mining company was held liable.

7. 1980 Vienna Convention on International Sales of Goods

As far as *force majeure* is concerned, 1980 Vienna Convention on International Sales of Goods (hereinafter "CISG") avoids any reference to related municipal concept. The excuse for non-performance pursuant to Article 79 CISG is established i) by impediment, presumably legal or physical[82] (or "time impediment" in Vine Wax Case[83] ruled by *Bundesgerichtshof*) or impediment insisting in not conforming delivery of goods, beyond the control of the party concerned (impediment), that could not ii) reasonably have been taken into account at the time of the conclusion of the contract (unforeseeability),[84] and iii) could not have been reasonably avoided or overcome including its consequences (unavoidability), then provided iv) he gives notice of this to the other party according to Paragraph 4 even though such circumstance shall be regarded as notoriously known,[85] the non-performing party is exempt from liability in damages.[86] Of course, the non-performing party, most suitably supported by an expert report[87] shall prove an impediment incorporating causation,[88] unforeseeability and unavoidability.[89] Furthermore, temporary impediments exempt

[82] Ziegel, J. S.—Samson, S.: *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Good.* 1981.

[83] Bundesgerichtshof, VIII. Zivilsenat, 24.03.1999, VIII ZR 121/98, interpretation discussed in Bernstein, H.—Lookofsky, J.: *Understanding the CISG in Europe.* Deventer, The Hague, 2003. 150–151.

[84] *Cf.* forseeability caused by prohibition already in force at the time of the conclusion of the contract in Bulgarska turgoskopromishlena palata, 56/1995 (Bulgaria), by already declared suspension in ICC Court of Arbitration—Paris, 7197/1992, by knowledge of related regulations before conclusion of the contract in Rechtbank's-Hertogenbosch, rolnr. 981/HA ZA 95-2299 (The Netherlands), or by fluctuations of prices in international trade in Rechtbank van Koophandel, Hasselt, AR 1849/94 (Belgium).

[85] Russian Federation Arbitration Proceeding 328/1994 of 10 February 1996, Article 1.5.

[86] See argument *a contrario* in ICC Arbitration Case No. 7197 of 1992.

[87] Handelsgericht St. Gallen, Switzerland, 3rd December 2002 [HG. 1999.82-HGK], Paragraph 9.

[88] Magnus, U.: Force Majeure and the CISG. In: *The International Sale of Goods Revisited* (eds.: Šarčević, P.—Volken, P.). The Hague, 2001. 18–19.

[89] Russian Federation Arbitration Proceeding 406/1998 of 6 June 2000, Article 1.3. *contra* Federal Arbitration Court for the Moscow Region Resolution of the Cassation

performance of the obligation only temporarily. Under Paragraph 2, the obligor is liable for the conduct of a third person, acting independently neither within his organizational sphere nor under his responsibility,[90] under such situation he has to prove not only exemption in relation to him but also exemption related to the related third person.[91]

Exemption delineated in Article 79 CISG is a revised version of non-liability stated in Article 74 of 1964 Uniform Law on the International Sale of Goods, which in Flambouras'[92] words referring to Nicholas[93] "unjustifiably facilitate[d] the promisor's excuse for non-performance." Contemporary Article 79 CISG only releases the non-performing party from his liability for damages. The only discrepancy may be raised in connection with hardship circumstances. Applying general rule on interpretation expressed in Article 31 of 1969 Vienna Convention on the Law of Treaties, pursuant to *travaux préparatoires* and purpose of uniformity, CISG is not based on (*clausula*) *rebus sic stantibus* doctrine and therefore it is clear that mere disturbance implying into more difficult, onerous or not profitable performance of obligation (sudden increase in the price on FX markets or commodity exchange, lack of FX94[94] *etc.*) shall not be recognized as events of exemption. However, uniform interpretation has not been reached yet.[95] *De facto* CISG confirms elements of *force majeure* on one site and frustration, impossibility of performance[96] or *imprévision* on the other site.[97]

Since Article 6 CISG enables parties to adjust its provisions (*ius dispositivum*) experienced merchants regularly do so and insert into their contracts *force*

Board on the lawfulness and reasonableness of decisions of the Arbitration Courts, 4 February 2002 [No. KA-A40/308-02].

[90] Amtsgericht Alsfeld, 31 C 534/94.

[91] Schlechtriem, P.: *Uniform Sales Law—The UN-Convention on Contracts for the International Sale of Goods.* Vienna, 1986. 104.

[92] Flambouras, D. P.: The Doctrines of Impossibility of Performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis. *Pace International Law Review,* Vol. 13, 2001. 261–293.

[93] Nicholas, B.: *Force majeure and Frustration... op. cit.,* 232–238.

[94] Arbitration at Russian Federation Chamber of Commerce and Industry [No. 123/1992 of 17 October 1995].

[95] See Weitzmann, T.: Validity and Excuse in the U.N. Sales Convention. *op. cit.,* 272 *et seq.* and Schlechtriem, P.: *Kommentar zum Einheitlichen UN-Kaufrecht.* München, 2000. 774 *et seq.*

[96] Bridge, M.: *The International Sale of Goods, Law and Practice.* Oxford, 1999. 106.

[97] Vilus, J.: Provisions Common to the Obligations of the Seller and the Buyer. In: *International Sale of Goods* (eds.: Šarčević, P.—Volken, P.). Oceana, 1986. 254–255.

majeure or special risks clauses.[98] Contrasting to majority of national legislations, which recognize and regulate doctrine of *force majeure*, in the sphere of international trade relationships occurrence of *force majeure* does not automatically lead to termination of the contract and traders often stipulate two-stages treatment with respect to *force majeure* (so-called two stage *force majeure* clause). If event constituting *force majeure* is permanent or continues after the expiration of specified period, each party will be entitled to terminate the contract.[99]

8. 1994 UNIDROIT Principles of International Commercial Contracts

1994 UNIDROIT Principles of International Commercial Contracts (hereinafter "UP") present general soft law rules, which are basically conceived for international commercial contracts.[100] In case of escape from the liability of non-performance, two kinds of contracts are distinguished. Firstly, in accordance with Article 5.4.1 a party is obligated "to achieve a specific result." In that case, party "is bound to achieve that result," but he escapes, if he proves *force majeure*. The definition of *force mejeure* is given in Article 7.1.1 UP pursuant to which non-performance was a result of an impediment beyond its control, it could not be reasonable to expect to take into account such impediment at the time of celebrating the contract or to have a possibility to have avoided or overcome it or its consequences. Secondly, according to Article 5.4.2 UP a party has a "duty of best efforts," that means he is not liable if he makes "such efforts as would be made by a reasonable person of the same kind in the same circumstances." Analysing *force majeure*, UP seem to be very similar to CISG, nevertheless, the scope of Article 79 CISG is reduced to claims for damages only and Article 7.1.7 UP asserts idea that excuse is general, except provision stated in Paragraph 4 determining certain claims which are not affected by *force majeure* including right to "terminate the contract or to withhold performance or request interest on money due." The case of *force majeure*, performance, as well as damages and penalties, cannot be claimed. Article 79 CISG does not contain a gap that could be filled by UP's *force majeure*. However, Article

[98] Rozehnalová, N.: *Právo mezinárodního obchodu* [International Trade Law]. Brno, 2001. 353. Moreover ICC Force Majeure clause in Klotz, J. M.—Barrett, J. A.: *International Sales Agreements, An Annotated Drafting and Negotiating Guide.* The Hague, 1998. 241 *et seq.*

[99] Schmitthoff, C. M.: *Schmitthoff's Export Trade, The Law and Practice of International Trade.* London, 1990. 200.

[100] UNIDROIT: Principles of International Commercial Contracts, UNIDROIT, Rome, 1994. 1.

7.1.7 UP does not contain any provision relating to third persons such as the "double *force majeure*" rules Article 79 Paragraph 2 CISG. And as Rimke states "[t]here are no compelling reasons, therefore, to substitute the provision of Article 79 CISG with that of Article 7.1.7 of the [UP]."[101]

9. Situation in European Union

Within the European Union, rules on *force majeure* have not been harmonized yet. Nevertheless, as Lando[102] states, European Court of Justice (hereinafter "ECJ") plays important role by developing rules on the subject of *force majeure.* For instance, ECJ in *NV De Jong* Case[103] pointed at two basic characteristics of *force majeure*, i.e. unforeseeability and unavoidability of the circumstance. In *Denkavit France SARL* Case[104] ECJ specified *force majeure* as "unusual and unforeseeable circumstance beyond [one's] control, the consequence of which could not have been avoided even if all due care had been exercised," in case C-124/92[105] ECJ added another characteristics (as highlighted in Case 284/82[106] or *Valsabbia* Case[107] as well) denoted to non-absolute impossibility. Besides, case law by ECJ distinguishes *force majeure* under private and public law branches.[108] As far as the European Commission (hereinafter "Commission") is concerned, in 1988 *de facto* following ECJ case law Commission summarized in its materials characteristics of *force majeure* (not absolute impossibility, externality, unavoidability of the unusual circumstance).[109]

[101] Rimke, J. *Force majeure and hardship... op. cit.,* 238.

[102] Lando, O.: The Rules of European contract law, Study of the systems of private law in the EU with regard to discrimination and the creation of a European Civil Code, European Parliament, Directorate General for Research, Working Paper, *Legal Affairs Series*, JURI 103 EN, 1999. 132.

[103] Case 20/1984, *NV De Jong Verenigde et Cooperatieve Melkprodukten Bedrijven "Domo-Bedum" GA* v. *Voedselvoorzienings in- en verkoopbureau (VIB)*, Paragraph 17.

[104] Case 145/85 *Denkavit* v. *Belgium* [1987] ECR 565, Paragraph 11.

[105] Case C-124/92 *An Bord Bainne Co-operative Ltd and Compagnie Interagra SA* v. *Intervention Board for Agricultural Produce*, Paragraph 11.

[106] Case 284/82 *Acciaierie e Ferriere Busseni SpA* v. *Commission of the European Communities*, Paragraph 11.

[107] Case 209/83 Ferriera Valsabbia SpA v. Commission of the European Communities, Paragraph 21.

[108] Case 77/69 *Commission* v. *Belgium* [1970] ECR 237, Case C-48/71 *Commission* v. *Italy* [1972] ECR 527, Case 33/69 *Commission* v. *Italy* [1970] ECR 93.

[109] Notice 88/C 259/07; OJ C259/11.

Regarding Principles of European Contract Law (hereinafter "PECL") developed by Lando's Commission, they indicate *force majeure* in Article 8:108 (*ex* Article 3.108) headed "Excuse Due to an Impediment." In fact, there is a similarity with Article 79 CISG. Nevertheless, reading Comment A to the PECL[110] the concept differs in its scope "... Article 8:108 has to apply only in cases where an impediment prevents performance" and Comment C expressly states that the circumstances of the impediment are corresponding with those "traditionally required for *force majeure*". Impediment has to be as follows: external, not predictable and insurmountable. If the impediment is of temporal character, the excuse is temporal as well; approach apparently influenced by Article 79 Paragraph 3 CISG. Concerning other conditions, obligor has to inform the other party about the existence of impediment in a reasonable time, apparently similar with Article 79 Paragraph 5 CISG.

10. Conclusion

In civil law systems *force majeure* is related to the obligation of one party, whereas in common law it affects the whole contract. French *force majeure* doctrine and *vis maior* under the Czech and Polish private law in contrast to English frustration doctrine shall be regarded as narrower. In fact, regimes within the first group do not recognize commercial difficulties as an exemption. There is a little difference between the reasoning in the classical *force majeure* and the German reasoning as regards the notion *Unmöglichkeit*. Analysing PECL, its notion of impediment has been mostly touched by French *force majeure* doctrine. ECJ's case law pursues the same impact.

Furthermore, generally speaking, French courts in case of pure private contractual relations do not apply *imprévision* doctrine. Identically, in case of Czech and Polish legal orders do not recognize such possibility. Differently, English judge is entitled to release parties from their contractual obligations, where either the transaction was altered or the purpose was frustrated. Similarly, German courts in case of the *Wegfall der Geschäftsgrundlage* intervene into contractual relations, but in comparison to English courts at a lower level of onerosity. The other attempts in relation to the discussed topic, UP's *force majeure* explicitly covers common law and civil law doctrines of *force majeure*, *Unmöglichkeit*, frustration, impossibility of performance and CISG *de facto* invokes similar concurrence as well.

[110] Lando, O.—Beale, H.: *Principles of European Contract Law*. Parts I and II, Combined and Revised, The Hague, 2000. 379.

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Lessons from the Abolition of Capital Punishment in Hungary: A Fortuitous Constellation Amidst and Beyond Democratic Transition

Abstract. Hungary ratified Protocol No. 13 to the European Convention for the Protection of Fundamental Rights and Freedoms concerning the abolition of the death penalty in all circumstances. This event is not a surprise since the Hungarian Constitutional Court declared capital punishment unconstitutional in 1990. Retrospectively, the development of the safeguards against capital punishment in Hungary might seem as a stretch of self-evident consequences. The present paper attempts to situate the decision of the Constitutional Court in its broader context and reflect upon the significance of symbolic founding gestures in times of democratic transition.

Keywords: Abolition of capital punishment; Hungarian Constitutional Court; Democratic transition

Introduction

Hungary ratified Protocol No. 13 to the European Convention for the Protection of Fundamental Rights and Freedoms [hereinafter: European Convention] concerning the abolition of the death penalty in all circumstances on July 13, 2003.[1] Protocol No. 13 made the important move to remove the narrow exception for the application of capital punishment in times of war or imminent threat of war left open by Protocol No. 6 (Art. 2) two decades ago. A similar exception is also familiar from Art. 2 of the Second Optional Protocol to the International Covenant on Civil and Political Rights [hereinafter: ICCPR], aiming at the abolition of the death penalty.[2] Thus, Protocol No. 13 became the instrument

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[1] Protocol No. 13 was adopted in Vilnius, on May 3, 2002 and entered into force on July 1, 2003 upon 10 ratifications. In respect to Hungary, it entered into force as of November 1, 2003 (currently under promulgation).

[2] UN General Assembly resolution 44/128 of 15 December 1989.

providing yet the most forceful demonstration of international commitment to doing away with capital punishment.

Hungary's ratification of Protocol No. 13 is not a surprise. Decision No. 23/1990 (X. 31.) AB of the Hungarian Constitutional Court abolished capital punishment over a decade ago, in the early days of the country's democratic transition. In the case the Constitutional Court found that capital punishment imposes a limit on the essential content of the right to life and human dignity [Art. 54(1), Constitution], thus it is not compatible with Art. 8 (2) of the Hungarian Constitution precluding any limitation on the essential content of fundamental rights.[3] The decision is one of the best known and most influential decisions of the Hungarian Constitutional Court.[4]

Since 1990 there was no serious attempt to restore the death penalty in Hungary, the restoration of capital punishment is not an issue in mainstream public discourse.[5]

Hungary's ratification of Protocol No. 13 provides an excellent opportunity to explore the interplay of strategic action and unexpected events surrounding the Constitutional Court's decision at the dawn of the transition process, and to identify the permanent traces the Court's decision left on democratic institutions and constitutional rights. A glance at the Constitutional Court's decision in its broader context is hoped to contribute to understanding better the inner mechanics of abolitionist strategies for the benefit of future applications. Indeed, two important caveats shall be emphasized from among all lessons derived from the Hungarian success story.

Retrospectively, the development of the safeguards against capital punishment might seem as a stretch of self-evident consequences. Shortly following the Constitutional Court's decision,[6] Hungary became a member of the Council of Europe and in two years, it ratified the European Convention for the Protection of Fundamental Rights and Freedoms and its eight protocols, among them Protocol No. 6.[7]

[3] References are to the Hungarian version. All translations from the Hungarian are mine.

[4] Sólyom, L: To the Tenth Anniversary of Constitutional Review. 21–47, in: *The Constitution Found? The First Nine Years of Hungarian Constitutional Review on Fundamental Rights* (ed.: Halmai, G.). Budapest, 2000. 22 and note 3. E.g. in the South African Constitutional Court's decision abolishing capital punishment in *S. v. Makwanyane*, CCT 3/94; 1995 (6) BCLR 665; 1995 (3) SA 391; [1995] ZACC 3 (6 June 1995)

[5] Marginal political forces did indeed resort to the rhetoric of reinstitution. Such attempts are going to be discussed in their broader context in detail.

[6] Hungary became a member of the Council of Europe on November 6, 1990.

[7] The ratification took place on November 5, 1992; promulgated in Act No. 31 of 1993. Subsequently, Hungary ratified Protocol No. 11 on April 26, 1995 (promulgated in Act No.

Thereafter Hungary ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights,[8] and finally, Protocol No. 13 to the European Convention. The decision of the Constitutional Court abolishing capital punishment in Hungary was formative of this safety net proscribing capital punishment. This is not to suggest, however, that the Hungarian Constitutional Court found the ultimate constitutional justification to keep capital punishment outside the array of state-imposed criminal sanctions. The Constitutional Court was not unanimous in its holding. Except for a lone dissenter, Hungarian constitutional justices agreed about the outcome of the case [i.e. the unconstitutionality of capital punishment], while they still differed about the reasons supporting a decision on unconstitutionality and filed concurring opinions accordingly. Indeed, the Hungarian capital punishment decision is a good example of a situation that could be characterized as a "incompletely theorized agreement" in Cass Sunstein's terminology.[9]

The Hungarian Constitutional Court's decision provides an excellent opportunity to reflect upon the significance of symbolic founding gestures of times of transition the lasting effects of which permeate constitutional and democratic processes long after the fury and fever of transition has cooled. The present paper attempts to situate the decision of the Constitutional Court in its broader context, covering numerous domestic and international political, legal, judicial and intellectual influences and trends, which have delegitimized 'death talk' in post-communist Hungary. In matters of strong and diverging public sentiment, it is especially interesting to pay attention to the interplay of strategic moves and unexpected events reflecting on each other, thus creating strains of continuity essential for legitimizing stances taken by the agents and institutions of a new democracy.

1. The immediate context of the Constitutional Court's decision abolishing capital punishment

Although in Hungary capital punishment as a criminal sanction was available until 1990, at the time of its abolition the application of the death penalty was

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42 of 1998). Hungary also signed but has not ratified yet Protocol No. 12 concerning the prohibition of discrimination.

[8] Ratified by Hungary on February 24, 1994, entered into force with respect to Hungary on May 24, 1994, promulgated by Act No. 2 of 1995.

[9] See Sunstein, C.: *Legal Reasoning and Political Conflict*, New York–Oxford, 1998. 35–62.

fairly limited. Capital punishment it was available for the most severe crimes and executions were not numerous. At the time it was abolished, capital punishment was an alternative sanction for genocide and certain war crimes, the most serious instances of homicide (murder, typically aggravated murder), terrorism, hijacking and for various military offences. The Criminal Code prescribed capital punishment altogether in 18 instances, out of which 11 constituted military offences.[10] Death penalty was not a mandatory sanction: it was always an alternative to imprisonment. One of the standard casebooks on criminal law suggested in 1980 that in society with a stabile government capital punishment may become superfluous, as life imprisonment might be an adequate alternative to capital punishment.[11] According to official records in the last 40 years, altogether 636 executions were performed, out of which 393 sentences were for political or military crimes. Between 1980 and 1989 altogether 29 persons were sentenced to death (there were 5 or less executions per year), and executions were not performed in all cases. At the time the population of the country was around 10 million and around 200 sentences were handed down for voluntary manslaughter.

These factors are not meant to trivialize the significance of the mere availability of capital punishment in a legal system. Still, it is important to see that prior to its abolition capital punishment was seen in Hungary as an extraordinary criminal sanction:[12] capital punishment was applied in a limited number of cases, capital sentences were subject to heightened judicial scrutiny, subject to executive pardon.

1.1 Capital punishment and the Roundtable Talks

The immediate context of the abolition of capital punishment in Hungary was the period of democratic transition in 1988–1989. The transition process was significantly influenced by the strategy and actions of the Communist Party

[10] Capital punishment was provided for in the *Criminal Code* [Act No. 4 of 1978]. Persons who were below 20 at the time of committing the offence could not be executed [Art. 39(1) of the Criminal Code, while in force]; for military offences the age limit was 18 years [Art. 126 of the Criminal Code, while in force]. The detailed rules on genocide and certain war crimes providing for capital punishment were contained in separate legislation.

[11] Békés, I.—Földvári, J.—Gáspár, Gy.—Tokaji, Gy.: *Magyar Büntetőjog, Általános Rész* [Hungarian Criminal Law, General Part]. Budapest, 1980. 338–339.

[12] The *Criminal Code* emphasized that capital punishment was an extraordinary measure [Art. 84, while in force].

before and during the Roundtable Talks.[13] Important safeguards were introduced to protect fundamental rights already in the early days of democratic transition. Although abolition of capital punishment was not at the forefront of the Talks, the issue of abolition was notably in the air. For instance, during the debates of constitutional revision in the still-communist parliament a former speaker of the communist legislature felt it necessary to note that he was for the abolition of capital punishment. As this episode clearly suggests that abolitionist voices were present in the discourse.

As surprising as it may sound, the Communist Party was not keen on preserving the death penalty. Indeed the last Communist minister of justice, Kálmán Kulcsár—entering office in June 1988—was an abolitionist. Recently he recalled that while criminal courts still handed down death sentences in June 1988 and the last execution took place one day before he entered office, the Presidium of the Communist Party agreed to granting pardon to all offenders sentenced to death. This *de facto* moratorium lasted until the Constitutional Court abolished capital punishment in 1990. Nonetheless, while the Communist Party did not make efforts to preserve capital punishment, the Party did not propose the overall abolition of capital punishment during the Roundtable Talks either.

In the course of the roundtable negotiations the abolition of the death penalty received little attention from the opposition. Documents reveal that when drafting the new constitutional rules on fundamental rights, the Communist Party was willing to act on the proposals of the opposition.[14] Instruments of human rights protection were often consulted by the participants of the Roundtable Talks and many provisions of the Hungarian Constitution concerning rights are translations of similar provisions of international instruments. The ICCPR was ratified by and promulgated in Hungary,[15] at the time of the Roundtable Talks, however, Hungary did not belong in the Council of Europe. In addition to relying on instruments of human rights protection in the process

[13] For a concise overview of the Hungarian Roundtable Talks see András Sajó's report in: Hungary in The Roundtable Talks and the Breakdown of Communism (ed.: Elster, J.). The University of Chicago Press, Chicago, 1996. The annotated documents of the Roundtable Talks were published in Hungarian in multiple volumes in: *A rendszerváltás forgatókönyve, Kerekasztal-tárgyalások 1989-ben* [The Script of Transition, Roundtable Talks in 1989]. Budapest, 1999.

[14] The written proposal of the opposition is not available. *A rendszerváltás forgatókönyve... op. cit.,* vol. 6, 107, note 63. The consent of the Communist Party is expressed in the minutes of the meeting of August 2, 1989. *A rendszerváltás forgatókönyve... op. cit.,* vol. 6, 101.

[15] Law-decree No. 8 of 1976.

of constitution making, outside the Talks there was a movement to raise human rights awareness and to direct attention to human rights instruments and 'rights talk'. For instance, the Alliance of Liberal Democrats (an opposition movement turned into a political party) organized a rally on the occasion of the 200th anniversary of the adoption of the Declaration of Rights of Man and Citizen of 1789. Such meetings certainly had the function of keeping the public aware and informed about developments at the Talks.

The draft of the Hungarian constitution's rights chapter under preparation prohibited only the arbitrary deprivation of life and human dignity, and did not preclude deprivation of life *per se*.[16] The text was proposed by the Communist Party. Indeed, the provision is a translation of Art. 6 (1) of the ICCPR. The opposition accepted the proposal of the Communist Party and the draft was adopted as Art. 54 (1) in the democratic constitution in identical terms. The minutes of the drafting negotiations do not contain references to the abolition of capital punishment.[17] Despite the obvious limitations of its language, in the circumstances the fact that the proposed constitutional provision on the right to life and human dignity was a translation of an international instrument might have appeared as a sufficient safeguard of the right to life and dignity.

This is not to suggest, however, that the participants of the Roundtable Talks, the Communist Party and the representatives of the opposition alike, were unaware of the shadow of capital punishment. In 1988–1989, at the time when the opposition movements started to become more and more visible, most political activities directed against the hegemony of the Communist Party were illegal and the majority of them constituted a serious crime [typically treason, felony and alteration of the existing regime of governance (conspiracy, et al.)]. During the Talks, the Communist government moved to partially decriminalize acts that could affect the existing system of government. Although by the time the amendment entered into force, the Opposition Roundtable had been in session since March 1989 and the National Roundtable had already started on June 10, 1989.[18]

While capital punishment was abolished as a sanction for crimes against the state, under the existing rules of criminal law technically all participants of the Roundtable Talks and those who actively worked on behalf of the new

[16] For the text of the proposal of the Communist Party (draft of the Ministry of the Justice) see *A rendszerváltás forgatókönyve... op. cit.*, vol. 6, 115–116, note 6.

[17] In the minutes of the meeting of the experts' sub-committee [sub-committee I/1 dealing with constitutional revision] there is no record of any discussion concerning the language of Art. 54 (1).

[18] Act No. 16 of 1989 as promulgated and entered into force on June 15, 1989.

opposition could have been prosecuted for 'conspiracy'. Retrospectively it is possible to argue that participants of the Roundtable Talks most probably could not have been charged with the more serious degree of conspiracy (armed conspiracy or wartime conspiracy) that was subject to capital punishment before the amendment of the Criminal Code. Certainly, today's wisdom was not so apparent in the summer of 1989, not even in the light of the Communist government's self-imposed moratorium on executions. Still, the Communist government's move to amend the Criminal Code was regarded as a sufficient safeguard against prosecution, at least at the initial stage of the Talks. Nonetheless, even after the Criminal Code's amendment, participants of a conspiracy endangering the existing political, social or economic regime could be subject to 2–8 years of incarceration while organizers could have been incarcerated for 5–15 year (Art. 139 (1)–(2), Criminal Code). Arguably, activities like attending the Talks or assisting the Talks most probably would have sufficed for the application of these provisions. Therefore, it is not surprising that amending certain provision of the Criminal Code on crimes against the state was a major issue during the Roundtable Talks.

Indeed, participants of the Roundtable Talks—while drafting the fundamentals of a future, constitutional government—had to create a legal framework which guaranteed their personal security during the Roundtable Talks. Also, the constitutional and legal rules devised had to be such as to provide sufficient safeguards after the elections following the Talks, independent of the outcome of the first democratic elections. Experts' sub-committees negotiated and drafted new rules applicable to elections, political parties; were developing amendments to provision on crimes against the state in the Criminal Code and had to create safeguards against aggressive political actions, and constitutional amendments necessary thereto. It was clear for all sides of the Talks that the amendment of the Criminal Code on crimes against the state necessitated a constitutional amendment. The committee of experts was focusing on crimes against the state and crimes restricting the freedom of speech.[19] Apart from rules on specific crimes, procedural guarantees in criminal procedure were a major concern for the participants of the Talks.[20]

While crimes against the state were exempted from capital punishment due to the Talks, this development is best characterized as a side effect of the Round Table negotiations. Although the political forces did not prefer the retention of the death penalty, neither the Communist Party, nor the opposition forces moved

[19] *A rendszerváltás forgatókönyve... op. cit.* [minutes of a meeting on August 24, 1989 (Kutrucz, K.)], vol. 3, 375.

[20] See e.g. *ibid.* (Hack, P., Kutrucz, K.)], vol. 3, 376, 386.

to abolish capital punishment altogether. The parties agreed that the new constitution should contain a provision on the protection of the right to life (i.e. Art. 54(1)). The wording of the provision as adopted is based on Art. 6(1) of the ICCPR, a respectable international human rights instrument, although it does not preclude capital punishment *per se*. Note, however, that the provision was drafted at a time when a *de facto* moratorium on executions was already in force.

1.2 Beyond the Roundtable: strategic action and unintended consequences

Despite all promising developments, in the course of the Roundtable Talks the participants did not move to abolish capital punishment altogether. At this time the issue of *de iure* abolition of capital punishment was addressed by a single-issue pressure group formed predominantly by lawyers: the League Against Capital Punishment [Halálbüntetést Ellenzôk Ligája].[21] In the beginning of 1989, immediately after such political movements were legalized,[22] the League Against Capital Punishment became very visible in mainstream press. Newspapers ran short notes on the first session of the League, published interviews and essays by the founders of the organization. These pieces presented a variety of arguments known from the international abolitionist discourse. It was also reported in the news that the League petitioned the Presidium of the Communist Party about the *de iure* abolition of the death penalty. The significance of the actions of the League Against Capital Punishment was also acknowledged on the international scene.[23] In the meantime, papers also ran views from the retentionist side.

It is interesting to note that the League Against Capital Punishment placed the abolition of capital punishment in the context of the Hungarian liberal tradition. References were made to the works of 19th century legal academics

[21] Körösényi, A.: *A magyar politikai rendszer* [The Hungarian Political System (in Hungarian)]. Budapest, 1998. 181. Besides the League Against Capital Punishment a number of single-issue organizations appeared on the political scene in 1988–1989. For the problems of the formation and operation of political associations in Hungary before such political associations were expressly legalized at the beginning of 1989 see Halmai, G.: *Az egyesülés szabadsága, Az egyesülési jog története* [Freedom of Association, The History of the Freedom of Association]. Budapest, 1990.

[22] That happened when the Communist Parliament passed Act No. 3 of 1989 on the freedom of association in early 1989. See also Elster, J.—Offe, C.—Press, U. K. et al.: *Institutional Design in Post-communist Societies, Rebuilding the Ship at Sea.* Cambridge, Cambridge University Press, 1997. 70.

[23] See e.g. Amnesty International, AI-index: ACT 50/006/1997 at http://www.web.amnesty.org/ai.nsf/index/ACT500061997 [last visited on March 2, 2004].

and politicians committed to liberal ideals (Ferenc Deák, Bertalan Szemere). For instance, in 1990 the League against Capital Punishment published, more precisely, reprinted Szemere's essay, an elegant and brilliant exposition of abolitionist views originally written in 1839 for an essay competition organized by the Hungarian Society of Sciences. Szemere's abolitionist essay won the competition and had a major influence on the understanding of criminal law and justice in the second half of the 19th century in Hungary. The draft criminal code of 1843 is an example of that development. Although the draft code was never enacted into law, it is noteworthy, that it did not contain capital punishment among criminal sanctions.[24]

While the League Against Capital Punishment had a well-planned and straightforward abolitionist strategy, unforeseen and unintended developments had a major positive effect on the success of their case. In the public discourse the reconsideration of the 1956 revolution and the need to serve justice to the victims of 1956, primarily to Prime Minister Imre Nagy, became strongly associated with the abolitionist cause. The execution of Imre Nagy and his accomplices became the most exposed unjust execution of the Communist regime, giving thrust to arguments promoting the abolition of capital punishment.

Without discussing the details and the vast literature of the subject, it is important to point out the relevance of the 1956 revolt and the execution of Imre Nagy from the perspective of democratic transition in Hungary. During the Communist era the events of 1956 revolt were usually characterized as a 'counter-revolution'. In the course of the Communist Party's reform attempts, the Party moved to evaluate the past 30 years of its operation. It was in this context that Imre Pozsgay, the chairman of the sub-committee dealing with historical inquiry, stated in a talk on the radio on January 28, 1989 that "based upon recent research the events of 1956 constituted a popular revolt". The position taken by Pozsgay—a high ranking Communist Party politician—clearly indicated a reversal in the Communist Party's long-held position regarding the significance of the events of 1956. Reactions followed promptly. Independent political organizations were welcoming the Communist Party's re-evaluation of the 1956 events in a memorandum.[25] As it turned out later, the memorandum was signed by all major political organizations that later took part in the

[24] Szemere, B.: *A büntetésről s különösebben a halálbüntetésről* [On Punishment and in Particular, on Capital Punishment]. Budapest, 1990.

[25] See the memorandum of February 18, 1989. *A rendszerváltás forgatókönyve... op. cit.*, vol. 1, 50–51.

Roundtable Talks. Public discourse on the reconsideration of the events of 1956 immediately started to flourish and continued all along the Talks.

The failed 1956 revolution was transformed into a symbol of democratic transition.[26] In 1989, the essence of 1956 was represented by the execution of Imre Nagy and his accomplices. The rehabilitation of Prime Minister Imre Nagy evolved into a political issue of considerable significance. Over 200 000 people were present at the public funeral (reburial) of the unjustly executed. The funeral was one of the first instances when the Communist Party refrained from interfering with the large-scale assembly in a public space organized by the opposition forces.[27] Irreparable injustice committed by a branch of government in the name of law has never been more apparent than at the reburial ceremony.

Over the years the reburial of late Prime Minister Imre Nagy has been transformed into a 'narrative' shared by many political movements. It became a complex symbol of democratic transition in Hungary and as a symbol it helped establish continuity in public memory within Hungarian history via repositioning (re-emploting) the 1956 revolt. The formation of the new democratic government was announced on October 23, 1989, on the anniversary of the 1956 revolution and October 23 also became one of the three major national holidays. Academic institutions were founded to investigate the events of 1956. Furthermore, as government agencies and civil organizations relied on the events of 1956 in the course of demanding and designing restitution, it was also institutionalized in a more indirect sense. Numerous victim groups were formed and they became very visible in the media, their action and inaction was also attributed meaning.[28]

In the long run the discourse and re-evaluation of 1956 left its imprint on the fundamental structures of post-Communist politics in Hungary.[29] While the League against Capital Punishment did not refer to the 1956 revolution and the executions, the reburial and the rehabilitation of the executed directed attention

[26] See e.g. Fletcher, G. P.: Searching for the Rule of Law in the Wake of Communism, *Brigham Young Law Review*, 1992. Vol. 1992, 146–150.

[27] The reburial of Imre Nagy's companions took place on June 16, 1989. On July 6 of 1989 the Supreme Court acquitted the executed prime minister and his accomplices.

[28] Körösényi: *op. cit.*, 180. (Note that the scope of the restitution legislation covers crimes committed in the period of 1944–1990.)

[29] Also see Éva Kovács finding that the 'Imre Nagy narrative' shifted over the years from being a victim narrative to a perpetrator narrative and was then inflated into an alibi to support political endeavors. According to Kovács this transformation (inflation) was fueled by revenge. See Kovács, É.: Íme az Istennek ama báránya, aki elveszi a világ bűneit. Etüd a rendszerváltó mítoszokról [Essay on the Myths of Transition]. *Világosság*, 2000. Vol. 41/6–7, 28, 35.

on the cause of abolition of the death penalty. Although these developments were not calculated by the League, the re-evaluation of the events of 1956, and the reburial of Imre Nagy and his accomplices served as the strongest argument against retaining capital punishment.

In Hungary the impact of the 1956 revolution and Imre Nagy provided unexpected, yet, significant in fueling the abolitionist cause in the public discourse. History and reflection on history created a context that prompted political actors to remove capital punishment from the system of criminal justice and to prevent the restoration thereof in Germany as well.[30] Memory of past injustice, however, does not command an evident case for abolition of capital punishment. In South Africa capital punishment was regarded my many as a symbol of terror and political oppression.[31] Death penalty was applied disproportionately, primarily against black South Africans.[32] Being mindful of this history of capital punishment one might have expected strong resistance against the death penalty. When the South African Constitutional Court abolished capital punishment under the interim constitution in *R. v. Makwanyane*, the terms of the final constitution were still in the making. 200 000 petitions—one tenth of all petitions—requested the drafters of the final constitution to restore capital punishment. The amount of petitions is still shocking in itself as the restoration of capital punishment was the third item on the top-list—following the petition to preserve Afrikaans as an official language and keeping the parliament in Cape Town.[33] The contrast between the Hungarian, German and South African experiences, therefore, is an important warning for movers of national abolitionist movements when it comes to tying the ropes of past injustice, memory, hopes and expectations into an applicable strategy.

[30] See Art. 104 of the Basic Law precluding capital punishment.

[31] Bogie, D.: Life or Death? The Death Penalty in the United States and the New Republic of South Africa. *Tulsa Journal of Comparative and International Law*, 1996. Vol. 3, 229, 230 and 233.

[32] Bouckaert, P.: Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa. *Stanford Journal of International Law*, 1996. Vol. 32, 287, 313.

[33] Gloppen, S.: *South Africa, The Battle over the Constitution.* Aldershot, Darthmouth-Ashgate, 1997. 257.

2. The Constitutional Court's decision abolishing capital punishment: the essential content of the right to life and dignity

The decision abolishing capital punishment is one of the first major judgments of the Hungarian Constitutional Court.[34] The challenge against the constitutionality of capital punishment did not surprise the justices: the abolitionists made their case visible in the public discourse. Indeed, by the time the justices of the Constitutional Court entered office, the petition filed by the League Against Capital Punishment was already awaiting them.[35] For the benefit of the Constitutional Court the League Against Capital Punishment

> "set forth in detail the European traditions of the movement against capital punishment, offered a survey of the state of capital punishment and its abolition, respectively, in the world, treated the history of capital punishment in Hungary, and discussed the reason for its abolition".[36]

Although the procedure of the Constitutional Court is not constrained by deadlines, the constitutional justices decided the case within 9 months.

(a) The case reached the Constitutional Court in the period when the Court's procedure was still under formation. Before deciding the case the Constitutional Court requested the expert opinion of various prominent lawyers.[37] The law professors argued that capital punishment was cruel and unusual punishment and urged the Constitutional Court to abolish capital punishment on substantive grounds. It was also submitted that the availability of capital punishment has no effect on crime in society.[38] The Chief Justice of the Supreme Court and the

[34] An English translation of the decision is available in Sólyom, L.–Brunner, G.: *Constitutional Judiciary in a New Democracy, The Hungarian Constitutional Court*, Ann Arbor, University of Michigan Press, 2000. 118–138.

[35] With five justices, the Constitutional Court started its operation in January, 1990. The first judgment was handed down on February 12, 1990. The League Against Capital Punishment submitted its petition on January 17, 1990 challenging the constitutionality of the death penalty. By the time the death penalty case was decided, the Constitutional Court had 9 justices on the bench.

[36] Horváth, T.: Abolition of Capital Punishment in Hungary. *Acta Juridica Hungarica*, 1991. 153, 155.

[37] Since the early cases it has been the general practice of the Constitutional Court to request expert opinions from a wide variety experts, or to request the opinion of relevant government agencies. See Holló, A.: *Az Alkotmánybíróság, Alkotmánybíráskodás Magyarországon* [The Constitutional Court, Constitutional Review in Hungary]. Budapest, 1997. 98. Professors Tibor Horváth and András Sajó who were requested by the Constitutional Court to provide expert opinions were also founding members of the League Against Capital Punishment.

[38] 23/1990 (X. 31.) AB decision, ABH 1990. 90.

Attorney General appeared in a hearing in front of the Court. The Chief Justice of the Supreme Court submitted that according to his moral and legal convictions the death penalty is unacceptable and it cannot be justified as a criminal sanction.[39]

While taking a clearly abolitionist position, the Attorney General also mentioned that the constitutional provision on the right to life and dignity (Art. 54(1)) did not form a sufficient ground for deciding the case. The Attorney General argued that the Constitution's right to life provision should be read in conjunction with the clause on permissible limitations on fundamental rights. The Attorney General also submitted that the most legitimate forum for taking a decision on the constitutionality of the death penalty would be the parliament, nonetheless, the Constitutional Court has sufficient legislative authorization to decide the case.[40]

(b) The Constitutional Court's decision is very concise: following the assessment of the relevant constitutional provisions, the reasoning itself hardly exceeds two printed pages. Eight out of nine constitutional justices concurred in judgment, while one justice filed a dissenting opinion.[41] The Constitutional Court read the constitutional provision on the right to life and dignity [Art. 54(1)][42] in conjunction with the Constitution's limitation clause which prohibits the tampering of the essential content of constitutional rights [Art. 8(2)].[43] The Constitutional Court found that as the imposition of capital punishment allows for the total and irreparable extinguishing of the right to life and human dignity, capital punishment constitutes a limitation on the essential content of the right to life. Thereupon the Constitutional Court established that capital punishment was unconstitutional.[44] The Constitutional Court thus abolished capital punishment upon general, substantive considerations. This way the Court did not review the procedural safeguards guiding the application of capital punishment, and the

[39] 23/1990 (X. 31.) AB decision, ABH 1990. 90.

[40] 23/1990 (X. 31.) AB decision, ABH 1990. 90.

[41] Dissenting opinions are authorized in Art. 26 of the Act on the Constitutional Court [Act No. 32 of 1989]. The dissent shall be filed with written reasons. Justices may also submit concurring opinions to the judgment as a matter of Court practice. The capital punishment case was the first decision in which the justices filed concurring opinions.

[42] Art. 54(1) of the Constitution provides that "in the Republic of Hungary everyone has the right to life and dignity, of which no one shall be arbitrarily deprived of".

[43] Art. 8(2) of the Constitution provides that "in the Republic of Hungary fundamental rights and obligations shall be regulated in act of parliament, the essential content of fundamental rights may not be limited".

[44] 23/1990 (X. 31.) AB decision, ABH 1990. 92.

Court also refrained from analyzing the details of the practice of death sentencing.

(c) The aspect of the judgment which subjected the reasoning followed by the Constitutional Court to criticism was indicated by the Constitutional Court's reasoning.[45] The justices pointed to that the tension between the Constitution's provision on the right to life and dignity [Art. 54(1)] on the one hand, and the general limitation clause [Art. 8(2)] on the other. The majority opinion makes it clear that while the Court relied on its interpretation in abolishing the death penalty, it was the duty of the parliament (in its capacity of a constitution-maker) to resolve the tension within the constitutional text.[46]

In his dissent Justice Schmidt argued that it was *ultra vires* of the Constitutional Court to resolve this tension via interpretation, since an interpretation of this kind amounts to constitution-making. Dissenting Justice Schmidt, did not question the legitimacy of judicial review as a means of deciding about the abolition of capital punishment. The dissent is based on the argument that it is beyond the jurisdiction of the Constitutional Court to resolve a contradiction within the text of the constitution. According to the dissent, the most the Constitutional Court could do when facing such a textual deficiency is calling the attention of the constitution maker (parliament in the Hungarian case) to the problem. According to the dissent, lack of jurisdiction would however not preclude the Court from disclosing its arguments against capital punishment.[47] Justice Schmidt unfortunately did not elaborate on the possible implications of this position. In this context it is important to note that although the Hungarian Constitutional Court has a power to hand down advisory opinions in cases of abstract constitutional interpretation, following the decision abolishing capital punishment the Court has construed this jurisdiction narrowly.[48]

(d) The tension generated by the relevant constitutional provisions is easy to trace.[49] Art. 54(1) on the right to life clearly allows for instances of non-arbitrary

[45] 23/1990 (X. 31.) AB decision, ABH 1990. 93. Note that this finding is in the reasoning of the decision, and not in the holding.

[46] 23/1990 (X. 31.) AB decision, ABH 1990. 93.

[47] 23/1990 (X. 31.) AB decision, ABH 1990. 94–95.

[48] Arts. 1(g) and 21(6) of the Act on the Constitutional Court. See 31/1990 (XII. 18.) AB decision holding that upon a request for constitutional interpretation the Court is going to answer a constitutional question in the context of an actual problem. Note also that standing to request abstract constitutional interpretation is limited.

[49] For a detailed analysis of this tension and the possibility of its resolution see Kis, J.: Az első magyar Alkotmánybíróság értelmezési gyakorlata [The First Hungarian Constitutional Court's Practice of Interpretation], 48–98, in: *The Constitution Found?* (ed.: Halmai). 52–58.

deprivation of life. The limitation clause [Art. 8(2)] at the same time precludes any limitation on the essential content of constitutional rights. In the case the Court found that any deprivation of life is arbitrary *per se*.

János Kis argues convincingly that the construction chosen by the Court violates basic rules of constitutional construction and in essence alters the text of the constitution.[50] Furthermore, according to Kis the Court could have relied on the narrow reading of both the right to life provision and the limitation clause.[51] Although this solution would have eliminated the tension within the constitutional text, it does not resolve the issue of constitutionality of capital punishment. More precisely, it does not offer a general, substantive resolution. Instead, it would have directed the Constitutional Court to test the arbitrariness of the rules of procedure and the practical application thereof. As another viable alternative Kis submits that the justices could have argued that the Court's perception of the right to life as an inviolable, absolute right is based on generally accepted moral grounds. This solution would have accounted for yet another problematic premise of the decision. As Kis notes concerning the nature of deprivation of the right to life, it is important to see that all intentional acts resulting in the deprivation of life are 'total and irreparable' in the sense used by the Constitutional Court.[52]

(e) The Constitutional Court's reasoning did not enter into an analysis of moral considerations and shared beliefs about capital punishment in this manner. However, Chief Justice Sólyom's concurring opinion is a helpful guide in understanding how the Constitutional Court reached its interpretation of conflicting constitutional provisions. The introductory part of the Chief Justice's concurring reasons is entitled "The Liberty of the Constitutional Court in Concluding its Judgment".[53] The Chief Justice argued that the Constitutional Court shall develop its own interpretation of the right to life and human dignity. This interpretation should be part of a coherent jurisprudence, a jurisprudence that is beyond the reach of daily politics, transcending the written constitution. This 'invisible constitution' shall be the standard of constitutionality applied by

[50] Kis: *loc. cit.*, 57. The Court equates 'arbitrary deprivation' with 'deprivation' of life. The concurring opinions dealt with the meaning of arbitrariness in detail. See the concurring opinion of Justices Lábady and Tersztyánszky at 23/1990 (X. 31.) AB decision, ABH 1990. 96 and Chief Justice Sólyom at 23/1990 (X. 31.) AB decision, ABH 1990. 107.

[51] Kis: *op. cit.*, 58.

[52] Kis: *op. cit.*, 56.

[53] 23/1990 (X. 31.) AB decision, ABH 1990. 96. Chief Justice Sólyom's concurring opinion also appeared as a separate article as Sólyom, L.: A halálbüntetés ellen [Against Capital Punishment]. *Világosság*, 1990/12, 908–915.

the Court. In creating the invisible constitution the Constitutional Court is constrained only by the requirements of constitutionalism.[54]

The concept of the invisible constitution immediately became subject to criticism.[55] Although the concept is one of the most-known jurisprudential premises developed by the Hungarian Constitutional Court, in its practice the Constitutional Court did not rely on this technique of interpretation extensively.[56] Nonetheless, the Chief Justice's concurring opinion explains at least in part the Court's perception of its own role and its attitude towards the inconsistency faced in the abolition case.

3. The aftermath of the Constitutional Court's decision

The above analysis focused on the central argument of the abolition decision: on the Constitutional Court's interpretation of the right to life and dignity. The Court decided about the unconstitutionality of capital punishment in abstract terms and the relevant part of the reasoning is concise. Although the essence of the decision may be summarized very briefly, numerous additional points were made in the reasoning of the Court and in the concurring opinions. Most of these issues are relative to the broader context of the abolition of capital punishment and will be analyzed in the context of future developments.

To begin with, the Constitutional Court's decision abolishing capital punishment was formative of constitutional jurisprudence: the lasting effects of the Court's reasoning have become traceable in constitutional decisions ever since. Thus, the capital punishment decision—initially a benchmark of the success of democratic transition—slowly permeated constitutional jurisprudence thus triggering effects that last well past the early days of democratic institution building.

[54] 23/1990 (X. 31.) AB decision, ABH 1990. 97–98.

[55] In the literature the concept of the invisible constitution was associated with sheer reliance on natural law. For a comparative analysis of the concept of the invisible constitution as a technique of interpretation see e.g. Trang, D. V.: Beyond the Historical Justice Debate, The Incorporation of International Law and the Impact on Constitutional Structures and Rights in Hungary, *Vanderbilt Journal of Transnational Law,* 1995. Vol. 28, 33.

[56] According to Kis it is possible to show that the Constitutional Court gave up on a natural law based theory in 1992 in the course of reviewing restitution legislation. Kis: *op. cit.,* 64–65. Giving up on this approach, however, did not set back the Court's rights-activism.

Furthermore, note that the decisions of the Constitutional Court are final and binding, they have an *erga omnes* effect.[57] All provisions regulating capital punishment and listed in the Constitutional Court's decision were omitted from the books accordingly. In this sense, the judgment of the Court was self-executing.[58] The Constitutional Court's decision, however, took the cooperation of the other branches while also supplying them with useful perspectives in a number of respects. To being with, the decision pointed to an inconsistency within the text of the Constitution, a matter awaiting resolution that might also require constitutional amendment. Second, with removing capital punishment from among criminal sanction, the Constitutional Court added new points of consideration for the coming reform of the Criminal Code. The Court's decision provided a set of principled underpinnings for governmental responses to a wave of violent crimes, an undesirable phenomenon to be dealt with in a newly emerging democracy. Outside the immediate context of criminal law and criminal policy making the Constitutional Court's decision also contributed to Hungary's entry into international organizations and undertaking international obligations that are conditioned upon a domestic observance of the dictates of the rule of law and respect for human rights.

It is not to suggest that the Constitutional Court's decision set the course of events as a grand plan of action. Although some of the steps to be undertaken in pursuance of the Constitutional Court's decision were more or less foreseeable, the Court did not prescribe a strategy to be carried into execution by the political branches. Rather, the Constitutional Court's decision permeated the open discussion of public affairs and supplied the participants of the public discourse both with a framework of argument and a set of premises, infusing the ongoing exchange of ideas with a rhetoric of constitutionalism and rights talk. Participants of the discourse were free to rely on these premises and often responded to each other's moves using the Court's decision as a yardstick. The Constitutional Court's decision and international engagements undertaken by Hungary in its aftermath were used routinely and efficiently to undermine (otherwise marginal) attempts to restore capital punishment. These developments were crucial for democratic institution building and have been instrumental ever since as they

[57] Art. 27 of the Act on the Constitutional Court.

[58] In the course of the restitution process Act No. 17 of 1993 extended the scope of crimes exempt from the statute of limitations. Among the newly included crimes there were crimes which were already barred before 1993 and were subject to capital punishment. Act No. 17 of 1993 however abolished capital punishment for these crimes [Arts. 81–82]. Affirmed by the Constitutional Court in dictum in 2/1994 (I. 4.) AB decision, ABH 1994. 49.

clearly demonstrate the force of safeguards in curbing attempts to limit rights in the name of unsubstantiated fears and public sentiment.

Due to the multiplicity of issues, it would be impossible to provide a detailed analysis of all potential aspects and consequences of the capital punishment decision. Instead, the following part attempts to draw a sketch of the development that arose upon and in response to the Constitutional Court's decision abolishing capital punishment.

3.1 Tension within the text of the Constitution

In the capital punishment decision, the Constitutional Court pointed to a textual inconsistency within the Constitution itself. In addition, the Court noted that it was the duty of the legislative to resolve this tension. Although since 1990 numerous constitutional amendments were passed, the Constitution's Art. 54(1) on the right to life and dignity allowing for a non-arbitrary deprivation of life has not been amended.[59] Thus, the inconsistency of the constitutional text persists. This fact, however, should not be interpreted as a sign of the parliament's hesitance to commit to the abolition of capital punishment. From the perspective of the abolition of capital punishment the relevance of this tension, or the non-conclusive constitutional language has been minimized in 1993, when Hungary became a member of the Council of Europe, ratified the European Convention on Human Rights and its Protocol No. 6 and was practically eliminated with the ratification of Protocol No. 13. As for the elimination of the tension that has been lingering around the text of the constitution ever since Art. 54(1) was formulated, the bold spirits hope for more compelling language to appear in the new constitution to be adopted, the latest.

3.2 The relevance of the decision in jurisprudence building: references to international trends and the multi-layered understanding of human dignity

The decision of the Constitutional Court in the capital punishment case became formative for a number of techniques of constitutional reasoning and jurisprudential concepts over the years. From the very start of its operation, the Constitutional Court consciously undertook a project of jurisprudence building. The decision abolishing capital punishment is a clear example of this endeavor, the traces of which are easy to identify in the Court's reasoning. On the one hand, in underscoring their conclusion the justices relied on sources of inter-

[59] Pursuant to Art. 24(3) of the Hungarian Constitution, Parliament may amend the Constitution with the concurrence of 2/3 of all MPs.

national human rights law. This methodological move was crucial in legitimizing the outcome reached in the case. As for the substantive aspect of the decision, in the case the Court continued to build the foundations of a constitutional jurisprudence heavily informed by the protection of human dignity. As more recent decisions suggest, while the protection of human dignity is still of significance in Hungarian Constitutional jurisprudence, the Court's approach to human dignity has not been without uncertainties.

(*International instruments of human rights protection.*) At the time of the Constitutional Court's decision in the capital punishment case the ICCPR was the only major international instrument of human rights protection was that was ratified and promulgated in Hungary. As was mentioned before, the provision in the Hungarian Constitution protecting the right to life and human dignity against arbitrary deprivation (Art. 54(1)) follows the language of the ICCPR's Art. 6(1). Note, however, that in the capital punishment decision in addition to various provisions of the ICCPR the Constitutional Court did refer to European instruments of human rights protection which Hungary did not ratify at the time. Sure, membership in the Council of Europe was literally days away, but it took almost an additional two years to ratify the European Convention itself. Therefore, it is interesting to investigate the reasons behind the Constitutional Court's reference to such international instruments of human rights protection.

The Constitutional Court's reliance on the European Convention and Protocol No. 6 at the time cannot be explained with mounting international pressure. It was only in 1994 that the Council Europe made imposing a moratorium on executions a condition of accession for aspiring members, the moratorium being the first step on the road to abolition.[60] Expectations were nowhere near what for instance Russia is exposed with regard to adopting Protocol No. 6,[61] and it was years before abolition of capital punishment could have been presented as a silent precondition of EU accession, as was the case with regard to the Baltic republics.[62] Thus, lacking international pressure the Court's references to international instruments are even more curious.

[60] See Resolution 1044 (1994) of the Parliamentary Assembly of the Council of Europe.

[61] For an insightful analysis on the relationship of Russia and the Council of Europe in the context of the death penalty see Ritter, K. H.: The Russian Death Penalty Dilemma: Square Pegs and Round Holes. *Case Western Reserve Journal of International Law,* 2000. Vol. 32, 129.

[62] Capital punishment was abolished by legislative action in Estonia (1998) and Latvia (1999). In Lithuania capital punishment was abolished by the Constitutional Court (ruling of December 9, 1998).

Note that the Constitutional Court did not apply these international instruments to the issue before the Court. Rather, the justices referred to these instruments as indicators of an international trend towards the abolition of capital punishment.[63] This finding might be a strong hint towards abandoning the view that the Court used these international human rights instruments as mere decorations. One has to keep in mind that the Constitutional Court was struggling with a prima facie tension between relevant constitutional provisions in one of its first major decisions.

Whether it is permissible for a constitutional review forum to resolve a tension between relevant constitutional provisions is a question that runs to the core of any theory on constitutional adjudication. Interestingly, the Hungarian Constitutional Court is not the only constitutional review forum that took a rather pragmatic approach avoiding such theoretical problems. In a recent case the South African Constitutional Court was of the opinion that

> "... A court must endeavor to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonize the relevant provisions, and give effect to all of them. ..."[64]

In the capital punishment case the Hungarian Constitutional Court harmonized this tension in part via resorting to international human rights instruments. This solution might be seen as an example of the justices' aspiration to build a coherent jurisprudence, in conformity with foreign and international law and jurisprudence. The Hungarian Constitutional Court is certainly not the only "new" constitutional court to rely extensively on comparative analysis. In South Africa the drafters of the interim and then the final constitution regarded foreign and international examples as a source of guidance and external constraint on the interpretation of the constitution.[65] The jurisprudence of the South African Constitutional Court is often informed by careful comparative analysis.

In Hungary, in the constitutional jurisprudence of an emerging post-communist constitutional democracy, international standards became important on the domestic scene as they provide an external reference point which is hard

[63] 23/1990 (X. 31.) AB decision, ABH 1990. 93.

[64] *United Democratic Movement v. President of the Republic of South Africa and others*, (CCT23/02) 2003 (1) SA 495; 2002 (11) BCLR 1179; [2002] ZACC 21 (4 October 2002), para 83.

[65] See Art. 35(1) of the interim Constitution, and Art. 39 of the final Constitution. Webb, H.: The Constitutional Court of South Africa. *University of Pennsylvania Journal of Constitutional Law,* 1998. Vol. 1, 205, 208.

to question for those who intend to stay in mainstream public discourse.[66] As Chief Justice Sólyom explained:

> "The adoption of constitutional notions and doctrines has not only provided a legitimate basis for the Constitutional Court but it has also compelled the challengers of a decision to enter into an internationally endorsed discourse with internationally impartial definitions."[67]

In its jurisprudence the Hungarian Constitutional Court have ever since consulted foreign and international sources at some length, even in cases where the justices decided not to make explicit mention of the foreign example. Since the ratification of the European Convention the Constitutional Court routinely reviews the jurisprudence of the European Court of Human Rights and also pays attention to leading cases from established democracies. A detailed analysis of cases in which the Hungarian Constitutional Court consulted foreign or international jurisprudence, and the implications thereof, would far exceed the limits of the present analysis. The approach followed by the Constitutional Court in the capital punishment case nonetheless remains an important example of a conscious judicial effort of jurisprudence building in a democratic transition. As the Hungarian example shows, international human rights instruments can provide sound grounds for such an exercise even in such cases where international conventions cannot but stand as evidence on emerging international trends in the field of human rights.

(*Human dignity in Hungarian constitutional jurisprudence.*) Reliance on international human rights instruments was not the only means of early jurisprudence building applied by the Hungarian Constitutional Court in the capital punishment decision. It was also in this case that the Constitutional Court established an important pillar of its jurisprudence on human dignity. Over the years the Constitutional Court established a 3-level system for the protection of constitutional rights which was followed by the Court until the late 1990's. Interestingly, in its initial form all three levels of rights protection were connected with an aspect of the right to human dignity. A gradual erosion of this tripartite system, an important cornerstone of which was laid down in the capital punishment case can be sensed in more recent decisions on homosexual sodomy[68] or physician assisted suicide.[69]

[66] On the significance of international sources in East European constitutional adjudication see *Trang, op. cit.*, 1.

[67] Sólyom: *To the Tenth Anniversary of Constitutional Review. op. cit.*, 22.

[68] Decision 37/2002 (IX. 4.) AB

[69] Decision 22/2003 (IV. 28.) AB

In its jurisprudence the Constitutional Court distinguished three types of constitutional rights from the perspective of constitutionally permissible limitations (standards of review). In a sense the concept introduces a hierarchy of constitutional rights.[70] On top of the imaginary hierarchy is the right to human life in indivisible unity with human dignity [Art. 54 (1), Constitution] that cannot be limited or restricted.[71] This is how the Constitutional Court constructed the unity of right to life and dignity in the capital punishment case. And it was on this ground where the Constitutional Court held that capital punishment amounts to the total and irreparable annihilation of the right to life and human dignity.

Note that the Hungarian Constitutional Court is not the sole constitutional review forum of the view that the constitutionality of capital punishment should be seen as a deprivation of human dignity. Justice Cory of the Canadian Supreme Court argued in *Kindler v. Canada* that

> "[t]he death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being. It is the annihilation of the very essence of human dignity."[72]

Also, the justices of the South African Constitutional Court found in *Makwanyane* that capital punishment violated the constitutional right to human dignity.[73] Such a view is not unprecedented even in the U.S. where Justice Brennan of the U.S. Supreme Court famously said in his concurring opinion in *Furman* that

> "Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated *whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death.*"[74] (emphasis added)

[70] Despite some similarities, the Hungarian concept is distinct from the German Constitutional Court's doctrine of objective hierarchy of values.

[71] See also Holló, A.: Az Alkotmánybíróság létrejötte és hároméves működése [The Establishment of the Constitutional Court and its First Three Years of Operation]. 63–107, in: *Alkotmánybíráskodás* [Constitutional Adjudication] (ed.: Kilényi, G.). Budapest, 1993. 102.

[72] *Kindler v. Canada*, [1991] 2 S.C.R 779, 817 (Cory, J.).

[73] *S. v. Makwanyane*, CCT 3/94; 1995 (6) BCLR 665; 1995 (3) SA 391; [1995] ZACC 3 (6 June 1995).

[74] *Furman v. Georgia*, 408 U.S. 238, 257 (1972) (Justice Brennan, concurring) In 4 years, Justice Brennan repeated his views in dissent in *Gregg v. Georgia*, 428 U.S. 153

In these cases, justices formulated their objections against capital punishment in the context of human dignity. The most important difference between these positions and the understanding followed by the Hungarian Constitutional Court is that unlike the other justices, the Hungarian justices understood the human dignity in unity with the right to life to be absolute and not allowing for any constitutionally acceptable limitation. In essence, the position developed by the Hungarian Constitutional Court is echoes the words of Art. 1(1) of the German Basic Law declaring human dignity as inviolable. The major difference between the Hungarian and the German approach is that while the inviolability of human dignity is stated clearly in the German Basic Law, in Hungary Art. 54(1) of the Constitution proscribes only arbitrary deprivations of the right to life and human dignity: the principle of inviolability of human dignity was established by the Constitutional Court.

Except for the right to human dignity read in conjunction with the right to life, constitutional rights are subject to limitations in accordance with Art. 8(2) of the Constitution. Under the limitation clause the Court first reviews whether the challenged norm infringes the essential content of the right. If the limitation does not touch the essential content of the right in question, the Constitutional Court determines the constitutionality of the limitations by the so-called 'necessity-proportionality' test. This approach is essentially similar to proportionality analysis widely applied by such courts as the German Federal Constitutional Court, the Canadian Supreme Court (Oakes test), the European Court of Human Rights or the European Court of Justice.

In Hungarian jurisprudence the proportionality test applies not only to constitutional rights mentioned expressly in the text of the Constitution, but also to constitutional rights that were derived from the so-called 'comprehensive (general) personality right' (a 'mother right') recognized by the Constitutional Court. The Constitutional Court derived the 'comprehensive (general) personality right' from the right to human dignity before the capital punishment decision.[75] The comprehensive personality right was derived from the right to human dignity read in conjunction with the right to life and was construed by the Court to protect the persons' decisional autonomy or self-determination. The comprehensive personality right has a subsidiary character: it may be invoked to

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(1976), the case in which the U.S. Supreme Court upheld the constitutionality of capital punishment.

[75] 8/1990 (IV. 23.) AB decision. At the time of the decision of this case, the petition for the abolition of the death penalty was already filed with the Court.

protect personal autonomy if there is no specific right enumerated in the constitution.[76]

Although in the capital punishment decision the Constitutional Court did not mention the comprehensive personality right, in its jurisprudence of the Court applied a concept of human life and dignity which includes elements from the understanding of human life and dignity developed therein.[77] The Constitutional Court relied on the broader concept of right to life and dignity also known as 'comprehensive personality right' and 'right to personal autonomy' in a wide range of cases including the right to retain control over motions in civil cases,[78] to the right to privacy[79] or the right to establish fatherhood in a civil case.[80] The Court also used the concept to establish its jurisprudence regarding religious freedom[81] or freedom of speech.[82] One may find that the Constitutional Court used the concept of right to life and dignity to widen the scope of rights protection via defining and redefining constitutional rights.

Rights not belonging to the above mentioned categories may be limited at the wide discretion of the legislative. Limits imposed may not be arbitrary and shall treat persons as subjects with equal dignity [Arts. 54(1) and 70/A (1), Constitution)].[83] This standard is lower than the proportionality review applied under the limitation clause, essentially it calls for simple reasonableness review. The standard of treatment of persons as subjects with equal dignity is typically applied in cases where the law draws a distinction on a ground that is not mentioned expressly in the Constitution's non-discrimination clause [70/A(1), Constitution] or where discrimination was not made with regard to a constitutional right.

[76] Cf. Arts. 1 and 2 of the German Basic Law. See also the German Constitutional Court's decision in the *Elfes* case.

[77] The Constitutional Court referred to these two decisions as founding decisions of the concept of 'comprehensive personality right' e.g. in 36/1994 (VI. 24.) AB decision

[78] 9/1992 (I. 30) abolishing the prosecutor general's right to appeal for review of a final judgment in the interest of legality; 1/1994 (I. 7.) AB abolishing the prosecutor's right to intervene in civil procedures in the interest of legality.

[79] 56/1994 (XI. 10.) AB decision. In the case the Court noted that although the constitution does not mention a right to privacy, it follows from the comprehensive personality right.

[80] 75/1995 (XII. 21.) AB decision.

[81] 4/1993 (II. 12.) AB decision.

[82] E.g. in 36/1994 (VI. 24.) AB decision; 20/1997 (III. 19) AB decision.

[83] See the concurring opinion of Chief Justice Sólyom in 35/1994 (VI. 24.) AB decision on agricultural lands, ABH 1994. 215–217. Also Kukorelli, I.: *Az alkotmányozás évtizede* [The Decade of Constitution-making]. Budapest, 1995. 96–97.

The interplay between dignity as a constitutional right and equal dignity as a constitutional standard is best demonstrated by the Constitutional Court's approach towards restitution. The Court ruled in one of its first decision on the constitutionality of restitution, that restitution is an *ex gratia* donation and not a matter of constitutional right [e.g. dignity].[84] Throughout its jurisprudence the Court has been consistent about this premise.[85] In the restitution cases the Court was of the view that when paying restitution the state does not settle claims in a legal sense, rather, it offers a grant. The government has a wide discretion in distributing such *ex gratia* donations. From a constitutional perspective this discretion is limited by the requirement of treating people as subjects with equal dignity. Partial restitution clearly satisfies this criterion, and so does periodical distribution of the amounts.[86] The limits of legislative discretion were, however, revealed in a recent case where the Constitutional Court held that providing 1 000 000 000 HUFs to one group of persons and 30 000 HUFs to the others violates the standard of treatment of equal dignity.[87]

The standard of review in non-discrimination cases becomes problematic, when the Constitutional Court does not specify clearly its reasons for interfering with legislative discretion. This is what happened in the following cases: although the justices hinted that the challenged rules violated an aspect of human dignity, the Court did not offer a more detailed reasoning thus leaving considerable room for doubt. In the incest case of 1999[88] the Constitutional Court found that the incest provision of the Criminal Code was unconstitutional to the extent it prohibited consensual homosexual sodomy between siblings. The challenged rule did not prohibit sodomy between heterosexual siblings. The decision of the Court in the incest case was based on the premise that the distinction drawn between homosexual and heterosexual siblings amounts to discrimination on "another ground' under Art. 70/A of the Constitution. In the

[84] 16/1991 (IV. 20.) AB decision.

Note that as a rule the justices do acknowledge monetary relief as compensation for the infringement of dignity and for other non-material (non-pecuniary) damages. The Constitutional Court heavily relied on its dignity jurisprudence in abolishing the statutory restrictions imposed by the Civil Code on the recovery for non-pecuniary damages. 34/1992 (VI. 1.) AB decision.

[85] 28/1991 (VI. 3.) AB decision; 15/1993 (III. 12.) AB decision; 26/1993 (IV. 29.) AB decision; 1/1995 (II. 8.) AB decision; 22/1996 (VI. 25.) AB decision, 36/1998 (IX. 16.) AB decision; 46/2000 (XII. 14.) AB decision.

[86] 16/1991 (IV. 20.) AB decision.

[87] 46/2000 (XII. 14.) AB decision.

[88] Decision 20/1999 (VI. 25.) AB.

1999 decision the Court found that the distinction in the Criminal Code was not based an objective and reasonable justification.

Thereafter, in the homosexual sodomy case[89] the Constitutional Court was dealing with a challenge concerning provisions of the Criminal Code setting a different age of consent for homosexual and heterosexual. The Court found that the in the sodomy provisions the distinction based upon sexual orientation. Sexual orientation pertains to the core of human dignity, thus, any distinction between persons in this respect shall be justified by particularly serious reasons. Still, the Constitutional Court held that the applicable standard of review is not the one under the necessity—proportionality test, instead, the Court decided to follow its approach in the incest case and applied a "reasonableness" test. Thus, while the Constitutional Court did place sexual orientation in the context of human dignity, keeping the standard of review at the lowest level is a clear sign of hesitation as to the proper approach to be followed. Such an uncertainty was preserved despite the unique significance of the protection of human dignity once emphasized by the Constitutional Court.

The tripartite approach, providing different levels of constitutional protection to various aspects of human dignity is not without further problems. It was in the abortion cases[90] where the Constitutional Court acknowledged the collision between the right to autonomy (self-determination) and the state's interest to protect the life of the fetus. In the abortion cases the Constitutional Court refused to follow the language absolutes used in the capital punishment case, as such an approach would have resulted in a complete ban on non-therapeutic abortions. This solution was in part reached on the ground that the Constitutional Court was not ready to declare that the fetus was a person under the Constitution with all rights protected therein. Instead, the Constitutional Court emphasized that this decision was for the constitution-maker or the legislator to take. In the case, the Court performed a balancing act between the woman's self-determination derived from her human dignity on the one hand, and the state's duty to protect the life of the fetus on the other hand. The state's duty to protect unborn human life was derived from Art. 8(1) of the Constitution and is commonly associated with the state's duty to provide for (institutional) guarantees necessary for the enjoyment of constitutional rights (institutional protection).

The limits of this balancing act applied successfully in the abortion cases without compromising the absolute of human dignity as recognized in the capital punishment decision were nonetheless highlighted in the Constitutional

[89] Decision 37/2002 (IX. 4.) AB.
[90] 64/1991 (XII. 17.) AB and 48/1998 (XI. 23.) AB.

Court's recent decision concerning the constitutionality of physician assisted suicide.[91] In the euthanasia case the Constitutional Court found that the decision to end one's life with the active participation of a physician does not belong to the essential content (core) of the right to self-determination (autonomy). The limitation imposed by this prohibition must be in line with Art. 8(2) and shall be tested under a necessity-proportionality test. According to the longstanding jurisprudence of the Constitutional Court, the limitation of a fundamental right is acceptable if the protection of another fundamental right or liberty, or the protection of a constitutional value cannot be achieved by other means.[92] In the case of euthanasia the limitations imposed on the right to self-determination (autonomy) derive from the obligation of the state to protect human life, as expressed in Art. 8(1) of the Constitution. It is the duty of the state to establish such procedures (safeguards) that protect the integrity of the terminally ill patient's decision and eliminate the effects of potential interference by family members, friends and medial professionals on the patient's decision. The appropriateness of the procedure established by law depends on the current state of human medicine, the overall quality of health care infrastructure and the availability of well-trained professionals to examine the patient's decision and to carry it out.

Note that in the euthanasia case the Court departed from its jurisprudence and found that the unity of the right to life and human dignity does not apply in contexts where one's life is taken by another person. In the context of euthanasia this approach is problematic. Although referring to the accomplice might seem as an obvious observation, it seems to avoid the core of the intellectual and constitutional problem presented by the relationship of the right to life, human dignity and self-determination (autonomy) in the euthanasia context. In the long-standing jurisprudence of the Constitutional Court, the right to self-determination was derived from the unity of the right to life and human dignity, and not from human dignity alone. It was the inviolable unity of the right to life and human dignity that made it possible for the Court to declare capital punishment unconstitutional in its historic decision. After all, the very wording of Art. 54(1) of the Constitution securing protection for the right to life and dignity provides not only that these rights are inherent, but also that they might be subject to deprivations other than arbitrary ones. In the capital punishment case the Constitutional Court indicated an inherent tension in the language of Art. 54(1) of the Constitution, a tension which has not been resolved yet. This textual

[91] Decision 22/2003 (IV. 28.) AB.
[92] See decision 30/1992 (V. 26.) AB.

uncertainty could be yet another reason for constitutional anxiety, when the Court is departing from its long established jurisprudence with such ease.

3.3 Criminal law after the abolition of capital punishment

In addition to calling for the amendment of the constitution, the Constitutional Court remarked in its decision that the abolition of capital punishment necessitates the reconsideration of the system of criminal sanctions.[93] The Constitutional Court was not the first to raise the idea of recalibration. As that was already mentioned, the reform of the criminal justice system was under consideration since the Roundtable Talks and the democratically elected political forces also found it necessary. When talking about the potential abolition of capital punishment before the Constitutional Court's decision, Minister Balsai also mentioned the need to reform the system of criminal sanctions as a logical consequence of removing death penalty. The large scale, strategic reform of criminal sanctions and sentencing along with adjustments called for by the Constitutional Court's decision abolishing capital punishment did not commence until 1993.[94]

The Criminal Code provides that while observing the aim of criminal punishment, sentences should correspond with the seriousness of the offence, the degree of culpability and other aggravating and mitigating factors [Art. 83, Criminal Code]. Depending on the personality of the offender and the motive of the crime committed, the judge may depart from the provisions prescribing the form of incarceration [Art. 45(2), Criminal Code]. Prior to 1993, as an exception, the judge was entitled to apply a sentence lower than the one prescribed in the Criminal Code, provided, that even the lowest sanction was too sever in the circumstances [Art. 87, Criminal Code]. In 1993 criminal judges were granted more discretion in sentencing: the rule for reducing sentences below the level prescribed by the Criminal Code was made a rule of general application.[95] The amendment was expected to result in more individualized criminal sentences.

[93] 23/1990 (X. 31.) AB, ABH 1990. 93–94. See also the concurring opinion of Justice Szabó at 23/1990 (X. 31.) AB, ABH 1990. 109.

[94] Act No. 17 of 1993

The criminal law reform is a comprehensive one and far exceeds the reconsideration of the system of sanctions and transitional justice legislation. For the purposes of the present paper the changes in the system of sanctions and sentencing are the most relevant aspects of the reform.

[95] Act No. 17 of 1993, Art. 19 (1). As in other cases, the discretion of criminal courts is guided by the decisions and guidelines of the Supreme Court.

The legislature intended to rely on the internal mechanisms of the criminal justice system in readjusting the system of criminal sanctions.[96]

According to the chief prosecutor for the capital city, Hungarian criminal sentences are harsh compared to similar sentences in Western Europe, although in the meantime Hungarian crime rates are lower compared to Western democracies. He added that in Hungary, unlike in many Western states criminal sanctions other than incarceration are not regarded as punishment in the public eye. However, the government's survey of the effects of the 1993 amendment made in 1997 suggested that criminal sentences were still very light.[97]

The government believed that elevating already existing terms of imprisonment in the Criminal Code was not going to result in heavier sentences. Instead, a set of amendments changed the rules applicable to sentencing, parole and probation, reducing sentences, accumulation and life imprisonment.[98] Since the 1998 amendment life imprisonment means a minimum of 20 years in a maximum security prison.[99]

The first day of possible release shall be determined by the trial court. Furthermore, in its judgment the trial court may preclude the release of the convict sentenced to life imprisonment.[100] In effect, this rule of sentencing introduced real life imprisonment in Hungary in 1998. However, note that life imprisonment never stands as a mandatory sentence under the Hungarian Criminal Code.

Note that the German Constitutional Court found real life imprisonment unconstitutional in 1977.[101] Relying on its dignity jurisprudence in the case, the German Constitutional Court attributed special significance to physical and psychological factors ['hope'] in preserving the inmate's dignity. In addition, it is important to note that the German Constitutional Court found it imperative that life imprisonment be backed up with a coordinated parole policy as opposed to an individualized, merit based parole system. While Hungarian constitutional

[96] Art. 87(2) of the Criminal Code defined the lowest possible term of imprisonment in reduced sentences.

[97] See official commentary to Act No. 73 of 1997 introducing the first wave of amendments to the rules on sentencing.

[98] Official commentary of Act No. 87 of 1998 amending the rules on sentencing. The amendments were enacted by Act No. 73 of 1997 and Act No. 87 of 1998.

[99] Art. 47/A(2) of the Criminal Code as amended in 1998. For crimes to which the statue of limitation does not apply, life imprisonment is a minimum of 30 years. Following incarceration, the convict is released on parole.

Before 1998 life imprisonment meant incarceration with the possibility of parole not earlier than 15-25 years as determined by the trial court.

[100] Art. 47/A(1) of the Criminal Code.

[101] (45 BVerfGE 187).

justices tend to listen to the wisdom of German constitutional jurisprudence, it remains to be seen whether such arguments would have similar weight before the Hungarian Constitutional Court once the constitutionality of the current rules on life imprisonment comes under review. The relevance of the 'hope' factor, however, was acknowledged.[102]

Although, the reasons for the government's attempts to raise criminal sanctions are manifold, it would be a little far fetched to say that the government was acting under an obligation derived from the Constitutional Court's statement in the capital punishment case. Indeed, the reform of sentencing rules might be better understood in the light of the revision of the criminal justice system as a whole. With transition to constitutional democracy and market economy there was clear need to reconsider guarantees in criminal procedure, to amend the rules applicable to young offenders and to introduce alternative sanctions economic crime. The opening up of the political system, however, brought unwelcome phenomena such as drug-related offences, the use of guns and explosives, money-laundering and the shocking brutality of a number of crimes against human life. The new trend of curbing judicial discretion and attempts to raise criminal sentences are attributable to a large extent to policy considerations aiming to fight organized crime.[103] Indeed, in its general introduction the official commentary of the legislative amendment distinguished the real life imprisonment from capital punishment. This comment might be read as a reassurance that the government has no intention to restore the death penalty.

Conclusion

This paper aimed to show how the decision of the Hungarian Constitutional Court abolishing capital punishment was formative of a context that prevents the restoration of the death penalty in Hungary. Amidst a web of influences supporting the abolition of capital punishment, such as the efforts of the Leagues Against Capital Punishment or the reinterpretation of the 1956 revolt, the Constitutional Court handed down its decision abolishing the death penalty in very abstract terms. The Constitutional Court was deciding the case not within the narrow constraints of the moment. For instance, although the public discourse at the time of abolition was heavy with sentiments about the 1956

[102] *Büntetőjog, Általános Rész* [Criminal Law, General Part] (ed.: Békés, I.). Budapest, 2002. 272.

[103] See the official commentary of Act No. 87 of 1998. Note that the act is called the 'Mafia package' in popular parlance.

revolution, in its decision the Court did not mention the events of 1956 or the unjust and shameful executions in express terms. The concurring opinion of Chief Justice Sólyom contains a subtle and elucidating reference in this regard. The abolition of capital punishment is more than the symbolic rejection of a system that sacrificed human lives for political purposes. The Hungarian Constitutional Court abolished capital punishment because it is incompatible with the principles of constitutional government as perceived by the Court.[104]

The decision of the Constitutional Court paved the way for Hungary's membership in the Council of Europe and made the ratification of Protocol No. 6 exceptionally smooth, undertakings followed by the ratification of Optional Protocol No. 2 of the ICCPR. These international commitments altered the terms of the domestic discourse about capital punishment as they introduced new points of reference and new safeguards. The Constitutional Court's decision was already a major step towards eliminating death talk from domestic public discourse. International obligations provide a further safeguard against the views of those who question the legitimacy or appropriateness of the Court's decision. It only demonstrates the integrity of this context that one of the newer appointees to the Constitutional Court, Justice János Strausz is a retentionist. Also, due to Hungary's international obligations there is no room for referenda on capital punishment anymore. In recent years there were two referendum initiatives sought the restoration of capital punishment. The National Elections Commission rejected the initiatives as pursuant to Art. 28/C(5) of the Constitution there should be no referendum concerning the fulfillment of international obligations. The Constitutional Court affirmed.[105] The recent ratification of Protocol No.13 to the European Convention on the unconditional abolition of capital punishment was the last move to make in perfecting the abolitionist web.

An examination of the Hungarian capital punishment case in its broader context provides an excellent opportunity to observe the making of a discourse space and the development of a constitutional culture from its inception. When deciding about the constitutionality of capital punishment, the justices of the Constitutional Court intended to hand down an enduring decision. The judgment withstood trials at least in two distinct senses. On the one hand the decision became the foundation for building a system of safeguards against attempts seeking to restore capital punishment. These safeguards proved to be effective in

[104] 23/1990 (X. 31.) AB decision, ABH 1990. 99–100.

[105] See 11/1999 (V. 7.) AB decision on the referendum initiative to restore capital punishment. See also 2/1999 (III. 3.) AB decision on a referendum initiative for the temporary restoration of capital punishment. The National Elections Commission rejected the initiative and the petition for review by the Constitutional Court was late.

controlling the needs and aspirations of daily power games. The Constitutional Court's decision became a reference point and a source of limitations for the purposes of the public discourse. On the other hand, an analysis of the jurisprudence of the Constitutional Court reveals that the decision—itself a piece of creative judicial interpretation—was developed further by the Court and became a starting point for a number of jurisprudential concepts and means of right protection. In the light of these developments the exciting question of the day in the field of criminal is not whether there is room for restoring capital punishment in Hungary, but whether "real" life imprisonment is constitutional.[106]

The success of abolition in Hungary is not to suggest that abolition of capital punishment via judicial review should be more successful *per se* than abolition via constitution-making, referendum or legislation.[107] One may go as far as finding that unless a constitution clearly precludes capital punishment (such as Art. 102 of the German Basic Law), no judicial review forum can establish reasons, which are capable to prevent the restoration of capital punishment. Judicial review fora have the final say in the case before the bench, but they do not have a final say on the matter in its larger context. Following the decision of any constitutional tribunal, political branches may resort to amending the constitution or enacting new legislation, thus contributing to an ongoing discussion of public affairs. Therefore, the authoritative interpretation of the constitution by a constitutional review forum cannot prevent *per se* the political branches from reopening the discourse about capital punishment.[108] Also, when newly established constitutional courts decide on the constitutionality of capital punishment among the first cases, the review forum may use this opportunity to lay the foundations of its jurisprudence, as was in Hungary or in South Africa. In comparison, old courts—the US Supreme Court being one of them—are

[106] See an interview with the well-know defense attorney Orosz, B. in *Fundamentum*, 1998. Vol. 2/4, 38.

[107] Analysing the legitimacy of judicial review as a means to abolish the death penalty would exceed the limits and aspirations of the present paper.

[108] For the concept of the political process as discourse see Habermas, J.: *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy* [Faktizitaet und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates]. REHG, W. (trans.) Cambridge, Mass., The MIT Press, 1998, especially chapter 6 on the judiciary and the legislature and Stone, A. S.: *Governing with Judges, Constitutional Politics in Europe*. Oxford, Oxford University Press, 2000.

Cf. the words of Chief Justice Sólyom in his concurring opinion to the judgment abolishing capital punishment: "The legislative may sustain or abolish capital punishment at its liking—until the Constitutional Court delivers the final word on the constitutionality of the death penalty." 23/1990 (X. 31.) AB decision, ABH 1990. 93.

constrained by the mass of previous case law.[109] Thus, whether the decision on the abolition of capital punishment is taken by a constitutional tribunal or is the expression of political will, in order to fully understand its motivation, significance and implications, the decision shall be considered in its broader context. The timing of the Hungarian Constitutional Court's decision abolishing capital punishment shall also be taken into account. At the time of the decision the Constitutional Court was a newly established institution untainted by the previous regime, a factor that rendered the Court immense popular (institutional) legitimacy. This phenomenon is not unique to Hungary. Another post-authoritarian constitutional tribunal, the South African Constitutional Court, also benefited from similar legitimacy.[110]

If viewed so, the context built with the active participation of the Constitutional Court is stabile while capable of accommodation and transformation. Indeed, the recipe offered by the Hungarian Constitutional Court turned out to be a highly successful one. Still, as the analysis suggests its success is due as much to careful planning as to the interplay of unforeseen but at least partly favorable factors. However, as these factors were in constant interaction with each other, the ratio of logic and luck might be impossible to determine. When describing phenomena in democratic transition in Central and Eastern Europe 'rebuilding the ship on the open sea' (Jon Elster) and 'working at the drawing-board' (Stephen Holmes) are established metaphors. These metaphors suggest conscious planning, forward-looking intellectual exercises, the actors' control over the project to a certain extent. Although the decision of the Court is regarded as an indispensable step in the evolution of the abolitionist context, careful analysis shows that while some components of the abolitionist context stem from strategic action or at least a forward-looking approach, unexpected and unforeseeable events also played a significant role. Since the Hungarian Constitutional Court's decision, the emphasis has shifted from certain aspects of this context and put other issues in the limelight of attention. A term in the word-game of democratic transition, or rather, of transitology, which captures such interplay of intended and unexpected consequences is probably Timothy Garton Ash's 'refolution'. An examination of the Hungarian case demonstrates the significance constitutional and legal safeguards in keeping the often rhapsodic sentiments about capital punishment at bay during and beyond 'refolutionary' times.

[109] See Harcourt, B. E.: Mature Adjudication: Interpretive Choice in Recent Death Penalty Cases. *Harvard Human Rights Journal,* 1996. Vol. 9, 255.

[110] Webb: *op. cit.*, 208.

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On the Possibility of Constitutional Court's Review of Directives on Unifying the Case Law in the Republic of Hungary

Abstract. The present study undertakes the review of one of the essential authorities of the Hungarian Constitutional Court: the issue of abstract subsequent norm control, which is currently amongst the most significant questions. The possibility of the constitutional review of the Supreme Court's directives on unifying the case law is subject to debate in legal literature and in the intercourse between the two organs as well. This study intends to elicit the nature of the problem through the elaboration of relating regulation and by utilizing certain Constitutional Court decisions concerning the subject. It will arrive at the conclusion that the present regulation also gives scope to the Constitutional Court review of directives on unifying the case law. The paper gives a survend evaluation of the solutions involved in the draft of the new Constitutional Court Act too.

Keywords: Constitutional Court, Supreme Court, directives on unifying the case law, constitutional control, hierarchy of legal sources, the principle of the separation of powers.

In the Republic of Hungary, the Constitutional Court, since the beginning of their operation, 1st January 1990, have significantly restricted the legislative activity of the Parliament and the Government, because the body has enforced the provisions of the Constitution against actual-political influences without any compromise. Beside these two branches of power, however the Constitutional Court has relatively few points of contact with the third branch: the courts. Because the Constitutional Court may review or refuse the review of the directives of the Supreme Court, the Supreme Court may come into on unifying the case law conflict with the Constitutional Court. It is of special actuality at present, because the reform of the regulation on the Constitutional Court is the question of the day. The Ministry of Justice has published the draft of the amendment of the Constitution (hereinafter Constamend1) and the draft of the new Act on the Constitutional Court (hereinafter ConstCourt bill1) in its

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home page[1] and in an altered and revised form they soon appeared in the home page of the Parliament too.[2] (Hereinafter the revised version will be referred to as Constamend2 and ConstCourt bill2.) These drafts may obviously be revised before adoption. In this respect the declarations of certain public figures; ministers, the President of the Supreme Court and Constitutional Court justices will help to understand this issue more properly.

The present study will examine the question from two angles. On the one hand, from the point of view if upon the present regulation the Constitutional Court is entitled to review the constitutionality of the directives of the Supreme Court on unifying the case law, on the other hand from the aspect if the future regulation should coercively involve this possibility.

I. The possibility for the examination on the ground of the prevailing legal situation

In the Hungarian constitutional system according to the Constitution, the highest judicial forum is the Supreme Court (Article 47, Paragraph 1) and the highest organ safeguarding the Constitution is the Constitutional Court. Nevertheless, the Constitutional Court does not form part of the regular judicial forum-system and there is no subordinating or superordinating relation between the two organs. The Hungarian legal system, as opposed to the German solution, does not make the possibility to review the constitutionality of the judicial decisions by the Constitutional Court. Making use of the authority of the Constitutional Court, which is named constitutional complaint in Hungary, the *unconstitutional law* forming the ground of a concrete case may be contested before the Constitutional Court and if it turns out right, the procedure may be restarted in a legal environment compatible with the fundamental law.

The Constitutional Court thus is not entitled to examine single judicial decisions. It is doubtful, however if the directives of normative character unifying the case law, handed down by the Supreme Court may be the subject of a constitutional control, and whether it was necessary and proper to involve them in the new draft. The question arises because the directives on unifying the case law are of normative character, but neither the Constitution nor the Act on the Constitutional Court provide an *expressis verbis* statement on the possibility of a Constitutional Court review. The question of a review is due to the normativity of the directives on unifying the case law.

[1] www.im.hu
[2] www.mkogy.hu

1. A few characteristics of directives on unifying the case law

a) Pursuant to Article 47, Paragraph 2 of the Constitution the Supreme Court shall assure the uniformity of the administration of justice by the courts[3] and its resolutions concerning uniformity shall be binding on all the courts.[4] The role of the directives on unifying the case law is to ensure the uniformity of the judicature. In the course of judicial discretion it may happen that given legal principles are construed in different ways, consequently in cases of similar character, decisions of different content may be passed. The uniformity of law enforcement should be ensured in order to eliminate this problem. For the sake of the course, the Supreme Court[5] pass directives on unifying the case law[6] and

[3] This provision of the Constitution does not preclude that an act would amplify the ways of task fulfilment of the Supreme Court—beside directives on unifying the case law—for the sake of the fulfilment of this constitutional duty. It was done by the Act on the Judicial System when provided on the publication of court decisions of principle. On the ground of the provisions of the Act on the Judicial System, it can be stated the regulation of the publication of court decisions of principle wanted to entitle all the judges and courts to contribute to the improvement of legal legislation. 12/2001 (14.05) Const. Court resolution, ABH 2001. 163, 173.

[4] Due to this provision of the Constitution, the force of directives on unifying the case law necessarily has an effect on litigants through the application of law, by transmitting the ruling based on the obligatory interpretation of law. This general force of directives on unifying the case law ensuing from Article 47, paragraph 2 of the Constitution, which is binding on the courts, may be effective after it has been passed. Cases involved in the acts of procedure may be different if the directives on unifying the case law (may) directly allude to the basic case(s) as well. 12/2001 (14. 05) Const. Court resolution, ABH 2001. 163, 173.

[5] Article 33 of the Act on the Judicial System regulates the role of colleges in the procedure of the Paragraph 1 analyses the practice of the courts and forms an opinion in contested questions of law enforcement, so as to provide a uniform litigation practice. According to the Constitutional Court this provision does not infringe legal security, because in this case the problem is not if the colleges of the Supreme Court or county courts decide in certain professional matters definitively and with a binding force. The rule concerning college opinion in questions of law enforcement involved in the Act on the Judicial System merely a provision that promotes the ruling upon a disputed question of law. The other rules of the Act on the Judicial System, which provide proposal making and initiative right to college leaders for the launching of a unity of law procedure, also corroborate this fact. It may happen—according to the wording of the act "if necessary"—, when the uniformity of law enforcement requires more than a college opinion. 12/2001 (14. 05) Const. Court resolution, ABH 2001. 163, 174.

[6] According to the view of the Constitutional Court, the Act on the Judicial System lays emphasis on the uniform judgement of questions of principle and for this sake within

proclaim judicial decisions of principle.[7] The directives on unifying the case law must be published in the Official Journal of the Republic of Hungary. According to the Constitutional Court, this provision has fulfilled the requirement relevant from the point of view of legal security, namely the cognizability and predictable application of the directives on unifying the case law, since the persons and institutions concerned may get knowledge of the decision of the Supreme Court in a proper way.[8] Thus, a directive on unifying the case law is a normative decision of the Supreme Court released in a procedure regulated by an act, which is binding on all the courts so the content involved in a directive on unifying the case law has a binding force upon all the subjects taking part in the judicial procedure. As a consequence of this, the specification of the directives on unifying the case law among the normative provisions is debated even in the special literature. Related to this the following remarks must be made.

b) The system of sources of law in the Republic of Hungary is regulated partly in the Constitution and partly in Act 11 of 1987 on Legislation. The system of sources of law is divided into two parts by the Act. On the one hand, it distinguishes provisions entailing rights and duties upon subjects, on the other hand specifies other legal means of the so-called state administration, like decisions and directives. The latter have no binding force on subjects, their function *generally* is to provide the uniform direction within the given

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the court organisation system regulates the "mechanism", through which court decisions deciding questions of principle may get to higher judicial forums, finally to the Supreme Court. Thus, the procedure concerning decisions of principle is regulated in the Act on the Judicial System. If the court decision of principle is submitted to the Supreme Court, the duties and rights of the Supreme Court, laid down in the Constitution are to be followed: namely: the uniformity of the law enforcement of the courts. If the Supreme Court require to form an opinion of principle expressed in a court ruling widely known in the litigation practice, the decision may be published. In this way, judicial practice may be properly oriented. The Act on the Judicial System does not refer to the observance of court rulings, and does not contain provisions like the Constitution does in relation to the directives on unifying the case. According to the Constitutional Court, a directive on unifying the case may be initiated if the reverse practice has developed due to the neglect of a court ruling previously published by the courts. Nevertheless, the directives on unifying the case law as a consequence of this, have a binding force on the courts. Thus the possibility that court rulings of principle may be published, will not bring about legal insecurity, because, contrasted with unity of law resolutions, it is not compulsory. 12/2001. (14. 05) Const. Court resolution, ABH 2001. 163, 173–174.

[7] Petrétei, J.: *Magyar alkotmányjog II. Államszervezet.* [Hungarian Constitutional Law II, State Organisation]. Budapest–Pécs, 2000. 213.

[8] 12/2001 (14. 05) Const. Court resolution, ABH 2001. 163, 169.

organisation. The directives of the Supreme Court on unifying the case law are mentioned neither among the laws, nor among the other legal means of state administration.

c) By virtue of Article 32/A of the Constitution the Constitutional Court shall review the constitutionality of laws and attend to the duties assigned to its competence by law. On this ground does Act 32 of 1989 on the Constitutional Court relegate the subsequent constitutional review of other legal means of state administration within the competence of this body.[9]

d) There may arise the question, however if the Constitutional Court is entitled to review, besides laws and statutes and other legal means of state administration, other acts of normative character, not relegated within its authority, for instance directives on unifying the case law. In order to find the answer it is worth examining the major characteristics of relevant directives. First of all, it must be stated that besides unifying the case law directives, certain decisions of the court may also have a normative content. In a certain sphere, for instance the formally binding force of judicial precedents has been recognised. Namely pursuant to Article 29 on the Act on the Judicial System,[10] a division of the Supreme Court in legal matters may reach a divergent ruling from that of another division of the Supreme Court, if the unifying the case law directive passed in the unifying procedure on its initiation provides that.[11] Nevertheless the primary aim of the above mentioned provision of the Act on the Judicial System is not to express the normative character but to safeguard legal security by providing the uniformity of litigation within the supreme forum of jurisdiction. Normative character refers here just to the relation among the unifying the case law divisions of the Supreme Court, and its purpose is to eliminate their different interpretation of law. Because of this, it has no direct effect on the litigation of the lower courts. They are effected exclusively by a directives on unifying the case law passed in the procedure referred to above, which—due to its abstract character—has a binding force on all the courts, thus,

[9] Cf. with 27/1995 (15. 05) Const. Court resolution. ABH (the collection of the resolutions of the Constitutional Court) 1995. 129, 135.

[10] Act 66 of 1997.

[11] Rácz, A.: Alapvető jogok és jogforrások [Fundamental rights and sources of law]. In: *Emlékkönyv Ádám Antal egyetemi tanár születésének 70. évfordulójára* [Book published in honour of Professor Antal, Ádám on the occasion of the 70th anniversary of his birth] (ed.: Petrétei, J.). Pécs, 2000. 187. In relation to this it is worth mentioning that binding force related to the courts can be regarded only as temporary since it will exist until the directive on unifying the case law is passed in the subject. After that, precedents will lose their—very narrow-ranging—binding force.

concerning the subjects in the judicial process it has an effect of *de facto* provision.

e) As concerns unifying the case law, in 1976 a member of the Constitutional Court *István Kukorelli,* expounded his still pertinent opinion related to normative acts—*directives, decisions of principle—of that time*, which cannot be passed at present, however the existing ones cannot be neglected either.[12] According to this, general norms, which are launched by the governing organs within a given organizational system upon the right of hierarchy, may be regarded as controlling norms. The major function of these norms is to ensure the uniform and concerted operation of different organs within the given organization. "Governing norms join provisions bearing a general binding force, interpret and explain their content but they should not primarily regulate social relations."[13] The practice of the Supreme Court puts directives on unifying the case law closer to controlling norms. The approach, according to which the directives on unifying the case law of the Supreme Court form a separate group of legal directives, is similar to this. Namely, these norms of law interpretation—as opposed to other directives—pursuant to the provision of the Constitution are binding also formally on the courts.[14]

f) Nevertheless, according to other opinions directives on unifying the case law not even in their effect bear provisional characteristics. Pursuant to this view, directives on unifying the case law is a constitutional institution of law, which joins the exclusive jurisdictional authority of the courts and upon the authorization of the Constitution falls within the power of the Supreme Court. This is the highest level judicial interpretation of law, bearing the aim to ensure the constitutional obligation connected to the principle of legal

[12] According to the statement of the Constitutional Court the survival of directives, decisions of principle and divisional opinions will not infringe legal security until a unifying the case law of different content is created. In order to provide the uniform litigation practice, compared to the previous rather complicated means of professional administration, directives on unifying the case law denote a new "quality", by no means. Article 2, Paragraph 1 of the Constitution does not prove necessity to review unjustified en masse previous directives, decisions of principle and divisional opinions limited to deadlines. The issue of directives, decisions of principle and college opinions had adequate constitutional and statutory basis (Act 46 of 1972, Article 46 and 499, passing them—just like in the case of unity of law resolution—falls within the authority of the Supreme Court. 12/2001 (14. 05) Const. Court resolution. ABH 2001. 163, 175.

[13] Kukorelli, I.: A Legfelsőbb Bíróság normaalkotó tevékenységéről [On the norm creating activity of the Supreme Court]. *Jogtudományi Közlöny*, 1976/11. 658.

[14] Rácz: *op. cit.*, 187.

security.[15] According to the representative of this viewpoint, interpretation can never get to the field of law enforcement by chance. At this point, it must be noted that *it is true as a requirement, but as a possibility, it cannot be excluded.*

Since there is quite a large number of similar, colliding views, it is worth examining the place of the directives on unifying the case law in the system of normative acts, and through this, the possibility for a Constitutional Court review.

2. On the Constitutional Court review of the directives on unifying the case

a) The normative character as the preliminary condition for the Constitutional Court control

The institution of the Constitutional Court, as a basic rule, was intended to review normative acts.[16] Article 46, Paragraph 2 of the Act on the Judicial System has taken the individual decisions expressively off the review of the Constitutional Court, since they are not decisions of a normative content. The Constitutional Court has rejected the constitutional review of individual parliamentary decisions several occasions on the ground that they are single acts without a normative binding force, thus pursuant to the Act on the Judicial System, their review falls off the authority of the Constitutional Court.[17] A few other exceptions, which however fall within the regulation sphere of special acts, were also made. The exceptions are as follows.

Pursuant to the Act on the Electoral System on matters of a national referendum or popular initiative, a complaint can be submitted to the Constitutional Court. In cases like that, the Court obviously acts upon single decisions.[18]

The competence of the Constitutional Court safeguarding the self-governments and autonomy of institutions of higher education also form an exception. On the ground of the Act on Higher Education, provisions and *single* decisions

[15] Szabó, Gy.: A bírói precedensjog kezdetei Magyarországon [The origins of judicial precedent law in Hungary]. In: *Ötödik Magyar Jogászgyűlés* [The Fifth Hungarian Jurist Assembly]. Budapest, 2000. 52.

[16] Individual, concrete court rulings can be regarded neither as norms, nor as legal sources, thus the review of their constitutionality does not fall under the powers of the Constitutional Court. However, no genuine constitutional examination of Constitutional Court acts of normative effect has been performed yet.

[17] Cf. e.g. with 52/1993 (07.10) Const. Court resolution ABH 1993. 407, 408) and 15/1999 (03. 06) Const. Court resolution ABH 1999. 407, 401).

[18] Act C of 1997, Article 130, Paragraph 1.

infringing the self-government and autonomy of higher educations can be challenged before the Constitutional Court.[19]

In the case of the dissolution of a local self-government, the Constitutional Court may express its opinion on the unconstitutional operation of the body, thus it will take measures definitely in a single case.[20]

Participation in the impeachment procedure against the President of the Republic may also be regarded as a single case.[21]

To sum up, the Constitutional Court generally exercises a norm control, but within a well-defined sphere, it may also undertake the constitutional review of acts of a normative character, and a Constitutional Court procedure in other single matters.

In the Hungarian law, within the acts of normative character there are also specified *judicial decisions*, since there are some provisions to express the normative character of certain court rulings.[22] Nevertheless, single court decisions—rulings and injunctions—show up with a binding force mainly in the relations between the parties. The directives on unifying the case law referred to above are undoubtedly bear a normative character: their normativity arises from Article 47, Paragraph 2 of the Constitution. According to this, "the Supreme Court shall assure the uniformity of the administration of justice by the courts and its directives on unifying the case law shall be binding for all the courts".

b) Constitutional Court procedure against provisions of normative character

ba) By virtue of Article 32/A of the Constitution, the Constitutional Court shall review the constitutionality of laws and attend to the duties assigned to its jurisdiction by law. On the ground of laws and under Article 1 of the Constitution, the different legal means of state administration are also under a subsequent Constitutional Court norm control. Directives on unifying the case law however formally do not belong to any categories and no other provision refers these acts under the procedure of the Constitutional Court. Notwithstanding, directives on unifying the case law are obviously of a normative

[19] Act 80 of 1993, Article 65, Paragraph 2. The bill on the Constitutional Court intends to take this authority off the Constitutional Court.

[20] Article 19, Paragraph 3, section 1 of the Constitution. The Act on the Constitutional. Court would refer the act of dissolution within the authority of the Constitutional Court.

[21] Article 31/A, Paragraph 6 of the Constitution.

[22] Pursuant to Article 7 of the Act 66 of 1997 on the Judicial System of the courts, court rulings have a general binding force, even if in a case the court verifies its *sphere of authority* or the *lack of its authority*. Nevertheless, it must be stated that in the latter case it is a question of procedure and not of a content obligation.

character, they are binding directly on the courts but indirectly they have a binding force on all the subjects who are concerned by the court procedure.[23]

Related to the problems scrutinised, it must be emphasized even if the Constitutional Court is the supreme organ safeguarding the Constitution, still it has no overall right for review, and a right to nullify acts. There is not a single provision to state that the Constitutional Court has a right of review concerning all the acts bearing a normative content. The fact that every provision and other legal means of state administration are under Constitutional Court control does not mean that all the norms should fall under the control, since provision as a notion is not the synonym of provision of a normative content. It does not mean however that the organs that issue provisions of normative content could neglect constitutional aspects drafted by the Constitutional Court.[24] Because of this, it is an important requirement that directives on unifying the case law should meet the Constitution and this appropriateness can be provided exclusively by the Constitutional Court.

bb) A frequent argument against the Constitutional Court review of directives on unifying the case law is that directives on unifying the case law expound only the content of decisions, consequently they cannot create a new normative content so their review is not justified. Notwithstanding, expounding and making the norm content concrete denotes that *one potential* meaning of the norm is made compulsory. As a consequence of this, directives on unifying the case law—by selecting one of the several interpretations and regarding it as a norm—make the legislators' wish more precise and unambiguous and in this way it will appear for the subjects as a new binding interpretation, *quasi* a new norm.[25] It can be regarded as that, because the original norm bears several

[23] In this respect, it is interesting that under Article 32, Paragraph 6 of the Act on the Judicial System "directives on unifying the case law, if the law makes no exception, has no binding force on the parties". On this ground it can be stated that within a certain sphere the law may extend the force of directives on unifying the case law to the parties. Thus at this time these directives can be directly binding on the parties too. According to the Constitutional Court, whether this provision corresponds to the Constitution must be examined upon the concrete regulation case by case. Cf. with 12/2001 (14. 05) Const. Court resolution. ABH 2001. 163, 172.

[24] Sólyom, L.: To the Tenth Anniversary of Constitutional Review. In: *A megtalált Alkotmány? A magyar alapjogi bíráskodás első kilenc éve* [The Constitution found? The First Nine Years of Hungarian Constitutional Review on Fundamental Rights] (ed.: Halmai, G.). Budapest, 2000. 25.

[25] The norm-character in itself is established by taking one of the several interpretations and recognising that as exemplary. This, however means the narrowing of the potential narrowing of the norm, thus it can be regarded as the creation of a new norm.

potential meanings and content, the application of which—with one exception—is excluded by a directive on unifying the case law. This exclusion, besides the exposure of the content, leads to the restriction of the norm content. Thus, the argument mentioned above is not suitable for the denial of the Constitutional Court review of directives on unifying the case law. On the other hand, the *Constitutional Court*—in accordance with its constant practice—judges acts *according to their content and not to their names.* In this way has the judicial body examined circular letters, ordinances etc.,[26] which do not belong either to laws, not to other means of state administration, but according to their content they act in that way. In an analogue way, thus directives on unifying the case law may also fall within this sphere of examination, since they appear as new norms.[27]

bc) Directives on unifying the case law reveal the content of provisions and provide compulsory interpretation on the content of laws. If the Constitutional Court is entitled to the constitutional review of laws, they must be entitled to the review of an unconstitutional interpretation as well.[28] A decree however rarely becomes independent, administered law: in most of the cases, the legislators' activity is also required. Provided that the norm reviewed by the Constitutional Court is the subject of a directive on unifying the case law as well, the directive on unifying the case law, together with the norm must be referred within the examination sphere of the Constitutional Court. The position taken by the Constitutional Court in this respect is that the former and present compulsory directives of the Supreme Court are regarded as norms.[29]

[26] Cf. e.g. with 60/1992 (17. 11.) Const. Court resolution. ABH 1992. 275, 277.

[27] Kukorelli, István in relation to this speaks expressively about the "legislative practice" of the Supreme Court. Kukorelli: *op. cit.*, 659.

[28] "It cannot be neglected that the Constitutional Court should judge and nullify the directive or principle of a decision of the Supreme Court which supplements the ambiguous law enforcement with an unconstitutional law interpretation..., since from the fact that the Constitutional Court is entitled to judge the constitutionality of an act, it follows that it is empowered to judge the authentic interpretation of the act too." Ádám, A.: A jogszabályok alkotmánybírósági ellenőrzéséről [On the constitutional Court control of provisions]. *Jogtudományi Közlöny*, 1992/12. 528. Sólyom, László states "like in the more the less, in the right of annulment of a provision, the exclusion of certain unconstitutional applications is also included." Sólyom: *op. cit.*, 32.

[29] Holló, A.: A bírói precedensjog kezdetei Magyarországon [The origins of judicial precedent law in Hungary]. In: *Ötödik Magyar Jogászgyűlés. op. cit.*, 44.

c) Further arguments on the Constitutional Court control of directives on unifying the case law

ca) The Constitutional Court—as I have already referred to—has taken measures in acts which according to their names could not belong to the procedure of the Constitutional Court, but in their content their effect is equivalent to acts falling under the review of the Constitutional Court. At the beginning of its operation the Court faced the fact that the central administrative organs issued their acts of normative content not under the name specified in the Act on legislation, such as e.g.: injunction, but under different names like circular letter or information.[30] Organs of lower level applied these provisions of normative content during their procedure, thus they had a binding force on the subjects. These circular letters and ordinances *did not have a provisional ground*, but due to the right of injunction etc. of the superior organ, *in their effect* were equal to the directives on unifying the case law.[31] Their force—apparently—covered well-defined groups of well-defined organs, but in an indirect way, they made an effect on all the subjects who had any contact with the organization system. *In a formal way*, merely on the ground of their name the Constitutional Court could not have reviewed these acts, but it expounded that these provisions of normative content actually qualified as acts named in the Act on legislation, thus according to their content they were regarded as that and the procedure was applied. An analogue argumentation may be applied upon directives on unifying the case law too: on the ground of their names—formally—their Constitutional Court review is made impossible, but due to their content, because of their character and concerning other constitutional principles and fundamental law provisions referred to above, they can also undergo a norm control. It must be added that the acts mentioned did not bear a provisional base (merely because of this fact, promulgating them was unlawful and unconstitutional), but directives on unifying the case law have a constitutional basis too. These acts, due to the force of the Constitution bind subjects in an indirect way and they are enforceable. Notwithstanding, the force of a directive on unifying the case law indirectly extends on the parties by all means, since the courts are obliged to apply them.[32] The requirement concerning

[30] Cf. with 60/1992 (17. 11.) Const. Court resolution.

[31] This equal character naturally appears within a different organization.

[32] By virtue of Article 32 of the Act on the Judicial System "directives on unifying the case law, if no exception is made by the law, have no binding force on the subjects". Regardless that this provision does not harmonize completely with Article 47 of the Constitution, because that makes directives on unifying the case law obligatory for the courts, this regulation seems to be senseless.

the review of directives on unifying the case law thus seems to be well grounded.

cb) The Constitutional Court expounded that Article 32/A of the Constitution gives rise only to the authority of a subsequent norm control, but this authority is "forcible and comprehensive".[33] The historical interpretation of the constitutional rule makes clear that according to the intent of the legislation all decrees and other legal means of state administration, *without exception*, should fall under a Constitutional Court control.

cc) Beyond this, since the courts constitute the third branch of power in the system of the separation of powers, it is unjustified to exclude acts which are promulgated within the judicial system and which make – either directly or indirectly – a normative effect on the subjects, from under the control of the Constitutional Court. Whilst the normative acts of the other two branches of power – the legislative and the executive power – fall under this control, what is more, form the essence of the activity of the Constitutional Court. László *Sólyom,* states if "the monopoly of the Constitutional Court to interpret the Constitution has a positive legal basis, it can be an effective aid to justify the relationship among the courts. *In lack of an express provision this provision may be deduced from the duty of the Constitutional Court.*"[34]

d) Further viewpoints and proposals for solution, published in the special literature

da) According to a clear-cut opinion, since all the courts are bound to apply the directives on unifying the case law of the Supreme Court, directives on unifying the case law indirectly bear a binding force and character on all the participants of the judicial procedure. Directives on unifying the case law thus have a normative force, they act as norms: a directive on unifying the case law is an abstract judicial decision with a normative force providing principles, which should be followed by judges in subsequent cases.[35] Thus, directives on unifying the case law, concerning the way of their application and consequences obviously bear similarities with legal norms.[36] The difference between directives on unifying the case law and legal norms is in the regulating subject, in the

[33] 4/1997 (22. 01) Const. Court resolution. ABH 1997. 41, 49.

[34] Sólyom: *op. cit.*, 26 8 (italics mine—P. T.).

[35] Gadó, G.: Az alkotmányjogi panasszal és a jogegységi határozattal összefüggő szabályozási kérdések [Questions of regulation related to constitutional complaint and directives on unifying the case law]. *Magyar Jog,* 2000/9. 540.

[36] *Ibid.*

matter regulated and in the manner, the rule is recognised. The effectiveness of the created norm and in connection with this, the relation of the norm with the Constitution, there is no difference.[37] Pursuant to this opinion, when facing unconstitutional directives on unifying the case law the Constitutional Court can choose from two possibilities. The first one is to undertake a review in the form of a subsequent norm control—if this right is not denied—, the second one is to nullify the legal norm[38] upon the concept of "living law". However, the latter version could prevail if the so-called "genuine" constitutional complaint was involved in the Hungarian legal system. "In lack of this, the constitutional control of directives on unifying the case law cannot be neglected."[39] Unlike the author, I regard the nullification of directives on unifying the case law and not that of basic provisions as expedient and justified.

db) The present president of the Constitutional Court holds an opposite view. According to his opinion the Constitutional Court review in relation to directives on unifying the case law should be confided to the verification of the constitutional requirement. If the Supreme Court neglected the constitutional requirement in the process of carrying a directive on unifying the case law,[40] the Constitutional Court review of live law could be realized. The author states[41] "a constitutional requirement thus will not institutionalise in the primary scope for action of the Constitutional Court, namely in legislation, but it functions as the aiming of law enforcement." Starting from the constitutional position of the Constitutional Court, it can be verified the Constitutional Court is authorized to classify constitutionality, to state the conformity to the Constitution and to provide the official interpretation of the Constitution. Consequently, the interpretation, given in a directive on unifying the case law by the Supreme Court, if it is different from the interpretation of the Constitutional

[37] Gadó: *op. cit.*, 51. According to Gadó there is no real difference between directives on unifying the case law and legal norms concerning the relation between the norm and the Constitution.

[38] Naturally, it is an unconstitutional interpretation of law, distorted by "living law".

[39] Gadó: *op. cit.*, 541. The author states that the creation of the statutory conditions of an abstract norm control towards directives on unifying the case law requires a consequent regulation.

[40] In this case, it is obviously the drafting of a new directive on unifying the case law or the amendment of an old one, because the Supreme Court could not consider the subsequent Constitutional Court direction in the process of reaching directive on unifying the case law.

[41] Holló, A.: Az alapvető jogok védelme [The protection of fundamental rights]. In: *A magyar alkotmányosság ezer éve* [Thousand years of Hungarian constitutionality]. Scientific conference (ed.: Mikolasek, S.). Esztergom, 1999. 16.

Court is not a competent interpretation.[42] According to his view, there should be developed "a procedure of the Constitutional Court and that of the Supreme Court built on each other in all the directives on unifying the case law in which the interpretation of the given thesis of the Constitution can be regarded as a genuine preliminary question. The procedure on a directive on unifying the case law – on the standard of the legal solution referred to above – should be suspended until the Constitutional Court's interpretation of the "preliminary question" of the given provision of the Constitution, initiated by the President of the Supreme Court. In such a "complex" procedure, the Constitutional Court and the Supreme Court would express their own constitutional position. Otherwise, the constitutionality of a directive on unifying the case law may be the subject of a Constitutional Court review."[43] It is worth mentioning here that the previous deputy-president also stated that the constitutional review of the directives on unifying the case law should fall within the competence of the Constitutional Court.[44]

dc) According to the previous Minister of Justice the Constitutional Court's review of directives on unifying the case law may be justified, because they bear a normative function. Since the competence would be introduced in the Constitution, the problem of constitutionality could not occur either. She thinks the competence would not transform the hierarchy of jurisdiction, because it is a concrete matter of the Constitutional Court, thus the Court had no competence to review decisions in concrete cases. The minister outlined two variants of legal consequence. In this way, the Constitutional Court should either nullify the unconstitutional directive on unifying the case law or verify the unconstitutionality and ask the Supreme Court "for remedy". In her opinion, in that case nobody would influence the Supreme Court. It is important to state that because the review is of constitutional respect and does not extend on concrete matters, it would be irrelevant in the first case too. Consequently, the place of the Supreme Court in the hierarchy of the judicial system would remain intact.

dd) Nevertheless, even well-known constitutional lawyers think that according to the regulation in force, the Constitutional Court is not entitled to review these acts, and had it been allowed by the amendment, the result would

[42] *Ibid.*

[43] *Ibid.*

[44] Lábady, T.: A helyét kereső alkotmánybíráskodás [Constitutional jurisdiction seeking its place]. *Világosság*, 1993/1. 38.

be the amplification of the sphere of norms reviewed.[45] In connection with the introduction of the institution they expounded that because of the *ex nunc* nullification, that would not infringe legal security. At the same time, they found it constitutionally perilous that while legal sources are involved in the Act on Legislation, there is no reference to directives on unifying the case law, although in their content they may be regarded as legal norm. In their opinion, in this case review would over-extend the law.

de) The ex-deputy president of the Supreme Court also argued against the Constitutional Court review of directives on unifying the case law. He stated "Pursuant to Article 38, Paragraph 1 of the Act on the Constitutional Court, the interpretative activity of the Court extends on the constitutional review of an applicable law and during this procedure they take a stand on the fact if the law may have an interpretation to ensure the compliance with the Constitution. Due to the creation of directives on unifying the case law, the legislator exclusively entrusted to the Supreme Court with the power at the highest-level of constitutional review of judicial interpretation. That is why pursuant to the Constitution in force, the Constitutional Court is not entitled to give a constitutional review of directives on unifying the case law."[46]

The viewpoint of the author, however at several points is not properly grounded. Firstly, under Article 38 of the Act on the Constitutional Court judges may really examine the constitutionality of a law, but Article 38 provides that the review of constitutionality of law falls within the authority of the Constitutional Court. Pursuant to Article 38, Paragraph 1 of the Act on the Constitutional Court, "the judge—besides the suspension of the judicial procedure—shall initiate the procedure of the Constitutional Court if in the case before him he has to apply a law or any other legal means of state administration in his judgement, the unconstitutionality of which he perceives." Secondly, the provision of the Act on the Constitutional Court cited above does not refer to directives on unifying the case law but to laws *providing the ground* of judicial decisions. Thirdly, the fact that a judge may have a constitutional review of laws during the procedure *does not entail* that the creation of the institution of directives on unifying the case law entrusted to secure the constitutionality of judicial law interpretation *exclusively* on the Supreme Court. Notwithstanding, there is no logical relation between these two statements. The aim of the creation of directives on unifying the case law was not to provide constitutionality, but to guarantee the uniformity of judicial

[45] Interview with Albert Takács, and Ibolya Dávid. Radio Kossuth, Program 'sixteen hours'. 09. September 2000.

[46] Szabó: *op. cit.*, 52.

interpretation of legal norms. Above this, it is worth mentioning our concern is not to secure the constitutionality by directives on unifying the case law but to secure the constitutionality of directives on unifying the case law and there is a sharp difference between these two. Fourthly, by virtue of Article 38 of the Act on the Constitutional Court constitutional review can not be exclusive, because if the judge does not turn to the Constitutional Court, any of the parties may do so within sixty days after the decision enters into force. Namely, pursuant to Article 48 of the Act on the Constitutional Court, "Anyone whose rights safeguarded in the Constitution are infringed, may lodge a constitutional complaint to the Constitutional Court, if his grievance is due to the application of an unconstitutional law and has exhausted all his resource of remedy or no other remedy is provided for him. The constitutional complaint may be lodged in, in writing, within sixty days after the delivery of the effective decision." If the constitutional complaint is well grounded, the court must provide remedy for the individual. I think these counter-arguments can refute the view-points above, thus even the statement that the Constitutional Court is not entitled to review the constitutionality of a directive on unifying the case law carries no conviction.

df) The deputy president of the supreme judicial body expressed his opinion in connection with the amendment of regulation too. According to this, the examination of the constitutional requirement decisive in the application of the norm, would be performed within the framework of a norm control, thus it was unreasonable and inappropriate to provide an independent sphere of authority for the Constitutional Court for the constitutional review of directives on unifying the case law. Thus even if the constitutional requirements were specified in a different way, the Constitutional Court could not decide on directives on unifying the case law (could not repeal or amend them).[47] Concerning the proposal however it may be criticised that the Constitutional Court *will not examine but specify* the constitutional requirement: the examination may cover just facts involved in the constitutional requirements, in a subsequent Constitutional Court procedure. On the other hand, from the citation it follows that the author does not consider the directives on unifying the case law as norms, since he makes a distinction between the review of directives on unifying the case law and norm control, which in my opinion is logically unjustified.

Finally, some conclusions may be drawn from the previous decisions of the Constitutional Court on the interpretation of its competence, on the ground of

[47] Szabó: *op. cit.*, 53

which directives on unifying the case law may be involved into the sphere of examination too.

3. Some decisions of the Constitutional Court concerning the interpretation of its competence

It is worthy to scrutinize here the decisions of the Constitutional Court in which the body exercised its competence ambiguously recorded in law, in a concrete way. The existence of such cases however may prove in itself that *a Constitutional Court's procedure does not need to have an expressis verbis provisional ground if the procedural competence may be deduced from other provisions or legal principles.* Since the Constitutional Court's right for the review of directives on unifying the case law is not obligatorily specified by law, that must be deduced, provided it is possible, from different constitutional or other provisions. The supporting arguments are the following:

a) The Constitutional Court held[48] that the constitutionality of an international treaty may be reviewed not only pursuant to Article 1 a) of the Act on the Constitutional Court, within a preliminary norm-control procedure, but also by virtue of Article 1 b) of the Act on the Constitutional Court within a subsequent norm-control procedure. In the codification work of the Act on the Constitutional Court and the Constitution, there is not a single data to prove that legislators wanted to evade from below the norm control any kind of acts—for instance the act promulgating international treaties. The potential conditions that—with special regard to the circumstances of constitutionalisation and to the drafting of the Act on the Constitutional Court—this case of subsequent norm control was not considered separately that time, will not have any effect on the right of the Constitutional Court to *concretise its sphere of authority by interpretation of legal norms.* The decision of the Constitutional Court construing the authority of its own have a general binding force, just like any other of its decisions. In this interpretation the Constitutional Court is guided partly by the wish *to fulfil its specific duty*, partly by the example of other constitutional courts and in this way it follows the solutions required by the development necessary for the administration of the Constitutional Court. The definition of "constitutional requirements" for instance has rendered the solution of "constitution-conform interpretation" which is generally applied constitutional courts all over the world—but it *frequently bears a separate statutory ground*—introduced into Hungarian law and adjusted it to the standpoint expounded on the competence to interpret legal norms. In accordance

[48] Const. Court resolution 1997, 41, 49.

with its previous decisions on the interpretation of competence, the Constitutional Court *besides completely performing* the constitutional authority concerning a subsequent norm control takes also the foreign examples of the constitutional review of international treaties into account. Finally, the Constitutional Court refers to the fact that the review of the constitutionality of international treaties remains within the framework of its constitutional duty: subsequent norm control and does not allude to the sphere of authority and duty of other branches of power.[49]

The Constitutional Court thus through the interpretation of competence, by the correlation of constitutional provisions and through the application of different—historical, logical etc.—interpretation methods stated and corroborated the existence of an authority not declared *expressis verbis* in a provision, but which may be deduced from the text of the law. The Court descriptively showed that not even in the subsequent norm-control procedure did they apply the right of annulment provided by law, but the constitution conform interpretation of the Constitution, a method which conforms to the protection of the Constitution and the principle of constitutionality which however bears no statutory ground. Thus through the interpretation and analysis of the principles and provisions of the Constitution certain issues of authority may be deduced, which otherwise are not named definitely among the provisions.

b) The Constitutional Court applied the method of extensive or restrictive interpretation several times and in connection with its different competences. These decisions construing the sphere of authority well demonstrate that the Court fulfil their authority by taking the principle of the separation of powers into account, in accordance with their constitutional status.[50] According to the Constitutional Court, in the process of the interpretation of their authority "the principle of the separation of powers should be taken into account to a greater extent, since that is the most important organizational and operational principle of the Hungarian state organisation".[51] The Court thus exercises its authority by considering its constitutional legal status, by respecting the principle of the separation of powers not merely through the mechanic application of express provisions but by taking all the relevant legal principles and values,[52] arising from the Constitution into consideration. The same can be referred to the acts

[49] Const. Court resolution 1997, 41, 49.

[50] E.g. 16/1991 (20. 04) and 31/1990 (18.12) Const. Court resolutions.

[51] Const. Court resolution 1990, 136, 137.

[52] In connection with constitutional values see Ádám, A.: *Alkotmányi értékek és alkotmánybíráskodás* [Constitutional values and constitutional jurisdiction]. Budapest, 1998. 25–83.

reviewed: in the course of the constitutional review the Court takes other provisions, principles and values into account. In relation to the directives on unifying the case law—by having regard for the content involved in the Constitutional Court decisions referred to above—it can be verified that in the process of a potential constitutional review the principle of the separation of powers is not infringed. As a consequence of the constitutional review of directives on unifying the case law, *the Constitutional Court will not become a part of the judicial system, will not rise above the Supreme Court*, because it is entitled to review the normative acts of the Supreme Court exclusively from a constitutional point of view, and cannot be in favour of the fact if their content is right or wrong, well-grounded or unfounded. The Constitutional Court is not entitled to verify that the standpoint of the Supreme Court taken up in a directive on unifying the case law is legally improper, misinterpreted, or mistaken concerning civil, criminal, administrative etc. law. The Constitutional Court may take a stand exclusively in question of constitutionality but in those, they may *definitely* take a stand.

c) On the ground of the fact sorted out above, it can be seen that the Constitutional Court may exercise the review of the directives on unifying the case law of the Supreme Court in lack of an *expressis verbis* constitutional or statutory authorisation as well. This right would be excluded only by an express prohibition of the Constitution or an act. Because of this, the Supreme Court (the intention of which is that the Constitutional Court could not proceed against their normative acts), in order to realise their intention, should "persuade" the Parliament to exempt directives on unifying the case law from below the Constitutional Court control with an express statutory prohibition. *It is important, if the Supreme Court does not wish to provide the possibility for the review, it is not enough to attain or urge that the Parliament should leave the issue unregulated. At this time, however it will be transferred to the competence of the Constitutional Court* and that body will decide in the question what sort of possibility exists against directives on unifying the case law, related to a concrete matter. *In lack of an unambiguous constitutional or statutory prohibition*, if only the regulating element concerning the review is "made to be omitted" from the act, the Constitutional Court may—without an express provisional ground, just by taking other principles, derivable from the Constitution and by providing the highest level safeguard of the Constitution, fulfil the review and in a given case, the annulment of a directive on unifying the case law. The Constitutional Court however, has undertaken a similar activity. Because of this, even if the new text of the Constitution or the new Act on the Constitutional Court did not express the possibility of a Constitu-

tional Court review of directives in unifying the case law, it would not definitely restrict the activity of the Constitutional Court in such matters.

4. The concrete Constitutional Court review of directives on unifying the case law, the correlation between living law and constitutional requirements

a) Provided that the Constitutional Court review in relation to directives on unifying the case law is recognised, in the case of unconstitutionality the Court can choose from two solutions. One of them is to annul the directive on unifying the case law bearing an unconstitutional interpretation.[53] The other is to apply their statements concerning the correlation between the interpretation of "living law" and constitution conform interpretation.[54] Accordingly, the constitutional protest (constitutional complain) related to judicial law enforcement may call forth a two-step Constitutional Court procedure. If the judicial practice applies the given provision in an unconstitutional way, the Constitutional Court will express the constitutional content of the provision in a decision. Provided that the judicial practice neglects the decision of the Constitutional Court, and because of this the law will enter into force as the result of unconstitutional law enforcement, the Constitutional Court will annul the given law on the ground of the principle of "living law".[55] Referring all this to directives on unifying the case law, the Court first would verify a constitutional requirement, and if the Supreme Court, and other courts later on did not recognise this requirement, the Constitutional Court would annul the given directive on unifying the case law on the principle of "living law". It is important to realise

[53] Pursuant to Article 40 of the Act on the Constitutional Court, if the Constitutional Court verifies the unconstitutionality of a law or of any other legal means of state administration, they will annul the law or any other legal means of state administration totally or partly.

[54] 1/1993 (13. 09)—internal opinion—on the Constitutional Court practice to be followed in the process of the constitutional review of judicial law enforcement.

[55] The principle of "living law" in the practice of the Hungarian Constitutional Court denotes in the process of the constitutional review of laws that the body reviews not exclusively the text of the law but if necessary, its meaning used in uniform law enforcement. If from among the potential interpretations of the law only one is applied by the legal practice and this interpretation is unconstitutional, the Constitutional Court will verify the unconstitutionality of the norm, or depending on the case, will specify the "constitutional requirements" important for the application of the norm. Nevertheless, the review of "living law" is quite frequent, since because of an individual character it may be significant in constitutional complains, but even in that case it is not regular.

that in this case not the given law but the directive on unifying the case law should be annulled. The reason for this is that the annulment of the directive on unifying the case law—even if the *ex nunc* annulment is taken as a base—would result in the—probably only partial—"fall off" of an act from the legal system. It may happen, however that a directive on unifying the case law is the result of the interpretation of a number of laws. Because of this, in some cases, it would lead to difficulties and in other cases; it would be impossible to decide which of the laws construed should be annulled to restore constitutionality. On the other hand, if the Constitutional Court reached the same result through the annulment of several acts instead of nullifying just one, legal security would also be affected. It is also expedient to refer to the separate opinion of Géza, Kilényi justice of the Constitutional Court, related to the theory of "living law". He states "if the legal practice by the unconstitutional interpretation come up against law, the organs exercising law enforcement must be enforced to undertake the constitutional interpretation and application of the act (or other provision) by the use of the appropriate legal means. It is not the legislator who should be punished because of the unconstitutional law enforcement of legislative organs, which means the Constitutional Court annuls the law, which upon a correct constitutional interpretation would not be unconstitutional".[56] In my opinion, this argument is very acceptable in the respect that not the fundamental rule (provisions) but the unity of law decision drafting the unconstitutional interpretation should be annulled. Unconstitutionality thus, besides complying with the requirements arising from constitutionality may be redressed in a single way: by the annulment of the unconstitutional directive on unifying the case law.

b) In relation to the examination of living law it must be seen "the Constitutional Court reviews the norm content, appearing in the permanent judicial practice, namely handles court interpretations as a fact and judges the constitutionality of a norm existing in practice. By the review of living law the Constitutional Court undeniably supervises the constitutionality of judicial practice, however not in a concrete case but in a general form having *consolidated into a norm*: Constitutional Court control refers not to the concrete litigation but to the norm creating activity of the judicial power. Judge made law, which has prevailed invincibly and uniformly for a long time, is a legal form just like the *decisions of the Supreme Court, which specify uniform law enforcement with an obligatory force*. The Constitutional Court review of these provisions leaves the independence of judicial litigation intact. May unconstitutionality arise, the Constitutional Court will nullify the norm or specify the potential

[56] Cf. with 57/1991 (08. 11) Const. Court resolution. ABH 1991. 272, 287.

constitutional applications of the norm, but will not deal with court rulings."[57] Constitutional requirement is also a norm: the Constitutional Court "in the tenor specifies it with the generality of a norm"[58] The possibility for the constitutional review of "living law" corroborates the requirement that directives on unifying the case law should be, by all means, placed under the review of the Constitutional Court.

c) Since the potential consequences of Constitutional Court decisions arise concerning the planned new regulation as well, these and the significantly dissenting ideas of legal literature will be discussed together with the new concept on regulation.

II. New ideas about the Constitutional Court, which concern directives on unifying the case law

1. The pertinent sections of the previous regulation concerning the Constitutional Court

The review of the regulation concerning the Constitutional Court has been in process for quite a long time. In favour of the amendment, the Ministry of Justice have prepared a number of bills already in 2000 and attached a "Proposition" to the conception to give grounds for the necessity of an amendment. In the Proposition, there is a summary of the arguments for and against the notions concerning the new regulation, and the necessity of the modification and the certain professional and political opinions connected to the ideas are accounted for in detail. Different viewpoints are contrasted in relation to the Constitutional Court review of directives on unifying the case law and the advantages and risks concealed behind the ideas are also demonstrated. By virtue of the persuasive argumentation of the Proposition, it is not justified that while the normative decisions of the other two branches of power fall under a Constitutional Court control, there is no such possibility concerning directives on unifying the case law. Nevertheless, the Proposition sorts out arguments—which, in my opinion do not seem to be persuasive—against the review as well.

a) According to one of the arguments, in this way the Constitutional Court may have a review of judicial law enforcement. Pursuant to the proposal "the

[57] Sólyom: *op. cit.*, 30.

[58] Sólyom: *op. cit.*, 45. Notwithstanding Sólyom also refers to the legitimating force of express legal regulation: "If the constitution conform interpretation gains an express constitutional ground, the courts will probably follow this".

alternative means against the courts may be grounded by the special character of this branch of power." The judicial branch of power is of a special character; decisions are not influenced by politics thus, there is no definite reason for a legal and professional sifting of the decisions (norms).

b) Pursuant to the other counter argument, the above authority would not comply with Article 47, Paragraph 2 of the Constitution, because it states; the uniform law enforcement of the courts is provided by the Supreme Court. Beyond this, the normative content of directives on unifying the case law is not equivalent to a law; since it will not verify a new legal content: just expound that of the law. Not even their binding force is equal, because directives on unifying the case law oblige the courts only. The Proposition, reflecting the political standpoint of the government finally states: "The professional arguments underline the variant that the Constitutional Court should not be entitled to the review of directives on unifying the case law."[59]

These counter arguments, I think have not been deliberate enough or they are not relevant to settle the issue. As to the first counter argument, it is not persuasive that the review of the normative acts of the legislative and executive power is justified because their decisions are effected by politics, thus their professional sifting is justified however, that of the courts, in lack of a political character, is not justified. Constitutional Court control is not simply a "professional sifting", but a special sphere of that: constitutional control. In questions of constitutionality, however there is no difference between directives on unifying the case law and the normative acts of the other two branches of power. It is no doubt that the Parliament and the majority of ministries, alike the Supreme Court, have expert advisory panels to justify and enforce constitutionality. Notwithstanding, uniform constitutionality may be ensured only if all the acts of normative character, which are based on law fall under the control of the Constitutional Court.

The second counter argument was not well grounded either. Securing the unity of law enforcement is not equal to the control of the constitutionality of the norm providing "security". The uniformity of law enforcement, totally independently from the Constitutional Court control, would be exercised by the Supreme Court further on, because the Constitutional Court would not exercise a control on criminal-, civil-, and administrative law interpretation, different from that involved in directives on unifying the case law, but would have an exclusive constitutional control.

[59] Proposition 6.

2. The amendment of the Constitution intended in 2003

In connection with the subsequent norm control, the Constamend2, as a significant amplification and important progress, would also provide the constitutional foundation to the constitutional review of directives on unifying the case law.[60] In the Constamend2, the review of conflict with international treaties would also have constructed a separate section and the scope of norms reviewed would have been amplified—among others—with directives on unifying the case law. It must be mentioned that the proposal made by the Minister of Justice of the previous Government involved the same solution, so there is an apparent political consensus in this respect. Notwithstanding, there is a significant difference between the drafts as regards that the first Constitutional amendment would have authorized the Constitutional Court to annul directives on unifying the case law conflicting with the Constitution, in the second draft there is no reference to a possibility on the annulment of directives on unifying the case law. The reason for this is that the revised version would refer the obligation to withdraw directives on unifying the case law declared unconstitutional, within the authority of the Supreme Court.

3. Notions related to the drafts of the new Act on the Constitutional Court

a) General rules

aa) The original draft of the Act on the Constitutional Court would have provided the possibility for the suspension of the application of a directive on unifying the case law and it would have been *referred under the authority of the full session. The revised draft however would not provide this possibility.* The reason for the annulment is the withdrawal concerning directives on unifying the case law, which would make the proposal null and void.

ab) As regards directives on unifying the case law, provided that a proposal related to such an act of the Supreme Court would be presented to the body, they were obliged to pass it to the President of the Supreme Court for an opinion.[61] Pursuant to the Act on the Constitutional Court2, the decision *on the unconstitutionality of a directive on unifying the case law* should be published in the Official Journal too. Its basis is Article 38, Paragraphs 1, and 2 of the

[60] Because of the considerable resistance of the Supreme Court, however the success of recognition is doubtful.

[61] Act on the Const. Court2, Article 29, Paragraph 1.

new draft, according to which the Constitutional Court must publish their decisions, besides their own official gazette, in the Official Journal as well.

ac) The Act on the Constitutional Court2 *would not let* the Constitutional Court apply a temporary provision in connection with a directive on unifying the case law.

b) Conceptions related to certain procedures

ba) *In relation to the review of conflict with an international treaty, the following conceptions have appeared*

baa) The scope of reviewable norms would be extended on other legal means of self-governmental administration and directives on unifying the case law, which would lead to the mild differentiation of the procedure.

Pursuant to Article 43, Paragraph 2 of the Act on the Constitutional Court, if the Constitutional Court verifies that a directive on unifying the case law conflicts with an international treaty, the Supreme Court will withdraw the decision within thirty days from the promulgation of the decision (namely the decision of the Constitutional Court). Concerning a directive on unifying the case law, there is no need to examine the level of legal source, because this act is not a law, thus its position could not be interpreted in relation to provisional hierarchy. However, it is doubtful why the Act on the Constitutional Court2 makes it impossible for the Supreme Court to amend the directive on unifying the case law conflicting with an international treaty and why the draft immediately operates with withdrawal. This latter possibility should also be provided for the supreme judicial body.

The Constitutional Court was not given the possibility to provide a constitution conform interpretation concerning the directives on unifying the case law of the Supreme Court.

bab) Since a directive on unifying the case law *can never occupy* a higher level than a law promulgating an international treaty, thus it does not require any regulation, so related to this the Act on the Constitutional Court2 does not involve any specification.

bb) *In connection with the subsequent review of unconstitutionality*— although the Constamend2 would permit the review of directives on unifying the case law, the ConstCourt bill2 would not provide the *pro futuro* annulment in relation to directives on unifying the case law. It has a base of principle and practice as well: *on the one hand*, the creation of a directive on unifying the case law would probably take less time than the amendment of another norm

or the creation of a new regulation. O*n the other hand*—and this is the more important reason—if a directive on unifying the case law is nullified, it will not give rise to a lack of regulation, because for the organs of law enforcement the relevant provisions still exist, however in their regard a wider scope of freedom will appear. In addition to that, the requirements of principle, involved in the nullified directive on unifying the case law—if due to the character of the annulment it is not excluded—may be applied and taken into account concerning the decision of the Constitutional Court, together with the decision and the constitutional content.

bc) Above this, by virtue of Article 50, Paragraph 2 of the ConstCourt bill2, provided that the provisions of the bill are realised, the Constitutional Court could order the review of the criminal procedure determined on the ground of an unconstitutional law or directive on unifying the case law.

bd) Besides this, the Constitutional Court could act in the concrete norm control procedure initiated by the judge, even against the directive on unifying the case law not in effect any longer. The same would be competent in the procedure of a constitutional complain. If the Constitutional Court acting within this latter authority would verify the unconstitutionality of a directive on unifying the case law referred to by the constitutional complain, the Supreme Court would be obliged to withdraw the unconstitutional directive on unifying the case law within thirty days after its promulgation.

be) In connection with the *constitutional complain* the major elements of the present solution would survive in the ConstCourt bill2. The draft, on the ground of the infringement of rights included in the Constitution will provide the possibility for those, whose grievance is the consequence of the application of an unconstitutional normative act—*among them directives on unifying the case law*—and the infringement of rights may be the subject of the Constitutional Court's review, if he has exhausted all the other possibilities for remedy or there are no other possibility for remedy.

bf) *If the unconstitutionality is the result of the omission of legislative obligation, directives on unifying the case law should not be taken into account.* The reason for this is partly that the effective acts and bills—count (would count) only an omission embodied in the omission of the drafting of a law by the *legislative organ*, under the effect of the action. The involvement of directives on unifying the case law in this sphere would recognise the legislative character of the Supreme Court *expressis verbis*, to which the legislators do not at present show any reluctance. On the other hand, since the already existing acts can be interpreted without the existence of a directive on unifying the case law, actually there is no omission related to them: the purpose and substance of

the creation of a directive on unifying the case law however, is not to draft a new provision but to clear up the meaning of a provision.

III. Further potential solutions

Since in the special literature there are several potential solutions concerning the review of directives on unifying the case law in the following, I will shortly introduce the variant not adapted in the drafts. The reason for this is that the regulation concerning the Constitutional Court is before acceptance, thus a proposal (or part of a proposal), which is not included in the draft may be reflected in the subsequent versions or in the final text of the law. The solutions not having inserted are different from the variants involved in the draft concerning some legal consequences proposed for the unconstitutionality of a directive on unifying the case law.

a) According to the related proposal, the Constitutional Court would be entitled to verify the unconstitutionality but the possibility of annulment—alike in the ConstCourt bill2—would not be included among the means of the Court. Thus, unconstitutionality could be eliminated in the way that the Constitutional Court would withdraw the unconstitutional directive on unifying the case law within a definite time after the promulgation of the decision. It means that the Constitutional Court would retain its right of review but the actual authority of annulment would be referred to the Supreme Court. The present President of the Constitutional Court András *Holló* for instance has expounded "according to the standpoint of the Constitutional Court as a result of the constitutional review of a directive on unifying the case law, the Constitutional Court would reach a so called "verifying decision", namely would just verify that the directive on unifying the case law is unconstitutional but its legal consequence, the annulment of the directive on unifying the case law would remain within the authority of the Supreme Court."[62] Notwithstanding I do not think that the Supreme Court, based on the opinion of the Constitutional Court will be inclined to nullify the act of their own, because even in the issue of Constitutional Court review they show a sharply negative attitude. President *Holló* himself had a solution for the verification of the unconstitutionality of directives on unifying the case law. According to his opinion "if the Constitutional Court, instead of the annulment of the provision interpreted by a directive on unifying the case law, will specify the constitutional requirements competent in the application of the law, this specification—

[62] Holló: *op. cit.*, 45.

since the Constitutional Court decision has a general binding force—is normative on the Supreme Court. The Supreme Court must harmonize directives on unifying the case law with the aspects specified under the constitutional requirements. As long as it has been fulfilled, the directive on unifying the case law cannot be applied."[63] However, it is doubtful if in this case until the "harmonization" it is to be adhered to the decision of lower level courts, the Constitutional Court or the Supreme Court. It is to be feared that to the latter: notwithstanding, court rulings, through the forum system of remedy can get before the Supreme Court quite easily, where the will of this organ will be enforced.

b) In relation to this solution it must be mentioned that concerning its substance it would not make any difference as if the Constitutional Court annulled the directive on unifying the case law, but it would bear a number of factors of uncertainty.

ba) Partly, even if the standpoint seemingly seeks a compromise between the Constitutional Court and the Supreme Court, there are also some risks concealed in the proposal. Beyond the aspects of prestige, it is all the same if a directive on unifying the case law regarded as unconstitutional is nullified by the Supreme Court and not the Constitutional Court. The only argument for may be that in this case, the Supreme Court's amending potential will prevail, but this *will remain under the pro futuro annulment possibility as well—which is however, intended not to be provided.* A complicated and detailed regulation is required in the matter if the Supreme Court—by standing against the opinion of the Constitutional Court—would not annul a directive on unifying the case law. At this time, it may be problematic to provide the mode of the solution. One variation could be that in this case—within an appointed time—the Constitutional Court would be obliged to proceed in an obligatory way and practised the authority of annulment. The other proposal covers that the directive on unifying the case law, by virtue of the law, should become invalid within definite time. In my opinion, neither of the solutions deviates in their effect from the annulment coeval with the verification of unconstitutionality exercised by the Constitutional Court, but they would cause a significant waste of time and result in legal insecurity.

bb) Notwithstanding, Géza *Kilényi,* former Justice at the Constitutional Court, states "indirect repeal is different from direct repeal not mainly concerning its sense but rather in the array of the procedure. The decision in this case is also made by the Constitutional Court but at this time, the body does it in a covert way and the legislative organ is forced to fulfil the task. The indirect repeal is

[63] Holló: *op. cit.,* 45.

more polite than the direct repeal but undoubtedly much more circumstantial as well."[64] I think putting the proposal into a statutory form could not be accepted by the Supreme Court either, and above this, if realised it would actually be equal to annulment, thus the application of a circumstantial and complicated regulation would not be obedient in the creation of the new act.

c) The method of the so-called constitution-conform constitution interpretation generally applied by the Constitutional Court may be connected to the issue of annulment.[65] According to the practice of the Constitutional Court it briefly means—although "living law", namely the "permanent and uniform" content appearing in the legislative practice must also be taken into account during the constitutional review of the norm—, and the annulment of a law should be avoided, if possible. Pursuant to the principle followed by the Constitutional Court, effective law should be preserved. Consequently the Constitutional Court will not necessarily annul the given provision, but if among its interpretative possibilities there is a variant of interpretation which conforms to the Constitution, the Court will specify the so called "constitutional requirements" competent in the application of the norm. Because of this, if there is a possibility to provide the prevalence of constitutionality by leaving the norm text unchanged, the requirements that should be applied or taken into account to make a law constitutional are specified in the clause of the decision. Obviously, if the legislative practice will not conform to this, the only way open for the Constitutional Court is to nullify the law.

d) Notwithstanding, in my opinion the method to specify constitutional requirements related to a directive on unifying the case law could be applied in no way. In that case, namely the Constitutional Court actually may not decide about a constitutional issue, but about a problem belonging to another branch of power, thus would take over the role of the Supreme Court. The reason for this is that the directive on unifying the case law has made one sense of the law bearing several interpretations obligatory for the courts. If by specifying the constitutional requirement, it were narrowed down further on, it would either make the directive on unifying the case law devoid of content, or result in an interpretation regarded as incorrect by the Supreme Court. Concerning the principle of the separation of powers however, it would be inadmissible. The Constitutional Court may keep directives on unifying the case law within

[64] Kilényi, G.: Az alkotmányosság védelmének szervezeti garanciái a különböző országokban [The organisational guarantees of the protection of constitutionality in different countries]. *Magyar Jog*, 1989/7–8. 608.

[65] Cf. with 38/1993 (11. 06) resolution. ABH 1993. 256, 266–267.

constitutional limits if a constitutional requirement, related to the law that forms the basis of the directive on unifying the case law is specified.

IV. Summary

In my view the Constitutional Court review of directives on unifying the case law may be administered on the ground of the effective legal background. Notwithstanding, a satisfying legal solution will require the uniformity of positive law regulation. Since besides the point of view of prestige, there is no reason why the Constitutional Court should not review—obviously *exclusively on the ground of constitutional respects*—the directives on unifying the case law of the Supreme Court, for the sake of the protection of the fundamental law, this competence should be provided for the Constitutional Court with the possibility of annulment.

Any different regulation would lead to the total disturbance of constitutional jurisdiction, which cannot be supported in a constitutional state. However, it is a healthy sign that in a recent decision of the Constitutional Court on the subject of a proposal initiating the constitutional review of a directive on unifying the case law, a decree of annulment was delivered because the person in question withdrew his proposal.[66] Since a decree of annulment must be preceded by a genuine examination—because submissions not falling within the authority of the body are refused—in that case the genuine constitutional control of directives on unifying the case law in all probability has been in progress. Provided that an appropriate proposal is presented, the Constitutional Court will hopefully pass a resolution concerning the constitutionality of a directive on unifying the case law.

[66] 213/B/1999 Const, Court decree. ABK 2003 September, 638, 639.

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Minority Rights in Hungary and the Situation of the Roma[1]

At present the Roma live primarily in Europe, they can be found in every country of the continent. Their number is estimated to be around 8 and 10 million in Europe, and the largest population of the European Roma—approximately 70%—is to be found in Central and Eastern Europe. Statistics on the Roma are rather difficult to gather, and even where these exist they are unreliable. It has a number of reasons one for example is that Roma do not like to declare themselves Roma for fear of prejudice and discrimination.

Many originate their antecedents from the North-West of India, from where they travelled several centuries ago. But wherever the antecedents of the European Roma come from, people who belong to the majority think they resemble each other recognisably, and they are bound together by the fact that non-Roma population regards and calls them gypsies.

Numerous questions concerning the Roma in Europe have remained recently unanswered and it is still doubtful whether they will assimilate in the society of the majority or perhaps they will demand their special rights as a minority (and it may vary country-by-country). Of course beside social integration there is also a much gloomier alternative, namely that they will remain a disintegrated part of European society for a long time still to come.

To achieve both forms of social integration, the states shall guarantee the equal enjoyment of human rights. However, in the era of human rights this might seem a minimalist objective and the need for it, which is often mentioned in documents adopted by international organisations as well, in a state governed by the rule of law cannot be subject to dispute any more.[2] Beside the

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[1] The term "Roma" used in this paper always refers to the "Gypsy", "Sinti" and "Traveller" categories.

[2] In connection to this, see Resolution 6 (XXX) of 31 August 1977, the UN Sub-Comission. "If they have not yet done so, all the rights that are enjoyed by the rest of the population."

equal enjoyment of human rights the social integration of the Roma now requires a form of additional positive distinction.

If a national legal system decides to provide for special minority rights or the free choice of identity, theoretically the Roma will be granted two possibilities (assimilation or special minority rights) from which to choose. In spite of this, however, it obviously makes some difference which solution the state prefers and what legal and financial means it has to support its preference. On the one hand it may provide for special minority rights, on the other, as a different solution it may support the various forms of affirmative action promoting the assimilation process, like the quota system in the USA.

The Minority Question and the Security Issue

The minority question is, in part, being treated in the framework of human rights protection but as a security issue both in the East and the West and this attitude unambiguously presents itself at the international stage as well.[3] (The security-based approach is not fortunate for several reasons. Consider, for example, whether it is compatible with the spirit of human rights that those who threaten security in certain cases are granted special rights or quite to the contrary that human rights are limited.) Yet, the way of thinking about what endangers the security of states has developed differently within Europe. While, according to the conclusion of Will Kimlycka, minority nationalism becomes imminent in the eyes of politicians and the majority population in the West only when it resorts to terrorism, even the most modest requests of the minority leaders can cause great panic in most countries of Central and Eastern Europe.[4] (Kimlycka mentions that when a few representatives of the indigenous population in Canada do not consider themselves Canadian, it is merely considered as a threat on solidarity in the North American context. As opposed to this, in the Central and Eastern European context similar declarations of the Roma leaders are sometimes considered problems that outright threaten the existence of the states.) It is not surprising, therefore, that there are

[3] A proof of this opinion could be that it falls under the scope of activities of the OSCE High Commissioner on National Minorities to intervene in situations threatening with a future conflict involving national minorities. In connection to this, see CSCE Helsinki Document 1992. The Challenges of Change II.

[4] Kymlicka, W.: Igazságosság és biztonság [Fairness and Security]. *Fundamentum* 2001/3. 15.

views according to which it would be beneficial to the managing of minority conflicts in Central and Eastern Europe just to convince the states of the region that the aspirations for autonomy they deem dangerous, instead of endangering the sovereignty of the state, may even become appropriate tools for the management of ethnic conflicts in certain cases. This persuasion becomes even more important considering the self-protecting mechanisms of the state, since the greatest of creatures, the great Leviathan, in the words of András Sajó: "...as opposed to dolphins, whales and people—is not inclined to commit suicide. On the other hand, the most natural feature of a state is that it protects itself: the objective of self-defence has made the gang of robbers (magna latrocinium) a state".[5] If the state is successfully persuaded, then two further conditions need to be met. First, this approach has to be transformed properly into the legal system, second, the bodies created through autonomy need to be endowed with a real sphere of authority in order that the introduced new legal institutions could function effectively. Following the accomplishment of all this, it will become possible to use the means of law—although they are undoubtedly limited in themselves—for the protection of minorities. (However, when introducing the Minority Act the Hungarian legislator did not meet the latter requirement fully.)

The Autonomy of Minorities

A catalogue of the special rights of minorities would be difficult to compile, nevertheless, it is certain that at the top of this imaginative hierarchy of rights we would find the autonomy of minorities, which "constitutes the maximum legal status a minority may achieve within a state."[6]

The autonomy of minorities established on a territorial or personal basis, has been part of the legal and political thought in Europe for long and, similarly to the concept of the nation, it has changed "together with the social circumstances and the conceptual structures corresponding to them in the

[5] Sajó, A.: Önvédő jogállam [Self-protecting Rule of Law]. *Fundamentum*, 2002/3–4. 55.

[6] Brunner, G.—Küpper, H.: European Options of Autonomy: A Typology of Autonomy Models of Minority Self Governance. In: *Minority Governance in Europ* (ed.: Gál K.). Budapest, European Centre for Minority Issues—Local Government and Public Service Reform Initiative, 2002. 17.

given ages".[7] (What is more, antecedents of legal history can be cited with regard to the autonomy of groups separated from the rest of the population in some religious, linguistic or cultural respect already from times preceding the development of the modern concept of nation. An example to this can be the royal charter issued by King Zygmunt August in 1551, which provided for the personal autonomy transcending religious matters of the Jews in Poland.)

The autonomy of national minorities is regarded as a development of the modern ages when the state delegates spheres of public power to organisations elected by the members of the minority through a democratic process. This can happen in two different ways: territorial autonomy may function when the national minority constitutes a integrated community in an area whereas personal autonomy may be established when the minority lives dispersed in the given area. Personal autonomy is often mentioned as cultural autonomy, since the public administration bodies organised on this principle are usually—but not necessarily—granted powers in the fields of education, culture and mass communication.[8] These two types of autonomy can also be applied jointly within a state and the Hungarian legislators made an attempt at this, when they wanted to mix the principles of personal and local autonomy in the Act LXXVII of 1993 on the Rights of National and Ethnic Minorities (hereinafter: Minority Act). However, this attempt turned out futile because of the inadequacies of the text of the Law.

Besides putting other principles of minority protection into practice, special importance shall be attributed to the realisation of the autonomy of minorities, because it is only through this that the elected representatives of minorities can appear in the sphere of public administration. After all central state power—no matter what goodwill it demonstrates towards national and ethnic minorities—cannot be regarded ethnically neutral, consequently state officials are often biased in favour of the majority ethnic group. Therefore, persons belonging to a minority may with just cause present their legal claim at the establishment of their own institutions—elected by the members of the minority and *de facto* endowed with spheres of authority of public administration—at certain fields of public life.[9] Such autonomy would be particularly important in the case of

[7] Conversation of Andor Németh and Attila József on the change of the nation concept, see Németh, A.: *József Attila*. Budapest, 1991. 134–135.

[8] See the brief summary of the two principles of autonomy in Hungarian professional literature. Ifj. Korhecz, T.: *A kisebbségi autonómiáról címszavakban* [In Brief on the Autonomy of Minorities]. *Európai Utas*, 1999/4 (37).

[9] In connection to this, see Kymlicka, W.: *Multicultural Citizenship*. London, 1995.

the Roma population because those belonging to this minority are over-represented with respect to the latter party of the "authority—client" system of relations. Accordingly, through the autonomy of the minority, the Roma minority or, using the terminology of international law, the "persons belonging to the [Roma] minority"—even if not in all fields of life—could turn to their own public administration bodies with their problems and could have their interests represented by them. (In the case of the Roma population, because of the territorial extension of the minority the personal principle should be applied, mixed with the territorial principle on the local level.)

Autonomy and the Hungarian Minority Act

Minority legislation seems to be closely tied up with national policies in general, but today, as a result of a "globalised conscience" evoked in the name of universal human rights, Central and Eastern European countries have to comply with the norms of international law on minorities. The effort to lay down the rights of minorities in legal instruments appeared in Central and Eastern Europe after the collapse of the bipolar world order. The first minority act was promulgated in 1989 in Lithuania at a time when it was still part of the Soviet Union. It was followed by the promulgation of a corresponding act in Estonia in 1990, in Latvia and Croatia in 1991, in Ukraine and Belarus in 1992 and finally in Hungary in 1993.[10] The Hungarian Minority Act was adopted by the Parliament on July 7, with an overwhelming majority of 96.5%.[11] The Act was formulated with due regard for the Hungarian Constitution which provides—uniquely in the whole region (not counting federal states)—that the minorities living in the country form a constitutive part of the state.[12] As part of the *travaux préparatoires*, the legislators had studied and referred to effective international documents such as the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the

[10] Brunner, G.: Die rechtliche Lage der Minderheiten in Mittel- Ost- und Südosteuropa. *Osteuropa Recht,* 1994, Vol. 40. 162.

[11] The Act can be considered an "omnibus law": several other statutes contain regulations relating to the situation of minorities.

[12] In connection to this, see The Constitution of the Republic of Hungary (Act XX of 1949) Article 68 (1): The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State.

Paris Charter and the European Convention on Human Rights. One of the goals enunciated in the Act was to bring about an institutional framework in which minorities can enjoy their identity, including facilities and opportunities for a "free and lively contact" with their mother countries and nations.

The Hungarian legislator probably had two aims in view: to preserve a colourful and multicultural world for future generations on the one hand and on the other, no doubt with an eye to the interests of Hungarian minorities living in neighbouring countries, to set an example to the legislators of these countries. Neighbouring countries consider autonomy as a phenomenon threatening their security and sovereignty. However, because of the defects of the text the effort to create an Act, which is worth following, did not work out.

The Act entered into force at a time when the minorities in Hungary were already in an advanced state of assimilation. (Minorities in Hungary represent a relatively low percentage of the overall population, live scattered over the country and often form minorities even at the local level.) The past few decades have seen a process of increasing linguistic assimilation especially among the Roma population, but the number of those professing to be native speakers of German, Romanian or Slovak has also decreased dramatically.[13] With reference to German nationals, for example, the Research Centre of Hungarian Germans offers the following explanation: as a result of the lack of German schooling and the detachment from the mother tongue as spoken in Germany, the role of the *Hochsprache* was taken over by literary and colloquial Hungarian. The report describes the present situation as one in which the local dialect of German is spoken only by the older generation and depends on factors such as age, sex and situation.[14] The loss of the minority language in many localities seems to be no longer reversible today and the problem is aggravated by the fact that most of those who still speak their vernacular do not know the literary register of their language. (Minority self-government meetings are usually conducted in Hungarian, occasionally coloured by the local dialect spoken by the minority.) Double or multiple identity seems to be the

[13] See in this connection Kemény, I.: A nyelvcseréről és a roma gyerekek nyelvi hátrányairól az iskolában [On Change of Language and the Linguistic Disadvantages of Roma Children at School]. In: *Nemzeti és etnikai kisebbségek Magyarországon a 20. század végén* [National and Ethnic Minorities in Hungary at the End of the 20th Century] (ed.: Sisák. G.). Budapest, 1999. 268.

[14] *A magyarországi németek* [The Germans of Hungary] (ed.: Manhercz, K.). Budapest, 1998. 46.

only option for those belonging to the more or less linguistically assimilated ethnic or national minorities.[15]

The Minority Act was meant to halt, or possibly to reverse, this process of assimilation. It is doubtful whether a relatively advanced stage of assimilation can be reversed from above with the instruments of law. Due to the territorial distribution of minorities in Hungary the principle of territorial autonomy alone would not have been applicable, so the Act was formulated so as to combine the principles of personal and local autonomy. The legislator's aim in working out the principles of the minority self-government system was to offer minorities an opportunity to build up their own cultural autonomy in the framework of a system of self-government, which is seen as "the foundation of the democratic order". Minority self-governing bodies established in the wake of the Act started their activity in 1995 within the newly created framework.[16]

The Persons under the Scope of the Act[17]

The personal scope of the Act covers all Hungarian citizens, who profess to belong to a national minority recognised by the Act, and to the communities constituted by these persons, irrespective of their numbers. (All legal regulations

[15] For a consonant opinion see Gerhard Seewann, *Ungarndeutsche und Ethnopolitik*, Budapest, 2000.

[16] Some minority self-governments were elected indirectly, some directly. There were two types of indirect foundation:

When more than half of the representatives in the representative body elected were candidates of the same national or ethnic minority, the representative body declared itself a local minority self goverment.

If at least 30% of the representatives elected were candidates of the same minority, the representatives of each minority were entitled to establish minority governments consisting of a minimum of three members. A minority local government was to dissolve if the proportion of minority representatives in the body fell below 30%.

Minority self-governments established by direct election: elections had to be called if requested by at least five voters professing themselves to be members of a minority and resident in the locality in question. A local spokesperson may be elected, if legal requirements were met, without a local minority government. National self-governments are elected by minority electors. Local authority representatives elected from minority candidates, local minority authority representatives and spokespersons qualified as minority electors.

[17] See on this connection Küpper, H.: *Das neue Minderheitenrecht in Ungarn.* München, 1998.

on national and ethnic minorities govern the relationship between the state and the individual minority member, but, as a consequence, they also relate to relationships between majority and minority members.) The scope of the Act—according to the European practice—does not extend to refugees, immigrants, resident foreigners and stateless persons of whatever national identity. Both the scope of the Act and the definition of the notion of national and ethnic minority given in the Act is rather debatable. As regards the scope of the Act, besides narrowing the range of persons to whom the Act is applicable, it seems on the whole superfluous, since it is difficult to devise a legal category which will be equally applicable to the various autochthonous national minorities; altogether 13 as the Act enlists them in Article 61(1).[18] (National legal systems often make a difference between autochthonous and non-autochthonous minorities and grant special rights only for the latter.) As regards the concept of minority, from among international documents on the protection of minorities we shall come across a definition of the notion of minority only in soft law documents and drafts, and domestic legal systems also suffice by enlisting the minorities living on their territories.

According to Article 1(2) of the Hungarian Act *"National and ethnic minority (hereinafter 'minority') is any ethnic group which have resided in the territory of the Hungarian Republic for a century, which constitute a numerical minority in comparison with the population of the state, whose members are Hungarian citizens distinguished from the rest of the population by a common language, culture and traditions, held together by a sense of community which is manifested in an effort to preserve that common heritage and to express and protect the interests of their historically evolved communities."* Comparing this definition and the list of autochthonous national minorities one shall do his utmost to find some overlapping.

Perhaps the most questionable point of this definition is the one, which confines the recognition of a minority as an ethnic and national minority to ethnic groups, which have been living in Hungary for at least a hundred years. Presumably, this restriction was included in the Act because it refers to the presence of the ethnic group in Hungary for several generations. At the same time, the requirement of exactly a hundred years of residence as a precondition of recognition is rather debatable, indeed, arguably unnecessary. The requirement is made to look doubtful by the well-known fact that even the members

[18] The national minorities qualified as autochthonous in Hungary are as follows: Bulgarian, Gypsy, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovak, Slovenian and Ukrainian.

of national and ethnic minorities recognised by the Act arrived to the country in several waves of immigration and therefore not all groups within those minorities meet the criterion stipulated by the Act.

Some of the thirteen minorities recognised by the Act will pass the test only on a very well-intentioned interpretation of the statutory text. To take an example: most of the Greeks living in Hungary are not descendants of the Greek minority by now assimilated, which has lived in the country for a long time. They are former Greek communist partisans and their children, who arrived in Hungary as the refugees of a lost civil war, and even some of those having arrived in 1949 profess to be Aegean Macedonians, and, in fact, some of them have considered establishing a minority self-government of their own. The Armenian minority is another case in point: most of its members are not descendants of the Armenians, who lived in Hungary in the 19th century and have been by now almost completely assimilated. They descend from the Armenians who fled to Hungary from the Armenian pogroms of the Young Turks in 1916. The Act can of course be interpreted to the effect that the earlier, by now assimilated Greek and Armenian minority groups have acquired a right to legal recognition. At the same time, it seems unreasonable that the law should make a distinction between the legal status of a Greek person, who arrived in Hungary after 1949 and an ethnic Chinese who has acquired Hungarian citizenship. Another question, yet unanswered, is whether a minority other than those so far mentioned can ever "grow old enough" to qualify for the hundred-year criterion, or whether it is able to gain legal recognition of its minority status by the state.

A further contradiction results from the fact that while in principle the Act emphasises the complete equality of the thirteen minority languages, the Hungarian state assumed obligations in the language charter of the European Council with respect only to six minority languages, namely Croatian, German, Romanian, Serbian, Slovak and Slovenian.[19] According to the census data, the largest linguistic minority of Hungary is constituted by persons speaking the Romani languages. At the same time, some of the minorities listed by the Act do not live up to the category of 'a language of their own', due to the advanced stage of the loss of language through assimilation.

[19] Act XL of 1999 on the promulgation of the European Charter on Regional or Minority Languages drafted in Strasbourg on November 5, 1992.

The Situation of the Roma

Today the Roma constitute the largest minority in Hungary. In the 2001 census, 190 000 individuals declared themselves to be of Gypsy ethnicity. As opposed to this, sociologists estimate the size of the country's Gypsy population to be about 600 000 persons. The Hungarian Roma belong to three linguistic groups: the Romungro, who speak Hungarian and call themselves "musician Gypsies", the bilingual (Hungarian and Gypsy) Vlach Gypsies, who call themselves "Roma" or "Rom"; and the Hungarian-Romanian bilingual Romanian Gypsies, who call themselves "Boyash".[20]

In the Hungarian Minority Act the legislator enlisted the Roma minority among national and ethnic minorities, which may have been a protest against the official Roma policy of the previous era. Under the reign of socialism, in 1961 the Political Committee of MSZMP KB (Hungarian Socialist Working People's Party, Central Committee) declared that the Roma are not to be regarded as a national minority, thereupon the official politics aimed at assimilating the Roma through social-political measures improving their situation. Though there were some results of these measures, they came to nothing after the change of the regime. Since the acceptance of the Minority Act it has been discussed again and again in professional circles whether it was a good decision to enlist the Roma among national and ethnic minorities and whether it wouldn't have been better to uphold assimilation as a more prosperous alternative as regards social integration.

István Kemény and Béla Janky in a study of theirs, for example, draw a parallel between the Romungro (a group of the Roma living in Hungary) and the Jews in Hungary, emphasising that both groups speak Hungarian as their mother tongue and in the course of the 2001 census the majority of both groups professed to be of Hungarian ethnicity.[21] (When current legislation on minority rights was being drafted, it was proposed that Jews should figure amongst the ethnic and national minorities. It was a well-intentioned effort of the government but was rejected by a majority of Hungary's Jewish population.)

[20] See in this connection Kemény, I.: Linguistics Groups and Usage among the Hungarian Gypsies/Roma. In: *The Gypsies/the Roma in Hungarian Society* (ed.: Kállai, E.). Budapest, 2002.

[21] Kemény I.–Janky B.: A 2003. évi cigány felmérésről [On the 2003 Survey on the Roma]. In: *A magyarországi cigány népesség helyzete a 21. század elején* (ed. : Kállai, E.). Budapest, 2003. 7–26.

The ancestors of the Jews who live in Hungary today entered the country in the 18th and 19th centuries, without of course having Hungarian as their mother-tongue. Now their native language is Hungarian, and it is likely that a great majority of them gave the response that they are Hungarian to the 2001 census question on ethnicity. The ancestors of the Romungros entered Hungary from the sixteenth to eighteenth centuries. Now their native tongue is Hungarian, and a large proportion of them—probably the majority of them declared themselves to be of Hungarian ethnicity at the time the 2001 census was conducted. However, as a result of segregation and exclusion, the number of those who declare themselves to belong to the Roma minority has increased, as opposed to the Vlach and Romanian Gypsies who—it appears—are on the way of assimilation. Anyway, researchers and Roma politicians frequently doubt the correctness of the decision of the legislator, though they generally admit that the dissolution of Roma minority self-governments that were established on the basis of the act is now absurd and impossible.

Deficiencies of the Act and the Registration

The decision of the legislator on what persons it regards as ones belonging to a given minority is not to be confused with the definition of minority. Whereas to define the notion of minority is not absolutely necessary, to delimit the scope of persons belonging to a minority is in certain cases of regulation indispensable.

Personal autonomy ensures spheres of authority regardless of territory to the persons belonging to the minority. Therefore, many believe that it is necessary to define criteria needed for the realisation of this form of autonomy. On this basis, it can be circumscribed who belongs to the minority at issue. It is a conceptual precondition of the functioning of personal autonomy that the minorities and not the majority population should elect their representatives, moreover that not the government or the parliament should appoint them.[22] The

[22] See the identical opinion of Tamás Korhecz. Ifj. Korhecz, T.: *A kisebbségi önkormányzatok megválasztásának szabályai a magyar, a szlovén és a jugoszláv jogban* [Rules of the Election of Minority Self-governments under Hungarian, Slovenian and Yugoslavian Law]. In: *Regisztrálható-e az identitás? Az identitásválasztás szabadsága és a nemzeti hovatartozás nyilvántartása* (eds.: Halász, I.—Majtényi, B.) [Registrating identity? The Fee Choice of Identity and the Registration of National Affiliation]. Budapest, 2003. 90–126.

best way of meeting this requirement can be if "an electoral register of minority voters is created", since its absence might render the legitimacy of the established institutions questionable. However, because of the negative historical experiences the Hungarian legislator rejected registration when accepting the law. (In Central and Eastern Europe in the past, when a minority was prosecuted or discriminated against, data on ethnicity were frequently misused.) According to many it is the unresolved nature of these questions that will doom to failure the operation of Hungarian minority self-governments organised mainly on the basis of the personal principle.[23]

The legal regulation of the minority issue in Hungary can be broadly described as permissive. This is shown by the fact that, in accordance with the legislative intention, minority local authorities can be established in almost all localities with a national or ethnic minority population irrespective of its numerical proportion to the rest of the population of the given locality. Indeed, if we allow ourselves a touch of irony, we may note that against the legislator's intentions the notorious phenomenon popularly dubbed "ethno-business" results in the establishment of minority local authorities even in places where there is no minority at all.[24]

The concept of autonomy espoused by the Act addresses the individual Hungarian citizens belonging to one of the minorities listed, encouraging them to establish corporate entities in public and civil law in villages, towns, the districts of the capital and at national level. The idea was to set at the disposal of minority citizens a system of institutions, which will help them regain, develop and protect their non-Hungarian identity. According to the principle of territorial autonomy enshrined in the Act, minority local authorities were formed at local levels by direct vote. The village level is an appropriate framework for local autonomy because minorities tend to live in small villages and the village is the only regional setting in which they may even constitute the majority of population. If a minority does not represent the minority of the population of a village, they may establish local minority authorities organised along the personal principle. (Most of the issues dealt with by corporate entities

[23] In connection to this, see Ifj. Korhecz: *A kisebbségi autonómiáról címszavakban... op. cit.*

[24] This expression refers to the infamous practice that as the Hungarian Minority Act did not specify the criteria of belonging to a minority, on various occasions the subsidies provided by law for persons belonging to minorities were obtained also by persons who did not belong to any minority.

organised at local levels for representing minorities concern the minority language.) At the national level, the national minority authority, a quasi minority parliament with consultative powers, represents the interests of the minorities, and until the representation of minorities in the parliament is *de facto* introduced, representation by self-government authorities remains the only legitimate form of representation for minorities. The Act presently endows the national self-government authority with the right to represent the interests of minorities at the national, regional and county levels the national minority authority for instance is entitled to build up the network of theatres, museums and libraries—in actual practice, however, the institutional framework, which came into being in the wake of the Minority Act shows signs of serious deficiency.

The Hungarian electoral system has a peculiar feature: any voter is free to vote for the minority candidate in his district. As a result of this, most of those who vote for minority candidates belong to the majority, and they vote in accordance with their preference, prejudice and temporary caprice. This is due to the fact that the legislator specified the same day for minority self-government elections as for the local self-government elections. (Although no precise data on the minorities are available today, we can safely state that a great number of non-minority voters voted for minority candidates at the elections.) What is objectionable in this arrangement is that the basic right of minorities is infringed whenever those not belonging to the minorities decide on the person who will represent the minority members: in the final analysis this goes against the system of minority self-governments.

Exploiting the deficiencies of the electoral system, many non-minority candidates entered the minority elections, who do not belong to minorities. (Under the law currently in force, it is the candidate who decides whether or not he wishes to stand for a minority, and it yes which one. All he has to do is to collect five of recommendations.) The financial support given to minority self-governments is far from sufficient, but it seems sufficient enough to motivate a few people, who are not members of a minority, to exploit the imperfections of the minority self-government system and enter minority elections.

Candidates may sometimes acquire an advantage in minority self-government elections through the mere fact that their names place them at the beginning in the alphabetical list, knowing the tendency of voters to vote for the first candidate on the list, when they do not know the minority members listed.

One of the deficiencies of the subsidy scheme, which is often criticised is its failure to give due consideration to the numbers of the different minorities.

It is doubtful, however, whether it would be possible at all, given the absence of registration. The distribution of subsidies obviously cannot be based on the total of minority and majority votes cast in the elections.

Therefore the amendment bill which has been submitted to the Parliament plans to establish a register of minority electors.

On Registration

Naturally, requirements can be set up with respect to such a register. On the one hand the alliance of persons belonging to a minority has to be formed on a voluntary basis, so membership in it has to be preceded by the personal declaration of the will of the person in conformity with the principle of free choice of identity. Beyond this, on the other hand membership can also be linked to objective criteria, as in the case of the Lapp.

They live dispersed, therefore the territorial principle is inapplicable to them. Their interests are represented by Lapp parliaments, which are organised along the principle of personal autonomy and elected by direct vote. The Lapp parliaments have consultative powers in all issues affecting the minorities. There has been a Lapp parliament in Finland since 1973, in Norway since 1989 and in Sweden since 1993. In order that the requirement about Lapps representing the Lapp could be met, Lapp electoral registers have been established in all three countries, although the regulations on the conditions of how one can be included in these registers are different in the countries concerned. One condition, however, is always specified: the principle of the free choice of identity, namely, that the given person has to declare himself Lapp. Beyond this, objective criteria define the linguistic ties in the three countries. For example, in Norway—this is where the Lapp parliament has the strongest spheres of authority—, a person can be included in the electoral register if he declares himself Lapp and Lapp is his mother tongue or at least one of his parents were recorded in the Lapp electoral register. In Finland, in order to avoid that Lapps be elected by persons belonging to the minority but who have already assimilated, the Lapp Electoral Commission rejected several thousand votes cast at the election. (Some six hundred appeals were lodged against these decisions but the Supreme Administrative Court rejected most of them. The basis of the judgements was that origin was defined mainly on the basis of mother tongue, which could be traced back to four generations only.)

It is to be mentioned in connection to this that under the legal regulation of Slovenia, recording one into the minority register, besides the declaration of the person, is also made conditional upon objective criteria and the decision of the minority community.[25] The reason for this method of regulation can be that communities are usually reluctant to accept new members, while it is also difficult for them to tolerate when someone leaves them. (Another thing to point out about Slovenian legal regulation is that it guarantees special minority rights to the Hungarian and Italian minorities classified as indigenous, while also Roma, Serbs, Croatians and Bosnians also live in the territory of the country.)

It is quite probable that no system of objective criteria could be found that would be applicable with respect to all minorities. For example, from among the criteria indicated in connection with the Lapps above, the one on the mother tongue could not be applied in the case of the Roma for certain. (In Hungary, for instance, the majority of the Roma population has already assimilated linguistically and the two main Roma languages spoken in the territory of the country, Romani and Boyash, are in a diglossal state. In addition to this, not even these two groups are homogeneous from a linguistic point of view. What is more, Roma groups can treat each other as strangers and they can even despise each other. In certain cases, the conflict can be harsher than the one between the Roma and the majority population.) In the case of the Roma, since their culture, lifestyle and identity cannot really be circumscribed the fact that their population does not form a clearly circumscribable group, also renders the definition of objective criteria with respect to the creation of a minority electoral register more difficult. (Among others, this is the reason why we have rather differing estimates on the number of the Roma living in the various countries.)

In any case, on the basis of the principle of free choice of identity, in theory it is possible to conceive the creation of a minority register, which would form the basis of personal autonomy and into which the persons belonging to the minority would be entered out of their free will in conformity with the principle of self-determination concerning data protection. The definition of the free choice of identity as a requirement is essential, since—as noted by Gyula Fábián—in order to qualify as a minority, every ethnic group has to have an "awareness of survival" as well. Acknowledging one's the identity serves to

[25] Ifj. Korhecz: *A kisebbségi önkormányzatok megválasztásának szabályai... op. cit.*

prove this awareness.[26] Beyond this, the free choice of identity can be restricted through objective criteria, if its purpose is the guaranteeing of special minority rights. According to the conclusion of Judit Tóth, although "everyone is free to declare or conceal his national or ethnic identity, identification cannot be avoided according to the order regulated by domestic law." In the opinion of the author, the requirements originating from constitutionality and the requests of the minority itself have to be taken into account during the elaboration of this regulation.[27] (The regulation set forth by the Constitution of Hungary creates a rather peculiar and contradictory situation: it considers the formation of a self-government the right of the minorities, while suffrage comprises not only them according to the provisions of the Constitution.[28])

Partly because of the negative experiences of the Hungarian Minority Act, when adopted the Act LXII of 2001 on Hungarians Living in Neighbouring Countries (hereinafter Status Law), the legislator introduced a kind of registration and thereby abandoned the more than hundred million potential beneficiaries living in neighbouring countries. In the case of the Status Law the principle of free choice of identity could not be applied in itself, without limitations. (This law provides assistance and grants for Hungarians living in neighbouring States.) It is an indisputable fact that the thus ensuing register differs from the internal registration system within the state in one important respect: namely, that the registered is administered not by the state in which the person is a citizen but by the mother country, with respect to which a Hungarian living beyond the borders does not have much to fear. In connection to this, many question whether this principle can be applied within a state in Eastern Europe at all, since minorities have no confidence in registers for historic reasons. It is, therefore, rather dubious, whether the persons belonging to minorities influenced by negative historic experiences are willing to have themselves recorded in such a register in the country of their citizenship, which has often showed a hostile behaviour toward them.

[26] Fábián, Gy.: Az identitáshoz való jog Romániában a lakosság nyilvántartás tükrében [The Right to Identity in Romania in the Light of Population Registration]. In: *Regisztrálható-e az identitás?... op. cit.*, 189–212.

[27] Tóth, J.: Többes mérce a kisebbségi hovatartozás megvallásánál [Multiple Scale at the Declaration of Belonging to a Minority]. In: *Regisztrálható-e az identitás?... op. cit.*, 37–72.

[28] In connection to this, see Article 68, Section 4 and Article 70, Section 1 of the Constitution.

In general, it can be said about every registration based on a voluntary choice of identity that should a register exist, only a part of the persons belonging to the minorities will have themselves registered: those who are the most active "in a public policy sense" in the representation of the minority. Here are some data to illustrate this: in Sweden, only 3 803 persons of the 5 990 citizens registered in the Lapp electoral register participated at the election in 1997. As opposed to this, the overall population of the Lapps is estimated to be between 17 000 and 20 000 persons. On the other hand, in Slovenia, practically every citizen belonging to the "indigenous" minorities was registered in the electoral register. The explanation to this is probably that these registers existed even prior to the change of the regime and the independence of the country.[29]

It is a fact that—whether envisaging discrimination or the granting of special rights—authority and law will not cope without specifying the scope of the beneficiaries or those deprived of rights. As opposed to the argument which as a result of fears rooted in history absolutely excludes the possibility of creating a registration of minority electors, it has to be noted that for dictatorial regimes, whether there had been any registration before their coming into power or not, it never meant any difficulty to prosecute and defame persons labelled enemies. To abandon minority special rights and other forms of positive discrimination in the absence of specifiable subjects of law would equal a return to general human legal protection, a regress to the theoretical basis from where in the beginning international regulation not accepting minority rights started to evolve after Second World War.

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Autonomy is becoming more and more popular in international organisations as well, since they increasingly see an instrument in it with the help of which national minorities can be protected in a way that the security of the states also remains intact. Autonomy based on the personal principle, although minorities concentrating in larger areas probably would not be content with it, could be used improve the situation of dispersed minorities, including the Roma minority. It must not be forgotten, however, that there are not many examples to prove that personal autonomy could also be realised and function successfully in the case of minorities with a larger population. In order that the situation of the Roma minority in Hungary could be improved, the actual establishment of

[29] See the data Ifj. Korhecz: *A kisebbségi önkormányzatok megválasztásának szabályai... op. cit.*

other legal institutions would also be needed even in the case of an appropriate reform of the legal regulation regarding minority self-governments. If those belonging to a minority were not guaranteed that it would really be them to elect their representatives—not even with the amendment of the legal regulation—, than the existing legal institution would have to be put aside and another way of regulation would have to be found. Hungarian legislators have enough time at their disposal to elaborate this, since the current system received a mandate for four more years after the 2002 self-government elections and, therefore, will function without modifications for a total of 12 years.

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ÁDÁM BOÓC*

Remarks on the Regulation of Company Limited by Shares in Romania

The accession of Hungary to the European Union may have a beneficial effect on the commercial relations between Hungary and Romania, and is likely to influence the Hungarian investments on the territory of Romania. As it is known, Hungarian Act XXIII. of 1999 has promulgated the Agreement between Romania and Hungary, concluded in Bucharest on the 16th of September, 1993 on the Actuating and Mutual Protection of Investments. This Act is devoted to the expansion of investments between the two countries.

Taking into consideration the fact that an investment is rather often launched by forming a company, a special purpose company in the project-country, I think that it might be useful to have a brief summary of the regulation on the company limited by shares in Romania. There is no need to dwell on why the company limited by shares is considered as the most adequate form for foreign investors. To mention only two essential circumstances, the amount of capital and possible anonymity of owners might be very important factors for the foreign investors. In this brief study I am going to summarize some determinative elements of the Romanian regulation of the company limited by shares while referring to certain parts of the Hungarian law.

It was the French jurisprudence and codification, which—besides the Roman law—had an elementary influence on Romanian jurisprudence and development of Romanian private law. This statement is true of civil law and commercial law, although it will be discussed in that the valid Romanian Act on Companies is also similar to the German provisions of company law in several aspects. The civil code of Romania, adopted in 1864 and effective even today in modified form, is influenced by the French law, especially by the *Code civil* of 1804. This code is based on the system of the *Institutiones*.

It was in 1887 that the Romanian commercial law was codified for the first time. The French *Code de Commerce* and the Italian *Codice civile* of 1882

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gave significant inspiration to this code.[1] It is worthy of mention that this Code did not lose effect even after 1948 in the new economic and social milieu. A draft of a commercial code was prepared in 1938, but it has never been adopted. In the period after 1948 the application of commercial law and the commercial code became limited in accordance with the modified social and economic relations. From that period one should mention the following rules of economic nature:

— 424/1972 Law-Decree on Mixed Companies;

— 3/1972 Act on Internal Trade, which contained provisions on foreign trade, as well;

— The Act of 30 January 1954 on natural persons and legal entities.[2]

The political changes of 1989/1990 entailed significant reforms in economic legislation, too. The most important stage of this reform is Act 31/1900 on commercial companies, which repealed the majority of the previous regulations of economic nature. I also mention Act 26/1990 on Company Register and the Law-Decree 96/1990, which ruled on the opening of Romania to foreign capital-investments. A fundamental change in economic life is also marked by the establishment of the Romanian Commercial Bank. This Bank was established in the form of company limited by shares with a registered capital of 12 billion lei. It is the Act 15/1990, which regulates the transformation of state-owned companies into commercial companies.

After the elections in November 1996, the new government fundamentally modified the Commercial code by Government-decree 32/1997 with immediate effect, the political background, to which was the intention to speed up the transition to a market-economy.[3] This decree was promulgated on the 27th of June, 1997 in the official gazette *Monitorul Oficial al Romanei*, and it became effective on the 27th of July, 1997. The Commercial Code is divided into nine titles as follows:

— General Provisions;

[1] See esp.: Hamza G.: *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján.* [Development of European private law.] Budapest, 2002. 206–208. In German: G. Hamza: *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn.* Budapest, 2002. 219–223.

[2] See esp.: H. Izdebski: *Les sources du droit dans les pays socialistes européens.* RIDC 38 (1986).

[3] See esp.: Sárközy T.: *A magyar társasági jog Európában. A társasági és konszernjog elméleti alapjai* [Hungarian Company Law in Europe. Theoretical Foundations of Company and Concern Law]. Budapest, 2001. 260.

— Formation of Commercial Companies;
— Operation of Commercial Companies;
— Modification of the Deed of Foundation;
— Exclusion and Revocation of Associated Members;
— Dissolution and the Merger of Commercial Companies;
— Liquidation of the Companies;
— Crimes;
— Closing and Transitory Provisions.

The code is divided into chapters within the titles. As it is indicated above, the Romanian commercial code—contrary to Hungarian Act CXLIV of 1997 on Economic Associations—contains the regulation on liquidation of companies and includes sanctions for certain economic crimes, as well. As it is well-known, the Hungarian legislator regulates liquidation, together with bankruptcy and voluntary dissolution in a separate act, while the crimes of economic nature can be found in the Criminal Code.

The Romanian commercial code recognizes the following forms of company:

— General partnership (*societate in nume colectiv*);
— Limited partnership (*societate in comandita simpla*);
— Company limited by shares (*societate pe actiuni*);
— Share joint stock company (*societate in comandita pe actiuni*);
— Limited liability Company (*societate cu raspundere limitata*).

The Romanian company forms are identical with those recognized by Bulgarian law.[4]

Beside the forms of company there is a fundamental difference between the Hungarian and the Romanian company law. Section 1 of paragraph 2 of the Romanian Commercial Code invests commercial companies of Romanian domicile with juristic personality, meaning that every form of Romanian company is considered a legal entity.

The modification of 1997 introduced several changes in the Commercial Code. A basic change in its structure is that the formation of companies is regulated in a general way rather than by type of company. An exception is the public company limited by shares, which is regulated in a separate chapter in the second title. From a terminological point of view we may experience certain simplification compared with the Commercial Code before the modification of 1997. The code employs the uniform term company capital (*capitalul social*), and it does not use the term stake capital for limited liability company or registered capital for company limited by shares. The officers of the company

[4] See: Sárközy: *A magyar társasági jog... ibid.*, 259.

are uniformly named *administrators*, and the deed of foundation is called *act constitutive*, which is signed by the founders (*fondatori*).

The *sui generis* rules on the company limited by shares can be found in the fourth chapter of the third title except to the above mentioned second chapter of the second title. The fourth chapter of the third title (Companies limited by shares) is divided into six articles, i. e. smaller sections, as follows:

— Shares (*Despre actiuni*);
— General Assemblies (*Despre adunarile generale*);
— Administration of the Company (*Despre administratia societatii*);
— Cenzors (*Despre cenzori*);
— Issue of Bonds (*Despre emiterea de obligatiuni*);
— Administrative Books and the Balance Sheet of the Company (*Despre registrele societatii si despre bilant*).

A company limited by shares may be formed both publicly and privately. The public formation of the company has its own formal procedure, which is separately regulated by the second chapter of the second title of the Commercial Code. The registration of the company in Romania has a *constitutive* effect, which means that the legal personality of the company is created by registration. It is the Commercial Court, which decides the registration of companies. Although the register is administrated by the Commercial Chamber, the legality of the registration and the register is supervised by a judge (*judecator delegat*). The mandate is given by the head of the competent court on a yearly basis. As a general remark it should be underlined that the fundamental reform of the Commercial Code in 1997 simplified the procedure of registration, which meets the demands of investors, as well.[5]

In case of public formation examination the Commercial Code requires by and a report of an independent expert concerning contributions-in-kind by shareholders. This expert must be appointed by the above mentioned judge. The Commercial Code also contains rules regarding conflicts of interest in connection with the expert.

It should be pointed out that the amendment of the Hungarian Company Code by Act XLIX of 2003 has strengthened the role of auditors in connection with the contribution-in-kind. In contrast to the previous regulation this amendment provides that the contributions-in-kind should be supervised by an independent auditor. The permanent auditor of the company is not entitled to

[5] Cf. G. Stalfort: *Rumänien: Das neue Gesellschaftsrecht. Teil 1: Gründung einer Handelsgesellschaft.* ROW 7/1997. 259–260.

this kind of supervision.[6] (It is worthwhile to take into consideration that this regulation creates double protection. The auditor however must be independent in his activity under to Act LV. of 1997 on Auditing Activity and the Hungarian Chamber of the Auditors.)

According to the Romanian law the joint capital of the company limited by shares the share joint stock company must be a minimum of 25 million lei. Before the modification of the Act in 1997 this amount was 1 million lei. The nominal value of a share must be at least one thousand lei. It is also the amendment of 1997, which allows a legal person to be a founder of a company limited by shares.[7]

The shares registered by the company can be registered shares or bearer shares. According to paragraph (2) section 91, the bearer share must be regarded as a basic category. Where the deed of foundation contains no provision on the nature of shares, these are to be regarded as bearer shares.

The Romanian Commercial Code is familiar with the term of preferred stock. The regulations however, differ from the Hungarian law in many aspects. Known to Romanian law the preferred stock for dividends and provides the nominal value of such shares must not exceed one quarter of the registered capital of the company. The most important difference between the Hungarian and the Romanian regulation in this respect is that the shareholder owning preferred stock for dividends has no voting rights and he is not allowed to attend the shareholders' general assembly, either. (These shareholders however may hold meetings, which are independent of the shareholders' general assembly.) As is known, Section 183, paragraph (4) of the Hungarian Company Act allows the company to issue shares, with no voting rights. One can have an economic explanation for this provision. It is very likely that in a giant company limited by shares a shareholder owning only a small number of shares may prefer receiving dividends in order to exercise voting rights, because otherwise he would have no real influence on the decision-making of the company.

Nevertheless, in one aspect the Romanian commercial code grants voting rights to the shareholders owning preferred stock for dividends on rather indirect way. The general assembly of the company—which cannot be

[6] Cf.: Biczi É.: *A részvénytársaság szabályainak módosításairól* [On the Modifications of Rules for the Company Limited by Shares]. Gazdaság és Jog 9 (2003) 9–10.

[7] See: G. Stalfort: *Rumänien: Das neue Gesellschaftstrecht. Teil 2: Die Handelsgesellschaft nach der Gründung.* ROW 8 (1997) 295. It should be pointed out that under the Romanian law an one-man company may only be established in the form of a limited liability company.

attended by these shareholders—may make a decision on the transformation of shares. According to Section 116 paragraph (1) of the Commercial Code there is a condition *sine qua non* to the validity of such decision. The separate meeting of the shareholders owning preferred stock for dividends has to give their approval to the decision. Although the approval cannot be regarded as a *sui generis* voting right, it creates a special opportunity to these shareholders to have a fundamental influence on the structure and future of the company limited by shares.

The Romanian Commercial Code lays down that the senior managers of the company and the members of the Supervisory Board cannot own shares without voting rights.

The Romanian law gives a different regulation on the transfer of ownership of registered shares and bearer shares. In the case of bearer shares the transfer of ownership can be accomplished simply by delivering the shares. In the case of registered shares the parties or persons authorized by them have to make a declaration in the shareholder's book. Nevertheless, the deed of foundation may specify other procedures, as well.[8]

As is known—under the Hungarian Company Law[9]—registration in the shareholder's book enables shareholders to exercise the shareholder's rights, which means that the transfer of shares should be regarded as effective from that moment. Nevertheless, registration in the shareholder's book is not a requirement for to the validity of the whole transaction from a civil law point of view.[10]

One can clearly detect the influence of the German *Aktiengesetz* promulgated on the 6th of September, 1965 on the Romanian Code in this respect of *own share* of the company.[11] Accordingly, the company may not acquire its own share except if the extraordinary assembly of the company so decides. It is an important rule that such decision must be published officially and the deadline of the whole transaction may not exceed 18 months from this announcement. The Hungarian regulation—before the modification in 2003—has followed another conception. The amendment of 2003 fixed—*inter alia*—a deadline of

[8] It is to be mentioned that the Romanian company law is also familiar with the term dematerialized shares. The transfer of ownership of dematerialized shares is regulated by the Act 52/1994.

[9] Section 198, par. (2).

[10] See: Fazekas J.—Harsányi Gy.—Miskolczi Bodnár P.—Ujváriné Antal E: *Magyar társasági jog* [Hungarian Company Law]. Miskolc, 2000. 299.

[11] Cf. *Aktiengesetz*, par. 71. See esp.: Stalfort: *Rumänien: Das neue Gesellschaftsrecht. Teil 2.* 295.

18 months, as well. The Romanian company law also states that the quantity of own shares acquired by the company may not exceed ten percent of the registered capital.

Tamás Sárközy points out that the original German system may be detected on the management of the Romanian company limited by shares in respect of the Board of Directors and the Supervisory Board.[12] The company limited by shares may have a chief executive officer (CEO) or a Board of Directors. In the aspect of the administrative manager of the company one should take into consideration the following important rule. The administrative manager must give a caution for the exercise of his activity. The caution may not be less than the nominal value of ten shares or the double his monthly salary. If the administrative manager himself is a shareholder he may fulfill this requirement by depositing ten shares with the company, which cannot be alienated during his mandate. It is worthwhile to mention that one can find several examples that someone is required to provide security for his *trustee*-activity. In the Roman law for example the so-called *tutor legitimus* had to provide security in the form of *stipulation* before the *praetor*. That security was called *cautio rem pupilli salvam fore* and was aimed to protect the assets of person under guardianship.[13]

It is a mandatory regulation of the Romanian company law that the chairman of the Board of the Directors, and at least 50% of the members must be Romanian citizens. If there is only one director (chief executive officer), then he must be Romanian citizen. The majority of the members and co-members of the Supervisory Board must be of Romanian citizenship. *Prima facie* this seems to be extraordinary and quite strange from the point of view of the foreign investors, but is not an unique legal solution. The Swiss Code of Obligations, *Obligationsrecht* (OR), containing 1186 articles at the present—which was promulgated on the 14th of June, 1881 and became effective on the 30th of June, 1883—provides in the third part that in a Swiss company limited by shares the majority of the members of the Board of directors must be Swiss citizens. If the Board of Directors includes only one person, then this person has to be Swiss citizen.[14] From this point of view one can see similarities between the Rumanian commercial code and the Swiss OR.

[12] See: Sárközy: *A magyar társasági jog... ibid.*, 260

[13] See: Földi A.—Hamza G.: *A római jog története és institúciói* [History and Institutes of Roman Law]. Budapest, 2003[8]. 263.

[14] See: OR, Article 708. In connection with OR see esp.: Hamza: *Die Entwicklung des Privatrechts... ibid.*, 58–61.

It should be underlined in connection with the Board of Directors that the Commercial Code allows some parts of the competence of the Board of Directors to be delegated to a leading board composed from the senior managers of the company. In my point of view this possibility should be open to bigger companies limited by shares, which have a huge administration. In these cases the Board of Directors can deal with the strategic questions, while this board can be active on the field of the company's operative management.

As I have already mentioned, the Romanian commercial law is familiar with the term share joint stock company. The Hungarian legal system does not recognize this type of company. The most important difference between the company limited by shares and the share joint stock company can be found in the administration of the company. Under Romanian law only a person bearing unlimited liability for the company can be senior manager in the share joint stock company.

In the system of the Romanian company law the Supervisory Board is intended for the classical controlling role. Hence there is no possibility to form a Supervisory Board, with competence to the *strategic guidance (Tamás Sárközy)*, which is covered by the Hungarian Company Act in par. 33.[15] The Romanian company law follows in this respect the provisions of the German *Aktiengesetz*.[16] The Romanian commercial code refers the members of the Supervisory Board as *cenzor*. Concerning the *cenzor*s the Romanian Commercial Code contains strict personal requirements. A company limited by shares must have at least three cenzors and deputy-cenzors. (The number of cenzors must be odd.) The cenzors must be elected for a term of three years, and can be re-elected. The cenzors are obliged to give security, the amount of which is one third of that given by the senior managers. There are also strict rules of incompatibility for the cenzors. There is an example for the state-control in this respect. If in a particular company at least twenty percent of the company capital is owned by the state, one of the cenzors is to be delegated by the Ministry of Finance.

It should be pointed out as a personal requirement for cenzors that one of the cenzors must be an accountant or an auditor. As is known, Hungarian law contains no provision in this respect. In my point of view, it can be an important guarantee for the proper operation of the Supervisory Board, if one member or even the president of the Supervisory Board is a lawyer or an

[15] See: Sárközy T. (red.): *Részvénytársaság* [Company Limited by Shares]. Budapest, 1998. 148.

[16] See: W. Zöllner (hrsg.): *Kölner Kommentar zum Aktiengesetz. I.* Köln—Bonn—München, 1988. 525–528.

auditing-specialist. During the reform of the Hungarian company law one should take this component into consideration. We should also emphasize that the members of the Supervisory Board must be shareholders under the Romanian law.

The controlling activity of the cenzors is precisely regulated by the Commercial Code. It is to be mentioned that the cenzors must check on a monthly basis the cashbook of the company and the existence of the stocks owned by the company or their deposit at the company as pledge or security. This requirement places heavy demands on the time cenzors.

The Commercial Code seeks to assure the cenzors' independence from the shareholders of the company by regulating that the cenzors must not give out to the shareholders or to third parties any pieces of information, which they obtain during their official activity. In my point of view this is a very important provision of the Romanian Commercial Code. Nevertheless the application and the enforcement of this provision seem to be quite problematical.

The Commercial Code does not specify the liability of the Supervisory Board, which is to be classified by the cenzors themselves. One can nevertheless make out the corporate liability of the Supervisory Board. Under the Code the Supervisory Board must act as a *corporate* and the cenzors may act *individually* in exceptional cases only. According to the German literature the German legal practice has considerably influenced the German law on the liability of the Supervisory Board.[17]

The Romanian Commercial Code does not give a separate regulation on the raising and depletion of the capital of the company limited by shares but its relevant rules are formulated jointly with other companies. Nevertheless, there are rules in this context which can be applied only in the case of a company limited by shares given the nature of this sort of company.

The modification of the Romanian Commercial Code in 1997 regulated in the merger and re-merger of the companies, including the companies limited by shares.[18] One has to underline that plans of merger or re-merger must be submitted in advance to the appointed judge (discussed above) for approval. Plans for the transformation must be officially published and the creditors of the company have the right to lodge protest against transformation. The most important legal consequence of the protest is that the transformation is suspended until a decision on the protest. The suspension will cease if the

[17] See: K. Schmidt: *Gesellschaftsrecht.* Köln—Berlin—Bonn—München, 1989. 629–631. For the liability of the members of the Supervisory Board see par. 116–17 of the German *Aktiengesetz.*

[18] See: Stalfort: *Rumänien: Das neue Gesellschaftsrecht. Teil 2.* 297.

company is able to reach to agreement with the creditors or if the company proves that the debts are paid up, or if the company can provide acceptable warranties to the creditors. It is also important to mention that in case of re-merger the companies will be held liable for the obligations of the former company in proportion of the assets acquired by the re-merging. Nevertheless, the parties have the right to stipulate a different proportion. If it cannot be clarified, which company should be held liable for a definite obligation then the liability of the companies will be regarded *joint* and *several*.

I do hope that I have succeeded in highlighting the conception and the major guidelines of the regulation on the company limited by shares in Romania. I also hope that this article can be useful for lawyers dealing with the legal aspects investments in Romania and that some parts of this outline can be taken into consideration during the *travaux preparatoires* of the new Hungarian company law.

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RÉKA FRIEDERY*

Transformation, Law Reform and Integration in Central and Eastern Europe

(Symposium held on 17–18 October 2003 in the Institute for Legal Studies of the Hungarian Academy of Sciences)

This symposium was the second event following the conference on *"Social Change and Legal Assistance: Lessons from the Hungarian Experience"*, held at Nagoya University in Japan within the frame of international cooperation between Nagoya University and the Institute for Legal Studies. The aim of the symposium was to examine the experience of Central European countries in a newly emerging international environment involving such relevant questions as the reception of a western-type legal system, the role of legal tradition and the legacy of the socialist legal structure. In addition, it was of great importance to explore the possibility of creating a new paradigm of legal assistance to countries in transition by sharing academic experiences. Internationally recognized lecturers were invited to take part in the academic discourse: *Professor Mamoru Sadakata, Professor Kaoru Obata, Professor Katsuya Ichihashi, Professor Masanori Aikyo and Professor Yasunori Honma*, members of the Nagoya University Graduate School of Law, Japan; *Professor Vanda Lamm, Professor Zoltán Péteri, Professor András Bragyova, Professor Csaba Varga, Professor Attila Rácz, Assistant Professor Gábor Sulyok and dr. Réka Végvári*, members of the Institute for Legal Studies, Hungary; *Professor Jiri Priban*, Charles University, Czech Republic; *Professor Marek Smolak*, Adam Mickiewicz University, Poland; *Mag. Andrea Dubisova*, Ministry of Foreign Affairs, Slovakia; *Professor Marijan Pavcnik*, Academy of Sciences and Arts, Slovenia. The observer of the symposium was *Mrs. Irina Kichingina* from the World Bank, as this international organisation has made legal and judicial reform a priority in recent years.

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The conference was opened by *Prof. Vanda Lamm*, Director of the Institute for Legal Studies and *Prof. Mamoru Sadakata* of the Nagoya University Graduate School of Law.

1. In the first working session the speakers *Prof. Kaoru Obata, Prof. Vanda Lamm and Mag. Andrea Dubisova* analysed the theme *"Integration into the European Union and Harmonization of Laws in Central and Eastern Europe"*.

The first contributor was *Prof. Kaoru Obata*, whose lecture dealt with *"Human Rights 'Conditionality' in the Process of EU Enlargement: Its Nature and Functions"*. The central questions of the lecture were the exact content of Human Rights conditionality and its role in the EU enlargement process. According to the speaker, applicants were treated individually in the enlargement process. The negotiations were conducted through bilateral conferences between Member States and each applicant state (but the Member States were not empowered to negotiate individually). During the process some procedural problems were also encountered, as in the case of common positions: during the negotiation conferences held to obtain the Council's approval and ratifications, the Member States were bound by the common position, meaning that the interest of each member state had to be taken into consideration, which made the member states act as a bloc. On the other hand, the power and weight of the acceding countries may be considered quite different both before and after the accession. Prof. Obata focused his speech mainly on the substantial conditions that were expressly stated for the admission of the new countries: he mentioned the Maastricht Treaty, which provides that an applicant must be a *"European State"*, while now the relevant EU Treaty sets criteria the *"principle of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law"*. In this way only states observing these principles may apply for membership. These conditions called *Copenhagen Criteria* (laid down by the European Council) may be classified into three categories: political criterion, economic criterion and acceptance of the *aquis*. Prof. Obata referred to the first as "Human Rights criteria" since it enumerates in substance the elements relating to democracy and/or human rights. According to him, the criteria are durable in nature: although they are preconditions for opening negotiations, they can be invoked at any stage of the process. Also, whether or not a given applicant satisfies the criteria, is a matter of unilateral evaluation by the EU and the member states. According to Prof. Obata, the superior position of the Human Rights concept is a logical consequence of the thesis that these rights constitute a fundamental principle of the EU. Non-fulfilment of the Human Rights criteria may block the accession negotiations. Although Human Rights concept operates to increase the force of conditionality, it is not because the relevant condition is

met by observance of universally recognized Human Rights, but because it is formally qualified as 'Human Rights' by the EU. The Human Rights criteria are *sui generis* in nature. The Commission identified problems in the light of the political criterion in the fields of prevention of corruption, functioning of the judiciary, protection of minorities, and implementation of administrative reforms. Only a small number of strictu sensu human rights problems were identified, which shows that human rights as defined in the Convention are quite different from political conditions.

The next speaker was *Prof. Vanda Lamm.* Her lecture addressed *"The Adaptation of the Hungarian Legal System to the Needs of Accession to the European Union"*. In recent legal history we could observe that membership in the European Communities or in the European Union was accompanied by the problem of adapting the constitutional system of a state to the requirements of being a member state. The problems arising from the need for adaptation are different: the reason for this lies, on the one hand, in the difference in constitutional systems, and on the other, in the status of the country as an original member or as a member-to-be. The Treaty of Rome did not contain explicit provisions providing for the supremacy of the community law over the national laws of Member States, and therefore certain characteristics of community law—especially its primacy—were not regarded as principles accepted *a priori* by the founding states. This principle of the *aquis communautaire* was developed by judgements the European Court of Justice delivered in 1963 and in 1964 in famous cases like the *Case Van Gend en Loos* and *Costa vs. E.N.E.L.*, where the Court of Justice held that the Community constituted a "new legal order of international law" which "not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage". This principle was confirmed again in other cases. The constitutional development of the Community and especially the ratification of the Treaty on European Union prompted even the founding States to amend constitutional provisions in order to adapt their constitutional systems to the obligations ensuing from the Maastricht Treaty. Some authors in Hungary have argued that the primacy of community law and its direct applicability in the Hungarian legal system must be secured by amending certain provisions of the Constitution on the relation between international law and internal law, and that Hungary's accession to the European Union calls for a monistic system based on the primacy of international law. According to the author this approach is mistaken because the primacy of community law is an issue, entirely different from that of dualism or monism and both solutions are acceptable as responsive to the demands of the European Union.

Mag. Andrea Dubisova's lecture on *"Integration into the European Union and Harmonization of Laws in CEE"* summarized the phases of the accession negotiations in Slovakia. Although the accession negotiations with that country were not officially opened until February 2000, the process of comparison of the European Union's legislation with candidate countries' legislation started with all candidate countries at the end of March 1998 following the decision of the Luxembourg Summit in 1997 to the effect that the enlargement process would involve all candidates, but that the negotiations would be confined to the most prepared countries. The screening part had a multilateral and a bilateral phase. First, the multilateral phase took place when the European Commission provided comprehensive information on the legislation of the European Union. Later on, in the bilateral phase, the representatives of candidate countries met individually those of the European Commission between March 1999 and February 2000. During the second phase the current state of legislation and of the administrative infrastructure was analysed with the aim of specifying areas where national legal norms did not conform to the requirements of the European Union's legislation, or the adoption of the *acquis communautaire* would give rise to financial and time-related problems. Furthermore, certain areas and exemptions connected with the transition period were discussed in general terms. During the negotiations, experts of the European Union examined whether a candidate country had harmonized its legislation with community law under a particular chapter. In addition, even if a chapter is provisionally closed it can be reopened during the negotiation process. The Accession Treaty has to be formed by agreements concluded between a candidate country and the EU in individual negotiating chapters. These also include the exact date of entry into the EU as well the kind and length of transition periods. Signing of the Treaty by a member state is followed by ratification by the legislation of each country. In Slovakia the ratification also requires approval by referendum of the accession to the European Union.

2. The second working session, concerned with the topic of *"Transition from Socialist Law and Resurgence of Traditional Law"*, was introduced by *Prof. Katsuya Ichihashi, Prof. Csaba Varga and Prof. Marijan Pavcnik.*

Prof. Katsuya Ichihashi's lecture on the *"Development of Administrative Law in Eastern Europe and Regions of the Former Soviet Union and Technical Legal Assistance"* presented an overview of the impact of social changes in Eastern Europe and the former Soviet Union. Among other things administrative law underwent its own development process in breaking away from socialism in the Eastern countries. As Prof. Ichihashi explained, administration was placed

under the control of the government and the communist party. The related tasks carried out through the internal institution of the administration, not pursuant to legal norms determined by a department outside of administration. The administrative court system that had developed to a certain extent before World War II. was rejected for its incompatibility. At the time of transition to a market economy these countries launched administrative law reform programs. In countries like Hungary and Poland, which have established comparatively long records, long-standing traditions and cultures in developing their systems of administrative law since the 19th century, and have devised systems of administrative justice, procedures and court, the revitalization of these institutions serves to enhance today's reforms of administrative law. In countries like the former Soviet Union, which had no such historical background, the efforts for revitalization of administrative law do not directly promote the necessary reforms, but merely offer a theory for that process. As Prof. Ichihashi summarized, revitalization of a western-style administrative law as a kind of technical legal assistance may eventually succeed in countries where the history and tradition of western administrative law had existed prior to the socialist rule. Legal assistance provided by western countries, the main strategy of which is aimed to dismantle the centralized administrative system embodying the socialist legacies of the past and to transplant a new framework having no roots in these territories, will not lead to progress apart from the adoption of administrative legal theories by the former socialist countries.

The next speaker was *Prof. Csaba Varga*, who read a paper on "*Radical Change and Unbalance in Law—with Own Traditions Resurging in Transition from Socialist Law*". As Prof. Csaba Varga said, radical changes in law have always been dangerous. At the time of the fall of the former regimes the public belief was that we only needed to do away with the remnants of the past and that the West would simply extend its borders over the former eastern bloc. However, the result was anything but different. The West could only offer its well-known everyday routine, the adaptation of which was just unrealizable. Prof. Csaba Varga mentioned the post-war situation of Germany and Japan as historical example. During the military expeditions the United States did not export the democratic tradition and the underlying *rule of law*; it focused on the culpability of the fallen regimes that had to be removed. It experimented with something new and opportune, which was obviously the right thing to do as one of the secure means for discontinuance of old practices and institutions in the doomed regimes. On the other hand, the allied military and occupying administration avoided implanting domestic democratic measures and instruments in an empty space. When use of force was not enough, it proceeded to

apply the otherwise neglected natural law so that the law and the legal continuity of the defeated could be broken inside. As Prof. Csaba Varga said, that kind of legal borrowing was not only dangerous but risky as well. A characteristic feature of our transition process was that it had an exclusively liberalizing effect. Faced with the need to establish conventions, its pursuit of reform could not materialize except through causing damage to the community. Direct interference with local social processes was mainly partial—for their own sake—without being incorporated in any systematic overall plan with community-wide dimensions. Behind this a rather limited *rule of law* can be found. During the transition process, national legal traditions are being moulded. They are formulated by reliance mainly on socialist routine, but also under Atlantic inspiration and by drawing upon European Union practices. As the speaker pointed out, a revival of past national traditions can only be hoped for in the long run, even though the process has got underway.

As the third lecturer, *Prof. Dr. Marijan Pavcnik* discussed *"The Transition from Socialist Law and Resurgence of Traditional Law—The Case of Slovenia: The (In)adequacy of Legal Positivism"*. Prof. Plavcnik started with a definition of the so-called socialist law. Socialist law was not a uniform and a generally accepted concept; there were some classical Marxist standpoints on the nature of socialist law, and different interpretations of and reactions to those standpoints according to the varying demands of practice in the socialist countries. The self-managing political system of former Yugoslavia allowed more room for a pluralistic concept of socialist law compared with the countries of "real socialism". Self-management law was not a new type or field of law; it was a question of new formal sources of law comprising legal norms. Prof. Pavcnik explained that traditional law was always closely linked to Yugoslavian and Slovenian law. It was used in areas to which socialist law did not penetrate, it filled legal gaps, and the system of legal education was mostly based on traditional law and legal thinking as well. The new socialist law was taught, but it was never dominant; because the older professors, who had studied between the two world wars, remained true to scientific legal positivism. So, the theories of pluralism and self-management were accepted but not institutionalized legally and politically, and the legal system was *de jure* and *de facto* dominated by one political party. The system of *checks and balances* could not work, because the rules on the *division of powers* were no more than an ideological ornament. In the transition process the new Constitution of independent Slovenia, centred on the classical constitutional material represented a milestone. It defines Slovenia as a social state under *the rule of law*; a catalogue of basic human rights and freedomsis compiled, competences of

central state bodies and their inter se relations are enunciated. According to Prof. Pavcnik, during the transition one has to take into consideration historical as well as legal traditions, but comparable foreign examples and solutions consistent with local conditions may also be adapted. It is of great importance that appropriate political groups and parties develop which would even *de facto* accept the values of a state under *the rule of law* and of a social state.

3. The speakers of the working session on *"Legal assistance in CEE and its Assessment"* were *Prof. Masanori Aikyo, Prof. András Bragyova and Prof. Jiri Priban.*

Prof. Masanori Aikyo spoke about *"Legal Assistance and Themes for Comparative Legal Studies—Rethinking the World from an Asian Stance"*. The lecturer gave a short description of the historical background. As he mentioned, after the collapse of the socialist regimes in Eastern Europe, in the Soviet Union and in many Asian countries a transition process has started. Before that, Japan as an Asian country devoted but a few studies to Asian law. Now, the changes and the new circumstances made it important for Japan that these countries build a new system promoting legal and political stabilization in this region. In this connection, Japan as well as other donor countries and international organizations are implementing legal assistance projects under which questions like the role of contemporary Japanese law in this process are to be answered. Japan, taking part in legal assistance to countries in Asia, witnesses a new era of objective need for Japanese law and Japanese legal studies to serve as a source of information to be disseminated to other foreign countries. Provision of legal assistance for each country basically means asking ourselves the question as to which of the laws we have adopted so far are suitable as a legal message to be communicated abroad. Prof. Aikyo stated that although there were differences in the backgrounds of transition, the standards of legal education, the state of legal cultures, the process of legal reforms etc. in the former eastern bloc and in the Asian countries, the common characteristic of their transition processes was to change from an administratively centralized legal system to a new legal system suitable to promote marketization. The lecturer explained that the transition of legal systems in Central and Eastern Europe and the formation of new laws offered interesting topics for comparative legal studies from the perspective of legal assistance and that there was a need to develop a new theoretical framework for comparative legal studies which would take into consideration different factors of legal culture based on a clear understanding of legal history and of the legal values involved.

The next lecture *"Legal Assistance as Transfer of Legal Knowledge–A Case Study of the Constitutional Courts of Legal Knowledge"* was delivered by *Prof. András Bragyova* who explained the concept of 'legal assistance' as a special form of transfer of legal knowledge from one legal system to another. This demand might be "external" to the legal system, i.e. being of a social or political origin in general, and it might be "internal", i.e. arising within the legal system itself. A legal system involves legislative provisions asserted in "metalanguage", i.e. in a normative or legal language, without which a legal system cannot exist. The legal knowledge—called *'legal dogmatics'* in the continental European legal system—may be considered as part of this normative language which includes the canonical formulations, the contents of the rules of positive law, the dogmatic statements about the law, standard forms of legal arguments, the accepted methods of interpretation, the doctrines and ideologies. The normative language of a legal system has functions to fulfill: the constitutional review is an efficient and speedy legal institution for transferring legal knowledge. Firstly, the constitutional review encompasses the legal system as a whole and has influence on it. Secondly, in the constitutional review, the legal argumentation or the theoretical elements—from the normative language or dogmatics—are more important by comparison with ordinary legislative language. Furthermore, transfer is facilitated by concentrating the constitutional review in a single court. Since there was no precedent for constitutional review in Central and Eastern Europe, there was a basic need for the transfer of constitutional argumentation, and this is the reason why they have turned to foreign models of legal argumentation—such as those offered by the the German *Bundesverfassungsgericht* or from the European Court of Human Rights.

The last contributor was *Prof. Jiri Pribán,* who dealt with the topic *"The European Constitution-Making and the EU's Involvement in Central European Constitutional Transitions"*. The CEE countries integrating into the Union in 2004 experienced a rather curious historic movement related to constitution-making. On the one hand, after the collapse of communism they started to recreate national sovereignty, while weakening it in favour of the European Union. On the other hand, among the three major arguments, which theoretically supported the European constitution-making efforts, the *identity argument* is of great importance to the national constitution-making process in the acceding countries as well. According to its advocates, the primary function of integration is to keep "*ethnos*" outside the gates of European politics and to establish a new European identity as contrasted with different ethnic and national identities. Therefore, the European Union may be a symbolic alternative to ethnically burdened nation states. The EU backed the peaceful nature of post communist

transformation and democratization because it kept under control the threats of political authoritarianism, hostilities within a nation, and other consequences of the political changes. The *neutralization function* of the European integration was shown in several tense situations, e.g. disputes about ethnic and national minority rights between Slovakia and Hungary. Prof. Priban described the current situation of the EU, where 'the constitutive power is desperate to constitute its constituent power', the European constitution-making process based on sovereignty claims and the notion of supremacy have met with many criticisms. The Convention's work on the constitution, which is more than a social contract in the sense of an alliance of the affected parties having mutual responsibilities and rights, followed the logic of John Locke's horizontal version of social contract and the draft presented is a social contract between the peoples of Europe politically organised in their democratic nation-states.

4. *"Judicial Reform and Comparative Law"* was the closing theme of the symposium treated by *Prof. Yasunori Honma*, *Dr. Réka Végvári* and *Prof. Marek Smolak*.

Prof. Yasunori Honma delivered a lecture on *"Judicial Reform and Comparative Law in Japan"*. He described the historical background to the law of civil procedure and the present status of judicial reforms, which serve as a basis for finding similarities and differences between the eastern European and Japanese civil justice system. The Japanese Code of Civil Procedure framed on the model of the German Code of Civil Procedure, came into force in 1890. Although it had significant impact on judicial practice in civil cases, the local characteristics of the system did not disappear. As Prof. Honma explained, that Code based on a relatively liberal and adversary system, was easily to adopt at the time, but, as the adversary system was apt to cause delays in resolving litigation, its amendment became necessary in 1926, with the Austrian Code of Civil Procedure serving as the main work of reference and with the Hungarian Code of Civil Procedure also consulted. The lecturer stated that a few years later the problem of the delay in litigation reappeared owing mainly to the unsettled procedure for the taking of evidence. After World War II, the American legal system introduced new elements such as cross-examination, but this amendment had no radical impact on the law of civil procedure as it had failed to incorporate preliminary elements like revealing in advance the evidence possessed by other party. Finally, in 1998, when efforts were made to amend the Code, emphasis was laid on improving the procedure for the taking of evidence. Although, the Japanese Parliament, recognizing the importance of the issue, passed an act to expedite the procedure with litigations to be settled

within 2 years, the Judicial Reform Council submitted recommendations significant to the judicial system in the light of a more comprehensive reform in 2000. Prof. Honma mentioned the introduction of the *saiban-in* system, under which a layman as assistant judge takes part in serious criminal cases and in the hearings, as under the *sanyo-in* system in civil cases (mainly family matters involving divorce) where the judges takes into account the opinion of the layman. According to the lecturer, comparative law and comparative judicial systems have become essential elements in institutional reforms, as the civil justice systems of the different countries express the local cultures formed over many years, so it is more appropriate to harmonize them instead of having them regulated in a single procedural law.

The next lecture on *"Judicial Reform and Comparative Law"* was delivered by *dr. Réka Végvári.* The lecturer gave an overview of the effects of the transition process on the judicial system. According to her, several modifications—seeking to protect and respect human rights and fundamental freedoms, to widen the procedural guarantees, to simplify and speed up the processes and to achieve the compliance with the new requirements of the judicial system—can be observed in civil and criminal procedures as well as in the organization and supervision of the justice system. As far as the organization and supervision of the system is concerned emphasis was laid on increasing the financial independence of the courts. The integration into the European Union and the recommendations of the Council of Europe had influence to bear on the reforms both underway and complete in the region. Dr. Végvári emphasized that the changes in administration, effected with the aim of widening the procedural guarantees and pursuing to accomplish the precedents of the European Court of Human Rights could be clearly recognised in criminal law. New methods of witness protection had been drawn up, the conditions for the application of coercive measures and secret service means had been modified on the basis of the rule of law. Tendencies were in line with the independence of judges, as far as the judicial institutions are concerned. The lecturer mentioned that the question concerning the place of the prosecution, i.e.whether it should belong to the government or should be independent, was still on the agenda. Efficient and continuous control over the police and greater emphasis on the importance of proceedings before the court were required. The strengthening of the adversary elements and the simplification of the procedure were based partially on *Anglo-Saxon* analogy, so the solutions to speed up proceedings were questionable. It was underlined that the comparative method had a determinant role to play both in the preparatory work and in the reshaping of the Hungarian criminal procedure.

Prof. Malek Smolak's lecture on *"Can Constitutional Courts bring about judicial reform? Polish and South African experience"* was devoted to the legal problems of the so-called transitional constitutionalism defined as the way the Constitution functions at the time of a substantial political change. The institutional changes in Poland and South Africa may be characterized as ongoing processes, and the constitutional courts are playing a vital part in them. The courts in Poland and South Africa are expected to create—or to create together with the legislature and the executive—a new social and political order based on justice and law. The judicial decisions of the Constitutional Tribunal and the Constitutional Court will now have to take a position on this problem. Consideration of the role of constitutional courts in political transformations necessarily leads to the questions of the judges' understanding of the relationship between the role of the judiciary on the one hand and that of the legislature and the executive on the other, as well as of the problem of the democratic majority principle and the lack of democratic authorization of the courts. The speaker stressed that the impact of constitutional courts on political transformations was closely related to the said understanding. According to him the periods of political transformation reveal the fallacy about the political neutrality of constitutional courts and induce judges to show an inclination towards passing more politically oriented judicial decisions. From this perspective, the adjudication of the Constitutional Court in South Africa, perceived as an attempt at creating a constitutional culture, may be understood as a procedure for achieving a social and political compromise based on the authorities and citizens 'self-limitation'. Such agreements opened, and created the framework for a political discourse, and they are a positive example of building a "negotiatory constitutionalism".

The discussants of the symposium were Prof. Zoltán Péteri in the session on "Transition from Socialist Law and Resurgence of Traditional Law", Prof. Attila Rácz on "Judicial Reform and Comparative Law", Prof. Csaba Varga on "Legal Assistance in CEE and its Assessment" and Dr. Gábor Sulyok on "Integration into the European Union and Harmonization of Laws in Central and Eastern Europe".

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OLGA BORBÁLA MOLNÁR*

Constitutional Questions Concerning the European Integration, with Special Regard to Hungary's Accession

1. General Remarks

Nowadays the constitutional aspects of the European Union (hereinafter EU) are especially popular: several authors have written about the Constitution and the Charter of Fundamental Rights of the EU from different points of view, but almost always repeating the same. The question of enlargement is fashionable, too. The '*EU enlargement. The Constitutional impact at EU and National Level.*'[1] is—in accordance with its title—therefore not unique. The book contains the proceedings of an international conference, which was held between 20–23 September 2000 in the Hague.[2] The purposes of this conference were to study the impact of the Intergovernmental Conference (hereinafter IGC) in Nice and the EU Charter of Fundamental Rights, and to show candidate countries the experience of the present Member States in the course of the adaptation of their constitutions to the obligations resulting from the EU membership.[3] The *rapporteurs* and speakers were representatives of European institutions, representatives of national governments and of national civil, administrative and

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[1] Ed. by Kellermann, A. E.—Zwaan, J. W. de—Czuczai, J. T.M.C. Asser Press, The Hague, 2001, lxi+601.

[2] It was organised by the T.M.C. Asser Institute in co-operation with the Constitutional and Legal Policy Institute (COLPI) from Budapest. See: in detail, Czuczai, J.: Az ún. 'Keleti kibővítés' alkotmányossági kérdései mind az EU, mind a tagjelölt országok tekintetében [The Constitutional Questions of the So-Called 'Eastern Enlargement' Regarding the EU and the Candidate States]. *Jogtudományi Közlöny,* 2001. 145–147, and the website of Asser Institute: www.asser.nl/Impact/default.htm

[3] Cf., www.asser.nl/Impact/default.htm

constitutional courts as well as professors, research fellows from universities throughout Europe and the United States.[4]

The book is a standard work and its authors are experts in the subject.[5] On the other hand, its theme—research on the constitutional aspects of the enlargement—is also original: the enlargement is often spoken of in general terms, but in this book the question is restricted to the most important aspect thereof, namely the constitutional one. The problems which the work deals with have remained significant also after Nice. Besides, all the main questions are examined on both Member State and candidate state levels, therefore a complex system of ideas is created. The volume constitutes a very interesting snapshot of the constitutional debate,[6] enabling us to see and comprehend all the constitutional questions of the integration.

The present author relies on this book for introducing the readers to the main constitutional problems faced at both EU and national levels. These problems are of great importance for Hungary, as it became a member of the EU by 1 May 2004. After reviewing these questions this study will also address those which must be solved by Hungary in this context.

2. The Main Constitutional Problems in Connection with the European Integration

By presenting some studies of each main part of the volume, the review sheds light on the constitutional problems entailed by the progress of integration. The reviewer intends to highlight the current general constitutional questions of the EU, namely the pros and cons regarding the Constitution of EU and the Charter, and the constitutional challenges originating from the accession for Member States in the past and for candidate states at present.

The book deals with the above-mentioned problems in four main parts: the first deals with the Constitution of the EU and the Charter. The second and third parts deal with the national level: the second part with the constitutional problems

[4] Hungary was represented by Attila Harmathy, Member of the Hungarian Academy of Sciences and visiting professor Jenő Czuczai (College of Europe, Brugge).

[5] Imre Vörös calls the authors 'big guns of the profession' in his book review. See Vörös, I.: Egy európai alkotmányjogi alapműről [On a Standard Work of European Constitutional Law]. *Jogtudományi Közlöny,* 2003. 112.

[6] Cf. Walker, N.: Review of 'EU Enlargement: The Constitutional Impact at EU and National Level' (eds.: Kellermann, A. E.—Zwaan J. W. de—Czuczai, J.). *Yearbook of European Law,* 2002. 591.

and the developing practice of the national constitutional systems of Member States, the third with the candidate countries' constitutional challenges and the effects of enlargement on their national constitutions. The fourth part elaborates once again on theoretical issues, namely the expected effects of the Nice IGC, the future institutional changes and the constitutional impacts of the enlargement.

The structure of the work is logical, so the reviewer will also follow its train of thought.

2.1. Constitutional Order of the EU

2. 1. 1. Constitution of the EU

The first study deals with the Constitution of the EU. Its title is '*Europe 2000—The constitutional agenda: an outline*'; it was written by *Joseph Weiler*, a professor of Harvard Law School and the European University Institute in Florence. He deals with the question whether the EU needs a constitution.

The EU raises a lot of constitutional issues, for instance it insists on supremacy *vis-à-vis* national the legislature and on direct effect, *vis-à-vis* the judicature, it has a charter protecting human rights, subsidiarity prevails, etc. Thus the EU already has an uncodified constitution. There are five arguments for its enactment: 1. lack of legitimacy, 2. non-functionability of Treaties as a constitution, 3. necessity of a Constitutional Court, 4. need for a formal charter of rights, 5. limitation on the competence of the Union.

The author expresses some scepticism about these arguments and expounds his views. In his opinion the change in the constitutional architecture is an urgent necessity, but it cannot be achieved by a formal procedure like adopting a constitution. He refutes the arguments one by one.

First, the opening of a constitutional discourse among European peoples only serves to decrease, rather than increase stability. On the other hand, a codified constitution rules out the principle of 'constitutional tolerance' by introducing a formal hierarchy between Member States and EU like in federal states, instead of the present case: the constitutional organs of the Member States accept that EU is *'primus inter pares'*. Consequently the EU would lose its originality.

Finally, the Treaties could be reduced to their constitutional nature, and the other provisions could be transformed into other legal measures of Community law. This method may result in a formal, entirely new constitution.

2. 1. 2. The Charter of Fundamental Rights of the European Union

The necessity of a Charter of Fundamental Rights is a hotly debated question as well. Its supporters mentioned the lack of a catalogue of human rights as a

shortcoming of the EU, because its institutions are not bound by the European Convention on Human Rights. The opponents of the Charter referred to many documents like the European Convention, UN treaties and national constitutions already dealing with human rights protection. They proposed that the EU investigate again whether or not accession to the Convention would be possible and feasible.[7]

Those who are not supporting the Charter—like Professor *Weiler*—emphasised the absence of a human rights policy. He thinks there is no need for a Charter of Human Rights either, because the protection of fundamental rights has already been guaranteed by the European Convention on Human Rights, and the European Court of Justice (hereinafter ECJ) has also stated that Community measures violating fundamental human rights must be repealed. *'The Union does not need more rights on its lists, or more lists of rights. What is mostly needed are programmes and agencies to make rights real, not simply negative interdictions, which courts can enforce.'*[8] Relying upon these findings, only the Treaty should be amended by introducing the human rights policy.

Henry G. Schermers, professor of the University of Leyden, in his study entitled *'Drafting a charter of fundamental rights of the European Union'*, deals first with the question whether the EU is bound by the European Convention on Human Rights and whether the Member States having ratified the Convention could transfer powers to the Community. The problem arose in Germany, where the human rights are listed in the constitution and may not be changed under Article 79, so the powers of the EU are restricted by them.

The second question is whether the Member States are responsible for infringements of rights committed by the Community. Since the Community is not a party to the Convention, the European Commission of Human Rights is not competent to examine its acts. States can transfer powers to international organisations, but this does not exclude their responsibility under the Convention. On the other hand, Member States cannot be obliged to examine the decisions of the Community because of the principle of supremacy and the idea of transferring powers to an international organisation. The adoption of the Charter of Human Rights could not provide a solution. It will add more rights to the existing ones, which must be exhausted before bringing the case to the European Court of Human Rights (hereinafter ECHR). It will not replace the Convention, so it will only involve further delays in the procedure. It will result in parallel structures and even more conflicts of competence. The best

[7] See www.asser.nl/Impact/default.htm Summary by Kellermann, A. E.

[8] See the book reviewed 12.

solution could be if the Community became a party to the Convention, and it examined the conformity of its acts with the requirements of the Convention. This could create a clear legal situation.

The starting point of *Roger Errera*, the author of the following study,[9] is that the ECJ has already developed the *'acquis communautaire'* relating to fundamental rights. The ECJ borrows from the ECHR, but it interprets the rules in relation to the structure of the EU. The problem is that the present system is incomplete, lacks clarity and legal certainty, and the decision of ECJ can differ from the ECHR. The Charter is not necessary if its content is almost the same as the Convention's, because the divergences deriving from the differences of approach are inevitable but legitimate.

Ernst M. H. Hirsch Ballin—the author of the next study[10]—thinks that the work on the Charter began in the interest of escaping from the question of accession to the European Convention. It causes difficulties in that, in case of accession, the Community loses its autonomy of interpretation.

The Charter is a significant element of constitutional development: it limits the exercise of powers and helps to identify the scope of EU competence.[11] According to the author, the Charter is more than a restatement of the Convention: it reflects the specific nature of the EU by stating the rights of Union citizens and the economic and social rights. It contains original rights such as the right to physical and mental integrity, protection of personal data, recognition of cultural, religious, ethnic and linguistic diversity in the EU, etc. The significance of the Charter lies in the identification of the EU as a 'public law structure with a constitution'[12]—writes Professor *Hirsch Ballin.*

In the study *'The impact of the EU Charter of Fundamental Rights in the perspective of enlargement'*[13] *Koen Lenaerts*, a judge of the Court of First Instance of the European Communities, considers the constitutional challenges stemming from the Charter for candidate states. They are to meet rigorous requirements as concerns respect for fundamental rights, with extremely strict sanctions by the EU. The Europe Agreements and the 'Copenhagen criteria' also prescribed obligations in this field. If a state wishes to accede, it must respect the principles of the EU, including respect of fundamental rights. This

[9] Its title is 'On human rights and the idea of a European Charter of fundamental rights'.

[10] Hirsch Ballin, E. M. H.: The EU Charter of Fundamental Rights: A building block for the European constitutional order.

[11] Cf. *op. cit.*, 32.

[12] See *ibid.*, 34.

[13] This study belongs to the fourth part, but on the basis of its theme it will be treated here.

is a legal condition for membership. However, there is no coherent approach to monitoring the actual status of human rights in the candidate countries. The EU relies on the Convention for ensuring respect for fundamental rights, hence a European State may be a member of the Union only if it accedes to the Convention. This problem will be solved by the Charter.

The author also deals with the protection of minorities, which is a precondition for accession, but the EU is reluctant to solve the problem within its own borders.

According to *Evgeni Tanchev*, Professor of Sofia University, the main effect of the Charter on candidate states is that they have to incorporate in their national constitutions the second and third generations of rights, i. e. economic and cultural rights.

Charters often precede constitutions because they require less political consensus. Therein lies their significance. However, the Charter is of no use if it does not contain an obligatory list of rights. [14]

2. 2. Constitutional Impacts of Enlargement on Member State Level

The second main part of the work describes the Dutch, the British, the Irish, the Danish, the Spanish, the Portuguese, the Greek, the Austrian, the Finnish and the Swedish constitutional order, and some general constitutional aspects of EU membership and the forthcoming enlargement. The reviewer will not describe the constitutional solutions of the Member States one by one, save the general problems and the British solution.

'Constitutional aspects of European Union membership in the original six Member States: model solutions for the applicant countries?' is the title of the study written by *Bruno de Witte*. Its main question is whether an *'acquis constitutionnel'* exists, which the applicant countries should accept. The author examines the six founding States, because they created the institutional system, and did not have to face an existing one. They gave very different answers to the challenges incurred, so in this context there is no common *'acquis constitutionnel'*.

According to the author, there are three main aspects of the constitutional challenges in historical order: limitation of sovereignty in favour of international organisations, adaptation to the supremacy of European Community (EC) law, and reactions to the effects of Treaty on the European Union (hereinafter TEU).

[14] See the book reviewed 36.

First, according to the *'Schuman Plan'* states had to surrender their powers in the two determined areas to a supranational body in order to prevent wars. The French, Italian and German post-war constitutions contain 'a provision permitting limitations of sovereignty or transfer of sovereign powers to international institutions'.[15] The model of the three leading states was adopted by the Netherlands and Luxembourg a few years later, but Belgium followed them much later. However, none of the Benelux states made an express reference to the EC.

The second challenge was the recognition of EC law's supremacy. The acceptance of the doctrine constituted no problem in the Netherlands and Luxembourg, because in these countries the supremacy of international treaty provisions had been accepted earlier. In Belgium, the Supreme Court adopted the doctrine as it had been formulated in the *Case Costa v. ENEL.* In France, the Constitution contained a provision on the principle, but the courts were extremely slow in accepting this rule. In Italy, the Constitutional Court recognised the supremacy of Community Law on the basis of its *'special nature that distinguishes it from other international treaties'*.[16] In Germany, the constitutional provision, which allows membership (Article 24), implicitly contains the primacy of Community law.

The third constitutional problem came up with the TEU, which led to constitutional amendments in Germany and France, and resulted in the explicit constitutional recognition of the European Union. In Belgium and Luxembourg there was a contrast between the constitutional provisions and the TEU concerning local elections, yet these countries ratified the Treaty while postponing the revision of the constitution, a highly criticized method. Nor were constitutions amended in Italy and the Netherlands, but there was no conflict of norms there.

Bruno de Witte deals also with the *limits* of 'absolute supremacy'. According to the Italian Constitutional Court, the EC law could only derogate the 'ordinary' rules of constitutional law, but not the fundamental principles or inalienable rights. In Germany, the *Solange-I.* and *Solange-II.* judgements are of overriding importance. The result of these judgements is that the German Constitutional Court is empowered to control whether the general system of fundamental rights protection in the EC conforms to the German constitutional standards. This attitude means that Italy and Germany intend to protect what they consider the core of their constitutions even against the EU. In France, the

[15] See *ibid.*, 67.
[16] See *ibid.*, 70–71.

enforcement of a norm of the EC running counter to a constitutional norm is also inconceivable. In Belgium, the *Cour d'Arbitrage* has the power to review the constitutionality of international treaties, but it has never done so in relation to the EC law. These cases show that constitutional courts *'cannot accept that any source of law might prevail over the national constitution itself.'*[17] Only the Dutch constitution ensures the absolute supremacy of treaties which have been ratified already.

The last problem the author touches upon is the sharing of the exercise of sovereignty. It can be split horizontally as well as vertically. The Belgian constitution states that 'the exercise of delimited powers can be attributed by treaty or by law to institutions of public international law.'[18] The joint exercise of sovereignty is in the interest of the people of Member States, but as it is exercised by decisions made by qualified majority, particular states 'can be outvoted'.[19]

After having discussed the main theoretical questions, we shall now see the problem from the point of view of each Member State. *Francis G. Jacobs* examines the constitutional impacts of accession state by state.[20] First he deals with Denmark, Ireland and the U.K. In *Denmark* there was no need to amend the constitution, because it spelled out in 1953 that the powers of the Realm may, to an extent specified by statute, be delegated to international authorities.

In *Ireland,* the Constitution was amended in 1972 with special regard to membership in the European Economic Community (hereinafter EEC). The new provision permitted membership and confirmed the primacy of EEC law. In the *U.K.*, there is no formal constitution, so only an enabling Act of Parliament could be used.[21] According to the principle of parliamentary sovereignty 'no Parliament could bind its successor'[22] and it was contrary to the recognition of the primacy of Community law. As a result, the European Communities Act included only an obscure sub-section, which ensured primacy *'as far as it was possible'*[23] and obliged the courts to follow the decision of the ECJ.

The next state to accede was *Greece* in 1981. It already had authorization in its constitution of 1975 as to the transfer of powers and the limitation of the

[17] See *ibid.*, 77.

[18] See *ibid.*, 78.

[19] See *ibid.*, 79.

[20] The title of the study is 'The constitutional impact of the forthcoming enlargement of the EU: What can be learnt from the experience of the existing Member States?'

[21] Cf. *op. cit.*, 186.

[22] See *ibid.*

[23] See *ibid.*

exercise of national sovereignty, so there was no amendment. Neither in *Spain* arose a need for amendment of the constitution. In *Portugal,* there were several amendments until the constitution came to comply with the requirements of EC law. Non-conformity of the legal order in these two states is for ordinary courts to examine.

Austria adopted a constitutional law expressly for the purpose of accession, but it did not settle the relationship between the EC and the national legal order, because it is the task of the Constitutional Court. In *Finland,* the Implementation Act proclaimed the membership and recognised the primacy of EC and EU law. In *Sweden,* the Constitution was amended to authorize the Parliament to transfer powers to international organisations.

The author examines potential conflicts between national constitutions and Community law. The reviewer will merely point to some problematic questions: whether powers exercised do not go beyond the scope of those transferred; the conflict between exercise of powers by EU and fundamental rights protected by national constitutions; conflicts between specific constitutional provisions and the Treaty interpreted by the ECJ; the absence of adequate provisions for the primacy of Community law in constitutions. The constitutional amendments cannot solve these problems within a short time. Instead, the constitutional provisions should be interpreted to give effect to EC law.

Another problem is that some of the Member States still hesitate to recognise the absolute primacy of Community law. Moreover, the recent candidate countries are newly independent and the independence provisions are firmly rooted in their constitutions. However, it is necessary to make the constitutional amendments before the accession, or else the transposition of the *acquis* has no sense, as it could have no effect—emphasises the author.

After the general overview of the question let us have a look at the United Kingdom, which has no written constitution and 'the Parliament can do anything'. It is very interesting how this state solved the problem of transfer of competence. The title of the essay, which demonstrates the problem, is *'The British way: the cohabiting with community law'*. The author, *Alan Dashwood,* deals with the sovereignty of Parliament in the U.K., which means that the acts made by the Parliament prevail over all of the norms and the courts must obey them. According to the traditional view, the powers of Parliament are unlimited and illimitable, therefore the Parliament cannot bind itself for the future. In the EU, however, Member States should limit their sovereign rights, and in the European Communities Act 1972 (ECA) the Parliament did it as well. The courts follow without reservation the decision of the Parliament. The limitation would only be lifted if the U.K. withdrew from the Union. The possibility of

express derogation from the ECA was nevertheless acknowledged. It shows how the EU membership could alter one of the ultimate principles of the United Kingdom.

2. 3. *The Constitutional Problems of the Candidate Countries in Relation to the Accession*

The third part of the book portrays the constitutional challenges deriving from membership for candidate states. The constitutions of candidate states must be amended so as not to hinder accession to an international organization, for example the EU. The Commission neither mentions adaptation of national constitutions in its reports, nor gives directives, because constitutions are regarded as belonging to the people of the country.[24] All states must find the constitutional solutions suited to the conditions of their own legal system and establish the framework for the success of community law, because there is no uniform model.[25] Besides the constitutions, the decisions of national constitutional courts are also important in the interpretation of these constitutions. Training of judges, prosecutors and other lawyers in European law is likewise necessary for the proper operation of the judicature in candidate countries after the accession.[26]

The constitutional obstacles should be removed before the accession, therefore this question is of the greatest importance for Hungary as well. It is very useful to examine the methods and solutions of the other candidate states, because one can learn and get ideas from them. At the conference it was decided to hold follow-up meetings in a multi-country project for the development of European models of constitutions. These European constitutional models could be helpful for the candidate countries in the process of amending their constitutions, and a comparative study of the problems could make the texts more transparent.[27]

The reviewer will briefly consider some chapters elaborated on the constitutional problems and the preparation for the accession in some candidate states, to portray the position of Hungary in comparison with the others. It is

[24] Cf. www.asser.nl/Impact/default.htm Summary by Kellermann, A. E.

[25] See in detail, *Jogalkotás, jogalkalmazás hazánk EU-csatlakozása küszöbén* [Law-making and Application of Law on the Threshold of the EU-accession of Our Country] (Ed. Czuczai, J.). 2003. 22.

[26] See www.asser.nl/Impact/default.htm Summary by Kellermann, A. E.

[27] See Kellermann, A. E.: *A bővítés alkotmányjogi hatásai nemzeti szinten* [The Constitutional Impacts of Enlargement at National Level] (translated by Kabai, E.). *Európai jog* Vol. I. No. 1. 2001. 10.

worth while to take a look at the Turkish, Polish, Slovenian and Hungarian constitutional orders.

Müntaz Soysal describes the constitutional problems in Turkey. The Turkish Constitution is incompatible with the system of the EU, because the transfer of sovereignty is not allowed, the supremacy of international law is not recognised, and the fundamental rights of persons are insufficient, etc. Thus there is a need for a thorough amendment of the constitution, which has to concentrate on two main points: *first,* recognition of the supremacy of international law and, *second,* transfer of certain sovereign powers to international organs or more specifically, to the EU.

Janus Justynski presents the history of the Polish constitutional law. After 1989 numerous constitutional amendments had to be passed. Finally it was decided to frame a new constitution, which was adopted in 1997. It recognised the supremacy of Community law, regulated the relationship between national and international law, and resolved the question of limitation of sovereignty. However, the sovereignty of Poland is defended by a two-thirds majority vote and a potential referendum. Poland did not accept the precedence of international agreements over the constitution, because it is the *'highest manifestation of the nation's sovereignty'*.[28] This owing to the fact that the *'Community is still an organisation of States, not an organisation of nations.'*[29]

In Slovenia the transfer of sovereign rights is not allowed by the constitution as yet: all powers are derived from the nation and implemented by national institutions. The constitution is superior to all legal acts, and hence also to ratified international agreements. The Constitutional Court has the power to decide on the conformity of an international agreement with the constitution in an '*a priori* constitutional review'. Although these are directly applicable, their direct effect is not automatic, but the courts decide on the question. Thus, an amendment of the constitution is required before the accession.[30]—writes *Primož Vehar.*

The preparation of Hungary for the accession is presented by *Attila Harmathy.*[31] First, he deals with constitutional questions of a general character,

[28] See the book reviewed 284.

[29] See *ibid.,* 289.

[30] The main constitutional questions, which must be resolved, are the hierarchy of legal acts, the transfer of sovereign rights, elections and the relationship between the government and the national assembly in EU matters. See *op. cit.,* 369–374. 'Constitutional problems in the period of pre-accession in the Republic of Slovenia'.

[31] 'Constitutional questions of the preparation of Hungary for accession to the European Union. See *op. cit.,* 315–326.

such as the relationship between national constitutional law and EC law. After the general constitutional problems the author examines the situation of Hungary. He begins with presenting the relevant sections of the Constitution on sovereignty, the supreme body, referendum, and fundamental rights. He also outlines the roles of the Constitutional Court and the Supreme Court. The Constitutional Court played a great role, because at the time of the political changes there was no new constitution, and it was the task of this court to develop the constitution into a coherent system. The Constitutional Court can declare a legal rule unconstitutional, but it has no effect on the obligations assumed under international law. The legislature is required in this case to achieve harmony between the two systems. Among the most important amendments of the constitution, he points out the transfer of some elements of sovereignty, the electoral rules and the regulation on the relationship between the Hungarian legal order and EC law.

2. 4. Acquis Constitutionnel *and the Enlargement*

This part of the volume deals with the enlargement from a different point of view. First *Jenő Czuczai* describes the changes in the constitutional challenges of candidate states according to periods. The *first period* is pre-accession and is connected with the Europe Agreements, which the author divides into three blocks. The first block was concluded with the forerunners and did not contain specific provisions on the EU constitutional *acquis*.[32] The second (Romania and Bulgaria) and third (Baltic States and Slovenia) blocks, however, contained a 'democracy clause' to give additional political and legal guarantees to the EU. The significance of the political criterion of Copenhagen is the political reorientation of the Europe Agreements, which could serve for a contractual legal and institutional framework in this period.[33]

The *second period* was the era of constitutional reforms necessitated by the accession. The author examines the constitutions of Albania, Poland and the rest of the Central and Eastern European candidate states. Although Albania is not a candidate state, its constitution is remarkably progressive and could be a model for candidate states. The Polish constitutional solutions are very similar

[32] On the Europe Agreements see: in detail, Vörös, I.: Az európai megállapodások mint az Európai Unió (EU) és Közép-, valamint Kelet-Európa közötti kapcsolatok jogi alapjai (kritikai elemzés) [The Europe Agreements as the Basis of the Relations Between the European Union (EU) and Central and Eastern Europe (Critical analysis)]. *Jogtudományi Közlöny,* 1996. 353–363.

[33] Cf. the book reviewed 415.

to the Albanian ones. At the time this study was written Poland was the only candidate state which could even immediately join the Union, because it has already resolved the constitutional problems. In the group of the other candidate states the author indicates the minimum standards for the amendment of the constitution and deals with the question whether any international organisation or specifically the EU will be addressed.

According to *Czuczai,* there is an existing constitutional *acquis* in the EU, and it is developing continuously. There is, however, no such chapter in the accession negotiations, because candidate countries must adopt the constitutional *acquis* in its entirety 'as it stands at the time of accession', and neither a derogation nor a transitional period can be given.

Finally, the author presents the 'constantly evolving constitutional *acquis* of the EU' and draws three general conclusions. *First,* the constitutional traditions of acceding states should be an inherent part of the new constitutional architecture.[34] *Second*, each candidate state must find its own constitutional way, which suits its national, historical traditions, because there is no 'ready-made model'. *Third*, this part of the *acquis* of the EU should also be screened somehow, because its content is not clarified yet.

Michael Bothe portrays the course of the German reunification. This issue is extremely interesting, as it was the first enlargement among the post-socialist states.

There was no new constitution adopted, but the Constitution of the Federal Republic of Germany was opened for accession by the other German *Länder.* The former law of the German Democratic Republic (hereinafter GDR) remained valid only if it was compatible with the law of the Federal Republic of Germany. Treaties concluded by the Federal Republic of Germany, including the EC treaties, had to be applied to the entire territory. The *acquis* had to be taken over, but a transition period was granted. The EC welcomed the reunification. No amendment of the treaties was made on that occasion.

There were some problems during the process of the reunification, because the old currency of the GDR was revalued by 300 per cent, and the frontier defence was abolished. It resulted in massive unemployment and a dramatic fall in the gross national product.

The German example constitutes a model for a smooth extension of the *acquis*, and warns us not to underestimate the problems involved in the economic differences—writes the author. However, there are also differences between the reunification and the forthcoming enlargement. The GDR was

[34] Cf. *ibid.*, 422.

under an extreme pressure of time, while the currently acceding states have had an adaptation process of several years. The EC formulated the political, legal and economic conditions of accession in the so-called Copenhagen criteria. The question of homogeneity of economic conditions will only arise later in the case of the currently acceding states, but the GDR faced it already before the unification.

By way of postscript, *A. E. Kellermann* deals with the causes of the outcome of the Irish referendum on the Treaty of Nice. He thinks that this treaty is too complicated for ordinary people, so either the support of people should have been increased or the treaty should have been accepted otherwise, e.g. by parliamentary procedure.

3. The Hungarian Constitutional Problems in Connection with the Accession

One cannot set up an order of importance among the contributions of the book reviewed, but for us, Hungarians, the most important question at present is the accession. Therefore, this question is worth examining in detail.

Up to now the constitutional questions have not been considered important in Hungary. The politicians do not seem to understand the importance of the problem; they considered the amendment of the constitution to be another scene of political battles, 'fishing up' particular questions from the draft only to postpone them. They would like to set these matters straight in the future by two-thirds majority acts, which means suspending the settlement of the problem.

The question of the transfer of powers and the relationship between government and parliament were the most controversial issues for the four parties. As it was not only a question of politics, it would have required profound professional analysis and consideration. An amendment of the constitution would have been needed along comprehensive lines, and not only for the purpose of inserting the European Clause.[35]

[35] See Vastagh, P.: Magyar jogalkotás, jogalkalmazás az EU-csatlakozásunk küszöbén [Hungarian Law-Making and Application of Law on the Threshold of Our Accession to the EU]. *Európa 2002* Vol. III No. 2. 2002. 6. or *Jogalkotás, jogalkalmazás... op. cit.*, 34.

3. 1. The Process of the Amendment of the Constitution

László Kecskés thought that the amendment of the constitution was not urgent: it could have been done well after the accession, only the Act on Law-Making should have been amended and the decrees on international agreements should have been updated. He thought that the vague amendment resulted only in unsettled matters of outstanding importance. One can agree with him in that the amendment requires more profound and professionally supported consideration, but the message of the book reviewed contradicts his point of view regarding the date of amendment: '*it is also socially and politically important to confront the constitutional implications of membership of EU before, not after accession.*'[36]

The first Bill (*No. T/1114*) to amend the Constitution was proposed on 15 October 2002. It expressed that the Republic of Hungary could transfer the exercise of its powers to the European Union or could exercise them jointly with the Member States. According to the opposition, the government was not prepared for the defence of national interests.

On 5 November this Bill was withdrawn and a new Bill (*No. T/1270*) was proposed, which omits that Hungary transfers the exercise of its competence *to the European Union,* because the Union is by no means a party to the Accession Treaty. According to *László Salamon*, as the European Union is not a federal state, there is no one to transfer competence to; it is a confederation above which there is no common state organization, so the powers are exercised by the Member States jointly.[37]

The political battles led to a compromise. On 17 December 2002 the Constitution was amended:[38] The Parliament passed the amendment to the constitution after a two-month forced period of constitutionalisation.[39] Before that a working group—led by *Imre Vörös*—dealt with the constitutional questions of accession. Its members were *Ibolya Dávid,* former Minister of Justice, *Antal Ádám*, former judge of the Constitutional Court, *Pál Vastagh*, former Minister of Justice, *Jenő Czuczai,* visiting professor, College of Europe, Brugge. The group pointed out a significant delay and regarded the amendment of the constitution as urgent. They formulated recommendations with a time-frame. Despite their work, nobody informed them about the amendment of the constitution.

[36] Czuczai: *Az ún.* 'Keleti kibővítés'... *op. cit.,* 147. or the book reviewed 191.

[37] Cf. *Jogalkotás, jogalkalmazás...op. cit.,* 136.

[38] Act LXI of 2002 on the Amendment to the Act XX of 1949 on the Constitution of the Hungarian Republic.

[39] See *Jogalkotás, jogalkalmazás... op. cit.,* 131.

The content of the amendment was judged differently by the experts. *László Kecskés* and *János Martonyi* accepted the integration clause. By contrast, *Imre Vörös* criticised it severely.[40] According to *Jenő Czuczai,* the amendment has some parts which can be said to be professionally acceptable, but it is regrettable that there was no preparatory work. He would have preferred to have the questions concerning the accession settled in one chapter.

3. 2. The Main Questions to Be Settled

3. 2. 1. European Clause (Section 2/A of the Constitution)
A few experts think that the accession cannot affect sovereignty, because it is indivisible and illimitable. They think that it affects only the method of exercising powers by placing them in a 'pool'.[41] The Member States actively participate in the life of the Community, so there is no limitation of their sovereignty; it is just put into a 'common pool' and practised collectively. In addition, states may even withdraw from the Community.[42]

According to the Hungarian Constitution, the public authority cannot be transferred, but only the *exercise* of power can. One may agree that by the accession our sovereignty or a part of it will not be transferred, only the exercise of competence will, but our sovereignty will be limited voluntarily. Since the

[40] See Kecskés, L.: Magyarország EU-csatlakozásának alkotmányossági problémái és a szükségessé vált alkotmánymódosítás folyamata. II. rész [The Constitutional Problems Concerning Hungary's EU-Accession and the Process of the Necessary Amendment of the Constitution. Part 2.]. *Európai jog* Vol. III. No. 2. 2003. 24. For instance, exemption from the application of domestic law must be provided for in the Constitution. See also, Vörös, I.: Az EU-csatlakozás alkotmányjogi: jogdogmatikai és jogpolitikai aspektusai [The Constitutional, Legal Doctrine and Legal Policy Aspects of the EU-Accession]. *Jogtudományi Közlöny,* 2002. 398 or *Jogalkotás, jogalkalmazás... op. cit.,* 41. or Vörös, I.: The Legal Doctrine and Legal Policy Aspects of the EU-Accession. *Acta Juridica Hungarica* Vol. 44. Nos 3–4. 2003. 143. and Vörös, I.: Az Európai Megállapodás alkalmazása a magyar jogrendszerben [Implementation of the European Treaty in the Hungarian legal system]. *Jogtudományi Közlöny,* 1997. 230–233.

[41] See e.g., *Igazságügyi Minisztérium — Külügyminisztérium IM/EUR/2000/TERVEZET/228/8. Az Európai Unióhoz való csatlakozásnak a magyar jogrendszert érintő egyes kérdései* [Ministry of Justice and Ministry of Foreign Affairs: Certain Questions of the Accession to the European Union Concerning the Hungarian Legal System]. Budapest, January 2001. 13–14.

[42] See also, Tóth, J.: Az európai integráció és az alkotmányozás kapcsolata [The Relationship Between the European Integration and the Constitutionalisation]. *Európai Tükör* Vol. III. No. 1. 1998. 104.

state transfers competence voluntarily, this transfer itself does not impair sovereignty, because it is a decision of the state, which acts independently and autonomously. However, the consequences originating from this decision (i. e. the common exercise of competence) could be in conflict with the interests of the state, as they externally impair our self-determination. In the decision-making of the Community, Hungary will have a small share, and it may happen that a decision will contradict the will and interest of the state. Furthermore, the main decision-maker in the EU is the Council, and if the government cannot represent the opinion of the Parliament, popular representation suffers a defeat.[43]

One can accept that sovereignty has several meanings, which have furthermore undergone changes, but the substance of the notion is still autonomy and independence. In the most general approach to sovereignty, one can distinguish an internal and an external side thereof, the two sides creating a unity. In an internal sense, it means an autonomous establishment of organization and determination of the legal system, and in an external sense it means self-determination in the field of international relations.[44] The EU limits sovereignty in both senses by making community law, by the primacy of this law, by the community court (ECJ) and by the Commission, which are independent of the instructions of Member States, by a common currency, by a Common Foreign and Security Policy, etc. As the Community has an effect on Member States' interests of primary importance, and as the Community's law-making legally binds Member States and overrules domestic law, Member States cannot be regarded as fully sovereign states any more. However, the Community has no state sovereignty, because it is neither legally nor politically independent of its Member States.[45]

For the transfer of the exercise of competence *constitutional* authorization is needed, because the application of unforeseeable norms and fulfilment of unforeseeable obligations will be undertaken, with limitations on state authority. Only a constitutional authorization can provide democratic legitimacy and

[43] However, taking into account the factor of globalisation, Hungary is already bound by the decisions of the EU, and the Hungarian Parliament has not been an independent decision-maker for a long time. The real alternative for the country is whether it takes part in making decisions or only follows them without participation. See Martonyi, J.: *Európa, nemzet, jogállam* [Europe, Nation, Rule of Law]. 1998. 64–65.

[44] See Szabadfalvi, J.: Nemzetállam és szuverenitás [Nation State and Sovereignty]. In: *Államelmélet* [Constitutional Theory] (ed.: Takács, P.). 1997. 135.

[45] Cf. MacCormick, N.: A szuverenitásról és a posztszuverenitásról [About Sovereignty and Post-Sovereignty]. *Fundamentum,* Vol. VII. No. 2. 2003. 11.

prevent control over Community law. By the amendment, the Constitution recognises an external power, thereby reaching beyond its own framework and breaking the tradition of nation state monopoly.[46]

Of course, the existence and the content of the clause are indifferent from the standpoint of implementation of EC law; this is a question of national constitutional law, because the authorization is the source of legitimacy of accession. It is important from the point of view of internal coherence and constitutionalism. According to *Vörös,* the transfer of competence to the EU is not equal to transfer to an international organisation, so this is not a simple tightening, as *Kecskés* thinks, but a special case.

Only certain powers deriving from the constitution can be transferred to the necessary extent, and the treaty requires two-thirds majority voting. Besides, the clause emphasises that the common exercise of competence serves *the interest of participating as Member State in the European Union.* This expression makes self-limitation functional and well-defined, which could not be found in Bill *No. T/1114.*

If one sees the amendment to the constitution, one can notice some faults. As the accession clause affects the Treaties, the Hungarian Constitutional Court will have to interpret them, but, according to Article 222 of the EC Treaty, interpretation is within the exclusive jurisdiction of the European Court of Justice. This conflict must be solved either in the Act on the Constitutional Court[47] or in the Act on Law-Making.[48]

Another problem is that the clause provides authorization only *for the future,* but the current legislation must also form part of the Hungarian legal system.

Furthermore, in a national constitution, there can be no reference to other states, so the expression that powers will be exercised jointly with other Member States is not correct; a relevant provision should be included in the Treaty on Accession.[49]

The last part of the clause states that the exercise of competence can be realised either independently or by way of institutions of the European Union. This section involves two problems: first, institutions of the Union cannot be spoken of, only institutions of the Community can be under Article 7 of the EC

[46] Cf. Vörös: Az EU-csatlakozás... *op. cit.,* 407. or *Jogalkotás, jogalkalmazás... op. cit.,* 60. or Vörös: The legal doctrine... *op. cit.,* 163.

[47] It would mean the introduction of a preliminary ruling in these cases, but this would add to the workload of the ECJ and would be an atypical solution.

[48] Cf. *Jogalkotás, jogalkalmazás... op. cit.,* 139–141.

[49] Cf. *Ibid.,* 143.

Treaty. Second, the European Court of Justice and the European Commission are supranational institutions, which are fully independent of the will of Member States.[50] On the other hand, common exercise of competence by oneself is a paradox, brought on by a grammatical error.

A new Bill *(No. T/4486)* was proposed in July 2003. Even though it has not been passed yet, it is worth examining. Current Section 2/A (1) would become Section 2/B, and new Section 2/A (1) would be inserted, which is a general authorization for transfer of exercise of powers to an international organization. In comparison, Section 2/B is concrete: it refers specifically to the EU. It is an amendment of current Section 2/A (1): it changes the above-mentioned phrases from 'interest of participation' to 'during participation' and leaves out the foregoing last section, which was problematic: it eliminates the said deficiencies.

3. 2. 2. The Relationship between the National Assembly and the Government (Section 35/A of the Constitution)

According to the Protocol annexed to the Treaty of Amsterdam, both the governments of the Member States and the Commission must inform national assemblies exhaustively, and, depending on whether parliaments have strong control over the executive in certain states, the executive must act in accordance with the position of the parliament.[51] If the parliament has no chance to influence the European decision-making, this could threaten the domestic democratic legitimacy of integration, so the democratic deficit is likely to rise most sharply between the government and the parliament.[52] In the *Czech* legal system, the Parliament can express its opinion, but the government can ignore it. In *Lithuania,* the government submits its motions to the Parliament and takes its decision into account.[53] A semi-strong model fits the Hungarian traditions. Regular information is not enough, because in this case popular representation disappears entirely and the government would have full powers in questions affecting the life of the country. The best solution would be for the Parliament to determine the position of the state and for the government not to depart from it on the European decision-making level without an authorization. This could guarantee interference of the Parliament in the shaping of European politics.

[50] Cf. *ibid.,* 144.

[51] *Igazságügyi Minisztérium — Külügyminisztérium IM/EUR/2000/TERVEZET/228/8...,* 60.

[52] See *Jogalkotás, jogalkalmazás... op. cit.,* 35. or Vastagh: *op. cit.,* 6.

[53] Cf. Sajó, A.: Az EU-csatlakozás alkotmányosságra gyakorolt hatása az új tagállamokban [Effects of EU-Accession on Constitutionalism in the New Member States]. *Fundamentum,* Vol. VII. No. 2. 2003. 21–22.

Nevertheless, the question was not settled satisfactorily by the amendment to the constitution, which states only that Hungary is represented by the government in the institutions of the Union operating through governmental participation. According to Fidesz (Alliance of Young Democrats—Hungarian Civic Alliance) and MDF (Hungarian Democratic Forum), the government should not support but positions approved by the Parliament. This would guarantee that the citizens of Hungary take part in the decision-making of the Union through the Parliament. MSZP (Hungarian Socialist Party) and SZDSZ (Alliance of Free Democrats) hold to be too strict.[54] The parties could not agree, so they postponed the solution of the problem: it will be regulated by a two-thirds majority act. It was a result of heavy political battles, and in case the parties cannot come to an agreement on the issue, the government will have great freedom of action. The amendment also ignored the Convent, which intended to accord a greater role to parliaments.[55]

3. 2. 3. The Supremacy of Community Law

As the EC law is not international law, the primacy of community law does not depend on whether one agrees with the monist or dualist approach,[56] because the relationship between international and national law is not applicable in this case.[57] However, this question had to be settled as well. The new Bill *(No. T/4486)* formulates Section 7 of the Constitution, but, as norms become compulsory upon promulgation of the treaties, the dualist concept remains. In contrast to Bill *No. T/1114*, which made a modest attempt for the settlement of the relationship between community law and domestic law, *Act LXI of 2002* does not deal with the question.[58]

The place of Community law must be found in the Hungarian hierarchy of the sources of law.[59] If it were above the constitution, it would adversely affect sovereignty. There is a point of view according to which, if the constitution

[54] Cf. Háttérbe szoruló nemzeti parlamentek [National assemblies pushed into the background]. *Magyar Hírlap* 15. November 2002. 13.

[55] Cf. *Jogalkotás, jogalkalmazás... op. cit.*, 148.

[56] Cf. *op. cit.*, 25. and *Igazságügyi Minisztérium — Külügyminisztérium. op. cit.*, 11. Nevertheless, as the Hungarian legal system is dualist, the chance of implementation of *directly applicable norms* had to be stated in the constitution.

[57] See Vörös, *Az EU-csatlakozás...*, 406. or *Jogalkotás, jogalkalmazás... op. cit.*, 58. or Vörös, The Legal Doctrine... *op. cit.*, 161.

[58] Cf. *Jogalkotás, jogalkalmazás... op. cit.*, 145–147.

[59] See Tóth: *op. cit.*, 107–108.

declares the supremacy of EC law and gives it legitimacy, the constitution stands above EC law, because its application can be derived from the constitution.[60] However, if the Community law were compulsory in Hungary by virtue of the Constitution, it would mean that all of the directly applicable norms could constitute a ground for instituting proceedings before the Constitutional Court.[61] According to *Vörös*, as the EC law has precedence over national constitutions, it cannot be measured by the latter and, therefore, cannot be unconstitutional either.[62]

Laying down the supremacy of community law in Hungarian laws and regulations would only be declarative, but would strengthen the rule of law. According to certain experts, the question should be settled in the Constitution, because a lower source of law cannot deal with the relationship between the Constitution and EC law.[63] However, if it were declared in the Constitution, a national legal rule conflicting with EC law would at the same time be unconstitutional and would create a Constitutional Court case, which would be impossible, because this is within the exclusive jurisdiction of the European Court of Justice. However, it could be possible if the limitation of the competence of the Constitutional Court were spelled out at the same time.[64]

As the amendment of the constitution does not contain the primacy of community law, it has to appear in the Act on Law-Making, and the conditions for the direct applicability of community law have to be created.[65]

3. 2. 4. Effects of Accession on the Judicature

Personnel and material conditions are required for the Hungarian courts to become Community Courts: judges must be trained in Community law;[66] the

[60] See Kukorelli, I.—Papp, I.: A magyar alkotmány EU-konformitása [The EU-conformity of the Hungarian Constitution]. *Európai jog* Vol. II. No. 6. 2002. 9, note 2.

[61] Cf. *Jogalkotás, jogalkalmazás... op. cit.*, 150.

[62] See Vörös: Az EU-csatlakozás... *op. cit.*, 406. *Jogalkotás, jogalkalmazás... op. cit.*, 58. or Vörös: The Legal Doctrine... *op. cit.*, 161.

[63] Kukorelli—Papp: *op. cit.*, 4.

[64] According to Péter Paczolay, there could be four options for stating the primacy of community law. The first is the earlier Bill (T/1114), the second is no reference to it in the constitution, the third is stating it in the act promulgating the Treaty on Accession, and the last is stating it in the Constitution together with limiting the powers of the Constitutional Court's competences. Cf. *Fundamentum* 2003/2. 63–64.

[65] Cf. *Jogalkotás, jogalkalmazás... op. cit.*, 145–147.

[66] There was a training, but its efficiency is doubtful. See Grád, A.: A hazai igazságszolgáltatás felkészülése az európai uniós tagságra — avagy rövidesen kiderül: amit hallunk vészharang-e, vagy csak az utolsó kört jelző csengő [Preparation of Domestic Judicature for

EC law, the most important decisions of the ECJ have to be translated; the computer network has to be improved; Hungarian judges must learn at least one foreign language.[67]

The directly applicable norms of Community law will be implemented in Hungary unaided. As private individuals may invoke Community law before national courts and as national courts will have to interpret national law in the light of Community law in the future, the attitude of the judicature must also be changed.

There will be changes in the position of the Constitutional and Supreme Courts as well. The Hungarian Constitutional Court[68] cannot examine the validity of Community law and the Supreme Court cannot play a mediating role regarding the application of EC law by the 'decision for the unification of the administration of justice', because examination of the validity of EC law and preliminary ruling belong to the exclusive competence of the European Court of Justice.[69] It should therefore be stated that these decisions do not cover but the provisions of Hungarian legislation.

This writing is intended to be no more than a broad outline, which highlights the main constitutional problems originating from advanced integration both within and outside the EU. Its aim is to draw attention to pending questions and attempts for solving them as well as to give some perspectives through the book reviewed, which identifies every constitutional problem concerning the integration, and the methods used by member or candidate states for solving them.

Membership in the European Union—or Else It Will Turn Out Soon, What We Hear is Either an Alarm Bell, or Just the Ring Indicating the Last Round]. *Európai jog* Vol. III. No. 4. (2003) 37–42. and Észrevételek Dr. Grád András tanulmányára (Országos Igazságszolgáltatási Tanács Hivatala Személyzeti és Oktatási Főosztály) [Remarks on the Study of Dr. András Grád. Personnel and Educational Department of the National Judicature Council]. *Európai jog*, Vol. No. 4. (2003) 43–44.

[67] See *Jogalkotás, jogalkalmazás... op. cit.*, 82.

[68] For further information, see Kecskés: Magyarország EU csatlakozásának alkotmányossági problémái... *op. cit.*, II. rész. 9–11.

[69] For further information, see *ibid.*, 12–14.

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ANDRÁS SAJÓ*

The Impacts of EU Accession on Post-communist Constitutionalism

Abstract. One of the persistent fears regarding the accession countries envisions that these countries will not catch up with the prevailing practices of constitutionalism and the rule of law that allegedly constitute the common tradition of Europe.

It is believed, and in many regards rightly so, that accession to the Union will push Eastern Europe towards the values and institutional settings of modernity. Given the process and political consequences of the accession, as well as for other, historical and cultural reasons, the short term modernization effects of the membership might be limited, even counterproductive. This paper discusses the impact of the current "Europeanization" on the public understanding and institutional structures of constitutional democracy in the new member states. Further, it evaluates the foreseeable impacts of the emerging European Constitution on the constitutional structures (the new checks and balances) in the new member states, except the human rights aspects of constitutionalism.

Keywords: accession constitutionalism European Union referendum sovereignty

Introduction

One of the persistent fears in the European Union is that the accession countries will be unable to catch up with the prevailing practices of constitutionalism and the rule of law that supposedly ground the common tradition of Europe. This fear is rationalized when considering that unbridled nationalism necessarily impacts upon territorial stability. There are other concerns regarding the weakness of democratic tradition especially after the years of totalitarian rule. It is believed that the institutional systems in place for enforcing the rule of law[1]

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[1] In fact, both new and old member states confront with some difficulty the aggressive enforcement of bureaucratic (excessively bounded) rationalism that relies on Union supremacy to the detriment of nation-state level constitutionalism. For the old member states see, e.g., the Alcan decision. C 24/95, Alcan II, [1997] ECR I-1591. [German rule of law concept disregarded by the ECJ].

merely exist in a formal sense rather than in terms of self-sustaining value commitments. The scope of this chapter does not allow for an analysis into the truth of such assumptions. It is undeniable that extremist nationalism is not absent in the rhetoric, and sometimes actual policies, of Eastern European political elites who in turn find popular endorsement for their nationalistic campaigns.[2] These nationalistic sentiments will be echoed once the population of new member states will be confronted with negative experiences as a result of them being unable to successfully articulate their special interests in a great "empire"; unfavorable comparisons of "Brussels as the new imperial power" with the "yoke of the Soviet empire" has already been made in many former communist countries.

One of the striking features of East European nationalism is that it is embedded in a value system that is (at best) indifferent to modernity as it grounds itself in past (ascribed and mystical) national glory. This belief does not generate much interest in the ethics of modernity as put forward in the rule of law (rational accountability for one's acts, transparency, predictability through formalism, etc). Modernists (modernizers) argue that accession will change attitudes toward modernization among large segments of the population. However, given the process of accession and the way the new Union is shaped, firm, popular commitment to an efficient democracy as well as the belief in popular self-government, such an efficient responsive and responsible modern institutional system has limited opportunities to prevail beyond the institutional façade. Citizens of the new member states might become *Zwangsdemokraten* (forced democrats).[3] This is problematic because so long as the new European constitutional identity remains an unfinished and uncertain project (an imposed mask) there will be only limited offering of a modernizing identity. It is also true that the Eastern European political elite seems to have a very instrumentalist disregard[4] for the rule of law even though formal legalism

[2] The Summer, 2003 Gallup poll indicates that although many Hungarians and Estonians identify themselves as citizens of the nation-state *only* (39 per cent) this is not particularly high compared to Great Britain (64 per cent). However, there was no Hungarian who would have identified himself/herself as "European only". Hungarian identity correlates with age but not with party affiliation.

[3] The term was used by a German journalist in regard to the late Bavarian Prime Minister Franz-Joseph Strauss. Of course, given certain historical circumstances the progress to genuine democracy might lead through imposed democracy.

[4] It is quite telling that the Hungarian Government's chief delegate to the European Convention who joined overwhelming majority of the delegates signing a document proposing that the new Constitution should be adopted by national referenda, stated in Hungary that he does not find appropriate to call a referendum; his signature was added as

is at least accepted. (Even Meciar accepted unfavorable decisions of the Slovak Constitutional Court.)

Instrumentalism and the hidden contempt of the rule of law and constitutional values in general are confronted with a normative committment to constitutionalism and the rule of law which programmatically exists in the "older" member states.

So long as "European solutions" are felt as being imposed and detrimental to local self-interests, "modernity" (i.e. efficiency considerations and pragmatism in decision-making, irrespective of traditional values and communitarian sentiments) will be detested. However it could be that those national institutions beyond national democratic control and interrelated with European institutional networks may create institutions within the traditional national(istic) states that serve democracy.

It is believed, and in many regards rightly so, that accession to the Union will push Eastern Europe towards the values and institutional settings of modernity. Modernity, in allowing for interest group collective action, can be considered a mixed blessing. Interest group politics behind European centralization is neither particularly conducive to a robust republican design of democracy nor does it contribute to fairness with regards to the protection of minority and other vulnerable groups.[5] As a result of these shortcomings relating not only to the process but also the political, historical and cultural consequences of accession the effect of modernization might, in the short term, be limited and perhaps even quite the opposite. Furthermore, the ambiguities of the European project could reinforce pre-modern values within acceding states. The current practices of constitutional public politics are limited to electoral participation of limited relevance for the decision-making. In other words, the rational discourse that allows for intellectual formation, the acceptance of governmental decisions and a more engaging decision-making process is absent.

In this paper I will look at the present impact of "Europeanization" on public understanding of constitutional democracy and the institutional structures put in place within new member states. I will then briefly consider the foreseeable

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part of the horse trading that took place at the negotiations. This is a telling, though by large not unique, example of the understanding of the binding force of contracts, both in the public and among the political elite.

[5] On the new European constitutional design as a project of centralization related to special interest group interest representation where they are loosing at the national level, see Ruta, M.: *The Allocation of Competencies in an International Union: A Positive Analysis*, http://www/ecb/int/pub/wp/ecbwp220.pdf

impact of the emerging European Constitution on the constitutional structures (the new checks and balances) of new member states. Due to the scope of this chapter, I will not address the human rights dimension of constitutionalism. I will consider, in particular, the formation, and distortion, of constitutional democratic politics in the accession process particularly with regard to the referenda and the constitutional structures that have emerged thus far in the new member states. The politics of accession and other governmental practices remain highly instrumentalist. Such instrumentalism diminishes the likelihood that the general public will cherish the virtues of deliberative democracy and tempered majoritarianism.

Relying primarily on the Hungarian experience I will analyze the potential changes in the democratic and constitutional ethos as a result of the emerging allocation of powers in the new Union. The constitutionalist inspiration that transpires from the debate on the European Constitution as well as the draft itself is highly problematic as a blueprint for "transformative constitutionalism."[6]

My first claim is that the accession process as well as the drafting of the European Constitution has reinforced a the irrelevance of constitutional democracy in the eyes of the public who continue to see it as a matter of majoritarianism. It remains to be seen how the emerging European Union model of pluricentric separation of powers ("network constitutionalism") will be understood and used democratically by the citizens of the new member states.

My second claim is that, outside of the genuinely free elections firmly entrenched within new member states, certain patterns of state socialism are going to be reinforced through membership to the Union. Democratic politics is understood for many people as a tool of maintaining free public services, irrespective of contribution or need (except the needs of service providers). Such trends might be reinforced whist converting local constitutional politics to the European level. The experiences of the accession process indicate that democratic participation and parliamentarism are often quite formal. Instead of genuine participatory politics and accountability, democracy becomes an opportunity to influence politics in order to maximize welfare services. *Union*

[6] Transformative constitutionalism is about openness to the future and it is based on a critical relationship to the past. In the distinction of preservative and transformative constitutions I follow Cass Sunstein, *Designing Democracy*. New York, Oxford University Press, 2001. 67.

On the pre-modern traditionalism of post-communist constitutions see Sajó, A.: Preferred Generations: A Paradox of Restoration Constitutions. *Cardozo Law Review*, 14 (1993) 847–864.

law and policies reinforce the welfare entitlement attitudes of the East European public. The Union has its own social welfarist value system (or routine) which reinforces the inherited welfarist expectations in the new member states. In these countries the use of resources for the maintenance of European Union type welfare systems might be counterproductive and contribute to the difficulty in creating a robust democratic and constitutional culture.

I. Constitutional structures and the thinning of majoritarian democracy

A. "Europe Clauses"—Preservative constitutionalism

Eastern European accession countries have recent constitutions that were created after the collapse of communism.[7] The Estonian Constitution (1992) (Art. 1),[8] and the Czech and Slovak constitutions (1992) declare the respective countries to be *sovereign*, while Poland (1997), Hungary (1990 amendment), Latvia (1992), Lithuania (1992) and Slovenia (1991) refer to *independence*. Lithuania's Constitution also states that people's sovereignty cannot be limited. Even in cases where the Constitution is less unequivocal (as in Hungary) prevailing national sentiment is well represented in the jurisprudence of the Constitutional Court. Here a very traditional concept of sovereignty (see below) has been agreed upon which in turn has resulted in the restrictive wording of the Europe clause in Hungary. The transfer of public powers is not possible. Only the transfer of the right to exercise certain powers is allowed since such a transfer cannot be based on the ultimate source of sovereignty—the Hungarian people.[9]

This concern with *state* sovereignty as a basis for independence is remarkable when compared with Western European constitutions where the matter is either not discussed at all, or is not made explicit (see e.g. Austria,[10]

[7] The Hungarian Constitution is technically the Constitution of 1949 but it was fully amended in 1989 with several additional revisions since then.

[8] "Estonia is an independent and sovereign democratic republic wherein the supreme power of the state is held by the people." The formulation follows closely Art. 1 of the 1938 Estonian constitution which is the basis of the adoption by referendum of the 1992 constitution, as expressly stated in the Preamble of the 1992 Constitution.

[9] See for example Várhelyi, O.: Hungary. In: Ott, A.—Inglis, K. (eds.): *Handbook on European Enlargement.* The Hague, 2002. 264.

[10] The Austrian Constitution states (Art. 1) that her legal order originates in the people. This, of course, can be seen as a reference to sovereignty.

Belgium), or is referred to in the context of the source of sovereignty: Italy, Art. 1.; France, Art. 3.—where sovereignty pertains to the people; Spain Art. 1.2—where the people are the depository of sovereignty; Portugal is one of the few exceptions where there is direct reference to state sovereignty.)

Since EU membership affects sovereignty, and arguably the independence of Eastern European states, it is understandable that the independence and sovereignty clauses are therefore seen as obstacles, to integration. The importance of these provisions is increased not only because they touch upon foundational issues but also as a result of the pro-independence public sentiment. The population in nation-states with newly recognized or regained sovereignty is understandably sensitive to issues of independence. Opposition politicians are ready to bring up the issue hoping for increased popularity in a society where popular culture traditionally honors (unsuccessful) heroes of independence. Moreover, the cultural and the legal elite are often keen on emphasizing independence as a fundamental constitutional principle (because of the constitutional wording and independence dreams in the legal traditions). Both the general public sentiment and the ongoing political conflicts explain why constitutional amendments intended for accommodating the operations of the Union are sometimes rather narrow.

By way of comparison it is worthwhile noting that the various approaches of transferring competence within the Europe clauses are essentially compatible with the prevailing continental constitutional solutions that emerged in the post-Maastricht context. The East European accession countries have carefully considered the constitutional solutions adopted in the Member States after Maastricht. The EU made it a priority to provide a knowledge base of expertise in this area. Given the increasing uncertainty of the nature of the Union, its identity, mission and decision making powers at the time the accession clauses were being written into the respective constitutions, it is understandable why some accession countries were reluctant to take a final position on the transfer of powers and competencies to the Union. The Latvian amendment, for example, expressly considers the accession to be subject to revision by way of a referendum that can be initiated by the people. Lithuania's amendment of Art. 136 also contains a safeguard clause: "The Republic of Lithuania participates in international organizations if such participation does not contradict interests of the state and its independence." However, the Europe clause states that it expressly "transfers to the EU the competencies of the national institutions in the fields foreseen in the Founding Treaties of the EU, so that it shall be entitled to implement common competencies with other EU member states in those fields."

B. Referendum—Instrumentalism and lack of deliberative democracy

Given the concern with independence and (popular) sovereignty and because of the fundamental changes that will occur as a result of accession, all the Eastern European countries concerned opted for a referendum to sanction accession (or the accession treaty). This was irrespective of whether this form of popular support is prescribed by the constitution or not as was the case of Hungary until the 2002 amendments, or Poland (where this is a matter of choice). Indeed, some of the constitutions were amended so that they include the requirement of confirmation by referendum. It would be expected that those firm believers in popular sovereignty (i.e. that sovereign power resides in the people) would welcome this position. However, with the significant exception of Lithuania,[11] the Eastern European accession countries (which do constitutionally and doctrinally endorse the position of popular sovereignty) have been keen on avoiding referendum and plebiscite. For instance there was no referendum even in the case of the dissolution of Czechoslovakia. Mobilizing for a referendum has always been a problem because of the quorum difficulties. Hungary barely satisfied the fifty per cent participation requirement in the case of the Hungarian NATO accession referendum. All previous referenda ended unsuccessfully in Slovakia where the law on referendum requires (as it was the case in Hungary) that voter turn-out must be higher than 50 percent of all registered voters in order for the referendum to be valid. Also many previous attempts at holding a referendum were perceived by the Eastern European political establishment as populist attempts to undermine the parliamentary constitutional order. (For the actual destabilizing effects of the use of referenda see its use in the power struggles between the Parliament and the President of Ukraine and similarly in Moldova.[12]) It is quite telling that the Hungarian Constitutional Court, although in principle a protector of the individual political right to referendum, systematically restricted the applicability of referendum declaring various initiatives to be disguised attempts at amending the Consti-

[11] The Lithuanian constitution stresses the constitutional and constituent importance of referendum from its moment of creation. Art. 9.1 provides that on matters of fundamental importance affecting the population or the country referendum be held. Note that the independence of Lithuania was restored through a 1991 referendum that was the culmination of mass resistance to Soviet rule.

[12] For a review of the use of referenda see Dorsen, N.–Rosenfeld, M.–Sajó, A.–Baer, S.: *Comparative Constitutionalism.* West, 2003. ch. 3.

tution. The Hungarian Constitution was amended in 1997 to the effect of curtailing the use of referendum as a device of change.[13]

On the one hand a theory of constituent power that denies the right of popular initiative in this context is perhaps an odd one but, on the other hand, it is quite understandable with regard to constitutional stability: a value that was considered crucial in the early formative years of the new democracies.

Notwithstanding the lack of constitutional positions, and the remarkable legitimacy of the available specific parliamentary process,[14] the political elites of all East European countries sensed (without any specific discussion) that accession needs a plebiscite-like popular endorsement. In a way, a referendum is not the preferred constitution amending procedure in the case of these easy-to-amend constitutions, neither is the tool of referendum intended to become the choice even after the current round of amendments. In fact, in most countries the mechanism foreseen to handle future constitutional amendments resulting from EU developments excludes the referendum (although Estonia and Latvia are somewhat ambiguous exceptions). The governments' desire of popular legitimation resulted in one-time solutions regarding referendum, yet exceptionalism in constitutional matters is always a cause for concern.

It is possible that the use of a referendum will create certain expectations with regard to future constitutional amendments and EU constitutional changes. The currently prevailing anti-referendum constitutional pattern seems, however, unchanged. Indeed, at least in Hungary (but not in the Czech Republic) the political elite finds that there is no need to accept the European Constitution via referendum because low level endorsement would be seen as a vote of non-confidence in the government; a referendum would provide additional opportunities for the parliamentary and extra-parliamentary opposition to

[13] The amendment was adopted by the socialist-liberal coalition ruling at the time, which disposed of a parliamentary supermajority sufficient to constitutional amendment. The provision became an obstacle in 2003 for the same coalition which currently has only a narrow majority. Because the socialist-liberal coalition restricted the use of referendum they could not and will not be able to bypass the resistance of the opposition in accession matters by calling a referendum (where they probably would have a clear majority); the special terms of the one time referendum on accession required the consent of the opposition.

[14] Wyrzykowski, M.: European Clause: Is it a Threat to Sovereignty? In: Wyrzykowski, M. (ed.): *Constitutional Cultures* [Institute of Public Affairs, Warsaw M (2000)]. at 278 indicates that a large coalition is needed for ratification. The Polish Constitution is prudent enough to enable parliamentary majority to go to the country via referendum in order to circumwent stalemate and opposition blackmail. The Hungarian socialists, when in power, ruled out that possibility through a constitutional amendment. That possibility, of course, determines the opportunistic behavior of the parliamentary opposition of the day.

impose its will on the government. Such considerations are clearly pragmatic and instrumentalist. Of course, within the Union, as the 2002 Irish referendum indicates, the allowance for a referendum remains an important popular control device over executive activities. "It is clear that retained powers of the people may force government to bring about greater domestic scrutiny of EU legislative proposals in advance of the referendum."[15] Without such a device the executive will gain further powers.

C. *A new separation of powers in the Union: further loss of popular-democratic control*

The most fundamental (substantive and procedural) changes in the Eastern European constitutional systems, laws, institutions, and societies will occur in the years immediately proceeding accession. It is only at that significant moment that an entirely new institutional mechanism will redefine these relations. Most of these changes will not be reflected in the constitutions unless there will be fundamental changes in the Union itself through the emerging constitutional framework. The interpretation of the constitutions and the extra-constitutional interpretation of sub-constitutional laws and institutions in political practices will, however, reflect these changes.

The constitutions of the new member states so far poorly reflect the shifts in decision-making. The current amendments address the role of the legislative branch in the formulation of future European policies and legislation in a minimalist way, allowing in practice the increase of the power of the executive. The amendments were adopted following instrumentalist considerations and as part of ordinary party politics. The prevailing solution limits the role of national Parliaments in the shaping of European decisions to that of a consultative body.[16]

In fact the powers of most parliaments will diminish and in some respect the powers of the executive will further increase especially in the case of those

[15] Hogan, G.: European Union Law and National Constitutions: Ireland. *FIDE XX Congress*, London 2002) www.fide2002.org 24.

[16] The model of consultative status for national parliament in the EU decision-making relies on the German model. Today many observers find this to be an insufficient solution for a parliamentary representative democracy, although contrary to Hungary or the Czech Republic the German government is subject to more stringent control, given the structure of joint-decision making in certain federal areas. In other words, because of the federal structure there is more power retained by Land legislative bodies, including through the Bundesrat. Of course, the Bundesrat does not genuinely fit the model of an elected representative body, since it is composed of non-elected Land government representatives.

Eastern European countries where the matter is simply pushed under the carpet. However because of the current cabinet dictatorship in most Eastern European countries the legislative branch is already weak by design. The emerging new division of powers takes away Parliament's legislative powers in matters that are of Union competence and renders unclear those legislative powers related to implementing legislation, that is if such powers will be retained by the national Parliament at all. In addition the present constitutionally provided control powers of parliament (relating to fundamental rights protection that require some form of supermajority in some East European countries) will erode. These developments will contribute to an increasing sense of loss of popular control over the nation's destiny and the irrelevance of constitutional institutions.

D. Does the European Constitutional System provide constitutionalism for the new member states?[17]

The lack of transparent popular representation may not be the ideal beginning for the people of the new member states about to set foot on a common European path that is leading to a partially uncharted European decision making process without full representation (or with a new complex representative system based on partial representation). The representative element of the concept of the representative government is at stake. It is unlikely that people will be compensated for this loss of representative democracy by direct elections to the European Parliament. The further loss of importance of the national parliaments fits into an existing European trend. Weiler refers to a "flexible" Europe with a "core" "at its center" that "will actually enable that core to retain the present governance system dominated by the Council—the executive branch of the Member States—at the expense of the national parliamentary democracy. *Constitutionally, the statal structure would in fact enhance even further the democracy deficit.*"[18] (Emphasis added.) The national legislative branches are the losers. Given the current constitutional arrangements, namely the lack of competence and information in national Parliaments as well as parliamentarians' defective capacity to handle the issues that are to be determined by the Council, Parliaments will not be able to defend the subsidiarity principle even if there were national or Union powers to that regard in the future. On the other

[17] I am not considering here the rule of law and human rights enhancing contribution of the Union to the new member states–here the advantages are more obvious.

[18] Weiler, J. H. H.: Conclusions. note 4. (Conference paper) *Europe 2004*–Le Grand Débat: Setting the Agenda and Outlining the Options. Brussels, 15 and 16 October 2001.

hand the national executive will be in the position to push through policies in the Council that it would not be able to push through its own Parliament because opposing public opinion, or majority (or coalition) party interests, or supermajority requirements would present insurmountable obstacles.[19]

On the basis that alternative forms of democracy are rather weak in East European civil societies, the European "democracy deficit" will be reproduced (in different forms) locally. However, this negative consequence might be countered by other consequences of membership. Furthermore given that European integration "has been, historically, one of the principal means with which to consolidate democracy within and among several of the Member States, both old and new, with less than perfect historical democratic credentials,"[20] accession may well have a beneficial overall effect on the quality and strength of the kind of democracy, or at least rule of law and political civility, practiced in the countries to join.

The transfer of powers from national Parliaments to the Council reshapes the fundamental relations among the branches of power in the respective member states without any public participation or even any public cognition of the new development. One may argue that in the parliamentary systems that prevail in Eastern Europe the separation of powers does not offer much protection against abuse of power anyway. Parliamentary systems per se are weak substitutions of the working model of a robust democracy based on long standing traditions. Therefore there is not much to lose in the Europeanization process. However, the constitutional performance of the new states was surprisingly good in the last decade. Even if parliamentary representation and traditional checks and balances are weakened, there are other sources of legitimacy such as government efficiency. The above concerns are motivated by abstract principles of the theory of democratic representation. To use normative claims is perhaps somewhat misguided in this case. After all, the existing parliaments have never had a decisive influence on the executive but have merely served as transmission belts that convey the results of popular elections through the mechanism of the formation of the cabinet.

It can certainly be said that from a constitutionalist perspective, and contrary to a democratic theory perspective, the new "allocation of powers" is not objectionable per se. In fact the likelihood of power concentration within a single hand is further diminished. The arrangement, however, does not automatically

[19] Consider, among others Pernice, I.: *Der Parlamentarische Subsidiaritätsausschuss.* Walter Hallstein-Institut WHI-Paper 11/02. Berlin, September 2002), www.whi-berlin.de/pernice-psa.htm.

[20] Weiler: above n. 18, 220.

increase the power of the people via improved self-determination. Given these preconditions and because of the fact that the accession constitutional amendments did *not* arise as a consequence of a crisis, one should not expect more robust national Parliaments debating European issues. The trends that emerged in the Nation State (the domination of the executive in the welfare administrative state) are not challenged through the process but were able to determine the constitutional regime of accession. A Constitutional safeguard of efficient governmental information to Parliaments and people regarding pending EU decisions, or lack thereof, makes no difference here.

The consequences of the constitutionalisation of accession do not necessarily enhance constitutionalism. The whole process is marked by ad hockery and most steps taking the new member states into the Union remain within the ordinary and quite open horse trading between opposition and majority. The political elites of Eastern Europe opted for an accession referendum. This looks like a gamble: the issue is not popular deliberation but demonstration of loyalty via plebiscite. The legal discussion is primarily about expediency of the procedure (see Slovenia), and political discourse is replaced by guesswork about quorum and majorities. This is hardly an example of taking people seriously.

At first glance it seems that national parliamentarism, the quintessential form of democratic government in the public imagery and a bulwark against executive tyranny, is going down the drain. However, this is not necessarily the message coming from the European Union. In view of the EU Treaty Parliaments remain important:

— in exercising political scrutiny of the positions adopted by their respective governments within the Council;

— in establishing cooperative relations with other parliaments in the EU;

— in drafting and implementing EU law;

In addition, the draft EU Constitution provided for additional opportunities and powers to national Parliaments. These new opportunities would have included direct and (more or less timely) notification regarding planned European legislation and opportunities of recourse, formally independent of the national executive in matters of abuse of the subsidiarity principle. One could argue, however, that these possibilities are not genuine possibilities for national parliaments as the identifiable instruments of representative government. The direct impact of national representative governments on the European Parliament (through national delegates of Parliaments who might have binding mandate) disappeared with the system of direct elections. The proposal to create a second chamber representing national Parliament has never been popular. It is true that

there is a certain sentiment that national Parliaments deserve special attention in the European legislative process for reasons of democratic representation, "being close to citizens"[21] rather than for reasons of national sovereignty. But the prevailing understanding is that powers in the Union emanate from the EU Constitution, even with regard to constitutionally established matters of subsidiarity.

Even with improved possibilities of early warning of Parliaments (as light of past experience, that national Parliaments will make use of these suggested in the European draft Constitution) one cannot take for granted, in the opportunities. Moreover, given the remaining opportunities of national parliamentary involvment, the position of the parliament might be that of defensor of national interests. Especially in case of the subsidiarity recourse it might be embarassing for the majority to endorse a position against the one that the executive has endorsed. On the other hand, and with particular relevance to new member states which are in the shadow of suspicion of being inculcated by nationalism, the opposition of the day might be inclined to castigate the majority and the government for giving up the national interest by not taking a clear position against a Commission position or a piece of European legislation that might be challenged on subsidiarity grounds. In this scenario national Parliaments may become the forum of nationalism.

Of course, the demise of national parliaments, even if it occurs, does not rule out alternative forms of parliamentarism, and more broadly, a deliberative democracy. The European Parliament offers a form of expression of popular will. How deliberative the European legislative process will be is a matter to be seen. What is more obvious is that the European parliamentarism, deliberatly and to a great extent, offers representation for the European identity of their electors, as the system allows for less effective national interest representation (in the sense of primordial national interest).

Certain features of the European Parliament might have negative impacts on the public in the new member states. For representatives coming from smaller countries there is little they can do about the nationalistic sensibilities of their electors. For small states the elected representatives will have no chance to represent successfully nationalistic interests. As they join big pan-European factions where blocs of larger countries dominate they will be dissolved and disappear in this distant formation. It is unlikely that the activities of the Parliament will satisfy the nationalistic expectations of the public in a small country. This might increase a sense of abandonment of national interests

[21] See e.g. French Convention representative Haenel, H.: http://european-convention.eu.int/docs/wd4/3640.pdf

and add to the feeling that there is no genuine representation at the European level.

One could argue that Senate members in the US are also popularly elected in their state constituency without losing their state-interest representation capacity. But the differences are formidable both in terms of the constituency and the way the representation is organized in the two systems. The constituency difference can be explained in reference to the planned motto of the European Constitution: representation in Europe is about unity in diversity; in the US diversity within unity that prevails. As to the constituency, the European MP represents a nationality—his electors are mostly of the same nationality, and of the same state. All US Congressmen are elected by Americans, who might have local (state or substate level) interests or ethnic affiliation. A congressman elected in a predominantly black, Jewish or Irish district (and most districts do not have such profile) will represent Americans first, with some ethnic positions on a few issues. This is not the case in Europe where the districts create clearly national constituencies, however, the representatives are forced to abandon this implicit mandate where it is dictated by (party) ideology, by European party discipline, and, most of all, by sheer numbers.

The logic of European legislation satisfies certain conditions of deliberative democracy, not necessarily because of the dialogue within the Parliament but because of the inter-institutional dialogue. Unfortunately this discussion is likely to remain non-transparent. Furthermore one cannot take for granted that the system has the potential to remedy the problem of bureaucratic-administrative homogeneity that characterizes executive legislation[22] and that is a major problem at the national level in regard to the implementation of European law (directives being implemented bypassing the legislation, via executive regulation). The problem of administrative homogeneity ("like-mindedness") remains where the interaction is between central (European) administrators and likeminded national administrators. (These latter are "like-minded" because of a pro-European training.) And even where there is interaction with the elected European or even national Parliaments these might share the administrative European ethos too. (See the impact on legislation and robust democracy of the composition of the legislature in Germany where civil servants are elected to Parliament in great numbers.)

[22] Executive legislation in the administrative state runs the risk "of a situation in which like-minded people are pressing one another toward an unjustifiable position." Sunstein, C. R.: *Designing Democracy. What Constitutions Do.* New York, Oxford University Press 2001. 141. Sunstein argues that control of delegated legislation is a remedy.

The nature of European Union law further diminishes the positive impact of the inter-institutional dialogue as fundamental problems are left unsettled, either because of subsidiarity or due to unprincipled political, intergovernmental, or inter-institutional compromises that leave matters unresolved or for decision-making at the national level, which often means exclusively executive legislation, to the detriment of public deliberation. The politically uncotrolled executive regulation means that the implementing regulation is prepared and enacted within the civil service. It is here that the insufficient constitutional/rule of law experience and the interest in democratic control will impose a high cost on the new member states. It is likely that in these countries there will be no public or institutional insistance that regulatory matters, other than dealing *directly* with *fundamental constitutional* rights restriction, be regulated in parliamentary processes. At least the Hungarian draft law on the legislative process prepared by the Ministry of Justice in 2003 intends to further restrict the domain of parliamentary law, enabling the executive to write the implenting legislation. One can already foresee the nature and qualities of regulations written by overwhelmed bureaucrats whose main concern is to have the norm pushed through without conflicts, and irrespective of constitutional, rule of law, or efficiency considerations. Of course, there are important reasons for this avoidance of Parliament: namely the dangers of delay and overpoliticization. But given the lack of commitment in the public bureacracy to constitutional/rule of law values it is at this deeper level that the fears regarding insufficient commitment to the rule of law seem appropriate. The political elite is not ready (yet?) to reshape the procedure allowing for more costly, rule of law commited procedures, partly because the same elite has an instrumental attitude to law: it is satisfied with the semblance of due process etc. This is a political elite that looks at politics as a matter of interest based horse trading, where principled positions are laughed at.

Note further that the East European civil service is not responsive to the public. Its leaders are not elected and for good reasons. Such arrangements contribute to diminished democratic accountability. Such trends might be reinforced in the environment of the European administrative state. The European administrative state has to work as an impartial entity (with regard to national interests). A democratically elected executive that controls the administrative structures would politicize the whole Union. The legitimacy of the civil service is unrelated to the democratic legitimation of the leaders, both at the European and member state level. The contrast is clear with the United States.[23] National

[23] The prevailing US doctrine that allows administrative discretion is formulated in *Chevron USA v. Natural Resources Defense Council* 467 U.S. 837 (1984). Agencies are

courts have no power to review the implementation legislation as it is a matter of community law.

Notwithstanding the above, the long term perspectives are not hopeless for constitutionalism in the new member states. After all, the emerging supra-national separation of powers adds to that what remains of separation of powers at the national level. With regard to restricting the chances of elected dictatorship the changes are favourable to constitutionalism. It will take time to learn to live with, use and perhaps appreciate the new constitutional arrangement where the traditional branches of power operate within (and complement) networks of interest representations which have limited democratic legitimation and partial representativity. It is possible that these alternative interest representations will operate as new checks and balances: it certainly does not satisfy traditional expectations of democracy and popular representation but may perhaps provide counterbalances and at the same time contribute to a more efficient steering of the European administrative state. To the extent the Union is indeed an administrative state (with an overloaded bureaucracy composed of generalists) it does not presuppose much democratic control through national parliaments, and even through a Union level parliament.

II. Welfarism and the perpetuation of the state-socialist endowment effect

Given that citizens of the new member states have limited political and practical opportunities as well as material and intellectual means to determine their own fate, and that this limitation is neither disguised nor regretted in prevailing Eastern European political cultures, the traditional patterns of a welfare dependent, anti-modernist *complaint-subject* might be reinforced. By "complaint-subject" I mean citizens who behave like subjects of a paternalist state, who refuse to take responsibility for their fate through democratic participation, and whose "voice" (Hirschman) remains limited to complaints. People complain about their personal bad luck and the bad luck of their national history, and about mistreatment by insensitive politicians, and lack of honesty and decency of other people, in particular of those who appear to be successful. Political attitudes and action of the East European citizen remain one of complaint (hence the pattern of protest vote). The complaints include dissatisfaction with

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authorized to interpret ambiguous legislative terms as they think it fit, as long as the interpretation is reasonable. Courts are expected to defer to the administrative interpretation of statutes. However, contrary to Europe, the American executive is popularly legitimated. The European and member state bureaucracies are without any popular legitimation.

welfare provisions. It should be noted that welfarism is particularly present in Hungary with a 54 per cent rate of welfarist redistribution (that is 54 per cent of the GNP). Similar problems and welfarist-populist resistance to or reluctance to reduce welfare spending on the middle class is present in the Czech Republic and Poland. These three largest accession countries face considerable budget deficits.

As mentioned above, popular democratic control in the post-communist countries will not be enhanced after accession. Moreover, and partly related to the emerging European decision-making process, the legacy of state socialism will be reinforced; namely socialist welfare dependence will be reinforced by the prevailing solidarity culture of the Union. The Union is programmed to promote welfare as the source or precondition of European homogeneity. This will have perverse effects in many new member states. The prevailing inherited attitude of the majority of the population in the new member states is that the State should provide all sorts of services for free, irrespective of individual contribution and need assessment. (Needless to say this may not correspond to the principle of social solidarity even though it may not be in conflict with the European practices that emerge in the name of social solidarity). Most political parties and governments have subscribed to this popular/populist attitude. This primitive theory of entitlements has been elevated to a theory of "subjective rights" in Hungary; that "theory" is voiced by government and opposition and sanctioned by the decisions of the Hungarian Constitutional Court.[24] Social rights serve as the basis of government provided services, which are taken for granted for all citizens. The attitude is inherited from socialism—the state socialist system provided all sorts of services in exchange for political loyalty and to a great extent irrespective of merit and economic inefficiency consequences. The resulting inefficiencies made the state socialist system unsustainable. However, the welfare expectations continued to operate in conformity with what one could expect on the basis of the endowment effect. People are generally inclined to ask much more for selling a good they possess than they are ready to pay, if asked to buy it. People estimate very highly the services which were already provided, although they would be reluctant to pay for such services. Such attitude is generally quite irrational, especially where it

[24] Likewise the Polish Tribunal, in the Pension cases. For Hungary, see Sajó, A.: How the Rule of Law Killed Welfare Reform, *East European Constitutional Review*, 5 (1996) 31–41.

helps to maintain very inefficient and costly bureaucracies, as it is the case in the post-communist countries (see, in particular the healthcare system).[25]

Endowed welfarism has proven to be quite popular. This popularity is not limited to Eastern Europe although richer countries may afford it more. It is a typical middle class attitude that favors, among others, the maintenance of universal services. The attitude was masterfully summarized in a dissenting opinion of Justice Kilényi of the Hungarian Constitutional Court.[26] Justice Kilényi argued that social rights are to be understood in conjunction with the constitutional right to social security. Social security is far more than the right to a social existence minimum (i.e. subsistence support). It is a constitutional right that pertains to *all* (individuals and families), "irrespective of differences in wealth". It includes the obligation of the state not to interfere with the material conditions of the citizens in a way that imposes on the masses of citizens burdens that are disproportionate and exceed their possibilities. At the beginning of 1995 the Hungarian Constitutional Court repeatedly protected existing, non-contribution based social services as statutory entitlements amounting to acquired rights that cannot be repealed, at least not until the recipients had sufficient time and opportunity to find alternative protection. The Court and, increasingly, most political parties accepted that general entitlements, unrelated to needs assessment are "subjective rights" and pertain to all.

The social welfare dependency that is rooted in the endowment effect had dramatic fiscal consequences. Universal services that were inherited from socialism were of a nominally high quality. As a result of different populist-electoral policies, at least some of these services were further extended after the collapse of state socialism. The state could not sustain these services, or their level (quality), except at the price of excessive taxes with negative impact on investment and increasing government debt that imposed increasing fiscal burden on economic development. At the moment when the requirements of the Stability and Growth Pact became a concern to the new member states and the governments, certain governments attempted to reduce the budget deficit. There was a general public outcry against any attempt to move towards a needs assessment based welfare system. It has to be admitted that the gross income of the population is HUF 1,1 m (4,000 Euros) with an average of 28 per cent income tax and approximately another 11 per cent social security tax. (Only 4

[25] Posner argues that endowment effects are rational if the disparity reflects the unique character of the goods in question – unique in the sense of lacking close substitutes. This is certainly not the case of the welfare services which are (or would be) available on the market. Posner, R.: *Economic Analysis of Law*. 5th edition, New York, 1999. 95.

[26] 26/1993 (IV.29.) AB hat. [annualized increase of pensions below inflation upheld].

per cent of the taxpayers reported more than HUF 4,000.000 annual gross income. As long as the tax remains high (40 per cent above the 4,000 Euro bracket) there is no disposable income for social services and the population is not in the position to make informed choices, though in the given system the level of services deteriorates.

It is likely that the welfare expectations attitude will be reinforced ideologically in the Union. Further, to some extent such tendencies might be reinforced on the basis of the specific rules of the secondary legislation of the Union that reflect welfarist concerns but correspond to the possibilities of much more affluent societies. (It is a matter of conflict for the future how the new member states will satisfy the budget deficit, and national debt reduction, etc. requirements of the Euro zone.) The solidarity-inspired and other socialistic provisions of the Treaty/Constitution will enhance the attitude of middle class welfare dependence.

The European attitude was well exemplified in draft Constitution that continued to enhance the idea that a high level of health protection is to be provided under nationally determined systems as promoted by Union policies.[27] To the extent that this points to an all-European standard the pressure on the weaker national economies to maintain free, or below market price services will continue. Note that the per capita health care spending in Germany exceeds at least sevenfold the Hungarian per capita expenditure, though in terms of the respective percentages of the national budgets the two countries are not fundamentally different. However, the Hungarian expenses are almost exclusively covered on the basis of a national insurance system that runs into major deficit, covered by the budget.[28]

I would like to illustrate the welfarist burden on the new member states (with the already mentioned consequences of welfare dependency reinforcement and negative impacts on economic development) with a more specific example that originates in the secondary legislation on commercial activities. Directive 2002/22/EC of the European Parliament and of the Council of 7

[27] Art. II-35: Health care.

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

[28] The health care expenditure looks non-sustainable in its present system of administration based on an allegedly "acquired right". Attempts to reform the system run into the resistance of the well organized medical profession and the pharmaceutical industry, supported by the opposition of the day, claiming that any reform imposing direct costs on the population violates people's rights.

March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) requires that universal service be made available at "affordable price" (Article 3. 2.). Annex IV specifies that such duty implies averaged prices or the provision of specific tariff options for consumers with low incomes. The resulting loss to the operator has to be recovered from contributions from the other undertakings (who will charge more to their users). I am sure that even Adam Smith would offer some arguments for such arrangements referring to public goods; modern economists would talk about positive network externalities. Further, solidarity might provide additional justification for such arrangements. For example emergency calls will be available to all. However, what are the implications of such logic where large numbers of the population are of low incomes? That the affected companies (sectors) will lose their competitivity.

Welfarist provisions in European Union law, similar to the above mentioned examples are of considerable importance for reinforcing socialist mentalities of endowment and post-socialist welfare institutions with all the inherent inefficiencies, unfairness (middle class bias) and non-sustainability that it entails.

After all, the quoted welfarist provisions of European Union law seem to reflect the same welfarist perspective that the national parliaments have inevitably accepted in response to democratic pressure. Such language and policies might be attributed to the self understanding of the administrative welfarist state. The Union's institutions and networks are not catering to welfarism and function to some extent as buffers against self-destructive welfarism of democracy at the national level. Nevertheless, the comprehensive language of the Union seems to mimic what would have resulted from traditional popular representative democracy. This may not be decisive where particular policies are left to independent networks without a welfare-oriented redistributive mission. It should be added quickly that all this is intended to indicate a possible trend only, a trend that at this moment is undermined by at least three facts. Firstly, the Union does not have much power of direct reallocation as this remains within the budgetary powers of national parliaments. Secondly, the transfers of the Union are certainly and perversly redistributive (see CAP). Thirdly, there are genuine efforts to recreate representative government or a network of representative governments at the Union level that might respond to (or resist) the same redistributionist democratic impulses that characterize national parliaments.

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The Place and Role of Company Law in the Codifications of West-European Commercial Law During the 19th Century

Abstract. The present study tries to summarise the role of company law in the codification process of civil law and commercial law. First, the study attempts to find the general features of the codification of company law summing up shortly the general history of company law. Later on the study describes the history of company law and commercial law in several Western-European countries. As a matter of fact the study deals with France, Italy, Spain, Portugal, Greece, Netherlands, Belgium, Germany, Austria, Switzerland, England.

The study tries to grasp the common characteristics of the legal development in the foregoing countries. The study also stresses the common features of the different forms of company and describes the way how the various forms of company were separated. The study pays high attention so the influence of company law on the development of civil law and commercial law. The study takes into consideration the comparative legal approach while describing the history of company law in the Western European countries.

Keywords: legal history, history of company law

The purpose of this study is to describe the role played by company law in the codifications of civil and commercial law during the 19th century, with special attention to the models of uniform regulation on certain forms of company and to the general characteristics of different legal institutions as covered by company law.

1. General features of the codification of company law

The efforts at the codification of company law in the 19th century created a fundamentally new situation in legal development in this field of law. The adoption of related codes generally ran parallel to uniform regulations on commercial law, with company law forming part of commercial law and representing a special province thereof.

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At the end of the 19th century private law was no longer confined to civil law as traditionally understood, to regulating the exclusive daily relations of private persons and families, but comprised the general domain of the law of organizations as well.[1] The joint stock company form may be said to have generally emerged in the 19th century, which was also marked by the appearance of limited liability companies, cooperatives and associations. The general economic reasons for the full development of the joint stock company lay primarily in the fact that economic life called for an organization with assets of its own, where members' interests were independently transferable and members' rights in the company were linked to their shares, while their liability for the company's debts was limited.

In the Middle Ages the predecessors of the joint stock company were companies licensed by certain royal prerogatives and established chiefly in response to the legal and organizational needs of carrying on trade with remote countries. As against this, a new factor in the 19th century was represented by those new economic sectors which, emerging as a result of the industrial revolution, needed rather great amounts of capital and included—among other things—the establishment of railway companies in the 1830s and 1840s and of certain financing institutions such as banks. There were two ways open to bolstering these industries, namely financing through loans and devising an organization whose members were those persons who secured the necessary capital for the given activity and whose interests thus obtained in then company were embodied in shares.

Of course, partnerships (associations of persons) retained a role along with other companies (pooling capital), so the unlimited or general partnership (*offene Handelsgesellschaft*) and the limited partnership (*Kommanditgesellschaft*) continued in existence. Their disadvantage *vis-à-vis* capital pooling companies is to seek in the members' underlying unlimited liability and the limited transferability of their interests in case of change in members. Limited partnerships in Germany represented, mainly in the period preceding industrialization, a frequent form of company, the number of whose limited or silent partners often became considerable. This process led to the foundation of partnerships limited by shares (*Kommanditgesellschaft auf Aktien*). Legal regulation was similar in England, but known to England law was only the form equivalent to the unlimited partnership (partnership), limited partnerships not appearing until later, early in the 20th century.

[1] Coing, H.: *Europäisches Privatrecht. I. Älteres Gemeines Recht (1500 bis 1800).* München, 1985. 95.

A great breakthrough in regulations on company law at the legislative level was marked by the adoption of the French *Code de commerce* in 1807. The French Code was the first to regulate the different forms of company on a comprehensive scale at the legislative level. Accordingly it was that Code, which set an example for the codification of company law in all states during the 19th century. It is necessary to underline basically two main features of the *Code de commerce*. Already known to it were the so-called capital-pooling company and two types thereof, the joint stock company and the partnership limited by shares. Art 38 of the *Code de commerce* regulated the latter jointly with limited partnerships, with the exception that the provisions on limited partnerships were applicable as supporting rules. It should also be mentioned, however, that in the case of joint stock companies Art. 39 of the French Code followed the concession principle, meaning that the foundation of joint stock companies was subject to government permission. That arrangement was an intermediate solution, for it represented progress in comparison with the establishment of companies formerly based on royal privileges, while it did not grant private persons a full right of association, the main reason being the requirement to afford appropriate legal protection for creditors and shareholders.

The *société anonyme* was given legal coverage by the third part of the French code. This amounted to raising to the level of written law the general practice of to hundred years preceding the Code. The relevant rules covered, *inter alia*, the stated capital of a fixed amount and its division into shares of a specified equal value (Art. 34), limited liability enunciated as a basic principle and limitations on cash contributions by shareholders (Art. 33), the appearance of the company under a firm name, with the obligation to use the mark "Corp." and the transferability of bearer shares and registered shares embodying the company's rights (Arts. 35–36). A revolutionary innovation was represented by the introduction of the concession system (Arts. 37, 40 and 45), which replaced the *octroi* system and is to be treated as an achievement by proclaiming at the statutory level the freedom of enterprise resulting from the French civil revolution. As it appears in the French *Code de commerce*, the joint stock company clearly separated the functions of the persons figuring in the name of the company (mandataires), who were eligible for a specified period and were recallable, and those of the general meeting representing the totality of shareholders.

As regards the legal regulation of the joint stock company by the *Code de commerce*, emphasis should also be laid on the fact that Art. 33 of the Code provided for a limited liability of shareholders, while permitting the issue of bearer and registered shares (Arts. 35–36) and laying down various rules on

transfer of such shares. Concerning the organization of the joint stock company, the *Code de commerce* applied the rules for the contract of agency in accordance with the fact that the company was represented by the so-called *administrateurs,* who personally bore no liability to third persons for contracts made on behalf of the company as such contracts contained obligations solely for the company. In addition, the Code laid down no further rules on the shareholders' status and their representation at the meeting, which were left to the articles of association to regulate. The foundation of a joint stock company was regarded by Art. 40 of the *Code de commerce* as an act under public law (*acte public*),[2] and the French Code contained several provisions for the protection of persons in contractual relations with the joint stock company, which is ample proof that the *société anonyme* is to be deemed a limited liability company, a capital-pooling company rather that an association of persons.

From the 1820s joint stock companies grew considerably in number in France and Belgium and from 1840 in Germany as well. In conformity with the French regulation, the concession principle became general in European legislation on companies, and the state authorities granting licence accordingly devised a set of general rules under which registration of companies was accepted and which were called normative regulations in Prussia. The French regulation was followed sooner or later by similar codes in all states of Europe.[3]

[2] The foundation of companies possessing juristic personality can be traced to the rules of Roman law in several aspects. "There is thus here a basis for the 'concession' theory of corporations, i.e. that they can only have personality by a creative act of the State, and Savigny, one of the chief exponents of this theory, held in fact that there are two separate rules. One was that the formation of an association without permission was an offence, though this rule only applied when the association was or might become harmful; the other, more important and still valid inn the modern law, that no association whatever could become a legal person without public authorization." Jolowicz, H. F.: Roman *Foundations of Modern Law.* Oxford, 1957. 131.

[3] See, e.g., Wetboek van Koophandel (1838), Art. 36 ss.; Gesetz Über die Aktiengesellschaften, 9.11.1843; GS für die Königlichen Preussischen Staaten 1843, Nr. 31. 341 ss.; Act for the registration, Incorporation and Regulation of Joint Stock Companies, 5.9.1844. 7 & 8 Vict. C. 110; Act for the Incorporation, Regulation and Winding-up of Trading Companies and Other Associations (Companies Act), 7.8.1862, 25 & 26 Vict. c. 89; Loi sur les sociétés, 24.7.1867, Bulletin des Lois 1867. 94 ss.; Gesetz betr. Die Kommanditengesellschaften auf Aktien und Aktiengesellschaften, 11.6.1870, BGB1. Des Norddeutschen Bundes 1870, Nr. 21.375 ss.; Loi contenant le titre IX, livre I^{er} du code de commerce relatif aux sociétés, 18.5.1873, Pasinomie 1873, Nr. 157. 150 ss.; Schweizerisches Obligationenrecht (aOR 1881), Art. 612 ss.; Codice di commercio 1882, art. 121 ss.; Código de comercio 1885, art. 151 ss.; Loi modifiant la loi du 18 mai 1873 sur les sociétés commerciales, 22.5.1866, Pasinomie 1866, Nr. 156. 259 ss.; Código commercial 1888, art. 162 ss.; Verordnung,

The regulations on joint stock companies in Germany required a longer process, which included a comprehensive codification on joint stock companies (the Joint Stock companies Act) in Prussia.[4] That Act contained no concrete provisions for the internal organization of joint stock companies, only Art.19 thereof stating that the board of directors (*Vorstand*) must act on behalf of the company and its following articles specifying the powers of the board of directors. The primary importance of the Act was manifest in declaring the joint stock company to be a legal entity capable of acquiring immovable property on its own behalf (Arts. 8–9) and undertaking obligations concerning bills of exchange. This can be attributed chiefly to the influence of *Savigny*, who was Minister of Legislation in the Prussian cabinet at the time.

This was followed by a turn in the German law of joint stock company when, as a result of the revolution of 1848, the Government included *Camphauesen* as Prime Minister and *Hansemann* as Minister of Finance who abrogated the previous regulation and introduced the concession system leading to a significant increase in the number of joint stock companies. By that time it had also become a general practice for joint stock companies to form three main organs, notably the board of directors, the general meeting and the supervisory board (*Verwaltungsrat* or *Aufsichtsrat*). The rules on joint stock companies accordingly became generally applicable, so the ADHGB—when adopted in 1861—witnessed an uniform regulation in the whole territory of Germany. That Code followed the concession system, from which however, the different states were allowed to make exceptions (Art. 249). The board of directors (Vorstand, Art. 227), the general meeting (Art. 224) and the supervisory board (Art. 225), which was optional, became mandatory organs of the joint stock companies. Art. 224 (2) states that each share represented one vote, entitling the holder to attend the company's general meeting, an organ vested with considerably enlarged powers. The ADHGB was clearly indicatory of a democratic tendency in the history of the German company law.

In England as in Germany and France, the process of development from the *octroi* system to the concession system in the field of company law can be attributed not only to economic, but also to political factors. Companies in the England of the Middle Ages were established by *royal charters* or *Acts of Parliament.* Along with such companies there operated companies under the common law, which were to be regarded as *unincorporated companies.* The

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20.9.1899, mit welcher ein Regulativ für die Errichtung und Umbildung von Aktiengesellschaften auf dem Gebiete der Industrie und des Handels verlautbart wird (Aktienregulativ), *Reichsgesetzblatt.* 1899, Nr. 1755. 839–858.

[4] Gesetz über Aktiengesellschaften vom 9. Nov. 1843.

latter were first considered invalid, but came to be recognized later, subject, however, to members bearing unlimited liability. The so-called Bubble Act of 1720 prevented the establishment of such companies, and then in the 19th century (1856, 1857 and 1862) there were adopted several statutes dealing with the English law of joint stock company. The reasons for the time-lag between the English codification and the German and French codifications were not only political and economic, but are also to be sought in the distinctive feature of English law, which is to be seen as a basically uncodified law. This not with standing, the 18th century witnessed efforts at regulation of some provinces of company law by the so-called *Trent Navigation Act* (1766), the *Companies Clauses Consolidation Act* (1845) and the *Railway Clauses Act*. The Bubble Act was repealed in 1825, thus opening the road to the free development of joint stock companies. At the same time, development in that direction bolstered speculative designs again, a reason why the obligation of companies to be incorporated became inevitable in 1826 and was also written into a statute in 1844. As regards the organization of companies, the establishment of the general meeting as the chief organ of the company's direction became general during that period.

The aforesaid general tendencies described, we shall now review the codifications and their results in some countries of the west European region.

2. France

In connection with joint stock companies it may be emphasized that in French law joint stock companies were regulated neither by the *Ordonnance du commerce* of 1673 nor by other general statutes. Establishment of joint stock companies was subject to *ad hoc* royal decrees, as is best exemplified by the emergence of companies trading with colonies and developing under the influence of Colbert (e.g. Compagnie des Indes occidentals, Compagnie des Indes orientales). In the case of those companies a large part of states capital was made available by the ruler himself. During that period joint stock companies were seen as an exceptional means to attain general goals of public interest, for which it was allowed to pool the necessary capital.[5]

It was one of the aims of the Great French revolution to abolish the guild system, for guilds represented privileges deriving from feudal mentality. That

[5] Koberg, P.: *Die Entstehung des Gesellschaft mit beschränkter Haftung in Deutschland und Frankreich unter Berücksichtigung der Entwicklung des deutschen und französichen Gesellschaftsrecht.* Köln, 1992. 217.

aim was achieved by the "le Chapelier" Act of 1791 granting every French citizen the freedom of enterprise subject to payment of business tax. Interestingly, however, although the "class of merchants" had been abolished, the commercial law related to it remained in existence, together with commercial adjudication redolent of by-gone days and old-time privileges.

The period of the French revolution was witness to the adoption of several statutes in rapid succession, such as the Decrees of 2 January 1791 and 24 August 1793, the former restricting the foundation of joint stock companies and the latter prohibiting the formation of different associations whose capital was embodied in bearer shares or similar securities and whose establishment was subject to consent of the state. A decree of 1793 prohibited the foundation of joint stock companies and ordered the dissolution of existing ones.[6] On 20 November 1795 there were passed a number of statutes which again permitted the foundation of joint stock companies without regulating in any way the organizational structure and the activities thereof.[7] These aspects were accordingly left to legal practice to govern.

On 3 April 1801 Bonaparte appointed a committee of seven members to frame the *Code de commerce*. Applicable from 1 January 1808, the uniform Code, adopted as five different statutes and consisting of four books (modelled on the *Code civil*: I. Commerce in general; II. Maritime trade; III. Bankruptcy; IV. Commercial adjudication), numbered 648 articles.

The *Code de commerce* of 1807 was the first European commercial code, which—although making allowance for the provisions of the *Ordonnance du commerce* of 23 March 1673, i.e. the work of Colbert—is to be regarded, in view of its significance, as a work influenced by early economic liberalism.[8] In the first part of the 19th century the *Code de commerce* served as an example for all states in respect of modern commercial legislation. Its elaboration started in 1801 in the committee set up by the *Conseil d'État*, in 1806 there were formulated separate codes, which were then incorporated in the *Code de commerce* of 15

[6] The reason is to seek in that the companies operating with royal permission belonged to the relics of the Ancien Régime and old royal privileges and were thus contrary to the republican ideas. Santuari, A.: The Joint Stock Company in Nineteenth Century England and France: 'Kinf v Dodd' and the 'Code de Commerce.' *Journal of Legal History* 14 (1993), 44.

[7] This was necessary in order to provide appropriate frameworks for the continuing operation of trade, with the freedom of entwrprise now guaranteed. Santuari: *op. cit.*, 44.

[8] Zachariä von Lingenthal, K. E. (Carl Croma): Handbuch des Französichen Zivilrechts. 1. Freiburg, 1984. 66. For a detailed analysis of the codification by the Code de commerce, see Mrs. Nagy Szegváry, K.: *Jog és gazdaság* (Law and Economy), Budapest, 2001. 46. et seq., and for its impact on the codification of the German commercial law see Mrs. Nagy: *op. cit.*, 67 et seq.

September 1807. Effective from 1808, the Code practically regulated three forms of company: general partnership, limited partnership, or partnership limited by shares as a special type thereof, and joint stock company. Its particular relevance for legal history lies in the fact that the common roots of West European regulations on commercial and hence on company law can be traced to this Code for the most part.[9] Its provisions were applied directly or indirectly in Belgium, Luxemburg, Netherlands, Greece, Turkey, Poland, and in several non-European countries such as Egypt and South American states. Special emphasis should be laid on the Italian *Codice de commercio* of 31 October 1882, the Spanish *Código de comercio* of 30 May 1829, and the Portuguese *Codigo commercial* of 18 September 1833.

The *Code de commerce* consisted of four books and 648 articles, and its part dealing with company law regulated four forms of company, namely general partnership, limited partnership, partnership limited by shares, and joint stock company.

The general partnership (*société en nom collectif*, SNC) was one founded by two or more members conducting commercial transactions under the same name, with members bearing personal liability jointly and severally for the company's debts (Co. Art. 20). Joint and several liability is practically the line of demarcation from the French civil-law society (*société civile*, Cc. Arts. 1832–1873), where—in the case of simple civil-law societies—members' liability was unlimited, but could be determined in proportion to their shares. The foundation of a general partnership was subject to a written contract and to compliance with the requirements of publicity, which meant the requirement for a copy of the signed articles of association, original and certified by a notary public, to be deposited with the local court (*justice de paix*) and with the commercial court (*tribunal de commerce*). However, judicial practice disallowed inspection of such document by anyone.[10] In connection with the amendment of 1867 it is to be stressed that Art. 56 made it mandatory for an excerpt of the articles of association to be published in an official journal (*Journal d'annonces légals*), such excerpt to indicate the names of members, the company's name and domicile, the provisions on management, the company's capital, commencement and duration, the company's registration with the court, and the abbreviation or name referring to the type of company. In addition to the Act of 1867 On

[9] "Bei Beratung des Code de commerce schwechte der Gedanke vor, ein 'droit commun de l'Europe' zu schaffen. Dies entsprach der welternhernden Politik Frankreichs, die nicht so auf Rechtsausgleichung, als auf Rechtsverdrängung ausging." Lehmann, K.: *Lehrbuch des Handelsrechts*. 2nd edition, Leipzig, 1912. 24.

[10] Koberg: *op. cit.* 200.

publicity, the acts of 1819 (18 March) and of 1820 (26 June) on trade registry required the court of the company's domicile to keep a trade register of those companies which had their registered office in their area of operation.

The general partnership was an association of persons, but it possessed juristic personality under the French law and was therefore entitled to be a member of another general partnership.[11] Unless otherwise provided by the articles of association, all members had the right to act on behalf of the company, while the right of representation was transferable to specified members or even to third persons. The members of the company bore subsidiary liability for its debts. In the 19th century the general partnership was one of the most popular forms of company, its percentage practically amounting to 75, with no significant change observed in this respect in France until the introduction of the limited liability company.[12]

Another significant form of partnership in France was the limited partnership (*société en commandite* SC), which was established by articles of association with one or more members bearing personal joint and several liability for the company's debts; the members were general partners (*associé solidaire, commandité*), and there were also one or more persons as limited partners (*commanditaires, associé en commandite*) joining the company as providers of capital (*bailleur de fonds*). The company was named after the general partners, and the names of limited partners could not figure in the company's name (cc. Art. 25). The company's management and representation were reserved for the general partners in accordance with the rules on general partnerships. The general partners' right of representation could not be limited except by the articles of association. The company's representative was liable under the rules on agency to the company's members for any damage caused in the exercise of his right of representation. The limited partners' liability was limited to making available to the company the amounts of cash contribution undertaken in the articles of association (Cc. Art.26). It should be mentioned that in the articles of association the parties could also stipulate that the company must pay interest to limited partners on their contributions in case the company obtained little profit. Limited partners were excluded from the company's management and representation.

The first legislation on simple limited partnership (*société en commandite simple*, SCS) was the *Ordonnance du commerce* of 1673, which demarcated the

[11] Koberg: *op. cit.*, 201.
[12] Koberg: *op. cit.*, 202.

general partnership from the simple partnership, then called *société générale,*[13] in para. 4 of Art. I. The *Code de commerce* of 1807 introduced several new elements in the regulation on limited partnerships, prescribing that the firm must have a name of its own, or subjecting limited partnerships, too, to the rules on general partnerships. This was followed by two minor amendments in respect of limited partnerships: the Act of 17 July 1856, which amended Arts. 51–63 of the *Code de commerce* and governed settlement of disputes concerning the legal relations of the company, and the Act of 6 May 1863 amending Arts. 27–28 of the *Code de commerce*. No statute required the limited partnerships to set up a supervisory board, but the possibility was left open of doing so.

There were no antecedents to the *Code de commerce* (Art. 38) incorporating the partnership limited by shares (*société en commandite par actions*) as a new form of company. In respect of such partnership the division of stated capital into shares was governed by the rules on joint stock companies, and other aspects by the rules on limited partnerships. This form of company was included in the Code at the request of various economic organizations, courts and chambers, since the first draft of the *Code de commerce* was to cover but one form of joint stock company, the formation of which was subject to state permission, but in the case of partnership limited by shares no further request was needed because it was compensated by the personal liability of general partners on the ground that shares could be issued without concession, thereby securing the necessary capital for the operation of the company. In the first part of the 19th century the partnership limited by shares became a significant vehicle for economic development, but it also naturally entailed transactions seeking profit derived from foundation and speculation. Abuses of such type reached quite large proportions during the 1830s and 1840s. The collapse of speculative businesses prompted the government to draft a bill in 1836–37 to abolish that form of company. However, the committee which had been set up to reform the relevant statute framed a bill that was to limit the transferability of the shares of partnerships limited by shares by allowing the issue of registered shares only, but the bill was not debated in the Parliament.

Thus it was the *Code de commerce* which regulated the joint stock company at the legislative level for the first time.[14] The joint stock company (*société anonyme*) was covered by Art. II of the Code. According to the relevant rules,

[13] The general partnership was legislatively governed by the *Code Savary* for the first time, and its designation was changed to *société en nom collectif* in the *Code de commerce*.

[14] The *Code de commerce*, too, made the foundation of joint stock companies subject to the consent of Parliament, thereby seeking to compensate possible abuses resultant from companies operating with limited liability. Santuari: *op. cit.*, 45.

the joint stock company appeared in commercial transactions under its own name, which was not allowed to contain the name of any shareholder, but was required to refer to the main object of the company (Cc. Arts. 29–30). The joint stock company was represented by mandataries (*mandataires*) who were elected for a specified period and were recallable. The representatives were not required to hold shares and were entitled to perform their function either without compensation or for a consideration (Cc. Art. 31). They were liable to the company under the rules on agency for any damage caused within the scope of management and bore no personal or joint and several liability to third parties (Cc. Art. 32). The shareholders were liable for the company's debts to the amount of their contributions (Cc. Art. 33). The stated capital could also be divided into bearer shares and transfer thereof was subject to assignment or, in the case of registered shares, to inscription in the book of share (Cc. Arts. 35–36). The foundation of joint stock companies was subject to a public document (*acte public*) and state authorization (*autorisation*) (Cc. Arts. 37 and 40).

Various decrees on state authorization laid down the rules for procedure. The Decree of 23 December 1807 was the first to specify the substantive elements of the charter required for the grant of permission. The Decree was later supplemented by detailed provisions on 22 October 1817, 11 July 1818 and 9 April 1819. The relevant rules on authorization may be summed up as follows. The founders of a joint stock company were required to present a petition (*petition*) to the local perfect (*préfet*) and the petition had to be signed by all shareholders, with the foundation document drawn up in a notarial document to be annexed thereto, and the prefect gave an expert opinion (*avis motive*) thereon and forwarded it and the annex thereto to the Minister of the Interior (*Ministre de l'interieur*), the expert opinion to contain a prognosis of whether the economic goal to be achieved by shareholders was appropriate and whether the financial strength of the company was acceptable. As a first step, the Ministry's Internal Trade Department (*Bureau du Commerce Interieur*) considered the petition before transmitting its decision to the home Affairs and commercial Committee of the Council of State (*Comité de l'interieur et du commerce de Conseil d'État*). The Committee stated its opinion on the material and returned it again to the ministry. This draft was then approved by a resolution of the Emperor, the king or the President, which was published after signature in the trade journals (*Bulletin des Lois and Moniteur*).[15] That rather detailed and complicated procedure was needed because the joint stock company was a necessary tool of developing modern undertakings capable of representing appropriate strength in both public and private spheres, and practically that was

[15] For a full treatment of the procedure for authorization, see Koberg: *op. cit.*, 218 et seq.

the only course of action in specific areas (e.g. railway construction, canalisation). At the same time, however, the joint stock company had the drawback that the personal liability of entrepreneurs became limited, whereby the creditors' interests could be damaged and room was left for speculation. Nevertheless, the complicated procedure for authorization raised an obstacle to the spread of joint stock companies as the foundation of a company took a period of 12 to 18 months.[16]

3. Efforts at codification in Italy

The *French code de commerce* was received in full into Italy during the rule of Napoleon early in the 19th century. The *Codice di commercio* was enacted on 25 June 1865 and put into force on 1 January 1866, following the concession system.[17]

The *Codice di commercio* of 1865 was basically patterned on the Piemont regulation of 1842 (*Codice Alberttino*), which, on the other hand, was based to a considerable extent on the Napoleonic Commercial Code.[18] That Act disallowed stipulation of advantages for founders and prohibited the foundation of a joint stock company if four fifths of the capital were not subscribed and one tenth was not paid up.

The Code was not a significant work,[19] so MANCINI was entrusted in 1869 with elaborating a new commercial code. The called *Progetto preliminare* was published in 1872. Thereafter, on 6 October 1876 and on 26 May 1877, a new committee on codification was set up by departmental order. Its draft was adopted by the Senate on 27 March 1882 and was promulgated as a statute on 2 April 1882. Then the legislative text revised by the committee, and the new *Codice di commercio* came into being on 31 October 1882 and entered into force on 1 January 1883, remaining applicable until the entry into force of the *Codice civile* in 1942.[20]

[16] Koberg: *op. cit.*, 220.

[17] Calisse, C.: *A History of Italian Law*. New York, 1969.

[18] Pfenninger, I.: *Die Begriffe Imperenditore, Impresa und Azienda im italienischen Codice Civile von 1942*. Diss. Diessenhofen, 1979, 33.

[19] "Der Codice von 1865 war kein ausgereiftes Gesetzgebungswerk." Mittermaier: Das italienische Handelsgesetzbuch vom Jahre 1882. *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 29 (1884), 132.

[20] Calisse: *op. cit.*, 504.

That Act introduced the normative system, probably under the influence of the French Act of 24 July 1867, and the British-type supervision was replaced by provision for publicity on the English model.[21] The need for a reform arose in the wake of World War One; there appeared certain proposals (1922, 1925, 1934), the law-decree of 24 July 1936 was issued on the supervisory board (*collegio sindicale*), and the *Codice civile* became effective in 1942.

4. Spain

The close of the 19th century ushered in a new era of international commercial law, in which the pre-existing commercial law of European merchants had ties with a trade or judicial customary law and resulted in the codification of divergent urban statute laws. In Spain that process began in 1797, when King Carlos IV ordered the elaboration of a uniform Spanish commercial code. It was not accidental that the need for it crystallized at the time of the French Revolution, the ideas of which brought great influence to bear on regulations on commercial law as well, for it was that period which saw the switch from the subjective system of commercial law (the law of the status of merchants) to the objective system of commercial law. The adoption of the Spanish Civil Code and Commercial Code in the period was another determinant factor in Spanish codification. It was under the influence thereof that the Constitution of Spanish provided for the unification of law in the whole territory of the country. Also implying the need for the elaboration of a uniform commercial code, which took place in various committees in different periods depending on political struggles and different political conditions. It was the irony of history that the uniform commercial code was adopted under the rule of King Fernando VII, who was expressly Francophobe, in no way supporting the French currents of thought, and was also opposed to the European efforts at codification. Still, the commercial code was framed, chiefly by *Pedro Sainz de Andino* (1786–1863), who was able to accomplish that goal even in the obtaining unfavourable political situation. *Sainz de Andino* can be considered to have been a prominent jurist and even more an excellent merchant, who recognized the dominant trends and elaborated the Spanish commercial code in keeping with the needs of modern economic life, having regard mainly to the achievements of the French

[21] Mittermaier: Die italienische Handelsgesetzgebung. *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 11 (1868), 314 et seq., and Mittermaier: das italienische Handelsgesetzbuch vom Jahre 1882, 132 et seq.

law.[22] In that activity he was supported by *Luis López Ballesteros* the Minister of Finance, also a man of a wide intellectual horizon. Their efforts resulted in framing a draft commercial code in 1827. Then King Fernando VII set up a committee to work out a counterdraft;[23] its draft was confined to laying down the general principles in brief terms as against *Sainz de Andino's* draft, which was detailed and practical. Fernando VII himself read both drafts and, on 31 May 1829, decided to accept the work of *Sainz de Andino*.[24] Then, on 5 May 1929, he issued a royal decree approving the commercial code with effect from 1 January 1831. At the same time he ordered the particular commercial laws and all previous decrees to lose effect on that date.

The *Código de comercio* (1829) contained 1219 articles and consisted of five books. The first book regulated the rights of merchants and commercial agents; the second book covered commercial contracts in general, i.e., their form and scope of application; the third book governed maritime trade; the fourth book was concerned with bankruptcy law; and the fifth book laid down the procedural rules. In its substance *Sainz de Andino* was guided by the French *Code de commerce* in many respects, particularly in the law of obligations, as the second and fourth books of the Code followed the subject areas of the *Code de commerce*. In addition, the Code comprised the traditional Spanish law, such as the *Consulado del Mar*, the *Ordenanzas de Bilbao*, the Castilian law, and in the maritime law it had regard to the Italian theories, while giving special consideration to the influence of the Prussian law.[25] Compared with the French model, the Spanish commercial code was considerably more thorough and gave a more detailed regulation. This is true particularly of commercial contracts, in respect of which *Sainz de Andino* formulated detailed rules for sale, exchange, loans and credits as well.

The greatest importance of the *Código de comercio* to legal history consisted in being the first in the world to introduce the trade register and the registration of firms.

In respect of company law the Code followed the French trichotomy, distinguishing the general partnership (*compania regular coledtiva*), the limited partnership (*compania en comandita*) and the joint stock company (*compania*

[22] Coing, H. (Hgg.): *Handbuch der Quellen und Literatur der neuen europäischen Privatrechtsgeschichte*. III/3, München, 1988. 3475.

[23] Löber, B.—Peuser, W.—Reichmann, A.: *Spanisches Handelsgesetzbuch. Codigo de Comercio*. I. Frankfurt, 1984. 5.

[24] Sainz de Andino's draft contained 1219 articles against 887 articles of the other draft. Coing: *Handbuch... op. cit.*, III/3. 3475.

[25] Löber—Peuser—Reichmann: *op. cit.*, 6.

anónima) and permitting the establishment of partnership limited by shares (Art. 275). The Code cushioned the rigour of the French concession system, prescribing only the permission of the local commercial authority (*tribunal de comercio del territorio*) and requiring no royal consent to the company's foundation (Art. 294).[26]

Although the Spanish commercial Code of 1829 received the highest professional recognition, it was discovered soon after its entry into force that the commercial transactions governed by it did not embrace all areas of economic life, and the changing political life of Spain revealed new aspect that were not covered in the Code. This led, in the years that followed, to the adoption of numerous supplementary statutes and to the preparation of a new programme for the elaboration of a completely new commercial code. As early as the 1830s, the procedural rules of the fifth book were found to call for additional provisions. Therefore, on 24 July 1830, there was adopted a comprehensive Act on procedure regulating commercial transactions and, on 10 September 1831, an Act establishing the stock exchange in Madrid. Both Acts can be considered to have been the constructs of *Sainz de Andino*.

The 1840s and 1850s saw a detailed regulation on company law process beginning on 28 January 1848 with the adoption of the Joint Stock Companies Act, which was followed by the Credit Societies Act of 28 January 1856 and the Mining Companies act of 6 July 1859. In the meantime, the Act establishing the Spanish National Bank (*Banco de España*) was adopted on 28 January 1856. The close of the 1860s witnessed a liberal turn in the territory of Spain, with efforts directed towards reforming the commercial law in its foundations. On 12 January 1869, legislation allowed the establishment of stock exchanges beside the Stock Exchange of Madrid, and the Act of 16 October 1869 liberalized the foundation of trading companies, allowing free establishment thereof, which had previously been subject to state authorization. As has been noted, efforts were being made at elaborating a new uniform commercial code during this period, and there were set up several committees for that purpose. The first such committee had started working in 1834, and another was set up in 1839 to prepare a complete draft, which was not adopted, however. In 1869, concurrently with the liberalization of commercial law, the state expressed a strong will to

[26] Sainz de Andino justified the mitigation by the fact that, given its losses connected with the colonies, the Spanish economy had considerably weakened and was therefore in need of urgent influx of foreign capital. Coing: *Handbuch... op. cit.* III/3. 3479. However, considering that the system left room for abuses in practice, the Act of 28 January 1848 on joint stock companies returned to the former concession system in Spain. Coing: *Handbuch... op. cit.* III/3, 3483.

have the commercial law recodified. On 20 May 1869 the committee set up in 1858 for that purpose were accordingly dissolved and the main principles governing the preparation of a new code were determined. A new committee was set up to do the work. Making slow progress but working with great care and precaution for 11 years, it produced by 1880 a draft stamped with the name of Minister of Justice *Manuel Alonso Martinez*. Revised by a new committee, the draft was submitted to the Spanish Parliament (*Cortes*), which, after its consideration thereof, adopted it on 22 August 1885 and put it into force on 1 January 1886.

The main task during the elaboration of the *Código de comercio* of 1885 was to adapt the commercial law to the economic and political trends that had emerged and changed since the Code of 1829,[27] the result being that, for all practical purposes, the structure of the Act of 1829 was also followed by the Act of 1885, which, however, divided the material of law into only four books, since the Spanish law of procedure had in the meantime been reformed to give a uniform regulation, thus eliminating the need for the fifth book. The substantive law retained several elements of *Sainz de Andino's* work, particularly in the field of maritime law, while the Code included a great number of new legal norms, such as rules of the stock exchange law, the bank law and the company law. The introduction of the normative system was seen as a significant step in respect of company law. The trichotomy of company forms remained unchanged.[28]

5. Portugal

The *Código commercial Portugues*, framed by *José Ferreira Borges*, was adopted on 9 September 1833, four years after the Spanish Commercial Code constituting its prototype.[29] The Code consisted of two parts, the first concerned with overland trade in three books and the second dealing with maritime trade. Chapter XII of the first part contained provisions on company law, beginning with general rules and laying down special rules on different companies. The Código was familiar with the joint stock company called *companhia de commercio*, the foundation of which was subject to concession. Also know were the *sociedade com firma*, the equivalent of general partnership, and the silent

[27] Löber—Peuser—Reichmann: *op. cit.*, 8.

[28] For a full discussion see Coing: *Handbuch*, III/3. 3487.

[29] The Code reflected Spanish and French influence, but a considerable number of rules were also taken over from Italian and Dutch law. Coing: *Handbuch... op. cit.* III/3. 3496.

partnership (*sociedade tacita*) as well as the *parceria mercantil*, the rules on which applied to limited partnerships, too.

This Portuguese Commercial Code of 18 September 1833 was elaborated on the basis of foreign commercial laws, inclusive of the British.

The committee set up by a royal decree was working from 1850 to 1859 to frame a civil code, its draft (*Código Civil Portugués*) was then revised by a separate committee of 10 members from 1860 to 1865 and submitted to the Parliament in November 1865. Following long debates in the committee, the revised draft was adopted by both chambers in July 1867. Thus, Act 213 (Diario do Governo Nr.213) adopting the Portuguese Civil code was passed on 1 July 1867. On 22 March 1868 the Portuguese Civil Code became effective in the Kingdom of Portugal and the surrounding islands, the Azores and Madeira. The Code consisted of 2538 articles and was divided into four parts. The first part (Arts. 1–358) regulated legal capacity iv civil law and the second part (Arts. 358-2166) governed the law of inheritance and was divided into 3 books, the first dealing with basic rights, the second with acquisition of rights with third-party involvement, and the third with acquisition of rights through action. The third part (Arts. 2167–2360) covered the law of property and the fourth part (Arts. 2361–2538) contained provision on wrongs and restitution or damages in two books, the first concerned with civil-law liability and the second with compensation of damage.

Work preparatory to a new Portuguese commercial code began in 1868 with the participation of judges, jurists and different scientific organizations. The draft was considered by both Houses of Parliament in 1887 and in Marc 1888, respectively, and was finally adopted in June 1888. Thus the Portuguese Commercial Code (*Código Commercial Portuguese*) of 28 June 1888 came into being and was put into effect by the royal decree of 23 August 1888 (Diario do Governo Nr. 203), becoming operative in Portugal and the surrounding islands as from 1 January 1889. On 20 February 1894 the application of the Code was extended to the Portuguese colonies and oversea possessions. The Commercial Code consisted of 749 articles and was divided into four books, the first (Arts. 1–95) regulating commerce in general, the second (Arts. 96–484) dealing with special commercial transactions, the third (Arts. 486–691) governing maritime trade, and the fourth (Arts. 692–749) concerned with bankruptcy. The first book contained provisions on merchants, who were persons capable of concluding commercial transactions and operating commercial businesses. Trading companies were also covered. An association or a legal person having no economic goal was not deemed to be a trading company. Interestingly, where a husband was to start a business without his wife's consent, the presumption

was that both consorts participated in the business. The wife was not entitled to start a business without the husband's consent, such permission to be included in the official document. Similarly, the wife was not entitled to participate in a commercial business except with the husband's consent even if her liability would have been limited. Art. 18 required merchants to manage a firm, keep a book, make the necessary notifications in the trade register and draw up a balance sheet. Foreign companies wishing to engage in business activities in Portugal were required to obtain a certificate from the Portuguese consul to the effect that their operation was in conformity with their own law and they carried on business activities lawfully. In actual fact, the company law was to be found in Arts. 104–150 of the Code.

Know to the Code were the general partnership (*sociedade en nome colectivo*), the limited partnership (*sociedade em commandita*) and the joint stock company (*sociadade anónyma*). The Code maintained the normative system introduced in 1867 and covered the board of directors (*direccao*) and the supervisory board (*conselho fiscal*) as institutions of the joint stock company. As under the Act of 1867, the cooperatives (*sociedades cooperativas*) did not constitute an independent trading company, but were held to represent a mixture of rules on the three types of company. This Code no longer regarded the silent partnership as a trading company, but considered it to be a mere contractual formation.[30]

Similarly known to the Commercial Code were the general partnership (*sociedade em nome colectivo*, Arts. 151–161), the joint stock company (*sociedade anónyma*, Arts 162–198), the limited partnership (*cociedade em commandita*, Arts. 199–206), the cooperatives (*sociedades cooperativas*, Arts. 207–223) , the silent partnership (*conta em participão*, Arts. 224–229), and the enterprise (*empresa*, Art. 230).

In its main features the joint stock company law showed similarity to the German law. Thus, the system of 1833 established for the foundation of companies was subjected to government. The Portuguese Act of 22 June 1867 prescribed registration (Arts. 162–165), just as the new Commercial Code did, excepting the banks, where Art. 18 of the Act of 3 April 1896 required separate permission of the government. In like manner, the foundation of joint stock companies intending to acquire immovable property for a period longer than 10 years was made subject to government permission. The Ministry of Trade and Industry kept a special register of firms along with the trade register. The chief organs of the company were the board of directors, the supervisory board and the general meeting, either ordinary or extraordinary. In respect of limited

[30] Coing: *Handbuch... op. cit.* III/3. 3501.

partnerships it should be noted that they could be either simple limited partnership or joint stock companies.

6. Greece

The *Code de Commerce* was introduced in Greece in 1821 during the war of independence and was ratified by the constituent National Assembly. Thereafter the Commercial Code was taken over in official translation by the Decree of 19 April 1835. Originally being the French *Code de commerce*, it consisted of four books. The first three books were available in Greek translation, but the fourth was replaced by the Decree of 2 May 1835 introducing the commercial courts.[31] That Code gave no new regulation, for, as *Von Mauer* writes,[32] the French Commercial Code had been applied in Greek territory before the revolution. The *Code de commerce* contained references to the Code civil as well, since they were elaborated at the same time, and they referred, in the places concerned, to the Greek-Byzantine law in Greece, i.e. the Greek law was the subsidiary body of law.[33] According to *Rokas*, this gave rise to a fundamental problem between the substance of the civil and the commercial law,[34] for, on the French model, the civil law was supplementary to the commercial law in Greece, too.

Initially the courts applied the Code civil as the underlying regulation. The first to do so was a court of Syros Island in 1827, but given that such application of law would have led to an indirect introduction of the French Code civil, the courts began to apply the Roman Byzantine law. They more or less followed the French law in respect of partnerships as well. General and limited partnerships were trading companies (as their goal was commercial), both being regarded as legal persons. On the French model, the partnership was invalid in relation to third persons when the obligation for publicity was disregarded, but once the firm was already in operation, this rule was to apply *ex nunc*. Partnership

[31] The Code was published in German and Greek in the official gazette, as was the case with every Greek statute at the time.

[32] "Schon vor der Revolution ... dasselbe (d.h. das französische HGB) von denn Handelsleuten in Constantinaopel und Smyrna aufgenommen worden und auch in Griechenland in Gebrauch gekommen (ist)." Maurer, G. L. von: *Das griechische Volk.* Heidelberg, 1835. 164.

[33] Yiannopoulos, A. N.: Historical Development. In: Kerameus, K. D.—Kozyris, P. J. (ed.): *Introduction to Green Law.* 2nd edition. Deventer, Boston, 1993. 8 et seq.

[34] "...daraus entstand ein grundsätzliches Problem hinsichtlich des Verhältnisses zwischen Handels- und Zivilrecht." Rokas, K.: Die Übernahme des Code de commerce in Griechenland. *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 125 (1963), 27.

between husband and wife was null and void,[35] but the Greek interpretation was somewhat different.

7. The Netherlands

Following the revolution of 1795, there arose a need for codification, with no results achieved until after the establishment of the Kingdom of the Netherlands in 1806, and the Code civil was introduced in the Netherlands on 1 May 1809. After the attainment of independence in 1813 the various codes remained in effect until the national codification of 1838. During that period four codes were of decisive importance, namely the Civil Code, the Commercial Code, the Codes of Civil and Criminal Procedure, and the code of Judicial Procedure. Modelled on the French law, the Civil Code (*Burgerlijk Wetboek*, BW) was composed of four books concerned with persons, things, obligations and evidence, and prescription.

The Commercial Code (*Wetboek van Koophandel*, WvK), following the French model but exhibiting several independent features, was adopted on 1 October 1838. It consisted of three books, the first covering commerce in general, the second legal relations connected with navigation, and the third concerned with bankruptcy law in general. The first two books constituted no special law but were a part of civil law, especially of the law of contracts.

The first book regulated the trading company, the general partnership (*vennootschap onder eene firma*), the limited partnership (*vennootschap bij wijze van geldschieting v. commanditaire vennootschap*), the joint stock company (*naamloze vennootschhap*), the cheque, the bearer security, and the insurance contract. The second book governed shipping contracts regardless of whether they were made between merchants. The cooperatives were introduced by a separate Act of 1876, which was modified in 1925.

The Dutch WvK was introduced in Indonesia on 1 May 1848. Its rules applied first to the European population of Indonesia and were gradually extended to the Asian population in 1855 and 1917. The WvK was subsidiary to the Data Law in respect of natives in case the latter did not cover some aspects (e.g. cheque and bill of exchange) or natives voluntary subjected themselves thereto.

[35] See Code de commerce, Art. 5.

8. Belgium

Following its separation from the Netherlands, Belgium gained independence on 4 October 1830. Before that date the two countries were linked by the Treaty of London from 20 June 1814 and were under French jurisdiction from 2 June 1794 (the battle at Fleurus). The French statutes were the central elements of Belgian legislation. Art. 138 of the Belgian Constitution of 5 February 1831 repealed the regulations inconsistent with the Constitution and upheld the rest. Belgium adopted and upheld the French Code civil and the *Code de commerce*, albeit with partial modifications by special statutes. The Commercial Code consisted of four books, the first governing commercial status, the second regulating merchants' contracts of marriage, the third covering commercial book-keeping, and the fourth regulating commercial transactions. The foundation of companies was subject to public authorization, depending not only on observance of law, but also on whether the foundation was of general benefit.

It was in the second part of the 19th century that the form of joint stock company acquired significance in Belgium, owing chiefly to the freedom of trade and enterprise recognized by the Act of 1791, which was passed on 2 March and put into force on 17 march. The French *Code de commerce* 1807 was also effective in Belgium during the 19th century. It required official consent to the foundation of companies. As regards the *société anonyme*, it is necessary to emphasize that members of this type of company bore no liability for the company's debts.[36] In contrast to the joint stock company, the foundation of a partnership limited by shares was not subject to official consent, because in its case there was a member, the general partner, who was personally liable with his entire property for the company's debts. It was due to the possibility of foundation without official consent that merchants gave preference, as often as not, to partnerships limited by shares. It is important to note that in connection with the foundation of joint stock companies the state investigated not only the company's compliance with statutory provisions, but also whether its foundation served the general good, the company was viable and its organization was not designed in a way likely to prejudice the interests of its members or of third persons.

Within the framework of a comprehensive reform, the third chapter in the first book of the Napoleonic Code was replaced by a new regulation of 18 May 1873, which was still applicable in the 20th century (1964) to joint stock companies; it scrapped the requirement for preliminary official permission and introduced the normative system. There were two limitations on foundation,

[36] It will be noted here that formerly the *société anonyme* had been the equivalent of the silent partnership.

notably the founders' liability and publicity of foundation. As that too large freedom of foundation led to abuses, it came to be regulated by partial rules, such as the Act of 26 December 1881 on the authenticity of the balance sheet and on profit and loss; under it, unauthenticity of the balance sheet incurred criminal responsibility. The Act of 22 May 1886 covered flaws and inadequacies resulting in the company's nullity. The Act of 25 May 1913 contained rules on contributions in kind seeking to avoid overestimate, as well as on issue of shares and the general meeting. Royal Decree No. 26 of 26 October 1934 modified exercise of shareholders' rights in general meeting, while royal Decree No. 185 of 9 July 1935 established control over the issue and public sale of shares, while introducing the form of limited liability company and allowing establishment of silent partnerships.

Replacing the Napoleonic *Code de commerce*, a new Act of 18 May 1873 changed the system of foundation subjected to public authorization and can still be seen as the basic legislation on the Belgian joint stock company law. Under it, the foundation of a joint stock company was not conditional on official consent, with the freedom of foundation becoming general and made subject to meeting but two conditions, namely the founder's liability and the publicity of the foundation document. Since the freedom of foundation naturally left room for very frequent abuses, a new Act of 26 December 1881 regulated the balance sheet and laid down rules on the distribution of loss and profit. It was followed by Act of 22 May 1886 on joint stock companies (see the amendment act), which regulated the founders' liability in cases where the foundation of a company proved to be invalid for some reason. These rules governed the founders' liability with greater rigour and in greater detail. The second amendment act on joint stock companies, passed in 1913, contained rules mainly on creditors' protection and considerably stricter provisions on publicity.[37]

9. Germany

With the disintegration and demise of the Holy Roman Empire at the beginning of the 19th century, the various German states adopted differing legal regulations. Such differences in the domain of civil law can be said to have been of great dimension in German territory early in the 19th century.[38] During that period the

[37] Coing: *Handbuch... op. cit.* III/3. 3372.

[38] Recknagel, C.: Die Trennung von Zivil- und Handelsrecht unter besonderer Berücksichtigung der Untersuchungs- und Rügepflicht nach § 377 HGB. Eine rechtsvergleichende Untersuchung unter Einbeziehung internationaler Einheitsrechte (EKG, UN-Kaufrecht) und

Prussian territory was governed by the ALR of 1794, the code resulting from the codification led by High Chancellor *Johann Heinrich Casimir von Carmer*, which contained the first comprehensive rules of commercial law in the territories controlled by German law. The ALR was chiefly grounded on municipal laws and showed little evidence of the influence of the *Ordonnance du commerce* (1673), since its sections dealing with commercial law rested mostly on the former Prussian legislation of Brandenburg.[39] The second part of ALR covered commercial law, its 7th chapter governing company law (Von *Handlungsgesellschaften*). In Austria the ABGB of 1811 was in force at the time, but it did not affect commercial law. In the Rhine territory the *Code civil* and the *Code de commerce* continued in force even after the war of independence. Baden was under the control of the Code civil, its annex being applicable as a commercial act (*Von den Handelsgesetzen*); it can be deemed to have been a version of the *Code de commerce* as revised by Baden. Bavaria was controlled by the *ius commune* and, in this respect as well, primarily by the *Codex Maximilianeus bavaricus Civilis* of 1756, while Württemberg was likewise under the control of the *ius commune* and the *Württembergisches Landrecht* (1610). At the Congress of Vienna the German federation expressed the need for a codification of regulations by the German states in the domain of civil law, but Metternich insisted on strengthening the sovereignty of individual states. As against this, the Peace Treaty of Paris of 20 November 1815 laid down that the independent German states were not to do anything but enter into a federal union, so, in 1815, the endeavours to establish united German states failed to produce the necessary result, notably unity. At that time, therefore, one can only speak of a federation of states in German territory, which lacked powers to legislate uniform regulations in the field of civil law. Although under art. 6 of the Treaty of Federation it was possible to achieve uniform regulations in pursuance of general goals (*Gemeinnützige Anordnungen*), Art. 64 of the Treaty provided for enactment of legislations in the individual member states.

The first initiative for drafting a uniform commercial law for the whole of Germany was taken after the German war of independence, which lasted until 1813–14. The first draft commercial code was prepared by a committee which Imperial Minister of Justice *Wohl* had set up in November 1848.[40] The members

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des französischen, englischen, amerikanischen und schweizerischen Rechts. Europäische Handelsschriften, Serie 2, Vol. 463. Frankfurt am Main—Bern—New York, 1985. 12. Also see Schmidt, K.: *Gesellschaftsrecht.* 3rd edition, Köln—Berlin—Bonn—München, 1997. 769 et seq.

[39] Recknagel: *op. cit.*, 12.

[40] Entwurf eines Handelsgesetzbuches für Deutschland. Erste Abteilung, Frankfurt, 1849.

of the committee were *Widenmann*, Deputy Secretary of States of the Minister of Justice. *Broicher* and *Grimm*, judges of the Appellate Court of Cologne, and Professor *Thöl* of Rostock.[41] The draft was framed under strong French influence, but the related efforts were discontinued on account of political events. Then, in 1856, the federal legislature established a committee which prepared the Nuremberg draft in 1861. In its resolution of 31 May 1862 the Bundesrat directed the federal government to ensure adoption of the draft by the individual states. The draft became effective in Prussia, Saxony and Nassau on 1 March 1862 and in Hamburg on 1 May 1866, but was never brought into force in Limburg and Luxembourg. The constitution of the North-German federal states took over legislative powers in the province of commercial law and the bill of exchange law and, as a result, the Commercial and Bill of Exchange Code was adopted on 25 June 1869 and put into force on 1 January 1870. Its provisions that were consistent with the Constitution of the North-German federal states were included in the Imperial Constitution, and the ADHGB as an imperial Act became effective from 1 January 1871 and entered into force in Württemberg, Baden and Bayern with effect from 13 May 1871. The ADHGB relied heavily on the rules of the *Code de commerce*, which was most noticeable in the ADHGB also recognizing the status of general partnerships, limited partnerships and partnerships limited by shares as subject at law, albeit not as legal persons.[42]

On 21 February 1856 Bavaria entrusted a committee with preparing the draft of a uniform German commercial code, an effort at the unification of law closely connected with political events. A reform of the German federal system was constantly on the agenda from 1855, with King Maximilian von Bayern similarly oriented towards a reform.

The political controversies of German states could be attributed primarily to rivalisation between Austria and Prussia. Bismarck was squarely against a German federation and opposed any course of development based on a literal interpretation of the strict Treaty of Federation. His aim was to establish a non-federal organization that was to take over any task which the Austrians wanted to solve with the medium-sized and small German states through the in-

[41] It will be noted here that there arose a serious dispute between Thöl and Goldschmidt, because Thöl favoured a commercial code based on the subjective system, while Goldschmidt supported one based on the objective system. Bergfeld, C.: Die Bedeutung des Code de commerce für die Vereinheitlichung in Deutschland. Ius Commune Sonderhelft 15. Vorträge zur Geschichte des Privatrechts in Europa. Symposion in Krakau 9–12. Oktober, 1979. Frankfurt am Main, 1981. 120.

[42] Bergfeld: *op. cit.*, 122.

strumentality of a federation. This also explains why Bismarck as a Prussian delegate voted against the proposal presented by the Bavarians on 17 April 1856. In doing so he stressed that he had no appropriate instructions and therefore requested that the records be left open. His request was motivated by thinking that the commercial code would otherwise be adopted even without Prussia. Bismarck was trying to hinder the work of the committee which had been set up to elaborate the code, claiming in part that it was impossible for such a code to be drafted by experts alone. At last, the committee was convened in Nuremberg on 15 January 1857, and it considered, along with the Prussian proposal seeking to elaborate the entire body of commercial law, the Austrian proposal aimed at enacting regulations on a narrower field of commercial law. In connection with the Prussian proposal mention should be made of an important antecedent thereof, that is to say that in 1814, when the Rhine province was annexed to Prussia, unsuccessful efforts had been made to introduce the ALR. Later, however, there was set up a committee attempting a revision of ALR in such a way as to align it with the Rhine law. Since that effort was similarly devoid of prospect, the Prussian focused on commercial law, first wishing to reshape the commercial-law part of ALR or to have it modified by basing themselves on the provisions of the *Code de commerce*. From the expert opinions of the chambers of commerce and of merchants it became apparent at that point that the Rhine merchants were more inclined towards maintaining the *Code de commerce*, while the old-time Prussian merchants preferred the ALR. That trend changed when a modification of commercial law was proposed in 1845. Great importance was then attached to the *Code de commerce*, but preparatory work did not begin until 1856. This makes it understandable that Prussia, too, made an immediate start on the preparation of a related Act after Bavaria had companied the acceptance of its proposal.

The draft was prepared on the basis of German jurisprudence and judicial practice and, first of all, on the examples of foreign states, including the French *Code de commerce*, as well as by drawing upon the Dutch Commercial Code of 1838, the Spanish Commercial Code of 1829, the Frankfurt draft of 1848 relating to a general German code, the draft commercial code of 1839 of the Kingdom of Württemberg, and the Austrian draft of 1849.

The Nuremberg committee considered the first three books of the Prussian draft at its first meeting from 21 January to 2 July 1857 and at its second meeting from 15 September to 30. There were tabled several motions for an amendment of the second draft, and, in accordance with the committee's decision of 11 March 1861, the draft of a general German commercial code was presented to the National Assembly on 16 March.

The historical antecedents served as a prelude to the elaboration of a commercial code, since the French *Code de commerce* had proved the existence of a possibility for the codification of commercial law in that period. In terms of substantive law, the mentioned Code had influence to bear, through the Prussian draft, on the elaboration of ADHGB as well. At the same time it may be stated that it was not the *Code de commerce* that provided a basis for the elaboration of ADHGB as a special province of commercial law.

The ADHGB established a distinction between trading companies and companies. A company founded by articles of association for the purpose of carrying out common economic activities was deemed to be a trading company. Economic activity meant engagement in commercial operations or transactions, the number of which was determined by ADHGB.[43] The general partnership (Arts. 85–149), the limited partnership (Arts. 150–172) and the partnership limited by shares (Arts. 173–206) as well as the joint stock company (Arts. 207–249) were known to ADHGB as trading companies. Following the reform of 1 June 1870, partnerships limited by shares and joint stock companies were regarded as trading companies irrespective of the object of business. Also, silent partnerships (Arts. 250–265), associations formed for the purpose of keeping joint accounts (*Vereinigung zu einzelnen Handelsgegellschaften für gemeinsame Rechnung*, Arts.266–270) and cooperatives (*Genossenschaften*) belonged to the category of trading company.

Within the meaning of ADHGB, the general partnership (*offene Handelsgesellschaft*, OHG) was one consisting of two or more members who carried out commercial activities under an identical firm name and whose interests were not limited to a pre-established cash contribution. Members bore unlimited liability, joint and several, for the company's debts and obligations to the extent of their entire property (Art. 112). There was no formal requirement for the conclusion of articles of association (Art. 85 II.). The company had to be registered with the commercial court, which determined the members, the firm and its domicile and prescribed rules for representation. Accordingly it was not necessary to submit the full text of the articles of association. Commercial registration was public and open to inspection by all. The Act distinguished external and internal legal relations of the company. As regards internal legal relations, the rights and obligations of members could be determined on the basis of the freedom of contract, i.e. the Act contained permissive rules in this respect, whereas its provisions governing external legal relations were peremptory.

[43] Unlike the Code de commerce, which contained no such classification in Arts. 632–633.

The OHG was not a legal person, its assets were separated from those of its members, but the company itself possessed no juristic personality. The company could sue and be sued under its firm name. Its character as association of persons was shown by the fact that the death of a member led to the termination of the company. The OHG could not be a member of another general partnership. It bore the name of one of its members or the names of several members. Unless otherwise agreed upon, all members were entitled to manage the company and to represent it in relation to third persons. Any limitation on this right of representation was invalid (Art. 116). Members excluded from management were entitled to be informed of the company's affairs (Art. 105).

The regulations on the limited partnership were based on the *Code de commerce*, but the rules of ADHGB were much more precise.[44] The limited partnership was one, which carried on commercial activities under a common name and whose members, one or more, were liable for the company's debts to the amount of their cash contributions, while the members of an OHG, one or more, bore full, unlimited liability for the company's debts (Art. 150). Accordingly the *Kommanditgesellschaft*, KG) was a modified version of OHG, a distinction of relevance to general partners. One member of a KG was a general partner (*Komplementäre*) and the other a limited partner (*Kommanditist*). Also in the case of limited partnerships, internal legal relations were governed by the freedom of contract, the general partner being entitled to manage and to represent the company. For that matter, these aspects were subject to the rules on OHG. At the same the Act allowed limited partners to act on the company's behalf in the capacity of *Prokurist* of commercial proxy. The limited partnership was not a legal person either, but was a form of company that had come to allow for one member's limited liability for the company's debts.

The institution of the partnership limited by shares (*Kommanditgesellschaft auf Aktien*, KGaA) was also regulated by ADHGB in Arts. 173-206 based on the draft of the French and Prussian commercial codes of 1856. In the case of partnerships limited by shares the general partner were personally liable for the company's debts and were entitled and obliged to represent the company (Art. 196), while the limited partners were not entitled to participate in the company's management, but were tied to the company more closely than would have been the case if they were shareholders of a joint stock company. The interests of limited partners were expressed in shares, which were bearer shares of a face value of 200 thalers each (Art. 173). Shareholders had to be inscribed in the company's book of share, and the shares had to be subscribed in order for the partnership limited by shares to be entered in the trade register (Art. 177). Where

[44] Koberg: *op. cit.*, 8.

the company's capital was composed not only of cash contributions, but also of contributions in kind, the first general meeting had to estimate the actual value of contributions in kind and the second meeting had to decide on the acceptance thereof (Art. 180), whereas general partners were under the control of the rules on limited partnerships. Partnerships limited by shares had, in addition to management, two more organs: the supervisory board (*Aufsichtsrat*) of at least five members and the general meeting (*Generalversammlung*) of limited partners. The supervisory board was concerned to control management and was entitled to inspect at any time the company's businesses and annual balances as well as the distribution of profit (Art. 194). Along with general partners it had the right to convene the general meeting and to control implementation of its resolutions (Arts. 186–187). This form of company was most popular in the territory of Prussia, but it never became as significant in German territory as in France.

The rules of the reform Act of 1870 on partnerships limited by shares underwent minor modifications, which affected the members of the supervisory board and the general partners. It is important to underline, moreover, that the requirement for concession was removed in the whole territory of the empire.[45] The reformed Act of 1884 on joint stock companies similarly gave a clearer expression, at the statutory level, to the economic differences between partnerships by limited by shares and joint stock companies. Seeking to prevent evasion of the rules on joint stock companies by choosing the form of partnership limited by shares, it provided that limited partners must be subject to the rules on joint stock companies and that general partners must have an interest of at least 4% if the company's stated capital was not more than DM 3 million and an interest of 2% if the stated capital exceeded that amount (Art. 174a).

The rules relating to joint stock companies (*Aktiengesellschaft*, AG) were laid down in Art. 207–249 of the ADHGB of 1861. A joint stock company was a trading company in which all shareholders, all members, made a contribution and bore no personal liability for the company's debts (Art. 207). The company's capital was divided into shares, but no minimum amount was fixed. The articles of association had to be drawn up in a document certified by a notary public or a court and had to show the main particulars of the company, such as its objects, the amount of stated capital, the value and types of shares (bearer or registered), the major rules on the acceptance of the balance sheet, and on the convening of the general meeting. Bearer shares could not be issued

[45] It will be noted here that the partnership limited by shares had formerly been one of the most popular forms of company in Prussia because its liability was limited, while no concession was required for its foundation.

unless the full amount of stated capital per share had been paid; that amount was fixed at 40% for registered shares. The company had to be entered in the trade register (*Handelsregister*) as a condition for acquiring juristic personality (Art. 213 of ADHGB). It had to establish a general meeting and a board of directors. Shareholders exercised their rights at the general meeting, and unless otherwise provided by the articles of association, each share had one vote (Art. 214 of ADHGB). The board of directors represented the company in concluding legal transactions. It was composed of one or more members, who were not required to hold shares and were entitled to a remuneration, were recallable at any time, and their right of representation in relation to third persons was not subject to any restriction. The members of the board of directors bore personal liability jointly and severally for any wrong or any contravention of the articles of association, particularly for payment to shareholders of dividend or interest in awareness of the company's insolvency (Art. 241 of ADHGB). Under the ADHGB, establishment of a supervisory board was optional, but once one had been established, it was governed by the rules on partnerships limited by shares. The foundation of joint stock companies was subject to state permission (Art. 208 of ADHGB). An exception to this rule was made by the federal states' statutes bringing the Code into force, as was done by cities of Hamburg, Lübeck, Bremen and Oldenburg, whereas Württemberg and Baden made public authorization compulsory for insurance companies and banks only. The ADHGB of 1861 relied heavily on the Prussian Joint Stock Companies Act of 1843.[46]

In Germany the reform of the Joint Stock Companies Act of 1870 broke with the former concession system and replaced it with the normative system. The previous requirement for public authorization was superseded by several new rules on the company's organs, publicity and liability. The minimum face value of each share was fixed at 50 federal thalers for registered shares and at 100 thalers for bearer shares (Art. 207a of ADHGB). Every joint stock company was required to set up a supervisory board of at least there members. The general meeting had to ascertain whether the entire capital of the company had been subscribed and whether at least 10% of shares had been paid. It was at that time that the Act included special provisions on contributions in kind (Art. 209b of ADHGB). Art. 210 of ADHGB provided that the articles of association must be entered in the trade register and that excerpts thereof must be made public. The members of the supervisory board bore personal liability jointly and severally in cases where unlawful repayments or payments of dividends had been made with their knowledge and they had failed to take appropriate measures against them

[46] Koberg: *op. cit.*, 14.

(Art. 225b). The board of directors was under obligation to make the balance sheet public. In addition, penal-law rules were laid down for members of the supervisory board and the board of directors who furnished false information for the trade register and the general meeting.[47]

From 1873 onwards, German territories began moving towards new reforms, and the related endeavours led to the amendment of the Act of 1884,[48] which sought to bring participants into closer contact with companies, create greater guarantees for securing stated capital, separate more sharply the workings of company organs and promote the performance of their functions. Another aim was to regulate the liability of participants. The minimum face value of shares was raised to DM 1,000, with departure from that amount allowed only in the case of joint stock companies founded for public purposes. For registered shares, the transfer of which was made subject to the company's consent, the face value was fixed at not less than DM 200. With respect to the company's registration, the requirement was to pay at least one fourth of stated capital against the previous one tenth (Art. 210 III. of ADHGB), and the company was prohibited from acquiring equity shares or burdening them with lien (Art. 215d of ADHGB). As regards foundation, the articles of association had to be signed, and the shares taken over, by at least five persons, such acts to be inscribed in a notarial or judicial document (Art. 209 of ADHGB). Art. 209h of ADHGB made an auditor liable to examining any contribution in kind made at the time of foundation. The liability of the members of the board of directors and the supervisory board as well as of the founder was expanded. The board of directors and the supervisory board were required to supervise and be liable for the process of foundation as well (Art. 213c of ADHGB). The liability of the members of the board of directors for the company's management was linked to the requirements of ordinary business activity and violation of those requirements incurred their liability to the company (Art. 241 of ADHGB). The same rule applied to the liability of supervisory board members. The powers of the general meeting were extended, and it was provided that, as a general rule, any matters outside the scope of competence of another organ of the company were amenable to decision by the general meeting. Such matters included modification of the articles of association, change in the structure of capital, election and recall of supervisory board members, acceptance of the balance

[47] The switch to the normative system gave impetus to the foundation of joint stock companies, which numbered in Prussia 203 in 1871, 178 in 1872 and 162 in 1873 against a total of 203 founded up to 1870. The number of newly founded companies began to fall afterwards. Koberg: *op. cit.*, 15.

[48] For a full discussion see Koberg: *op. cit.*, 16, fn. 28.

sheet and approval of specified contracts. That Act was the first to provide for the protection of minority shareholders' rights. Shareholders representing one tenth of stated capital were entitled to request the court to appoint an auditor to examine the company's management (Art. 222 of ADHGB). Shareholders representing 20% of the company's stated capital were accorded the additional minority right to sue members of the compensation of damage caused to the company by breach of duty (Art. 223 of ADHGB). Shareholders representing 5% of stated capital were entitled to obligate the company to place the items they proposed on the agenda of the general meeting (Art. 237 of ADHGB). It was an added minority right that any shareholder was entitled to contest before the court any resolution of the general meeting violative of the law or contrary to the articles of association.

In German law the ADHGB was the first to make a sharp distinction between the silent partnership (*stille Gesellschaft*) and the limited partnership. The economic goal pursued by both types of company was to ensure that outsiders, participating as partners contributing capital should be liable for the company's debts only to the amount of capital made available by them. In the case of silent partnership it was difficult to distinguish this form or company from simple loan. The ADHGB regulated the silent partnership in Arts. 250-265. A silent partnership was one in which a person made available capital to a trading company and shared in its profit and loss (Art. 250. I. of ADHGB). Such a company was founded by contract not subject to formal requirements (Art. 250. II. of ADHGB) and governing only the internal legal relations of members. It was not required to be entered in the trade register, and silent partners (*stille Gesellschafter*) were not entitled to participate in management. The owner of the assets made available to the company by the silent partner became a general partner, and in case of the company's bankruptcy the silent partner was entitled to notify as creditor one half of the loss exceeding the amount of his cash contribution (interest) (Art. 258. I. ADHGB). The silent partner's death did not terminate the company, so the death of the general partner, his own bankruptcy or his loss of disposing capacity naturally entailed termination of the silent partnership (Art. 261 of ADHGB). Of course, this form of company was of advantage because the limited partner's liability was limited to the amount of his cash contribution, while he was entitled to act with powers of attorney on behalf of the company, conducting affairs and even concluding legal transactions. Thus, in effect, it was only the general partner who bore liability and personal risk. The advantage of the silent partnership vis-à-vis the limited partnership lay in that the silent partner was in a position to act as creditor in case of the company's bankruptcy.

The shipping company (*Reederei*) was regulated by Arts. 450–476 of ADHGB. A shipping company was one in which the vessel was in common ownership in order that the parties might undertake business on sea routes by keeping a joint account (Art. 456 of ADHGB). The common ownership of the vessel was divided into property shares. The *Reederei* could not be regarded either as a trading company or as a legal person, but was a company covered by commercial law. Legal relations between members were controlled by the articles of association (Art. 457 of ADHGB). Unless otherwise provided by the articles of association, each member was entitled to participate jointly in the company's management, members acted on the basis of joint decisions governed by the majority principle, while the voting rights were determined by property shares. Management was transferable to an outsider as well (*Korrespondenzreeder*). Members were required to meet obligations in proportion to their property shares (Art. 467 of ADHGB). As a general rule, it was not possible to repudiate a shipping company contract, but members' interests were transferable at any time without the consent of the other members. Where a shipowner (*Mitreeder*) went bankrupt, died or became incapable of action, such events did not result in the company's cessation (Art. 472 of ADHGB). Thus, the *Reederei* was a form of company which bore the typical stamps of associations of persons on the one hand and of capital-pooling companies on the other. The high risks involved in maritime trade soon came to create a demand for limitations on the liability of shipping company members. Accordingly, members' liability for the company's debts was limited to the vessel and the cargo, but it was incurred only if the shipowner himself was not liable, for if he was liable for his decision, he bore personal and unlimited liability for the company's debts.

The ADHGB was followed by the adoption of the German Joint Stock Companies Act on 11 June 1870.[49] The subsequent efforts at reforming the ADHGB were, in some aspects, treading a common path with the preparations for the codification of civil law as a whole, although a commitment was clearly expressed to the effect that a dualist regulation should be adopted in Germany.[50] A significant role in revising the ADHGB was played by Secretary of State *Nieberding* of the Imperial Ministry of Justice, who proposed a revision of commercial law in 1893. It was on his initiative that *Eduard Hoffmann*, relying

[49] Gesetz, betreffend die Kommanditgesellschaft auf Aktien und die Aktiengesellschaft. EGBl. 1870, S 375.

[50] "Das Handelsrecht soll nicht in denn Entwurf eines bürgerlichen Gesetzbuchs aufgenommen werden, sondern Gegenstand besonderer Kodifikation sein ..." Excerpt from the expert opinion of the preliminary committee set up on 15 April 1874 for the codification of BGH. Quoted by Schubert: Die Entstehung, 2.

on the expert opinions of *Bolze* and *Behrend*, prepared the draft of a new commercial code consisting of 414 articles.[51] The draft was debated on several occasions, and the questions still outstanding were settled by the ministerial conference of 24 October 1896, which approved the HGB on 5 November 1896. The Bundesrat considered the draft on 11 and 22 January 1897, adopting it as an Act.

10. Codification of the Austrian commercial law

The need to undertake a unification of different legal regulations by the codification of commercial law arose early in the 19th century.[52] In 1809 the Royal Court of Vienna's committee on legal affairs was entrusted with preparing a draft commercial code. The Code was to consist of five books containing the rules on commerce in general, bill of exchange, maritime trade, bankruptcy, and the judicial system. Only two books were prepared, but neither entered into force. It was in 1842 that the need for codification was again brought into focus, and the related efforts produced in 1849 a new draft consisting of ten books and published under the title of *Entwurf eines österreichischen Handelsrechts (Zweiter Entwurf)*. The draft did not become an Act, but it had a significant influence on the dogmatics of commercial law. It was followed by the Ministry of Trade's draft in 1853,[53] which was revised by the Ministry of Justice in 1855 and presented to the ruler in 1857,[54] but not adopted as an Act either.

In the 1860s Austria could be divided into three parts in the field of regulations on commercial law: Dalmatia and South Tyrol under the influence of French law, namely the *Code de commerce* of 1807; the Hungarian territory (Hungary, Croatia, Slovenia) controlled by the commercial acts which the Hungarian Parliament adopted in 1839 and 1840; and the remaining Austrian

[51] Entwurf eines Handelsgesetzbuchs für das Deutsche Reich. For a full treatment see Schubert, W.: *Die Entstehung des Handelsgesetzbuch von 1897* (Hgg.: Schubet, W.—Schmiedel, H.—Krampe, C.). Frankfurt am Main, 1986. 2.

[52] During that period the influence of French and Bavarian law was felt in South Tyrol and Salzburg. Hämmerle, H.—Wünsch, H.: *Handelsrecht. I. Allgemeine Lehre und Handelsstand.* 4th edition, Wien, 1990. 10.

[53] For that matter, Tyrol adopted the Act on registration of firms and on trading companies as a separate act in that year. Randa, A. R.: *Das österreichische Handelsrecht mit Einschluss des Genossenschafsrechtes und der Gesellschaft mit beschränkter Haftung.* I. 2nd edition, Wien, 1911. 7.

[54] This draft became known as Vierter Entwurf in the pertinent literature. Hämmerle—Wünsch: *op. cit.*, 11.

territories, where special statutes and decrees governing partial fields of law were in effect.[55]

In the meantime, the codification of commercial law was similarly under way in the German territories and produced the ADHGB, which was put into force with some modifications in Austria as in other countries.[56] The commercial code was composed of four books, the first covering the status of merchants, the second regulating trading companies, the third governing silent and accidental partnerships, and the fourth concerned with commercial transactions.

During World War One the need arose for a modification of the commercial code, and Professor PISKO drew up a draft in 1920 aimed at the unification of commercial law in the German Empire and therefore based mainly on the rules of the German HGB of 1897. The draft was not adopted, but the period under discussion was marked by the enactment of several special statutes such as those regulating shares in 1899 and introducing the limited liability company (GmbH) in 1906. For the known political reasons Austria adopted the German HGB of 1897 in 1928.

11. Switzerland

In the middle of the 19th century the intensity of industry and trade cut across the cantonal frameworks so strongly as to call for removal of commercial law barriers between the cantons. Creation and transformation of the necessary legal environment became a social demand also felt at the government level. In constituent assemblies the governments of the cantons of Bern and Solothurn proposed, as early as 1848, the unification of penal law, the law of penal procedure and commercial law as well as the centralization of commercial adjudication, but the Constitution of 1848 did not authorized the federal legislature to adopt such an act.[57]

[55] Randa: *op. cit.*, 6.

[56] The Austrian commercial code was named Allgemeines Handelsbuch and did not comprise maritime law Hämmerle—Wünsch: *op. cit.*, 12. It is to be noted here that this Austrian commercial code, resting on the ADHGB, served as a basis for the elaboration of Hungary's Commercial Code XXXVII of 1875, although the Hungarian Code showed several differences as it did not include, e.g., the partnership limited by shares and the silent partnership. For a full discussion see Randa: *op. cit.*, 10.

[57] For more detail see E. Huber: *System und Geschichte des Schweizerischen Privatrechts.* I–IV. Basel, 1893. 202. et seq.

On 17 January 1854 an intercantonal conference chaired by *Blösch* (a member of the Government of the Canton of Bern) met with the participation of 13 cantons[58] to make preparations for a uniform regulation on the bill of exchange law, although the more distant goal of unifying commercial law was already of topical interest at the time. Emanuel Burckhardt-Fürstenberger, a jurist of Basel, drew up the draft, which was considered by a committee[59] and was modified in several aspects. The draft on bill of exchange law thus prepared reflected German influence in the first place, since Burckhardt-Fürstenberger relied on the example of the *Allgemeine Deutsche Wechselordnung* of 1847, but he effected numerous structural and substantive changes (e.g. in respect of procedure and enforcement concerning the bill of exchange law). The cantons participating in the conference reached no agreement on the acceptance of the draft, because each canton demanded major modifications.[60]

A renewed effort at codification was motivated by the adoption of the *Allgemeines Deutsches Handelsgesetzbuch* (ADHGB) of 1861.[61] As was stressed by Staehelin,[62] the government of the Canton of Bern was specifically influenced by this Act in entrusting Professor Walter Munzinger[63] and Edouard Carlin in July 1861 with framing a commercial code for the Canton of Bern.

Concurrently with the preparations for the cantonal codification of Bern, the federal government sought expert opinion from three professors of law,[64]

[58] The conference was attended by representatives of the cantons of Zürich, Bern Luzern, Freibourg, Schaffhausen, St. Gallen, Graubünden, Aargau, Thurgau, Waadt, Wallis and Neuchâtel as well of the city of Basel.

[59] Blösch, Adolf Burckhardt, a banker of Basel, and Emanuel Burckhardt-Fürstenberger were members of the committee.

[60] It will be noted here that several cantons such as Aargau, Solothurn, Bern, Luzern and Schaffhausen drew upon this draft for framing their own cantonal bills on exchange law.

[61] The adoption of ADHGB was instrumental in the unification of law in Germany, for most of the German Bünde gave it legal effect between 1861 and 1868.

[62] Staehelin, A.: der Entwurf eines schweizerischen Handelsrechts von 1864. In: *Hundert Jahre Schweizerisches Obligationenrecht* (Hgg. Peter, H.—Stark, E. W.—Tercier, P.). Freiburg, 1982. 35.

[63] Walther Munzinger (1830–1873) was the son of a liberal Landamman of Solothurn, brother of Werner Munzinger Paschka, a known African explorer. After the family had moved to Bern, he began to read law in that city and also studied in Paris and Berlin. From 1857 he was teaching commercial and exchange law, German private law and Swiss constitutional law at the University of Bern. He was professor from 1863.

[64] DUBS, a member of the federal government, had previously requested the expert opinion of Heinrich Fick concerning the possibility and desirability of elaborating a uniform commercial and exchange law for Switzerland.

notably Walther Munzinger, Heinrich Fick[65] and Emanuel Burckhardt-Fürstenberger. The prominent Swiss jurists in commercial jurisprudence were requested to identify the legislative enactments on commercial law in the different cantons, the advantages and disadvantages of unifying commercial law at the federal level, the possible content of such a commercial code and the changes which the adoption of the code would entail in the judicial system.

Munzinger and Fick thought that unification was possible by widening the scope of PGB, while Burckhardt- Fürstenberger proposed adoption of the ADHGB. The federal legislature took it into account that Munzinger was already working on a code of commercial law and that his expert opinion was shared by its representatives. Therefore, on 22 August 1862, it entrusted him with elaborating a body of uniform commercial and exchange law for Switzerland. His draft was considered by an expert committee (consisting of DUBS, Emanuel Burckhardt-Fürstenberger, Edouard Carlin, Heinrich Fick and Charles Friedrich, a member of the Ständerat) at two sittings (between 23 and 30 November 1863 and between 25 and 31 January 1864). The draft was modified and supplemented in several aspects, and its final version was prepared in German in June 1864 and then translated into French by Friedrich.

Munzinger's draft bill consisted of five books and 492 articles. In elaborating the parts on commercial law and the law of obligations Munzinger kept in view the provisions of ADHGB and PGB in the first place, while relying to a lesser extent on the *Allgemeine Deutsche Wechselordnung* and the bill of exchange codes of the Swiss cantons for formulating the rules of exchange law.

The first book (*von dem Handelsstand*) governed the legal status of merchants and such legal institutions as the trade register, the trading company, the business book, the powers to register firms (*prokura*), the commercial power of attorney and the commercial broker. The second book (*von den Handelsgesellschaften*) regulated trading companies like the general partnership (*Kollektivgesellschaft*), the limited partnership (*Kommanditgesellschaft*), the partnership limited by shares (*Kommanditaktiengesellschaft*) and the joint stock company (*Aktiengesellschaft*). The third book (*von Geschäftern des Mobiliarverkehrs*) contained contact-law rules, including general provisions on the capacity to contract, the making of contract, the place and time of performance, stipulation of interest, acquisition of property by legal transactions, retention (*retentio*) and the like as well as special rules on contracts, such as those governing sale,

[65] Heinrich Fick was the son of a high-ranking state official of Hessen. He took his doctoral degree and was qualified as a lecturer at Marburg, where he was later elected mayor, but, given his liberal views, his post was not approved by the government of Hessen. Thereafter, from 1851, he was professor at the Law School of Zürich.

agency, forwarding, insurance, exchange, and issue of orders for payment. Furthermore, it included special rules such as conflict rules applicable to contracts between subjects at law in different cantons (e.g. Art. 205 governed the capacity to contract of citizens of another canton). The fourth book (*von dem kaufmännischen Konkurse*) laid down the rules of substantive law relating to bankruptcy proceedings. The fifth book (*von der Kassation und Urteilsfällung durch das Bundesgericht*) determined the jurisdiction of federal courts in matters of commercial law.

The third book of the draft outlined a mixed system of civil and commercial law rules, which were incorporated in a single code, for this book contained provisions applicable to merchants and non-merchants alike, but gave prominence to the special rules of commercial law expressly governing commercial transactions only.[66] With this legal-technical solution of codification Munzinger followed the PGB of Zürich, in which Bluntschli covered commercial contracts as part of contract law on the ground that commercial law was nothing else than a part of the law of contracts.[67] The draft met a favourable reception among the jurists of the day, with its precise and intelligible system and notions praised by, e.g., Albert Schneider (1836–1904), professor of Zürich, Wilhelm Endemann (1825–1899), professor of Jena and Bonn, Levin Goldschmidt, a jurist in German commercial law, and Bluntschli.[68] At the same time, Andreas Heusler (1834–1921), one of the best known and most acknowledged jurists of Switzerland of the day, strongly criticized, in a study of 115 pages, every detail of the draft, chiefly because, in his view, the time had not yet come for

[66] Such provisions expressly applicable only to merchants covered, e.g., the maximum rate of interest, merchants' right of retention (retentio), and pledge.

[67] "Es ist nun Anderes als ein Stück Obligationenrecht und zwar dasjenige Stück, das vornehmlich für den handelsmännischen Verkehr von Bedeutung und darum bedürftig und fähig ist." Munzinger, W.: *Motive zu dem Entwurfe eines schweizerischen Hadelsrechts.* Bern, 1865. 11, fn. 39. Quoted from Staehelin. Staehelin: *op. cit.*, 43.

[68] The Swiss "popular feeling" demanded that in everyday life the law should be intellectually accessible even to simple merchants, should not be alienated from the people, as it saw the prefiguration of a police state in any overregulation. With that in mind, legislation should be simple, brief and understandable. Güggen-Bühl argued against overregulation when he wrote: "Dem Richter soll die Regel gegeben werden, aber die Ausnahme kann und darf nicht durch den Gesetzgeber normiert werden. Der Richter soll ... in einzelnen das Recht erkennen, er soll die rechte Regel anwenden, die rechte Ausnahme finden." Guggenbuhl: *Die Entstehung des zürcherischen privatrechtlichen Gesetzbuches.* Zürich, 1924. Quoted by Schlegelberger, F. (Hgg.): *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes.* I–VI. Berlin, 1929, I. 228.

commercial law to be governed by a uniform code in Switzerland.[69] The federal legislature did not vote for the draft bill, because, as was pointed out previously, the Swiss Constitution of 1848 did not authorize the Bundesversammlung to adopt such an Act.

At the intercantonal conference on 4 July 1868 the government's representative stressed the need for the Confederation to adopt a uniform code of contract law. The task of elaborating such a code was assigned to Munzinger.[70] Concurrently a committee of six members was set up to support the work of codification. One year later the committee gave opinion on the parts of the draft already prepared (the general part and the contract of sale) and then, early in 1871, on the first complete draft. The drafters of OR followed the model of the important European codes of the time, such as the French Code civil and the ABGB, and relied on the traditions of Roman law as preserved in the science of the German pandects. In addition, the Dresden draft of 1866 (*Dresdner Entwurf*)[71] regulating questions of liability, the *Bayerischer Gesetzentwurf* über die *Rechtsgeschäfte* und *Schuldverhältnisse*, the *Hessen-Darmstädtischer Entwurf* and für das Königreich Sachsen bürgerlichen Gesetzbuch exerted a great influence and served as important source-material.[72]

The thorough revision in 1874 of the Constitution removed the obstacles to the federal legislature adopting a code of contract law, which comprised commercial and exchange law as well. Art. 64 of the 1874 Constitution authorized the federal legislature to frame such a code.[73] The German and French texts of the draft were first published in 1877. The draft was considered

[69] For more detail see Staehelin: *op. cit.*, 40.

[70] After the death of Munzinger, Heinrich Fick continued and completed the elaboration of the code, and the draft underwent a profound change under the impact of German law. See Stolleis, M. (Hgg.): *Juristen. Ein biografisches Lexikon. Von der Antike zum 20. Jahrhundert.* München, 1995. 446.

[71] The drafters of OK took over some 400 articles from the Dresdner Entwurf; Schneider and Fick made some 240 references to the bill in their commentaries. See H.–P. Benöhr: der Dresdner Entwurf von 1866 und das schweizerische Obligationanrecht von 1881. Motivationen der Redaktoren und Lösungen in den Kodifikationen. In: Peter, H.—Stark, E. W.—Tercier, P. (Hgg.): *Hundert Jahre Schweizerisches Obligationenrecht.* Freiburg, 1982. 59 et seq.

[72] For more detail see Merz, H.: Das schweizerische Obligationenrecht von 1881. Übernommenes und Eigenständiges. In: *Hundert Jahre Schweizerisches Obligationenrecht. op. cit.* 10.

[73] "Dem Bund steht die Gesetzgebung zu: ...über alle auf den Handel und Mobiliarverkehr bezüglichen Rechtsverhältnisse (Obligationenrecht, mit Integriff des Handels- und Wechselrechts)", Bundesverfassung 64. §.

in several committees, was finally passed by the Bundesversammlung on 14 June 1881 and entered into force on 1 January 1883.

Its system being unique, the code was referred to as code unique in the pertinent literature. It gave a uniform regulation on both civil and commercial law unlike, e.g., the French model of regulation, where the Code civil as *lex generalis* and the *Code de commerce* as *lex specialis* represented a dualist model. On the other hand, the code unique showed many points of similarity to the PGB, which was basically applicable to both merchants and non-merchants, while some of its special provisions revealed differences in respect to merchants, the reason being that the special regulation on the situation of certain social segments (i.e. merchants) was not in accord with the "democratic feelings" of the Swiss people.

That system of the code of contract law, its structure being contrary to the contemporary European trend and resulting in the monism of civil and commercial law, was traced by *Eugen Bucher*[74] to disagreements between the Swiss federalists and centralists, since the Swiss cantons wishing to continue functioning in a loose confederation were interested in preventing a uniform regulation and therefore the most they agreed to was the unification of commercial law, which was becoming of vital importance to economic life. The centralist cantons supporting a strongly centralized political system set the aim of achieving the full unification of Swiss law, and they did attain that aim by amending the Constitution in 1898. The said monism of the code, however, could in no way be seen as a protest against the French system,[75] as was also stressed by *Bucher E*, but it merely pointed up the Swiss political constellation of the day,[76] as was also reflected in Art. 64 of the 1874 Constitution.

[74] Bucher, E.: Der Einfluss des französischen Code Civil auf das Obligationenrecht. In: Caaroni, P. (Hgg.): *Das Obligationenrecht 1883–1893. Berner Ringvorlesung zum Jubiläum des schweizerischen Obligationenrechts.* Stuttgart, 1984. 144.

[75] This is borne out in particular by Bucher's study clearly indicating those rules in the Swiss code of contract law that were identical, often literally, with those of the French Code civil, influencing the OR or its drafters directly by borrowing from the Code civil or indirectly through the rules of the Dresdner Entwurf or the codes of some French Swiss cantons.

[76] "Der Code Civil war ja die Grundlage für die kantonalen Zivilgesetzgebung der west- und südschweizerischen Gruppe. Es versteht sich von selbst, dass Munzinger, der sich ja auch für französisches Recht habilitiert hatte, bei Ausarbeitung des aOR schon deswegen stark auf französisches Zivilrecht (Code civil, Code de commerce) zurückgreifen musste, um das Gesetz auch für die französischrechtlichen beeinflussten Kantone konsensfähig zu machen." Kramer, E. A.: Die Lebenskraft des schweizerischen Obligationenrechts. *Zeitschrift für Schweizerisches Recht* 124. I. (1983), 251. Although, as was also emphasized by Kramer,

Another reason for a monist codification can be found in that the PGB as the prototype of OR likewise outlined such a system in Switzerland and that a similar demand was formulated by the Swiss people's sense of justice, as was voiced in the government' s committee on codification, as well.[77] That legislative technique served to avoid a double regulation of the same daily relations, for which there was in fact no material basis.[78] Given that Switzerland had adopted no separate commercial code, views were also expressed that Switzerland had no commercial law either.[79] *Oftinger* held that although the Swiss law had indeed no set of norms embodied in a separate Act in respect of merchants, Switzerland did have a commercial law, for there existed special rules based on civil law material and applicable solely to merchants.[80]

The 1881 code of contract law consisted of five books and 33 chapters. The first book comprised the general part (*Allgemeiner Teil*) embodying general rules of contract law, such as those relating to the conclusion and expiration of contracts, the sanctions for and the consequences of non-performance, and the passing of contractual rights. The second book contained special rules on contracts (*Die einzelnen Vertragsverhältnisse*), such as those governing sale, donation, and lease. The third book laid down the rules of company law. The last two books regulated the trade register, accounting and securities. The third chapter on trading companies followed the German commercial code and the amendment acts of 1871 on joint stock companies. The association (*Verein*) was likewise regulated in those books. That legislation was followed by amendment acts supplementing the OR and laying down partial rules, such as the Decree of 6 May 1890 introducing the trade register and the official journal of commerce.[81]

Munzinger was qualified as a lecturer on French law,, it was an unquestionable fact that the drafters of the Swiss codes of commercial law (Munzinger, Fick and Huber) belonged in their cast of thought to the ambit of German law. (For more detail see Kramer: *op. cit.*, 247 et seq.)

[77] "Die Ablehnung eines Sondergesetzes für Kaufleute stehe »mit den demokratischen Gesinnung des Schweizervolkes im Zusammenhand, vermöge deren es jeder Sonderstellung eines Berufsstandes entschieden abgeneigt« sei." See Kramer: *op. cit.*, 255.

[78] It will be noted here that the current international trend is similarly moving towards unification (See, e.g., the Italian Codice civile of 1942 and the Hague Convention on International Sale).

[79] K. Oftinger: Handelsrecht und Zivelrecht. Monismus oder Dualismus des Privatrechts und seiner Gesetzbücher? *Süddeutsche Juristenzeitung* 50. (1954), 153. Oftinger refers here to Oser-Schönenberger's commentary on contract law, in which the authors questioned the existence of a Swiss commercial law.

[80] Oftinger: *op. cit.*, 160.

[81] The numerous other amendment acts, or the Nebengesetze can be divided into three groups in terms of content, notably acts on warranty (Haftplichtgesetze), acts on industrial property, and acts on private insurance.

Eugen Huber, in evaluating the qualities of OR, emphasized that its parts dealing with the law of contracts rested on Roman law (e.g. the doctrine of error), and he confirmed that the OR was a mixture of the sciences of the German pandects and of the French doctrine based on the French Code civil.[82] In point of fact, Italian jurisprudence as the third "nation" of Switzerland added no more than the translation to the radiance of altOR, the work of Professor Filippo Sefarini of Pisa. Eugen Huber wrote in praise of the drafters of OR, because the old OR was conductive to the unification of law in the area where it was most needed.[83]

12. England

In 1825 in England three forms of company existed: company founded by royal charter, company founded by statute, and deed of settlement company.[84] During the decade after 1825 the legislators came under strong economic and social pressure to license the joint stock company on a general scale, or else unincorporated companies could have gained more ground, with their contradictory legal status and with the drawbacks of limitations on contractual liability merely under civil law.[85] During that period the legislators were hesitant

[82] Huber cited as examples compensation for damage, the theory of bilateral contract, performance of contract, and the regulation on transfer of property on the French model. For more detail see Kaufmann, H. A.: Das Schweizerische Obligationenrecht und Eugen Huber. In: Caroni, P. (Hgg.): *Das Obligationenrecht 1883–1998. Berner Ringvorlesung zum Jubiläum des schweizerischen Obligationenrechts*, Stuttgart , 1984. 79.

[83] "Es sei zugleich eine »politische Tat« deren Ergebnis »Vorarbeit für ein allgemeines europäisches Recht« sei. " Huber quoted by Kaufmann: *op. cit.*, 80.

[84] For a summary of this topic, see Boyle, A. J.: The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History. *MLR* 28 (1965); Buxeaum, R. H.—Hopt, K. J.: *Legal Harmonization and the Business Enterprise. Corporate and Capital Market Law Harmonization Policy in Europe and the U.S.A.* Berlin, New York, 1988; Teubner, G.: Enterprise Corporatism. New Industrial Policy and the 'Essence' of the Legal Person. In: *EUI Working Papers*, No. 87/294. Badia-Fiesolana, 11987; Tunc, A.: A Comparison of European and British Company Law. In: Schmitthoff, C. M. (ed.): *The Harmonization of European Company Law*. London, 1973; Sándor, I.: *Az angol társasági jog történetének főbb korszakai és azok jellemzői* (The Main Periods of the History of British Company Law and Their Distinctive Features). *Acta Facultatis Politico Juridicae Universitatis Scientiarum Budapestinensis de Rolando Eörtvös Nominatae* 36 (1997/98), 57 et seq.

[85] "If the State had not given way, we should have had in England joint stock companies, unincorporated, but contracting with limited liability." *Maitland quoted by Palmer's Company Law*. London, 1996. 1011.

in the question of authorizing on a general scale the establishment of joint stock companies possessing juristic personality. In the wake of the great French Revolution the existence and operation of capital-pooling companies, subject to limitations on members' liability, became a necessity but,, in the light of previous experience, achievement of the related goal was not possible except by strict provisions for the protection of creditors and owners.[86] Propensity to invest was widespread in England at the time, and it was heightened by the possibility of reaping enormous profit from loans to be granted to the newly emergent states of South America and on the insurance market.[87] The firms that had not won royal or legislative favour could not but carry on such activities in a form of company possessing no juristic personality, and therefore, at the beginning of the 19th century, there operated in England a large number of firms that were not legal persons but were named joint stock companies.[88] The first step was taken in 1834 by the adoption of the Trading Companies Act, which ordered registration of the company's members, but gave no general regulation concerning the limitation of their liability.[89] By way of experiment, there were introduced, on the proposal of barrister H. Bellenden Kerr and on the continental model, companies that could be established by royal charter (Chartered Companies Act, 1837), but they did not gain much ground because of the heavy costs they involved.

In 1844, on the motion of Gladstone, Chairman of the Board of Trade, the Parliament passed the Joint Companies Act,[90] which prohibited the operation of

[86] Radia aptly terms them "blue sky laws". "Many Securities Acts ("Blue Sky Laws"), designed to protect investors, have been passed. The most striking characteristic of the modern corporation is the severance of ownership and control." Radta, M.: *Handbook of Anglo-American Legal History.* 1936. Reprint, Florida, 1993. 482.

[87] Hunt, C.: *The development of the Business Corporation in England 1800–1867.* New York, 1926. 30 et seq.

[88] Hunt: *op. cit.*, 54.

[89] In 1818 England made an initiative to introduce the French société anonyme, but the Parliament rejected it. Hunt: *op. cit.*, 52. Again, the Act of 1834 failed to introduce the normative system, and the process of foundation was long-drawn-out and expensive and remained impossible to complete in the overwhelming majority of cases.

[90] (7 § 8 Vict. C. 110) The Act rested on three basic principles. First, it sharply distinguished the partnership and the joint stock company, allowing foundation of firms of more than 25 members or where shares were freely transferable without the consent of the company's other members. Second, it required nothing but the mere fact of registration for the foundation of a joint stock company, but the company was to engage strictly in the same activity for which it had been established. Third, the registrar of Companies ensured full publicity of the company's particulars. However, the failure of the Act to have accepted the members limited liability remained a drawback, and members were not exonerated from

unincorporated companies and was the first to permit foundation of joint stock companies subject to registration, thereby introducing the normative system in England.[91] Another positive novelty of the Act lay in establishing the Company Registrar, i.e. the register of firms. While the Act allowed the companies to acquire immovable property, for instance, it did not invest them with juristic personality representing the greatest advantage, that is, members of the company remained directly liable for the company's debts.[92] Members were trying in vain to eliminate this drawback by including in the foundation document stipulations limitative of liability, but such stipulations were deemed invalid in relation to third persons. A further problem was presented by the cumbersome and unwieldy procedure of registration, for companies were not entered with full effect in the Registrar of Companies until after a preliminary, provisory procedure. It was only upon completion of such procedure that companies acquired separate juristic personality.[93] The introduction of the normative system placed foundation of joint stock companies within reach of all, although the two-tier system made the procedure bureaucratic.[94]

In 1852 the Mercantile Law Commission was entrusted with determining the type of modifications necessary for the introduction of the limited liability company. The Commission relied on French examples and examples of the States of New York and Massachusetts for preparing its report of 1854 showing that the proposed alterations would not be of benefit to the country's general

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unlimited liability for the company's debts until after three years following alienation of shares. *Gower's Principles of Modern Company Law.* 4th edition, London, 1979. 41.

[91] The registration of a joint stock company required at least 25 founding shareholders, and publicity was a requirement for the process of subscribing shares. This caused the registration procedure to be separated into two phases: the company was first registered conditionally, such registration was followed by public subscription of shares, the documents of subscription and the foundation document to be submitted concurrently and conjointly to the registry of firms, which registered the simultaneous certificate showing that at least three fourths of the company's stated capital had been subscribed. For that matter, the Act referred to this form of company as partnership in several places (e.g. sect. 25). For a detailed analysis of the Joint Companies Act of 1844, see Horrwitz, W.: Historical Development of Company Law. *Law Quarterly Review* 62 (1946), 376 et seq.

[92] The introduction of limited liability had been proposed by the Hause of Commons as early as 1825 (Hansard XII (1825) 1284.) and then Bellenden Kerr proposed introduction of the société en commandite on the French model, namely the limited partnership, thus ensuring limited liability.

[93] For a full treatment see Hunt: *op. cit.*, 96 et seq.

[94] From 1844 to 1856 there were registered 910 English and 46 Irish companies. Hunt: *op. cit.*, 114.

economic life.[95] That notwithstanding, the House of Commons restated its case for progress in a resolution of that same year,[96] which eventuated in the passing of the Limited Liability Act.[97]

The Limited Liability Act of 1855 allowed limitation of joint stock company members' liability to the face value of their shares, subject to certain conditions, however. Thus, the company was required to have at least 25 members who had to own not less than three fourths of the face value of the company's capital and had to subscribe at least 20% of the face value of their shares; the last part of the company's name had to include the word Limited; and the company's auditor had to be approved by the Trade Commission. Further significant progress was made by the provision that the company's directors were not personally liable for their activities on behalf of the company except when, in awareness of the company's insolvency, they paid dividend or gave loan to members. The first two of the aforesaid requirements were removed by the Joint Stock Companies Act of February 1856,[98] but the second, invented by Lord BRAMWELL, is still mandatory in modified form. The Limited Liability Act (1856) consolidated all earlier legislation on joint stock companies and, guided by the spirit of laissez-faire, ushered in a completely new era in the development of company law.[99] Its essential principle was that of allowing everyone to form and operate a joint stock company with limited liability[100] and ensuring that third persons had knowledge of such facts. The procedure for registration of companies became simplified and less expensive, the foundation document required but seven signatures and the charter of company could be based on the model as devised in

[95] Horrwitz: *op. cit.*, 379 et seq.

[96] "That the Law of Partnership which renders every Person, who though not an ostensible Partner, shares the Profits of a Trading Concern, liable to the whole of the Debts, is unsatisfactory, and should not be so far modified as to permit Persons to contribute to the Capital of such Concerns on Terms of sharing their Profits, without incurring liability beyond a limited amount." Hansard CXXXIV (1854), 764, 800.

[97] Furthermore, the Limited Liability Act of 1855 allowed companies founded under the Companies Act of 1844 and issuing shares at a face value of at least 10 English pounds each to bear legally limited liability. Holdsworth, W. S.: *A History of English Law I–XVI.* London, 1966. XV. (2). 54.

[98] "This Act, of 116 sections and a Schedule of tables and forms, was the first of the modern Companies Acts." Cower: *op. cit.*, 48.

[99] Horrrwitz: *op. cit.*, 383.

[100] Conferring limited liability on the shareholders of joint stock companies markedly increased propensity to invest: the companies formed between 1856 and 1862 numbered 2.500, a figure which rose to 3.500 between 1863 and 1866. Hunt: *op. cit.*, 143 et seq.

Table B annexed to the Act. The company was not required to pay up its capital before commencing business.

In 1862 the Parliament passed the Companies Act, denominated *magna carta* of co-operative enterprise by Sir FRANCIS PALMER, which made significant amendments to the Act of 1856,[101] containing—inter alia—the model charter in Table A for the first time. While the Companies Act of 1862 represented considerable progress, the first modern Act was the Companies (Consolidation) Act of 1908, which "consolidated" the 18 Acts passed since 1862.

It was practically the Companies Act of 1862 which introduced the *ultra vires* doctrine in English law,[102] serving as a restriction chiefly to provide protection against abuses of limited liability.[103] That Act was the groundwork for company law up to 1908. Under it, the company was allowed to make contracts only within its scope of activities as shown in the foundation document, while members were not entitled to alter the foundation document in this respect even by unanimous decision. Subsequent legal practice widened this rule to the effect that payments to members were similarly allowed within the company's scope of activities only.[104] English law made continuous efforts to abrogate the *ultra vires* rule, which was changed by the Companies Act of 1947 empowering shareholders to alter the company's scope of activities by unanimous decision without the consent of the court.[105] The Companies Act of 1862 had the added merit of introducing the company limited by guarantee (provided by members),

[101] For a full treatment see Horrwitz, W.: Company Law Reform and the 'Ultra Vires' Doctrine. *Law Quarterly Review* 62 (1946), 66 et seq.; Horrwitz: *Historical Development*, 3844 et seq.

[102] The ultra vires doctrine was formulated in Art. 12 of the Companies Act of 1862, providing that "...save as hereinafter provided in the Cas of Change of Name, no Alteration shall be made by any Company in the Conditions contained in its Memorandum of Association". This specially Anglo-Saxon rule did not apply to companies formed by charter.

[103] The legislator's intent is expressed with the greatest clarity in Judge Lord Hatherley's judgement: "When you consider that this Act of Parliament (i.e. the Companies Act 1862) was passed with the view of enabling persons to carry on business on principles which were, up to that time, wholly unknown in the general conduct of mercantile affairs in this country ... it was necessary that the public, that is the persons dealing with a limited company, should be protected, as well as that the shareholders themselves should be protected." Ashbury Railway Carriage and Iron Co. (Ltd.) v Riche, 7 H. L. 684.

[104] Horrwitz: *Company Law Reform*, 70. Also see Pickering, M. A.: The Company As a Separate Legal Entity. *MLR* 31 (1968), 485 et seq.

[105] Kahn-Freund, O.: Companies Act 1947. *Modern Law Reriew* 11 (1948), 82.

and extended its scope of applicability to insurance companies, which had formerly been covered by a separate Act.[106]

In addition to the introduction of limited liability, the election of an auditor was made mandatory to protect shareholders and creditors. Auditors came to play a decisive role in controlling the operation of companies.[107]
Another significant change was brought about by the amendment of 1867, which spelled out the unlimited liability of directors and managers to the company for any damage caused to it by their activity.

At the end of the 19th century the greatest weakness of company law was represented by misleading statements made in reports, a problem which became most conspicuous in the judgement rendered in the case known as Derry v. Peek (1889) 13 App. Cas. 337, the court holding that the directors who had furnished false information in the carefully prepared balance sheet were not liable for the damage caused thereby, provided they had acted truthfully and not fraudulently. That unfortunate decision was corrected by the Directors' Liability Act of 1890, and another Act of 1900 prescribed public registration of the company's debts in the balance sheet.[108]

13. Closing conclusions

It may be stated in general that company law played an important role in the codification of commercial law during the 19th century. The leading role in regulations on company law was assigned to the French *Code de commerce*, with significant contributions also made by the German ADHGB, the Swiss OR, and the British Acts on company law, which broke new ground in some respects.

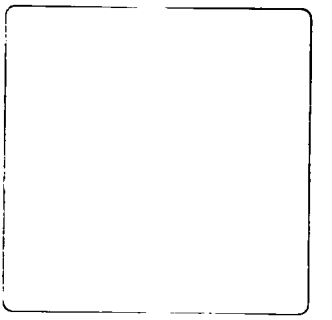
Possibilities for formulating partial rules to govern different forms of company at the statutory level, thereby laying the basis for establishing the basic principles of a new branch of law drawing its nourishment from commercial law, were opened by the codifications of commercial law. No doubt that a great role in related efforts during that period was reserved for statutory regulations on companies possessing juristic personality and that the development of a normative system which became widely accepted on the English model can be said to have been of epochal significance.

[106] Holdsworth: *op. cit.*, XV. (2), 58.

[107] Hunt: *op. cit.*, 140.

[108] For a full discussion of the Company Act of 1900 see Topham, A. F.: Company Law. *Law Quarterly Review* 51 (1935), 211.

Of course, the company law achieving a status of its own within commercial law brought with it the formulation by this branch of law of its set of internal rules as well. Particular emphasis should be laid in this respect on the fact that the introduction of the normative system was primarily instrumental in the detailed elaboration of rules for the protection of minorities and creditors, which were conductive to the attainment of the foremost aims of company law in modern times.



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Protection of Human Rights and the Environment in Russia

Abstract. The study deals with the environmental human rights in Russia. It examines the role of the constitutional provisions enacted in 1993 and proclaiming that everyone have the right to favorable environment, reliable information about the state of the environment. This right is being examined in conjunction with other human rights provisions of the new Constitution. The rights related to the protection of nature, health and the ways of their practical implementation are also covered. Other important pieces of legislations dealing with the problem of environmental rights such as the 1991 Act on the Protection of the Natural Environment, 1996 Act on Radiation Safety, 1996 Act on the Protection of the Rights of consumers are examined in light of the constitutional provisions. The author points out to the importance of recognized environmental rights in light of the critical state of environmental situation in Russia. The study also deals with the role and competences of local administrative organs in the domain of environmental protection. The role of the judiciary, including the Constitutional Court, and of the Ombudsman forms a part of the author's examination.

Keywords: protection of the environment, human rights, Russia, right to favourable environment, right to health.

The legal regulation of protection of environmental rights

Environmental rights are recognized and regulated under human rights law and concern observance of various needs of the person in any interaction with the environment (nature).

Recognition and regulation of environmental rights are the most essential innovations of the development of Russian legislation. It is especially important that environmental rights are recognized by the Constitution of the Russian Federation (1993). According to Art. 42. everyone shall have the right to favourable environment, reliable information about the state of the environment and compensation for damages inflicted to health or property by violation of environmental regulations. This scope of rights is directly related to the right to

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work in conditions which meet safety and hygiene requirements (Art. 37), and to the right to health protection and medical care (Art. 41).

Furthermore, the Constitution establishes other constitutional rights which stipulate proper observance and protection of environmental rights. According to Art. 29. everyone shall have the right to seek, receive, transmit, produce and disseminate information by any legal means. Everyone shall have the right of association, including the right to establish trade unions for the protection of their interests (Art. 30). Citizens of the Russian Federation shall also have the right to assemble peacefully without weapons, hold rallies, mass meetings and demonstrations, marches and pickets (Art. 31). Citizens of the Russian Federation shall also have the right of appeal in person and make individual and collective appeals to state bodies and bodies of local government (Art. 33). So as to guarantee protection of human rights and freedoms in Russia, the Constitution accordingly provides that everyone has the right to protect rights and freedoms by all means not prohibited by law (Art. 45).

The former Soviet Constitution of the RSFSR (1978) also guaranteed the human right to health protection. The Constitution stipulated that this right was ensured in particular by measures concerning improvement of the state of the environment. But the state of the environment since the adoption of that provision has exacerbated and now it is characterized as catastrophic. The state of health of the citizens has accordingly worsened. The mechanism of protection of individual rights remained extremely weak at that time.

The provision of the RSFSR on Protection of the Natural Environment[1] (1991) not only specifies the right of citizens to health protection from adverse effects incurred by the natural environment, but also stipulates a number of important rights of the citizens that promote its protection. In particular, it guarantees the citizens the right:

a) to establish public associations, funds and other public groups for the purpose of environmental protection, to join such associations and funds, and contribute their earned income;

b) to take part in meetings, rallies, picket lines, marches and demonstrations, petition drives or referendums on environmental protection, to express their opinion and write letters, complaints and statements concerning environmental protection and demand that these receive consideration;

c) to demand that the respective organs provide prompt, full and reliable information about the state of the natural environment and take measures to protect it;

[1] Vedomosti S'iezda narodnih deputatov Rossiiskoi Federacii i Verkhovnogo Sovieta Rosiiskoi Federacii, 1992. No. 10. § 457.

d) to demand that decisions that permit the sitting, planning, construction, rebuilding or operation of environmentally harmful facilities be rescinded either by administrative means or by court proceedings, and to demand restriction, suspension or termination of the operations of enterprises and other facilities which have negative effect on the environment and on human health;

e) to demand prosecution of officials concerned and private citizens and file suit to seek compensation for damages caused to citizens' health or property by environmental offences (Art. 12).

With respect to the high social and ecological danger of pollution of the environment by radiological sources the Federal Act on Radiation Safety of the Population of 9 January, 1996[2] also establishes a scope of rights for the citizens. According to Art. 22. the citizens of Russia, foreign citizens and persons without citizenship living in the territory of the Russian Federation have the right to radiation safety. The citizens and public associations also have the right to access to objective information from organizations which carry out activities with the use of sources of radiation within the limits concerning radiation and according to accepted measures on maintenance of radiation safety (Art. 23). The representatives of public associations are given the right to appeal to any organization which carries out activities with the use of radiological sources under conditions established by the law of the Russian Federation. According to Art. 26. the citizens have the right to compensation for loss of life, damages caused to their health, and (or) to compensation for losses caused to them.

The Federal Act on Protection of the Rights of Consumers of 2 January, 1996[3] specifies the right of consumers to education so as to protect the rights of consumers (Art. 3). This right is guaranteed by specification of appropriate requirements concerning state educational standards of both general educational and professional programs, and also by means of organization of a system of information of consumers about their rights and the necessary actions for protection of these rights. The act establishes another important right of the consumer—to safety of the goods (work, service). The consumer has the right that the goods (work, service) under usual conditions of their use, storage, transportation and utilization were safe for life and health of consumers and the environment, and that they did not cause damages to property.

In the system of protection of environmental rights of the citizens, it is possible to distinguish rights to the use of nature, i.e. to use natural resources for fulfilment of various needs of the person—economic, recreational, aesthetic,

[2] Sobranie zakonodatel'stva Rosiiskoi Federacii, 1996. No. 3. §. 141.

[3] *Ibid.*, 1996. No. 3. §. 140.

scientific or cultural. The rights of citizens to the use of nature are regulated broadly by the law concerning natural resources—land, water, forest, underground (mineral resources) and wildlife.

Political and legal importance of the recognition of environmental rights

In the event of a critical environmental situation in the country, low efficiency rights has large political and legal implications. The importance of the recognition and legal regulation of environmental rights is determined by nature protection regulations, especially, the constitutional regulation on the rights of the individual have in the development of modern society and state. According to the general theory of the rights of the person, the prerequisites of vital activities of people are formulated under human rights regulations, which objectively facilitate the functioning of the individual, the society and the state.

The recognition of the person, his rights and freedoms as a supreme value (Art. 2 of the Constitution) entails from political and legal aspects a change of approach to the relationship between the state and citizens and of guidelines for the activity of state bodies. Taking into account the fact that the powers of the bodies of legislative, executive and judicial authority in a law-based state originate in the rights of the person and citizen, recognizing a priority of the rights of the person means that when adopting new law, making administrative and judicial decisions, it is not the interest of the state, its bodies and officials, but the natural and inalienable rights of the person that shall be the basic guidelines.

By recognizing environmental rights, the Russian legislation made a step in the direction of formation of a law-based state and asserted the intention to form it. The rather broad regulation of subjective environmental rights in the developing law is a certificate of the democratization of the state. The recognition of these rights promotes the consciousness of citizens, environmental awareness and culture. The right to favourable environment and other environmental rights justify the demand for appropriate conduct of other subjects, first of all, of state bodies. They will promote the involvement of citizens in protection of the environment and of the state in the given sphere. At the same time, the regulation of environmental rights supports the powers of the state, exposure of the state to international scrutiny and entry into European and global legal networks.

The legal importance of the recognition of these rights is predetermined by their content and the circumstances of the citizen endowed with the rights. So, the subjective right as a legal category means the rights expressed in a norm and framed by it: *a)* freedom of conduct by the individual within limitations established by the legal norm; *b)* an opportunity for the individual to draw on a social boon; *c)* right to take steps and demand that other persons take appropriate measures; *d)* an opportunity to appeal to court for redress of the violated right.

The recognition and legal regulation of environmental rights is important not only for the individual, but also for the society and the state. So, the socially responsible state, establishing this or that right, may expect that the citizens asserting these rights promote an increase in the efficiency of nature protection by the state. For example, securing citizens the right to participate in preparation and making environmentally significant economic and other decisions within the procedure of environmental impact assessment that relies on expertise in environmental protection, it is reasonable to expect an increase in the efficiency of the concerning activity of bodies of the executive authority.

Accordingly, the society and the state do not remain indifferent to how the citizen asserts his rights. They must be interested in the involvement of citizens.

Thus, environmental rights have essential legal importance as instruments of gradual restoration of a favourable state of the environment in the country, which, when consecutively enforced, shall ensure normal conduct of the person.

The right to favourable environment

The right to favourable environment is one of the basic natural rights of the person. This right as well as the right to life established under Art. 20 of the Russian Constitution, are rights guaranteed by nature. The human right to favourable environment as well as the right to life were for the first time established in the Russian Constitution of 1993.

The right to life is associated with the right to favourable environment. The first, undoubtedly, is related to the quality of environment, in which the person lives. The lifetime of people should not be shortened because of ignorance of environmental legal regulations. According to the available data, the state of health of the person is determined to 20–30 p.c. by the state of the environment. According to the Russian State Statistical Committee, in 1997, the average life span of men in Russia was 57 years. There are grounds to assume that the life

span is shortened, alongside with other reasons, because of degradation of the environment.

So long as the right to life is related to the protection of natural environment, it can be protected by means and instruments stipulated under Russian law on protection of environmental rights. The right to life will be guaranteed and protected objectively by means of observance and protection of the right to favourable environment.

The subjects of the right to favourable environment are the citizens of Russia and foreign citizens who live in the territory of the Russian Federation.

To ensure the most effective observance and protection of the right to favourable environment, it is theoretically and practically important to determine the content of the concept of favourable environment. Russian law does not define this concept, though legally significant criterions prevail in the given context. First of all, they are expressed in the system of norms concerning environmental quality. The system of such norms, as well as the general requirement of their development is determined under the Act on Protection of the Natural Environment. It includes norms pertaining to maximum permissible concentration of harmful substances in atmospheric air, waters and soil, and norms of maximum permissible levels of noise, vibration, magnetic fields and other harmful physical impacts on the environment.

The mentioned norms prescribe qualitative characteristics of the state of the natural environment and are primarily designated to promote maintenance of its cleanliness that is only one, but a very important characteristic of the favourable state of the environment.

Its other main required characteristic is the non-exhaustion (non-depletion) of natural resources. Environmental criteria concerning the use of natural resources to serve economic purposes and needs of the person are specified to limit the use of the natural resources under the above mentioned act. The respective limitations on use of natural resources are determined under regulations pertaining to land, underground (mineral resources), water, forests and wildlife.

The requirements to satisfy aesthetic and other needs of the person and to sustain the biological variety of nature are also specified under the right to favourable environment. The maintenance of a favourable state of the environment with the purpose of satisfaction of these needs and of the preservation of natural resources is provided for under the regulation pertaining to specially protected natural territories and objects, recreational zones and other territories.

Thus, the environment is favourable if its state meets the established environmental criteria, norms and requirements concerning its cleanliness, non-

exhaustion (depletion) of natural resources, ecological stability, biological variety and aesthetic riches.

The right to favourable environment is one of the fundamental and universal subjective rights of the person and citizen that affect vitality and it promotes the maintenance of normal ecological, economic, aesthetic and other conditions of life. Other environmental rights—to demand duly, complete and authentic information about the state of the environment and measures on its protection, or compensation for damage caused to health or property of the person by environmental offences, to demand the cancellation of decisions on location, design, construction, reconstruction or operation of environmentally harmful objects in an administrative or judicial procedure as stipulated by the Constitution of the Russian Federation and other law—in essence serve as means of enforcement of the right to favourable environment.

The observance of the right to favourable environment in the Russian Federation should be guaranteed within the framework of nature protection by authorized state bodies and users of natural resources on the basis of a system of legal, institutional, technical, economic, scientific, educational and other measures on protection of the nature and rational use of natural resources.

Powers of public environmental associations

The citizens may draw on environmental rights by establishing public environmental associations endowed with broader powers than those of individual citizens.

The powers of public environmental associations for protection of the natural environment are specified under a number of statutes. In the most concentrated form they are stipulated under Art. 13 of the Act on Protection of the Natural Environment. According to the act, environmental associations and other public associations engaged in protection of the environment have the right to:

— develop, adopt and promote their own environmental programs, protect the public's environmental rights and interests, develop the public's environmental awareness, and engage citizens in active environmental protection efforts on a voluntary basis;

— use their own funds and volunteer labour to work in connection with the protection and renewal of natural resources and improvement of the environment, to render all possible assistance to state organs in their struggle against those who violate regulations on environmental protection and establish public

environmental protection funds and spend those funds on the implementation of environmental measures;

— recommend their own representatives so that they contribute to state environmental expertise with regard to sitting and designing facilities, draw on public environmental expertise, and demand the repeal of decisions to site, build or operate environmentally harmful facilities or the restriction, suspension, termination or reorientation of their activities in an administrative or legal procedure;

— demand that prompt, reliable and complete information be provided regarding environmental pollution and environmental protection measures;

— organize meetings, rallies, picket lines, marches, demonstrations and petition drives and gather signatures and make proposals regarding projects and referendums;

— demand that state environmental expertise be secured and outline an environmental platform via the mass media;

— demand the prosecution of officials concerned and file claims in court or an arbitration tribunal in search of compensation for damages to citizens' health and property stemming from violation of environmental regulations.

The act requires that the environmental activities of public associations should be conducted in full accordance with their charters and the law of the Russian Federation and its subjects.

At present there are more than 1000 public environmental associations in Russia, which implement diverse useful activities.

One of the instances of the enforcement of the powers of public associations in the field of protection of the environment is the appeal of the Russian social-ecological union in Vologda to the regional arbitration court by reason of the decision of the Vologda authorities to commence the construction of a site for solid waste disposal on the territory of "Russian North" national natural-historical park designated by the Government of the Russian Federation in March, 1992. In March, 1996 the court approved of the claim of the public organization.

Furthermore, the Supreme Court of the Russian Federation approved of the claim of the Russian branch of Greenpeace and the representatives of the population of Krasnoyarsky krai, when it considered the Decree of the President of Russia on the State Support of Structural Reorganization and Conversion of Nuclear Industry in Zsheleznogorsk of Krasnoyarsky Region of 25 January, 1995 as illegal and contradicting Russian nature protection regulations. The President in his decree permitted that the mining-chemical industrial complex operated with temporary storage for the purpose of further treatment of

nuclear fuel waste from foreign nuclear power stations in the territories of other states. The decree contradicted Art. 50 of the Act on the Protection of the Natural Environment, which stipulates that import of radioactive wastes and materials from other states for the purposes of storage, depletion or disposal of radioactive materials underwater or the transfer of such materials into outer space for disposal is forbidden.

Therefore, the presidential decree aimed to promote environmentally harmful activities, which violate the right of citizens of Russia to favourable environment.

Protection of Environmental Rights

The mechanisms and procedures of protection of environmental rights is a necessary prerequisite that the proclaimed rights shall be enforced. The specification of such mechanisms creates legal guarantees that ensure observance and protection of environmental rights.

The analysis of the legislation in the field of protection of the environment and human rights reveals two basic ways of protection of environmental rights: a) self-defence and b) protection by means of a state institution. Each of these ways in real protection mechanisms of protection of environmental rights draw on many factors, including democratization in the field of environmental protection, i.e., real involvement of the citizens in the preparation of and making environmentally significant decisions and control of their enforcement.

a) Ways of protection of environmental rights in the scope of competence of executive authority bodies

While the option for assertion of environmental rights by the citizens frequently depends on the discretion of administrative bodies and the respective officials, the problem of protection of environmental rights in the scope of competence of executive authority bodies becomes rather significant. The ways of protection include:

— judicial control of administration (i.e., the powers of courts over consideration over administrative disputes and potential organization of the administration of justice);

— administrative (interdepartmental) control and supervision of implementation within the framework of the executive authority;

— organisation of admission and consideration of appeals (claims and complaints) by bodies of the executive authority;

— supervision of the competence of specific structures of the executive authority (ministries and departments) and also of bodies of local government;

— control by the representative bodies of state authority over administrative bodies in frameworks determined by law and in the context of the principle of division of powers.[4]

Violated environmental rights can be directly redressed in an administrative way. The administrative way of the appeal for review of decisions and actions violating environmental rights is regulated by the Federal Act on the Appeal for Review of Actions and Decisions Violating the Rights and Freedoms of Citizens to a Court of 14 December, 1995.[5] The act provides an opportunity for administrative appeal of joint and individual actions, decisions or failure to act by state bodies, bodies of local government, institutions, enterprises and their associations, public associations and officials, state employees, as a result of which the rights and freedoms of the citizen are violated or the assertion of rights and freedoms by the citizens are impeded.

The act provides the claimants an opportunity for the choice of bodies, to which they can file complaints for the violated environmental right. The claimant can appeal directly to court or to a higher state body, a body of local government, an establishment, an enterprise, association or to an official. According to the act, a higher body, association or an official shall be obliged to consider the complaint in a month's time. If the complaint is repudiated or the claimant has received no answer within one month from the date of its submission, he/she has the right to appeal for consideration of the complaint to court.

The procedures of consideration of complaints by executive authorities have practically not obtained as of today, since according to experts, procedures in the former USSR were extremely imperfect and protected primarily the administrative authority to the detriment of the citizen's rights and interests.

The adoption of the regulation of appeals by the citizens to executive authorities, which stipulates procedures of consideration so that they promote effective protection of human rights, is extremely pressing. The perfection of mechanisms of protection of environmental rights within the competence of the executive authority bodies can be connected to the development of the system of

[4] Salischeva, N. G.: On some aspects of the protection of rights, freedoms and lawfull interests of citizens in the domain of activities of executive organs of the Russian Federation. In: *The Constitution of the Russian Federation and the improvement of the mechanism of protecting human rights*, Moscow, 1994. 74.

[5] Sobranie Zakonodatel'stva Rossiiskoi Federacii, 1995. No. 31. §. 2900.

the administration of justice as stipulated under Art. 118 of the Constitution of the Russian Federation.

b) Protection of environmental rights in court

The constitutional provision on the principle of division of powers and the separation of state authority from judicial authority implies a qualitative change of roles, i.e., on the one hand, authority and influence of courts on the competence of state bodies in the field of environmental protection, on the other hand, it opens new legal ways of protection of environmental rights and interests.

The Russian Constitution sets forth that everyone shall be guaranteed judicial protection of his rights and freedoms (Art. 46). The right of the citizens to claim judicial enquiry is one of the latest significant instruments of Russian law in the scope of environmental protection.

The right of the citizens to submit a claim in court is stipulated under Articles 12 and 91 of the Act on Protection of the Natural Environment, which provides for the termination of environmentally harmful activities that cause damage to health and property of the citizens, national economy and the natural environment. As a general norm, the act specifies that disputes on protection of the natural environment, which concern citizens, are subject to consideration in a judicial process (Art. 78).

The right of the citizen to claim judicial enquiry as a universal legal means of protection allows to represent not only the interests of the claimant, but finally of the whole community and promotes the maintenance of legal order. Simultaneously, this right is established as an effective form of control over powers of the state apparatus, bureaucracy and over abuse of authority.

The process of judicial appeal is regulated under the Federal Act on the Appeal to Court for Review of Actions and Decisions Violating Rights and Freedoms of Citizens. The act also determines the scope of actions (decisions), which can be appealed to court. As such, it distinguishes joint and individual actions (decisions) of state bodies, bodies of local government, institutions, enterprises and their associations, public associations, officials, state employees and requires submission of official information as grounds for taking action and as a result of which: a) the rights and freedoms of the citizen are violated or curtailed; b) any duty is illegally assigned to the citizen or he/she is illegally held responsible.

The citizens also have the right of appeal for failure of state bodies, enterprises, associations, officials, state employees to act, if that entailed consequences as listed above. In the scope of environmental protection the opportunity of the

appeal by reason of failure of state bodies and other subjects to act according to regulations concerning protection of the environment, is potentially a powerful legal means of increasing efficiency of nature protection by the state.

The citizen has the right to challenge both actions (decisions) above and information as the basis for implementation of actions (adoption of decisions) or both simultaneously.

According to the act, the appeal is admitted, if the rights, freedoms and interests of the claimant are infringed. Thus, the citizen has the right to appeal to a court for any action or failure to act that has adverse environmental consequences for a community on a whole. Meanwhile, sometimes it is difficult to prove that the illegal decision or action (failure to act) obviously violates the environmental rights of the claimant. But in case the decision is recognised as illegal, not only the right to favourable environment of the citizen that challenged this action is protected, but also that of a broader circle of persons affected by the action.

The complaint can be lodged by the citizen, whose rights are violated, and at the request of the citizen, by the authorized representative of a public association or labour collective.

So that an appeal to court with a complaint concerning wrongful environmentally significant actions or decisions can be made, it is necessary to have a minimum of legal and environmental knowledge. However, the overwhelming majority of Russian citizens at present does not have such knowledge. According to the Constitution of the Russian Federation, everyone shall be guaranteed the right to qualified legal assistance (Art. 48). The case can be transferred to legal consulting firms. However, these organizations are hardly capable to render qualified legal assistance on environmental issues, as protection of the environment is a poorly advanced area in Russia. As minor importance is assigned to this sphere in practice, it has had a corresponding effect on the competence in environmental law of the employees of consulting firms. Under these conditions, specialized law firms could have a major role in representation of environmental interests of the citizens in courts. Lately, they have been established in Russia.

The Federal Act on the Appeal to a Court of Actions and Decisions Violating the Rights and Freedoms of the Citizens specifies a choice of courts for the citizens, to which they can appeal for protection of their rights. According to the decision of the citizen, the complaint can be submitted to a court of his residence or to a court where the body, association, official that violated his environmental rights is based.

The law also determines the terms of appeal to court with the complaint. If the citizen files a complaint for review of the decision or actions violating his environmental rights in an administrative procedure, the term of submission of the complaint in court is one month from the date of reception in writing the refusal of a higher body, association or from the expiration of a month's term after submission of the complaint, if the citizen had not received written answer to it. If the citizen directly resorts to judicial proceedings to protect his rights, the act specifies a three months' term to file a complaint since the day the citizen recognised the infringement of his right. The court has the right to amend the term of submission of the complaint missed for valid reason.

It is a distinctive feature of consideration of the complaint of the citizen by the court that state bodies, bodies of local government, institutions, enterprises and their associations, public associations, officials, state employees, whose actions (decisions) are challenged, have the remedial duty to prove documentary legality of the challenged actions (decisions). Thus, the citizen is released from the duty to prove their illegality, but is obliged to prove the fact of infringement of his rights and freedoms.

Consequently to consideration of the complaint, the court makes a decision. If the complaint is well-grounded, it will recognize the challenged action or decision which has resulted in the infringement of the rights of the citizen as illegal, and it will oblige to comply with the claims of the citizen, cancel the measures taken or in other ways redress the citizen's violated rights and freedoms. Moreover, at a stage of submission of the complaint to consideration, at the request of the citizen or under the initiative of the court, it has the right to suspend the implementation of the challenged action or decision.

Concerning state employees, whose actions (or decisions) are recognized as illegal, the court shall apply the Federal Act on Fundamentals of State Service of the Russian Federation[6] or other federal law concerning the responsibility of the state employee or shall dismiss the case. The responsibility can be assigned to persons, whose actions (decisions) are recognized as illegal and to persons who presented information as grounds for illegal actions (decisions).

The court can make a decision on compensation for losses or damage caused to the citizen by illegal actions (decisions) and also by presentation of invalid information.

It is an important question whether courts can not only reject, but also change the challenged decision. From the point of view of the principle of division of powers, the decision of the court should contain only a conclusion

[6] Sobranie Zakonodatel'stva Rossiiskoi Federacii, 1995. No. 31. §. 2900.

about the legality of the challenged actions and decisions and about their cancellation in case of validity of the complaint.

Protection of environmental rights by the constitutional court of the Russian federation

An important role in the mechanism of protection of the environmental rights in Russia belongs to the Constitutional Court. In connection with recognition of the right to favourable environment under the Constitution, it is an urgent problem to provide conformity of Russian law, normative legal acts and treaties with the Constitution. According to the Constitution, human rights and freedoms shall determine the meaning, content and implementation of the law, the functioning of legislative and executive authority and of local government (Art. 18). Therefore, not only new law and other normative acts should be brought into line with the Constitution, but all obtaining law, as well.

Art. 125 of the Constitution of the Russian Federation specifies a number of normative legal acts, which shall be considered by the Constitutional Court with respect to their conformity with the Constitution of the Russian Federation. It includes federal law, normative acts of the President of Russian Federation, the Federation Council, the State Duma, the Government of the Russian Federation; constitutions of republics, charters, and law and other normative acts of subjects of the Russian Federation; treaties between state government bodies of the Russian Federation and state government bodies of subjects of the Russian Federation; international treaties of the Russian Federation which are not in force.

The Constitutional Court scrutinizes the conformity of these specific regulations, however, not on its own initiative, but at the request of specific state bodies. The right of appeal to the Constitutional Court belongs to the President of Russian Federation, the Federation Council, the State Duma, the Government of the Russian Federation, the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation and to legislative and executive government bodies of subjects of the Russian Federation.

According to the Federal Constitutional Act on the Constitution of the Russian Federation of 21 July, 1994,[7] the conformity of new normative acts and agreements between state authority bodies to the Constitution shall be reviewed from the point of view of the content of norms, the form of the act; the order of signing, conclusion, adoption, publication, putting into force and

[7] Sobranie Zakonodatel'stva Rossiiskoi Federacii, 1994. No 31. §. 1447.

from the point of view of the division of legislative, executive and judicial authorities. The establishment of conformity of the acts, which had been adopted before the Constitution of the Russian Federation came into force, is made only with respect to the content of norms.

The recognition of the result of consideration of the respective normative act or treaty or of its separate provisions as not corresponding to the Constitution of the Russian Federation entails the cancellation not only of the given act (treaty, provision), but it also creates basis for cancellation of other normative acts if they are based on the act (treaty, provision) considered as unconstitutional.

The Constitution of the Russian Federation also stipulates the instrument of the review of conformity of the regulations to the Constitution at the request of courts. When considering a case, the court comes to the conclusion that the law applied in this particular case is not in conformity with the Constitution of the Russian Federation, so the court appeals to the Constitutional Court with a request for review of the conformity of the regulation. From the moment of making the decision by the court on appealing to the Constitutional Court and until this Court makes its decision, the consideration of the case in court shall be suspended.

Alongside with the review of conformity of the specific provision and other acts to the Constitution, the protection of environmental rights within the competence of the Constitutional Court is connected to the enforcement of the right of the citizens to constitutional complaint. According to the Act on the Constitutional Court of the Russian Federation, the right of appeal to the Constitutional Court with an individual or collective complaint against violation of the constitutional rights and freedoms belongs to the citizens and an association of citizens, whose rights and freedoms have been violated by the law applied or subject to application in a particular case. Such right also pertains to other persons and bodies specified under federal law (Art. 96).

The complaint for violation of the constitutional rights and freedoms by the law is admitted, if the law mentions the constitutional rights and freedoms of the citizens, and also if the law is applied or is subject to application in a particular case, the consideration of which is completed or had been commenced in court or other body applying the law.

By admitting the consideration of the complaint against violation of constitutional rights and freedoms by the law, the Constitutional Court consequently notifies the court or other body that considers the case, in which the challenged law is applied or is subject to application. However, the notice does not entail suspension of consideration of the case, though it can be suspended at the discretion of the court or body.

As a result of consideration of the complaint against violation of constitutional environmental rights by the law, one of alternative decisions can be accepted: either on recognition of the law or its separate provisions as corresponding to the Constitution of the Russian Federation, or on recognition of the law or its separate provisions as not corresponding to the Constitution of the Russian Federation or as creating an opportunity for interpretation by court or other body, which would not correspond to the Constitution. In case of recognition of the law applied in a particular case as not corresponding to the Constitution, the case shall be subject to reconsideration by the appropriate body in the usual process.

Protection of environmental rights by the commissioner for human rights

Violated environmental rights can be redressed by the Commissioner for Human Rights, as well. This position is established according to Art. 103 of the Constitution of the Russian Federation with the purpose of maintenance of guarantees of state protection of the rights and freedoms of citizens, their observance and respect by state bodies, bodies of local government and officials.

The institution of the Commissioner for Human Rights (ombudsman), which functions in more than 100 states, supports, supplements and expands the traditional control functions of parliament concerning other state bodies and thereby ensure the observance and protection of human rights.[8] The commissioner is appointed to the position and is released from the position by the State Duma in a procedure stipulated under the Federal Constitutional Act on the Commissioner for Human Rights in the Russian Federation of 26 February, 1997.[9] The establishment of the position of the commissioner for human rights promotes both the restitution of violated rights, improvement of the legislation in the field of human rights in Russia bringing that in conformity with the conventional principles and norms of international law and with the development of international cooperation in the field of human rights, legal education on the rights and freedoms of the person, on forms and methods of their protection.

The competence of the Commissioner includes consideration of complaints against decisions or actions (failure to act) of state bodies, government bodies, officials, state employees if earlier the claimants had challenged these decisions or actions (failures to act) in a judicial or administrative procedure, but disagree

[8] Khamaneva, N. J.: The Ombudsman role in contolling the observation of human rights and freedoms of citizens. In: *The Constitution of the Russian Federation... op. cit.* 141.

[9] Sobranie Zakonodatel'stva Rossiiskoi Federacii. 1997. No. 9. §. 1011.

with the decisions adopted on their claims. The act sets forth that the Commissioner shall not consider complaints against the decisions of the Chambers of the Federal Assembly of the Russian Federation and of legislative bodies of subjects of the Russian Federation (Art. 16). The act stipulates the conditions of submission of complaints concerning terms. They should be filed to the Commissioner within a year from the date of violation of the rights and freedoms of the applicant or from the day the applicant recognised their violation.

According to Art. 20, the Commissioner, by receiving the complaint, has the right:

— to submit the complaint to consideration;

— to inform the applicant about the instruments it can resort to for protection of his rights and freedoms;

— to transfer the complaint to a state body, a body of local government or official, to which the competence of the sanction of the complaint in substance pertains;

— to reject submission of the complaint to consideration.

The Commissioner shall notify the applicant about his decision in a ten days' term. In case of commencement of consideration of the complaint, the Commissioner also informs the state body, the body of local government or official about the decisions or actions (failure to act) which will be reviewed.

Under certain circumstances, the Commissioner on his own initiative has the right to arrange for protection of interests of the people within his scope of competence. Such circumstances involve: availability of information about mass or rough violation of the rights and freedoms of the citizens, and also cases that entail special public importance or circumstances related to the protection of interests of the persons who are individually not capable of resorting to legal means of protection (Art. 21).

For effective performance of functions, the Commissioner is guaranteed a scope of substantial rights. When considering the complaint he has the right:

— to visit all bodies of state authority, bodies of local government, enterprises, institutions, organizations, military objects;

— to request and receive information, documents and materials necessary for consideration of the complaint from state bodies, bodies of local government, from officials and state employees;

— to receive explanation on questions subject to consideration of the complaint from officials and state employees, except the judges;

— to carry out independently or together with competent state bodies, officials and state employees an enquiry into the activity of state bodies, bodies of local government and officials;

— to commission competent official bodies to implement expert research and reach conclusions on questions subject to consideration of the complaint;

— to be informed about criminal, civil cases and cases of administrative offences, decisions on which have entered into force; and also about cases terminated in proceedings, and about materials, initiation of criminal cases on which was rejected.

As a result of consideration of the complaint, the Commissioner has the right:

— to appeal to court with a petition for protection of rights and freedoms violated by the decision or action (failure to act) of a state body, body of local government or official, and also to participate in the trial as specified by the respective law personally or through a representative;

— to appeal to competent state bodies with a petition for initiation of a disciplinary or administrative procedure or a criminal case against the official in whose decisions or actions (failure to act) violation of human rights and freedoms are seen;

— to appeal to court or procurator with a petition for review of the decision of a court or judge, which has entered into force;

— to state the reasons to the official, who has the right both to protest and be present at the trial as a supervisor;

— to appeal to the Constitutional Court of the Russian Federation with a complaint against violation of constitutional rights and freedoms of the citizens by the law applied or subject to application in a particular case.

Conclusion

The Russian state in the 1990s paid considerable attention to the regulation of protection of environmental rights. In this respect, its policy corresponds to international approaches to the solution of environmental problems.

Significant steps have been taken to develop the environmental legislation and to create the mechanism of protection of the environment in the country. This mechanism includes the specification of environmental quality and discharge norms, environmental impact assessment, ecological expertise, ecological licences, ecological certification, ecological audit, economic measures for protection of the environment and liability under environmental law. Objectively, these instruments are to ensure observance of environmental rights.

In practice, these are not implemented in the most effective way. As a result, environmental rights are usually violated. The existing mechanism for restitution of violated environmental rights is not applied frequently, for which the main reasons are non-readiness of state bodies to protect these rights and the mentality of the Russian people.

Further tasks in this context are to develop the regulation of environmental rights, especially with respect to the rights of future generations and to provide education on environmental protection to people, officials and state employees.

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National and Ethnic Minorities in Poland—the Legal Problem of Definition

Abstract. The Polish Constitution adopted on 2 April 1997, for the first time after the war, contains a provision dedicated exclusively to protecting national and ethnic minorities, however without a definition of those two categories. The legislator extended the rights of national and ethnic minorities beyond those identified in the Article 35. The extension of such rights also results from international agreements. Thus far there is no statute regulating in a comprehensive and complete manner the situation of national and ethnic minorities (the Constitution does not make its adoption mandatory), the legal regulations concerning these issues are dispersed. The problem of legal definition of the national minority appeared in connection with the initiative of the formal recognition of the Union of People of Silesian Minority. Its application has been rejected by Polish courts for the reason of non-existence of such a minority and for the attempt of abuse of the electoral privilege granted to national minorities. The Supreme Court's position has been confirmed by the Chamber and then by the Grand Chamber of the European Court of Human Rights. However the 2002 national census revealed a new phenomenon of the Silesian minority: 3% of the inhabitants of the region declared their affinity to Silesian nationality.

Keywords: minority rights, Poland, constitutional law

I. Initial questions

Democratic political processes consequential on the fall of communism in Poland, just as in other countries of Central and Eastern Europe, initiated the appearance of postulates and requests of national minorities in the public debate. However, compared to other states where the previously dormant nationality issues erupted like a volcano (Czechoslovakia, Yugoslavia, the Soviet Union).

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Poland—a state without much national diversity[1]—should be treated as a relatively non-conflictual one.

After many years during which there were no legal regulations concerning national minorities and the state implemented an assimilation policy, the establishment of the Sejm Committee for National Minorities was crucial for recognizing the existence and expectations of minorities (in August 1989), just like the declaration of the first non-communist Prime Minister Tadeusz Mazowiecki in September 1989, when he stated that Poland is also the homeland of national minorities.

Soon, the respect for such differences and application of international standards concerning such societies was manifested in bilateral international agreements (treaties),[2] regulating the issues of national minorities and containing clauses aimed at protecting them.

Despite various degrees of specificity of the matters regulated by treaties, their common feature is the reference to international standards and the so-called

[1] The number of members of national minorities, according to results of the National Census announced in June 2003 is: out of the total number of 38,2 million citizens of Poland—173.000 Silesians, 153.000 Germans, 48.700 Belorussians, 31.000 Ukrainians, 12.000 Roma people, 1.100 Jews, 1.100 Armenians, 8000 Czechs, 500 Tartars and 50 Karaims. In other words, 96,74% of respondents declared Polish nationality, 1,23%—a nationality other than Polish, while 2,03% did not make the relevant declaration.

These data differ considerably from the estimates made in 1992, when this number according to minority organizations approx. was 1,5 million; according to governmental estimates between 900.000 and 120.000; according to estimates of the Helsinki Committee in Poland—between 860.000 and 980.000. The percentage of national minorities in the total number of inhabitants of Poland (38,45 million) was between 1,9 and 3,8%. Figures quoted after: *Report for the Secretary General of the Council of Europe on implementation by the Republic of Poland of provisions of the Council of Europe's Framework Convention for the Protection of Minorities*, Warsaw 2002; Rzepliński, A.: Położenie mniejszości narodowych w Polsce [Situation of national minorities in Poland]. In: Kłoczowski, J. (ed.): *Ochrona praw mniejszości narodowych i religijnych* [Protection of Rights of National and Religious Minorities]. Lublin, 1993. 44.

[2] Such commitments are contained in agreements with: Germany of 17 June 1991; the Czech and Slovak Federal Republics of 6 October 1991; Hungary of 6 October 1991; Ukraine of 18 May 1992; Russia of 22 May 1992; Belarus Republic of 23 June 1992; Republic of Latvia of 1 July 1992; Republic of Estonia of 2 July 1992; Kingdom of Spain of 26 October 1992; Romania of 25 January 1993; Bulgaria of 25 February 1993; Republic of Lithuania of 26 April 1994; Moldavia/Moldova of 15 November 1994; Uzbekistan of 11 January 1995; Greece of 12 June 1996. Quoted after: Janusz, G.—Bajda, P.: *Prawa mniejszości narodowych. Standardy Europejskie* [National Minority Rights. European Standards]. Warsaw, 2000. 68–69.

minority clauses, covering a wider or greater catalogue of rights in the field of protection of persons belonging to minorities concerning: the right to learn the mother tongue and to education in the mother tongue and to use this language freely in private and public life, the right to form their own associations and organizations, the freedom of contacts between the members of a given minority in the country and abroad, the right to spell forenames and surnames in the mother tongue, the right to confess and practise their own religion.[3] The persons protected by treaties may exercise these rights individually or collectively (together with other members of their group).

Until 1997 the constitutional provisions did not contain any regulations on national minorities. There were certain nationality-related criteria in Article 67 para. 2 and Article 81 of the provisions of the 1952 Constitution maintained in force by the so-called Little Constitution (constitutional act of 1992), which adopted the general principle of equality and non-discrimination.[4]

Only the Polish Constitution adopted on 2 April 1997, for the first time after the war, did contain a provision dedicated exclusively to protecting national minorities. This regulation is contained in Article 35, in the chapter concerning the freedoms, rights and obligations of a person and a citizen.

II. Constitutional regulation of national minority rights

The model of protection of national minority rights adopted in the 1997 Constitution is characterized by:

1. the general principle of equality and non-discrimination,
2. ensuring, apart from the general equality and non-discrimination, also separate protection of the rights of minority members,

[3] Janusz, G.: Regulacje prawne dotyczące ochrony mniejszości narodowych w Polsce [Legal regulations concerning national minority protection in Poland]. In: *Status prawny mniejszości narodowych w Polsce w świetle Konwencji Ramowej o ochronie mniejszości narodowych* [Legal Status of National Minorities in Poland in the Light of the Framework Convention on the Protection of National Minorities]. Warsaw, 2001. 119.

[4] The postulate of a separate regulation, one conforming to international standards, of the problems of national minorities in the Constitution was accepted almost from the very beginning of the constitutional debate. Cf. Rybczyńska, A.: Uwagi na temat statusu prawnego mniejszości narodowych w Polsce w świetle projektów konstytucyjnych lata 1989–1991 [Remarks about the legal status of national minorities in Poland in the light of constitutional drafts in the years 1989–1991]. In: *Ochrona... op. cit.* 83–89; Kallas, M.: Prace parlamentarne nad uregulowaniem statusu mniejszości w Polsce (1989–1995) [Parliamentary work on regulation of the status of minorities in Poland (1989–1995)], *Przegląd Sejmowy,* 1995, No. 3.

3. the adoption, to a certain extent, of protection of rights of communities of national and ethnic minorities.

Ad. 1. The constitutional prohibition of discrimination is formulated very widely. According to the provisions of the Constitution (Article 32 subpara. 2) no one may be discriminated against in the political, economic and social life "for any reason whatsoever", while the state authorities are under a duty to treat all persons equally. In addition, the Constitution introduces a prohibition against political parties whose programmes or activities are based upon or sanction racial or national hatred (Article 13).

Ad. 2. The contents of Article 35 of the Constitution, which concerns "national and ethnic minorities", must be analyzed in terms of: a) the notions contained in it and b) the persons enjoying protection and its scope.

The Constitution does not define the notion of minorities (national or ethnic ones).

Ad. 3. Since it is impossible to rely on a definition of "minorities" (national and ethnic ones) agreed in international law, the constitutional law doctrine[5] identifies each minority using a combination of two criteria: the subjective one—signifying the willingness of each person to identify with such a minority—and the objective one—indicating the actual existence of a minority group, distinguished by some objective features. When determining the notion of a "national or ethnic minority" such features include a distinct culture, especially language, and a well-rooted awareness of such distinctness.

In other words, you may only belong to an actually existing minority if you have the features which characterize it, but always on condition of voluntary identification with that minority. As a consequence, the notion of minority is formulated in the doctrine as "a group of citizens of the state which are distinguished from the dominant part of the society by the awareness of their national (or ethnic) membership, which may be accompanied by differences in the language, religion, customs and culture in general.[6]

[5] Garlicki, L.: *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary]. Vol. III, Chapter II: Freedoms, rights and obligations of a person and citizen, Article 35, 4.

[6] See Łoziński, S.: Przekroczyć własny cień [Cross Your Own Shadow]. In.: Berdychowska, B. (ed.): *Mniejszości narodowe w Polsce. Praktyka po 1989 roku* [National Minorities in Poland. Practice After 1989]. Warsaw, 1998. 15; Kwaśniewski, K.: Socjologia mniejszości a definicja mniejszości narodowej [Sociology of minorities and the definition of a national minority]. *Sprawy Narodowościowe*, vol. I, 1992, No. 1. 14. A similar definition of a minority as the entity that enjoys protection was adopted in Article 20, para. 1 of the 1991 Treaty with Germany.

The wording of this article, which mentions "national and ethnic minorities", proves that these are two different notions, thus each of them may be defined separately.

Here, we should mention that:

1. this distinction is not universally adopted in international law, where often only one of these terms is used, both these terms being treated as interchangeable.[7]

2. The fact that these terms are treated as interchangeable in international law does not mean that they are synonymous in Polish law. The fact that the constitution uses both of them implies that they have different meanings. Their non-synonymous nature is expressed in the Polish legislative solutions where e.g. only national (and not ethnic) minorities enjoy the privilege of relief from the consequences of electoral threshold.

3. The fact that the legislator uses both these terms requires establishing a criterion to distinguish them. Such a criterion proposed by the legal doctrine[8] to distinguish "national" from "ethnic" minorities is the criterion of "statehood", according to which a national minority is a group which forms part of a nation whose main seat is in another state, while an ethnic minority is a group distinguished from the given nation by the possession of certain specific cultural features (e.g. distinct language, dialects, customs).

Despite certain deficiencies of the above differentiation (history knows many nations deprived of their statehood), it seems that this criterion was adopted also by the Supreme Court when it ruled on the inadmissibility of registration of the Union of People of Silesian Nationality, which will be discussed in detail later on.

The persons who enjoy individual protection include only "Polish citizens" who belong to minorities, excluding foreign and stateless persons even if they stay in Poland.[9]

[7] Cf. Article 27 ICCPR and Article 30 of the Convention on the Rights of a Child, which concern ethnic minorities, and Article 5, para. 1 of the Convention against Discrimination in the Field of Education and Article 14 ECHR, which concern "national minorities".

[8] Winczorek, P.: *Komentarz do Konstytucji RP z dnia 2 kwietnia 1997 roku* [Commentary to the Constitution of the Republic of Poland of 2 April 1997]. Warsaw, 2000. 54–55; Łoboziński: *op. cit.*, 35. The same criterion is used in the justification for the draft Act on National and Ethnic Minorities in the Republic of Poland, *Druk Sejmowy*, No. 223.

[9] The range of persons who enjoy protection as national minorities is differently regulated in the International Covenant of Civil and Political Rights, to which Poland is a party. According to the interpretation of its provisions made by the Commission on Human Rights, members of minorities do not have to be citizens and do not even have to be permanent residents. Migrant workers or even visitors in a State-Party, including those that

The constitutionally guaranteed freedom is the possibility to maintain and develop the particular national or ethnic identity, which is expressed as the freedom to maintain and develop the particular language, maintain customs and traditions, as well as to develop the particular culture.

Apart from Article 35, also Article 27 of the Constitution concerns the language-related rights of minorities. Pursuant to this provision, "Polish shall be the official language of the Republic of Poland. This provision shall not infringe upon the national minority rights resulting from ratified international agreements".[10]

Therefore, it follows from the contents of Article 27 of the Constitution that the scope of respect for language-related rights of minorities is determined, in the event of national minorities, by international agreements. This applies especially to such an important right as the right to use one's mother tongue as an auxiliary language[11] in contacts with public authorities.

The constitutional freedom of maintaining customs and traditions and developing culture is connected with the constitutional safeguards of freedom of confession, ensuring religious education and upbringing to children.

In conclusion, we may state that Article 35 in combination with the remaining principles and provisions that form the system of freedoms and rights of a person allows us to formulate three general rules: the prohibition of assimilation (understood as measures taken by public authorities in order to eliminate national and ethnic diversities); the principle of equal treatment; the prohibition of discrimination.

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constitute a minority, are entitled not to be refused the enjoyment of the rights granted to minority members. Cf. Komentarz Komitetu Praw Człowieka dotyczący praw osób należących do mniejszości chronionych [Commentary of the Human Rights Committee on rights of members of protected minorities]. In: *Toruński Rocznik Praw Człowieka i Pokoju, 1994–1995*. vol. 3, Toruń, 1996. 119.

[10] Regardless of this provision, Article 87 of the Constitution contains a general provision recognizing ratified international agreements as a source of law in Poland, which gives Article 22 the character of *lex specialis*.

[11] Such a possibility is envisaged in the contacts between persons that belong to minorities and administrative authorities by Article 10, para. 2 of the European Framework Convention for the Protection of National Minorities ratified by Poland. There are direct references to the issues of using a minority language as an auxiliary language in the agreements with the Czech and Slovak Republics (Article 8, para. 2) and Belarus. Bilateral agreements with Germany and Lithuania use the expression "free use of the mother tongue in the private life and publicly". For more information see Janusz: *op. cit.*, 118–122. In the current legal status, Poland has not ratified the European Charter for Regional Languages, signed on 12 May 2003.

Respect for these freedoms is guaranteed by various administrative and judicial procedures—including the right to trial, the constitutional complaint, the right to apply to the Ombudsman.

The Constitution formulates also the right of groups of national and ethnic minorities to the protection of their identity, indicating their institutional rights (establishing their own educational and cultural institutions and institutions designed to protect religious identity) and procedural rights (the right to participate in the resolution of "matters concerning their cultural identity").

III. Statutory regulations of minority rights

Provisions of the Constitution do not pose any obstacles for the ordinary legislator to extend the rights of national and ethnic minorities beyond those identified in Article 35, unless this infringes upon other constitutional principles and norms. The extension of such rights may also partly result from international agreements.

In the current legal status, as there is no statute regulating in a comprehensive manner the situation of national and ethnic minorities (the Constitution does not make its adoption mandatory), the legal regulations concerning these issues are dispersed.

Despite the lack of a statute which would provide for the possibility of using in public life, apart from the official (Polish) language, minority languages as auxiliary ones, the binding Codes of Administrative, Civil and Criminal Procedure permit the use of other languages than Polish in official relationships to a limited extent (by conducting proceedings with the participation of a translator/interpreter). The Law on the System of Common Courts[12] gives a person who does not have sufficient command of Polish the right to appear before a court and speak a language known to him/her, receiving gratuitously the assistance of an interpreter.

The Polish Language Act,[13] while stating that Polish is the official language, emphasises at the same time that it "shall not infringe the rights of national and ethnic minorities" (Article 2 subpara. 2). Executing the statutory delegation, the Minister of Interior and Administration[14] established the possibility of

[12] Act of 22 July 2001, *Journal of Laws* (Dziennik Ustaw), No. 98, item 1070.

[13] Of 7 October 1999, *Journal of Laws*, No. 90, item 999.

[14] Regulation of 18 March 2002, *Journal of Laws*, No. 37, item 349 on the events when names and texts in Polish may be accompanied by versions in translation into a foreign language.

providing the names and texts in localities that have large communities of national minorities or ethnic groups with translations into a foreign language, in particular the language of the national or ethnic minorities living in the given area. Providing translations concerns the names and texts designated to be read by the public, placed on: plaques of a public utility authority or institution, in other noticeable place designated for information, in means of public transport.[15]

Currently, there are also no problems concerning the right to spell and pronounce the forenames and surnames of members of minorities in the mother tongue, even though the provision of Article 2 para. 2 subpara. 2 of the Act of 1956 on Changing Forenames and Surnames still considers non-Polish pronunciation of a surname as a valid reason for changing it.

The possibility of returning to the surnames and forenames compulsorily polonized in Poland after 1952[16] is fully recognized in judgments of the Supreme Administrative Court issued on the basis of regulations of bilateral treaties.

Similarly, there are no issues connected with the legal regulation of educational rights of national minorities.

The Act on the Educational System of 1991 obliges public schools to enable their pupils and students to maintain the sense of their national, ethnic, linguistic and cultural identity, and in particular to learn their own language, history and culture. Such education may be conducted upon the parents' application in various forms: in separate groups, branches or schools – with additional lessons of language, history and culture; in inter-school teaching teams of schools or their branches where the language of tuition is the language of the national or ethnic minority.

Detailed principles of education are now contained in the Regulation of the Minister of National Education and Sport of 3 December 2002 on the conditions and manner of performance by public schools and establishments of tasks allowing the maintenance of the sense of national, ethnic, linguistic and religious identity. Pursuant to another Regulation of the Minister of National Education, pupils or students who belong to national minorities and ethnic groups may take final secondary school examinations in Polish or in the

[15] The first event of application of the provision of the Regulation was placing the plaques of the Office and Council of Lasowice Wielkie Gmina [Municipality] (Opolskie voivodeship) in German, with the official name of the locality.

[16] Pursuant to an unpublished order of the Prime Minister of 7 September 1952.

language of the given national minority (except for examinations in the Polish language, geography and history).[17]

Even though neither the Constitution nor ratified international agreements concern the political rights of national minorities, linking them with civil rights, the Law on Elections to the Sejm and the Senate of the Republic of Poland contains a provision (introduced in 1993) that relieves national minorities from the duty to exceed the 5% electoral threshold.[18] In 2002, a provision was introduced into the Law on Elections to Municipal Councils stating that, when dividing *voivodeships* [provinces] into constituencies, grouping together *poviates* [counties] may not be grouping together in a way which violates the social links between electors belonging to national or ethnic minorities who live in the territories of these *poviates.*[19]

Minorities were granted access to mass media by a provision (Article 21 para. 1 subpara. 9) of the Radio and Television Broadcasting Act of 1992, which obliges the public radio and television stations to take into account the needs of national and ethnic minorities.[20]

Protection of minority rights in the structures of the executive power[21] was entrusted to the relevant organizational units of the Ministry of Culture (Department of Culture of National Minorities), Ministry of National Education (Department of Education and Upbringing) and Ministry of Interior and Administration (Department of Citizenship).

The Minister of Interior and Administration is responsible for the government's policy concerning national minorities. This policy is co-ordinated by the Interministerial Team for National Minorities,[22] headed by a Secretary of State delegated by the Minister. Representatives of each ministry dealing with various aspects of national minority policy participate in the Team's work.

[17] Regulation of the Minister of National Education of 21 March 2001 on the conditions and manner of evaluating, classifying and promoting pupils, students and listeners and conducting examinations and tests in public schools. *Journal of Laws,* No. 29, item 323.

[18] Act of 12 April 2001 Law on Elections to the Sejm and the Senate of the Republic of Poland, *Journal of Laws* of 16 May 2001, No. 46 item 499.

[19] *Journal of Laws,* No. 127, item 1089.

[20] Of 15 October 1992.

[21] Sora, M.: Ochrona mniejszości narodowych z perspektywy administracji rządowej [Protection of national minorities from the perspective of government administration]. In: *Status prawny... op. cit.,* 135 and foll.

[22] The Team, appointed on 6 February 2002, continues the activities of the Inter-Ministry Team for National Minorities, which existed in the years 1997–2001.

The Team is one of the opinion-giving and advisory bodies of the Prime Minister as regards developing and co-ordinating the Government's policy on minorities. The Team is serviced by the National Minorities Division, which has functioned since 2000 within the structure of the Department of Citizenship of the Ministry of Interior and Administration. The head of the Division is also the secretary of the Team for National Minorities.

Since 2000, at *voivodeship* level there are plenipotentiaries (or advisors) of *voivodes* [province governors] for national minorities.

Regardless of the legal regulations discussed above, the Parliament is working on a draft of Act on National and Ethnic Minorities in the Republic of Poland. The current[23] version of the draft, apart from a definition of national minorities, attempts to regulate in a comprehensive manner their social, educational and cultural rights.

The definition of minority proposed in the draft is similar to the definition adopted in the Central European Initiative Instrument for the Protection of Minority Rights of 1994, which means that the draft does not take into account the constitutional distinction between national and ethnic minorities.

The draft makes references to almost all principles of the Council of Europe's Framework Convention for the Protection of National Minorities, including a catalogue of rights enjoyed by national minorities, the prohibition of discrimination on national or ethnic grounds and the prohibition of assimilation. While recognizing the principle of equality of citizens, it does not exclude the possibility of conducting a policy of preference for national minorities in order to even out the chances.

In the areas inhabited traditionally or in considerable numbers by members of national minorities, the draft envisages the possibility of minority languages being treated as auxiliary languages, taking into account the possibility of spelling names of localities, authorities and streets in minority languages. A special chapter devoted to education and culture of national minorities contains regulations connected with teaching the mother tongue and education in that language, the principles concerning financing cultural events, national minorities and the tasks of radio and television broadcasts. The draft envisages also the

[23] The work on the previous draft was delayed, among other things, because of delayed ratification by Poland of the Framework Convention of the Council of Europe for the Protection of National Minorities. After ratification of the Convention in April 2000 and the Committee taking into account its provisions, the draft was again submitted by the Sejm Committee for National and Ethnic Minorities on 11 January 2002.

establishment of the Office for National Minorities headed by the Chairman, who would be responsible for implementation of the state policy on minorities.

Critics of the draft (including the government), while accepting the need to adopt the statute and the majority of solutions proposed in it, point out some deficiencies of the draft and proposals of controversial solutions.

In the government's opinion, the draft submitted for the first reading displays major content-related and legislative defects. The most important objections concern:

— lack of differentiation in the text of the draft between the notions of "national minority" and "ethnic minority" and lack of indication of the categories for membership of such minorities,

— lack of precise regulation of the principles of using minority languages as auxiliary languages in the public life. According to the government, a statutory regulation of this issue, due to both its importance for the status of minorities and novelty of the regulation, should be a comprehensive one. The statute should indicate the conditions (prerequisites) which have to be met in order for the minority language to be introduced as an auxiliary language in the given *gmina*,

— the government objected also decisively to the proposal of establishing a new central authority of government administration for minority issues—the Chairman of the Minorities Office. According to the government there are no actual grounds for such a major change of the system of protecting minority rights in the structure of the executive power and it would be sufficient to strengthen the position of the Team for National Minorities and increase the powers of the Minister of Interior and Administration.

IV. Protection of minority rights in international law

The policy of the Republic of Poland on national minorities is implemented on the basis of the internal legal order and instruments of international law, signed and ratified by Poland, which instruments set standards of protection of rights of members of national minorities. It is international law regulations that determined those standards of protection of rights of national and ethnic minorities that were the point of reference for Poland on its way back to the family of democratic states.

The Constitution of 2 April 1997 defined for the first time in an unequivocal and undisputed manner the place of international law instruments in the domestic legal order, which makes real the protection of minority rights on the

basis of international agreements. Article 87 para. 1 mentions ratified international agreements among the legal instruments binding in the Republic of Poland. This means that provisions of ratified international agreements may bind all entities in the state—they may affect the legal status of individuals, similar entities (e.g. private-law legal persons), political parties, NGOs and each segment of public authorities at central and local level. At the same time, by the introduction of the category of sources of universally binding law, the Constitution defined in an exhaustive and enumerative manner the categories of instruments on whose basis the rights, freedoms and obligations of all these entities may be regulated.[24]

According to the Constitution, a ratified international agreement, after promulgation in the Journal of Laws of the Republic of Poland, becomes part of the domestic legal order and is applied directly, unless its application depends on the enactment of a statute (Article 91 para. 1). Here, we are concerned with international agreements relating to freedoms, rights and obligations of members of national minorities, which agreements belong to the constitutional category of international agreements whose ratification requires prior consent granted in a statute (Article 89 para. 1). The Constitution defines the special place of such agreements in the domestic legal order: they take precedence over statutes if the statute cannot be reconciled with the agreement (Article 91 para. 2). The constitutional watchdog of coherence of the system of source of law is the Constitutional Tribunal, which decides *inter alia* on the conformity with the Constitution of statutes—including the statutes authorizing the President to ratify a specific category of international agreements—and international agreements, and on the conformity of statutes to ratified international agreements whose ratification required prior consent granted in a statute (Article 188).

Due to the fact that previously the issue of validity of international agreements in the domestic legal order was not regulated in the fundamental law and Poland acceded, in the pre-constitutional period, to many important international agreements, relevant provisions were included in the transitional provisions of the Constitution. A principle was introduced that international agreements ratified by the Republic of Poland before the entry into force of the Constitution pursuant to the constitutional provisions in force at the time of their ratification and promulgated in the Journal of Laws are considered as ratified with prior consent granted in a statute and the provisions of Article 91 of the Constitution, quoted above, apply to them if it follows from the contents

[24] Garlicki, L.: *Polskie prawo konstytucyjne. Zarys wykładu* [Polish Constitutional Law. Reading Outline]. ed. VII, Warsaw, 2003. 126.

of the international agreement that they concern the category of matters listed in Article 89 para. 1.

After the end of WW II and the establishment of UN system of human rights protection, Poland became a party to numerous UN documents which regulate the status of minority members, including: Universal Declaration of Human Rights, UNESCO Convention against Discrimination in Education, International Convention on Liquidation of All Forms of Racial Discrimination, Convention on the Prevention and Punishment of the Crime of Genocide, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, as well as the Convention on the Rights of the Child, ILO Convention on Discrimination in Respect of Employment and Occupation. Poland opted also for the resolution of the Commission on Human Rights concerning the rights of members of national, ethnic, religious and linguistic minorities, adopted at 57th session of the Commission in Geneva.

Within the framework of the Organization for Security and Co-operation in Europe, Poland signed the following instruments concerning, *inter alia*, the protection of national minorities: Final Act of the Conference on Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension of CSCE and "Challenges of Change"—the Helsinki Document. It participates—as the host of the Office for Democratic Institutions and Human Rights of OSCE—in annual meetings of member States, aimed at reviewing the commitments in the field of human rights and developing new strategies, including the preparation of effective aid for Roma people.

National minorities issues are one of the topics discussed at all meetings of the Wyszehrad Group (including in Bratislava in 1999, in Budapest in 2000, in Prague in 2000 and in Warsaw in 2001). Discussions concern legal solutions devised to protect minorities and, in particular, experiences of implementation of minority programmes in each state. Within the framework of another regional group, the Central European Initiative, in 1995 Poland became a signatory of a now, within the framework of the CEI Working Group on Minorities, it document entitled "CEI Instrument for the Protection of Minority Rights", and participates in cooperation and exchange of experiences with partners from the region.

Since 1989, the strategic objective of Poland's foreign policy has been membership of the European Union. These efforts have been crowned with the signature of the Accession Treaty on 16 April 2003. Before this took place, Poland, like other candidate states, was obliged to meet specified requirements, including political ones, determined in the conclusions of the European Council in Copenhagen in June 1993. One of the important conditions was observance of national minority rights. In the course of harmonization activities,

Poland was evaluated by the European Commission from the point of view of its preparedness for accession. It should be stressed that only two states, Poland and Cyprus, were considered as states conducting proper policies on national and ethnic minorities (mainly Roma people). The European Commission considered that Polish legislative and executive powers function properly from the point of view of national minority protection.

The Republic of Poland has been a party to the Framework Convention for the Protection of National Minorities since 1 April 2001. Ratification documents were submitted to the Secretary General of the Council of Europe together with the interpretation declaration adopted by the Council of Ministers of Poland. The declaration states, inter alia, that in view of lack of a definition of national minority in the Framework Convention, the Republic of Poland interprets this term to denote national minorities inhabiting the territory of Poland, whose members are Polish citizens. This understanding of national minorities corresponds to the wording of Article 35 of the Constitution.

The principle of reciprocity is the basis for international law commitments concerning the rights and freedoms of national minorities resulting from bilateral agreements between Poland and other states, particularly neighbouring states (cf. footnote 2). The fact that legal regulations concerning the status of each minority are dispersed in bilateral agreements results in their differentiation, despite their basic conformity to European standards. Naturally, minorities without a "mother state"—Roma people or Karaims—are deprived of protection in such agreements.

V. Problem of the Silesian minority in case law of domestic courts and ECHR

The initiative of recognition of a distinct Silesian nationality emerged in 1995, at the meeting of an association called the Movement for the Autonomy of Silesia. The pioneer of separation of the Silesian nationality was also priest Arkadiusz Wuwer from Tychy, who in 1996 sent an inquiry to the Ministry of Interior whether Silesian nationality existed. The answer was that, due to lack of a precise definition of a nation in Polish law, everyone had the right to feel who they wished. Priest Wuwer sent the letter from the ministry together with a declaration on membership of the Silesian nationality to his mother *gmina* requesting that it be included in his personal files.

In 1996 the *Voivodeship Court* in Katowice received an application for registration of the Union of People of Silesian Nationality pursuant to the Act—

Law on Associations.[25] According to the submitted memorandum of association of the Union, its objectives included the protection of ethnic rights of persons of Silesian nationality (Para. 7), and there was a provision that each person of Silesian nationality was eligible to become an ordinary member of the Union (Para. 10). Paragraph 30 stated that the Union was an organization of the Silesian national minority.

In June 1997, the District Court of Katowice registered it in spite of the negative opinion of the *voivode*. The voivode questioned the provision of the memorandum of association that the Union is an organization of the Silesian national minority, while such a nationality does not exist (only an ethnic group, if anything), therefore the court registered something that did not exist. In addition, the *voivode* pointed out that the memorandum of association did not contain a definition of a "person of Silesian nationality", as a result of which the membership of this nationality was left to an arbitrary decision of the Union's authorities, which was inconsistent with the Law on Associations.

The Appeal Court of Katowice supported the *voivode*'s opinion, holding that Silesians could not be treated as a national minority, but only an ethnic group. It ruled that a national minority to which one wishes to belong and with which the given person identifies himself/herself must objectively exist. One cannot determine one's national identity without reference to the basic precondition which is the existence of the nation. And the nation exists when the general public has no doubts as to its existence.[26]

The Supreme Court dismissed the cassation appeal filed by the would-be Union of People of Silesian Nationality and upheld the decision of the Appeal Court. It found that registration of the Silesian nationality would infringe the law, because "non-existent minority" would enjoy the privileges of national minorities, adding that Silesians were not a national minority, but an ethnic one. As we have already mentioned, both these definitions are still missing in Polish law. Even though, on the day of issue of the judgment, Poland was not yet bound by the Framework Convention on National Minorities, the Supreme Court referred to an explanatory report to this Convention of 1995, which provides that the individual's subjective choice of the nation is inseparably linked to objective criteria relevant to the person's national identity. This means that a subjective declaration of membership of a specific nationality groups implies prior social acceptance of the existence of such a nationality group. Therefore even though an individual has the right of subjective choice

[25] Act of 7 April 1989—Law on Associations, *Journal of Laws*, 1989, No. 20, item 104.

[26] Judgment of the Appeal Court of Katowice of 24 September 1997, I ACa 493/97.

of nationality, this does not directly lead to the emergence of a new, distinct nationality or national minority.

The Supreme Court confirmed also that, contrary to appellants' statements, refusal to register the Union did not infringe Poland's international commitments, because neither the International Covenant on Civil and Political Rights nor the European Convention on the Protection of Human Rights and Fundamental Freedoms provides for unlimited freedom of association.[27]

Having exhausted the domestic instance procedure, in 1999 the would-be members of the Union of People of Silesian Nationality filed a complaint to the European Commission on Human Rights in Strasbourg that the Republic of Poland violated Article 11 of the European Convention on Human Rights—freedom of association. They considered that Polish courts abused the right to assess whether a given—Silesian in this case—nationality exists. After entry into force of Protocol 11 to the Convention, the application was referred to the Court for examination.

In the judgment of 20 December 2001, ECHR supported the arguments of the Polish government. It pointed out that the applicants' real motive for registration was to benefit from electoral preferences. It declared that "rights and freedoms of individuals or groups may be limited so as to ensure greater stability of the country as a whole, including its democratic electoral system." However, it stressed, referring to the existing case law, that the restrictions on freedom of association admissible under Article 11 should be interpreted narrowly.

ECHR did not express its opinion whether Polish courts had the right to examine the existence of Silesian nationality. It found, however, that as Polish law did not provide for any procedure whereby a national minority could seek recognition, for groups not recognized as minorities by bilateral treaties the only way was the procedure of registration of the relevant association. Consequently, it criticized the Polish state for the lacuna in the law as regards registration of membership of a minority, which left a sense of uncertainty for individuals and forced them to make use of a procedure designed for a different purpose.[28]

The Silesian unionists appealed against the judgment. The case was referred to the Grand Chamber of ECHR on 2 July 2003 and examined as the first case against Poland according to the appeal procedure. The Silesians pointed out that refusal to register their union was justified by mere suspicions and suppositions as to the future, that is uncertain, activities of the union including the use thereof to abuse electoral privileges. The appellants put forward an opinion that registration of an union or association is not the same as the registration of an

[27] Judgment of the Supreme Court of 18 April 1998, I PKN 4/98.

[28] *Case of Gorzelik and Others v. Poland. Application No. 44158/98.*

electoral committee. The committees are registered by the State Electoral College. If it refuses registration, the case may—upon application of the persons concerned—be decided upon by the Supreme Court according to the procedure determined in the electoral law. Should it turn out that the Silesians' Union abuses the law, its activities may be suspended by the *voivode* and even the association may be dissolved by the court. So if the Court in the previous judgment found that the institution of elections should be protected against abuse, the procedures that exist in Polish law are sufficient for that purpose.

The Polish government put forward a counter-argument that registration of the union would signify legal recognition of the existence of this nationality. In turn, recognition of the existence of this nationality would have important political consequences in the light of the Law on Elections to the *Sejm* and Senate of the Republic of Poland, as its Article 134 provides for exemption from the 5% electoral threshold for committees of "registered organizations of national minorities". In its opinion, the government suggested that main objective behind the establishment of the union was to circumvent the above provisions of the Law on Elections.

Decisions on referring an appeal to the Grand Chamber of ECHR are rare. When commenting on this fact, Chairman of the Helsinki Foundation for Human Rights, Marek Nowicki, said that this meant that the previous judgment raised serious objections of the Court.[29] Marek Nowicki supported the opinion of the Union of Silesians that the sole criterion relevant for assessing whether a national minority exists should be the subjective conviction of the persons concerned that they belong to it. Therefore the state has no right to assess such membership based on objective preconditions. If fifteen persons wishes to establish the association of the minority of dwarves, the state has no right to investigate if they really are dwarves. They have the right to associate under any banner, provided they do not violate the law. And if the state wants to protect its electoral law, it should formulate it differently.

The National Census, whose results were published in June 2003, showed that the Silesian nationality is not only an artificial construction, adopted by its advocates in order to take advantage of electoral privileges.[30]

The census confirmed that Poland is a nationally homogeneous state, since 96,7% respondents declared Polish nationality. As many as 173.000 of

[29] Cf. the words quoted in the article entitled Narodowość dozwolona [Permissible nationality]. *Gazeta Wyborcza* of 30 June 2003. 9.

[30] It is symptomatic that the Chief Statistical Office, the body responsible for conducting the National Census, when publishing its results on its website uses the term "Silesian community" and not "Silesian minority".

respondents declared—for the first time in the history of censuses in Poland—they belonged to Silesian nationality. So, out of approx. 5 million inhabitants of the region, about 3% submitted declarations of membership of Silesian nationality. We know, however, that this number would be greater if there were broader awareness of the possibility of choosing this option. What came as a surprise was the number of persons declaring German nationality—153.000 in the whole country—that is, considerably smaller than estimated (including estimates of the government and the Helsinki Committee in Poland that defined their number at around 300.000).[31]

The census was preceded by a wide-ranging awareness-raising action organized by the Movement for the Autonomy of Silesia, that there was a possibility of declaring Silesian nationality in the census. In a kind of reaction to it, the German minority organization conducted a leaflet campaign in which it denied the existence of the Silesian minority.

In the National Census, respondents were asked: "What nationality do you belong to?" and the census takers were obliged to use the following definition of nationality: "Nationality is a declarative individual feature (based on a subjective feeling) of each person, expressing his/her emotional, cultural or genealogical (due to parents' origin) links with a certain nation". The nationality question was an open one, no possible categories of answers were suggested, unlike in the census conducted in Czechoslovakia standing on the verge of disintegration in 1991, when the category "Silesian nationality" was used for the first time. The definition used in the census question gives right to theoretical doubts and allows almost all ethnonyms to be accepted as answers (quite frequently the answer "European nationality" was given—sic!). These statements indicating "Silesian nationality" should be understood as a declaration of a sense of link with this ethnic group, closer than that the link with the Polish or German nations.

The declaration of national identity in the census is, by definition, unfairly simplifying: those having complex or multiple identities have to choose only one. The picture becomes simplified and deceptive, but clearer. In sociological research of a more nuanced nature than the census, over 50% of respondents in

[31] The census revealed also that in Poland there are approx. 280.000 of persons with double—Polish and German—citizenship, which constitutes slightly more than half of the number of persons declaring German nationality. The falling number of members of German nationality is connected with the gradually shrinking in each subsequent election to the Sejm support for the Social and Cultural Society of Germans in Śląsk Opolski, which enjoys the statutory exemption from electoral thresholds (from about 74.000 in 1993 to 42.000 in 2001).

the area of Śląsk Opolski [part of Silesia] declared mixed identity: Silesian and German or Silesian and Polish.[32]

If the census confirmed the new phenomenon of the Silesian minority, it should be linked with both positive and negative factors. The first category should include the fact that now, just before accession to the European Union, regional identity is becoming increasingly attractive (and it may be possible to acquire certain status and obtain economic support from the Communities), and the real attitudes of inhabitants of the region, especially the identification with their specific work ethos and the strong sense of family links. The second group includes political contestation of pauperization and economic degradation of the region (shutting down unprofitable hard coal mines, which were the main employers in Silesia), which—in Silesians' opinion—the Polish government does not try to prevent.[33]

Using sociological criteria one could hardly agree that a Silesian nation or even nationality exists. We are rather dealing with a strong ethnic group and not a fully-developed nation or even nationality, as nations usually strive for an independent state or political independence, use their own languages, have their own national territories. In the case of Silesia nobody requests separation, regional autonomy at most, there is no Silesian language but rather a groups of various dialects of the Polish language,[34] and the ethnic territory is currently divided between two states—Poland and the Czech Republic.[35]

According to European standards, a national state has full sovereignty to grant the status of a national or ethnic minority to ethnic groups that inhabit its territory. From this point of view the census results would have little significance—Polish authorities would not have to consider Silesians as a nationality. But we have to remember that another standard is the so-called self-categorization of citizens, i.e. recognition that—in accordance with Article 3 para. 1 of

[32] Cf. research by dr Danuta Berlińska quoted by Marek Świercz in the article Ślązak brzmi dumniej [Silesian sounds more proudly]. *Śląsk*, 2003, No. 8 (94), 6–7.

[33] Dziadul, J.: Narodziny narodu *[The birth of a nation]*, *Polityka*, 2003, No. 28 (2409) 20–22.

[34] Silesian dialects, unlike the language of Kashubians, a Pomeranian ethnic group that forms part of the Polish nation, were not considered as the so-called regional language within the meaning of the Council of Europe Charter of Regional or Minority Languages. However, some linguists recognize the existence of regional varieties of Polish: the above-mentioned Kashubian and Silesian. Cf. Dunn, J. A.: *The Slavonic Languages in the Post-Modern Era*. www.arts.gla.ac.uk, quoted in the judgment of the Grand Chamber of the European Court of Human Rights of 17 February 2004 in the case of Gorzelik and Others.

[35] Szczepański, M. S.: Narody, narodowości i spisowe deklaracje [Nations, nationalities and census declarations]. *Śląsk*, 2003, No. 8 (94) 8.

the Framework Convention for the Protection of National Minorities—"every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice".

In the second-instance proceedings, ECHR regarded the census results from Silesia as one of the facts of the case worth consideration and quoted them in its judgment of 17 February 2004. The judgment of the Grand Chamber was consistent with that issued in the first instance. ECHR declared that the Republic of Poland did not restrict the applicants' freedom of association as such. State authorities did not prevent the concerned parties from associating or promoting the particular minority issues, but from creating a legal person which—thanks to its memorandum of association and pursuant to the electoral law—would obtain special status and electoral preferences. The Court also pointed out that Polish courts questioned only those provisions of the articles which would grant the Union the right to electoral privileges, approving all the remaining ones. The applicants' refusal to make the necessary amendments to the memorandum of association shows, according to the Court, a clear intention to use the association for political purposes. Summarizing, the Court considered that the steps taken by the Polish State in this case were legitimized by a "pressing social need" and did not infringe the principle of proportionality, therefore refusal to register the association was within the permitted scope of restrictions on the right "necessary in a democratic society", as provided for in Article 11 para. 2 of the Convention.

Despite the clear standpoint taken by the Grand Chamber of the Strasbourg court, the case of union of people of Silesian nationality is not over. Members of the Movement for Autonomy of Silesia (whose current number is around 5.000) filed a new application to the court for registration of the Union of People of Silesian Nationality. These has been one major amendment to the memorandum of association presented to the court. Before it was to be an organization of "the Silesian national minority", while now—an association of "persons declaring they belong to the Silesian nationality", the official name remaining unchanged yet. Initiators of registration stress that they do not attempt to acquire the rights enjoyed by national minorities and that the union will not enter the political scene, but is to cultivate the culture, language and history.[36]

[36] Cf. the words of Andrzej Roczniok, who initiated the efforts to register the association, in Mniej niż mniejszość [Less than a minority], *Polityka*, No. 24 [2456] of 12 June 2004.

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Summum Ius Summa Iniuria—Comments on the Historical Background of a Legal Maxim of Interpretation

Abstract. Interpretation based on maxims of legal logic occupies an honourable place among the possible methods of legal interpretation; this being done most frequently using basic concepts originating from the classical period of Roman law, which faciliate orientation among contradictory decrees and help to clarify the meaning of legal rules. The following principles belong hereby, widely known in Modestinus's formulation but dating from the period of the *leges XII tabularum*: *„lex posterior derogat legi priori"*, the Papinian *„lex specialis derogat legi generali"*, and the *„lex primaria derogat legi subsidiariae"*. It is a basic interpretive principle, that the legal rule should be interpreted in its integrity, not by extracting certain parts of it. The following the letter of the law often leads to its evasion. During the interpretation one should take into account the legislator's intention. If this is doubtful, the more lenient solution should be preferred. All these ideas can be traced back into a highly philosophical, Celsian principle, which is—also widely accepted in contemporary legal thinking. It—declares the vocation of the Law to implement Justice, according to which *„ius est ars boni et aequi"*, the Law is an art of the Good and the Just. Out of these, the procedure called *in fraudem legis* is connected to the statement that enforcing the letter of the law often leads to inequity contradictory with the spirit of the law, i. e. injustice. Cicero also quotes this *proverbium*, already widely spread in the age of the Republic, which remained in use in his formulation until today: *„summum ius summa iniuria"*, i. e. the utmost enforcement of the law leads to the greatest injustice.

The present paper has a modest aim. It does not offer a general survey, but rather an introspection into the problem. First it enumerates the occurences of this proverb in the sources of Roman literature (I.), then it sketches the development and semantic changes of the concept of *interpretatio* (II.), next it investigates the meaning of *summum ius* in the relation of the *ars boni et aequi* principle and the concept of Justice in legal sources and Cicero's works (III.), in the end it will consider the further reaching consequences of this *proverbium* in *Adagia* by Erasmus of Rotterdam, one of the most important humanists (IV.).

Keywords: Cicero, summum ius, summa iniuria, interpretation, aequitas

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I. This idea occurs for the first time in Terence's comedy, *Heautontimoroumenos*: *„Neque tu scilicet / illuc confugies: 'Quid mea? Num mihi datumst? Num iussi? Num illa oppignerare filiam meam me invito potuit?' Verum illuc, Cherme, / dicunt: Ius summum saepe summast malitia."*[1] The situation is the as follows: Syrus asks Chermes for money, so that he could help his young master, but in order to get the sum he claims that he needs it for Chermes's daughter. The law is indoubtedly on Chermes's side, but the unconditioned clinging to the law cannot be reconciliated with the *pietas* and *clementia* expected from a Roman *pater familias*. In order to analyse the *summa malitia* turning point it is useful to peruse some meanings and the most typical occurences of the *summus–summa–summum* adjective and the different connotations of the word *malitia*. In its original meaning *summus is* the Latin equivalent of the Greek *hypathos*.[2] Varro[3] and Isidorus Hispalensis[4] use it as a grammatical technical term for the explanation of the *superlativus*, while Quintilian applies it for the description of rhetorical amplification.[5] Used figuratively, it can be encountered in many places, both with temporal meaning[6] and in relation with social status,[7] e.g. applied to the *optimates* and the *nobiles*[8] as the contradiction of the *humiles*, the *infima plebs*[9] and the *infimus ordo*.[10] Isidorus describes the word *malitia*, deriving from the word *malus*, as the evil thought of mind,[11] it occurs in the works of many auctors as the synonym of *astutia* and *calliditas*.[12] In the prologue of *Heautontimorumenos* Terence mentions *expressis verbis* the Greek type of

[1] Terentius: *Heautontimoroumenos* 792. *sqq.*

[2] Walde, A.—Hofmann, J. B.: *Lateinisches Etymologisches Wörterbuch I–II.* Heidelberg, 1954. II 630.

[3] Varro: *De lingua Latina* 8, 75.

[4] Isidorus: *Origines sive etymologiae* 1, 7, 27.

[5] Quintilianus: *Institutio oratoria* 7, 10.

[6] Plautus: *Asinaria* 534; *Persa* 33; *Pseudolus* 374; Cicero: *Cato maior de senectute* 78; Suetonius: *Tiberius* 64, 4.

[7] Plautus: *Cistellaria* 516; *Amphitruo* 77; *Captivi* 279; *Mercator* 694; *Stichus* 409; *Persa* 418; Cicero: *Tusculanae disputationes* 2, 144.

[8] Plautus: *Stichus* 492. *sq.*; *Cistellaria* 23. *sq.*; *Pseudolus* 70; *Mercator* 604; Terentius: *Heautontimoroumenos* 227. 609; *Adelphoe* 502.

[9] Plautus: *Cistellaria* 24. *sq.*; Terentius: *Eunuchus* 489; *Hecyra* 380; Cicero: *Epistulae ad Atticum* 4, 1, 5; *Philippica in M. Antonium* 2, 3.

[10] Carcaterra, A.: 'Ius summum saepe summast malitia', In: *Studi in onore di E. Volterra*, Milano 1971. IV. 631. *sqq.*

[11] Isidorus: *Differentiae* 1, 358. *Cogitatio prova mentis malitia appellatur.*

[12] Isidorus: *Origines sive etymologiae* 10, 6. *Astutus ab astu vocatus, quid est callidi et cauti nominis, qui possit sine periculo fortiter aliquid facere;. Cf.* Carcaretta: *op. cit.* 638.

his comedy,[13] which, with regard to the above cited *proverbium*, can most probably be identified with two lines by Menander,[14] though the two ideas do not correspond word for word.[15] Terence speaks about *ius*, whereas Menander mentions *nomoi*, i. e. the laws and not *dikaion*; the *synchophantés* has a slightly wider semantic meaning than *malitia*, which could be translated into Latin as *damnum*, *calumnia* or *malum*, in any way designating a content in contradiction with the spirit and destination of *ius*.[16] The *lian akribós* can be equally translated by the phrase *summo iure* or *nimis exacto quodam studio*.[17] Hence it becomes obvious that Terence heavily altered the Menandrian thought and adapted it to the circumstances of Roman legal life but preserved its basic message.[18]

Hieronymus takes his version from this Terentian *locus*: *„O vere ius summum summa malitia."*[19] A statement with similar content (*summum ius summa crux*) is formulated by Columella, when he deals with the responsibilities of the *pater familias* and the *dominus*: *„comiter agat cum colonis facilemque se prebeat, ... sed nec dominus in unaquaque re, cui colonum obligaverit, tenax esse sui iuris debet, sicut in diebus pecuniarum vel lignis et ceteris paucibus accessionibus exigendis, quarum cura maiorem molestiam quam impensam rusticis adfert. Nec sane vindicandum nobis quidquid licet, nam summum ius antiqui summam putabant crucem."*[20] So it is forbidden to deal too harshly with the colonii, the master should exercise the virtues of meekness and consideration.[21]

The *proverbium* passed into legal common knowledge in Cicero's formulation in *De Officiis*: *„Existunt saepe iniuriae calumnia quadam et nimis callida, sed malitiosa iuris interpretatione. Ex quo illud 'summum ius summa iniuria' factum est iam tritum sermone proverbium."*[22] Consequently, it is not

[13] Terentius: *Heautontimoroumenos* 4–5.

[14] Menandr. Nr. 545.

[15] About the question of contaminatio in Terence's comedies see Rieth: *Die Kunst des Menanders in den Adelphen des Terenz*. Hildesheim, 1964.

[16] Donatus: *Commentarius a. h. l. Summum ius saepe summa est malitia id enim, quod datum est, utique reddendum est, sed iure cautum est, ut filia quidquid acceperit vel filiae nomine datum fuerit, quae in familia est, non recte datum videatur. Itaque aequitatis est ut debitum solvi debeat, ius est ut sic datum reddatur: ita summum ius summa malitia.*

[17] Carcaterra: *op. cit.* 641.

[18] Carcaterra: *op. cit.* 644.

[19] Hieronymus: *Epistulae* 1, 44.

[20] Columella: *De re rustica* 1, 7, 1. *sq.*

[21] Fuhrmann, M.: Philologische Bemerkungen zur Sentenz 'Summum ius, summa iniuria', In: *Studi in onore di E. Volterra*, Milano, 1971. II. 74.

[22] Cicero: *De officiis* 1, 33.

the *ius* itself that results in *iniuria*, but the malevolent enforcement of a seemingly lawful claim is the case, when injustice is committed unter the mask of law enforcement.[23] Taking into consideration the bequeathing of the *proverbium*, one can safely assert that the Terentian and Columellian versions are more closely connected to each other than to the Ciceroniam *antithesis*, and that they represent an earlier stage in the formulation of this thought.[24] In these two authors' work the clash of the legal and moral norms becomes foregrounded, i. e. the action permitted and approved by the *ius* becomes a subject of contest from the side of the *mos*.[25] The Ciceronian formulation goes even further: it is not only the legal and ethical norm that conflict here, the collision takes place within the legal system.[26] The claim is made not only for a morally correct decision but also for the right and justified application of the law. The proverb objects to the abuse of the law, to its literal and not sensible interpretation.[27] (The phrase *factum etiam tritum sermone proverbium* could refer to the fact that Cicero himself took over the idea of *summum ius summa iniuria* from an earlier *auctor* or the practice of the *forum*. It can be also assumed that he is referring to his own rhetorical practice when he emphasises the great familiarity of the proverb, as he frequently used the *summo iure agere* and the *summo iure contendere* phrases, too.[28])

However, he greatly exceeds the requirement of equitable legal interpretation in *De legibus*, where, among other things, he analyses the connection between natural law and positive law.[29] In this work Cicero appears as legislator—as his model Plato[30] does in *Nomoi*[31]—, a thing which must have seemed extremely

[23] Bürge, A: *Die Juristenkomik in Ciceros Rede Pro Murena*, Zürich, 1974. 53; Földi A.—Hamza G.: *A római jog története és institúciói (History an Institutes of Roman Law)*, Budapest, 2004. (9th edition) 73.

[24] Stroux, J.: *'Summum ius, summa iniuria' Ein Kapitel der Geschichte der interpretatio iuris*, Berlin—Leipzig 1926. 21; Fuhrmann: *op. cit.* 1971. 74.

[25] Stroux: *op. cit.* 49.

[26] Fuhrmann: *op. cit.* 1971. 75.

[27] Büchner, K.: Summum ius summa iniuria. In: *Humanitas Romana*. Heidelberg, 1957. 102; Tomulescu, C. S.: Der juristische Wert des Werkes Ciceros. In: *Gesellschaft und Recht im griechisch-römischen Altertum*. Berlin, 1968. I. 230.

[28] Cicero: *In Verrem* 6, 4. *Non agam summo iure tecum, non dicam id quod debeam forsitan obtinere, cum iudicium certa lege sit.; Epistulae ad Atticum* 16, 15, 1. *Ego ... dubitassem fortasse utrum remissior essem an summo iure contenderem.*

[29] Tomulescu: *op. cit.* 230.

[30] Cicero: *De legibus* 1, 15.

[31] Cf. Görgemanns, H.: *Beiträge zur Interpretation von Platons Nomoi*, München, 1960; Morrow, G. R.: *Plato's Cretan City*, Princeton, 1960.

new, almost provoking indignation, because doing this he intended to reform and replace the venerated *leges XII tabularum*,[32] thus occupying the place of the nation who made these laws.[33] The first book contains considerations of legal theory, which was practically unknown in Rome in the 1st century BC. It aims at harmonizing statutory law with natural law because this was the only way Roman law could lay claim to universality.[34] From the demand of *ius naturale* neither the *comitia*, nor the *senatus* can give exemption, this being eternal and unchanging. The fundamental task of the legislator and the judge is to porceed according to this,[35] and the task of the law is to separate the lawful from the unlawful.[36] The law and the *ratio* are inseparably connected, moreover, they are each other's synonyms in a certain respect; so the law must originate directly from philosophy and not from the pretorial edict or the *leges XII tabularum*, thus it can never lose its validity.[37] He formulates in a strictly imperative mood the demand never before written down in Rome: *„Lex iusta esto!"*[38] Law must be based on Justice, which might seem trivial in itself, but Cicero had felt the lack of this condition himself; thus the law solely depends on Justice, and social cohabitation depends only on the law, this conclusion must have seemed considerably bold in ancient Rome.[39] Cicero, appearing in philosophy as a great system originator, wanted to encompass law in a system as well as in his work—unfortunately lost since then—entiteled De iure civili in artem redigendo, which does not seem to have exerted much influence on legal scholars in Rome.[40]

Returning to *summum ius summa iniuria*: it was quite common that certain maxims formulated in everyday life and transmitted through literary sources were appropriated by Law as rules of universal validity. Just as example, I enumerate hereby a couple of *proverbia* becoming *regulae iuris*.[41] Aquila

[32] Cicero: *De legibus* 2, 23. 59.

[33] Knoche, U.: Ciceros Verbindung der Lehre vom Naturrecht mit dem römischen Recht und Gesetz. In: *Cicero ein Mensch seiner Zeit*, hg. Radke, G. Berlin, 1968. 41.

[34] Hamza, G.: A ius naturale a Corpus Ciceronianumban (The ius naturale in the Corpus Ciceronianum). In: *Hereditas Ciceroniana.* Debrecen, 1995. 75. *sqq.*

[35] Cicero: *De re publica* 3, 22.

[36] Cicero: *De legibus* 2, 13.

[37] Cicero: *De legibus* 1, 18; 2, 14.

[38] Cicero: *De legibus* 1, 18.

[39] Knoche: *op. cit.* 46. *sqq.*

[40] Lübtow, U. v.: Cicero und die Methode der römischen Jurisprudenz. In: *Festschrift für L. Wenger.* München, 1944. I. 232.

[41] Carcaterra: *op. cit.* 663.

Romanus quotes the sentence *„cui quod libet, hoc licet"*,[42] which can be found in Ulpianus as *„non omne quod licet honestum est"*.[43] Publius Syrus's thought, *„lucrum absque damno alieno fieri non potest"*[44] resonates with Pomponius's rule: *„iure naturae aequum est neminem cum alterius detrimento fieri locupletiorem"*.[45] Seneca maior's sentence *„tacite loquitur; silentium videtur confessio"*[46] corresponds with Paulus's *„qui tacet, non utique fatetur: sed tamen verum est eum non negare"*.[47]

II. In order to highlight the origin and the meaning of the word *interpretatio*, let us examine the *loci* to see in what context the concept *interpres* and *interpretari* in Plautus, and other, mainly fragmentary bequethed authors of archaic Roman literature. In *Poenulus* the slave says that the speech of his master could only be made intellegible by Oedipus, who solved the enigma of the Sphinx too.[48] In *Pseudolus* the content of an undecipherable letter could be solved only by the Sybilla.[49] Both cases are concerned with the deciphering the meaning of extremely intricate texts, which can be done exclusively by *oracula*, the solvers of great predictions, of mythical secrets, so the author draws the activity of *interpretari* into the scope of religious mysteries and endows it with the meaning of decoding, of solving an enigma.[50] In *Bacchides*, the importunate messenger is made to leave in a comic fashion but with quite resolutely, by the use of very palpable means,[51] to which the messenger, who interpreted the highly paraphrased threat for himself thought it better to proceed more cautiously.[52] In Cistellaria a father makes out from the words of

[42] Aquila Romanus: *De figuris sententiarum* 27.

[43] Ulp. D. 50, 17, 144.

[44] Publilius Syrus: *Sententiae* L, 6.

[45] Pomp. D. 50, 17, 206.

[46] Seneca: *Controversiae* 10, 2, 6.

[47] Paul. D. 50, 17, 142

[48] Plautus: *Poennulus* 443. *sq. Isti ... orationi Oedipo opust coniectore, qui Sphingi interpres fuit.*

[49] Plautus: *Pseudolus* 25. *sq. Has ... credo, nisi Sibulla legerit, interpretari alium posse neminem.*

[50] Fuhrmann, M.: Interpretatio—Notizen zur Wortgeschichte, in: *Sympotica F. Wieacker.* Göttingen, 1970. 82.

[51] Plautus: *Bacchides* 595. *sq. Ne tibi hercle haud longe est os ab infortunio, ita dentifragibula haec meis manibus gestiunt.*

[52] Plautus: *Bacchides* 597. *Cum ego huius verba interpretor, mihi cautiost.*

the *hetaira* speaking with him that she seduced her son;[53] in this case it is not the enigmatic words and composition of the interlocutor where one should draw conclusions from, but it is rather the conclusion drawn from the situation, the subjective opinion that is denominated by the word *interpretor.*[54] Refreshing the interlocutor's memory, recalling a certain event can also be signified by the verb *interpretari,*[55] elsewhere the revealer, the solver of a doubtful situation, or the implementor of a plan is called the *interpres.* In the last case it is the synonym of *internuntius.*[56] Thus Plautus uses the expressions *interpres* and *interpretari* with two connotations, on the one hand in their original sense, meaning mediation, on the other hand in the sense of understanding, making to understand, a more abstact and indirect meaning; this latter meaning including a kind of irrational activity, pertaining to the realm of the *religio.*[57] This seems to be corroborated by the fragments after Plautus and before Cicero. A Pacuvian fragment connects the task of the *interpres* with the interretive activity of the *augures* and *haruspices* and it mentions a sinister *prodigium,*[58] placing the interpretive activity within the context of Roman religious institutions.[59] A fragment from a Latin translation of the *Ilias* contains a line from Agamemnon's reply to Calchas's premonition; comparing it to the Homeric text it becomes evident that *interpres* here stands for the Greek *mantis.*[60] It is also a fragment by Pacuvius, according to which the activity of the *interpretari* in the course of interpreting obscure texts is at certain times doomed to highly uncertain guesses.[61] Based on this, we can assume that in the beginning the *interpres* mediated not only between humans but also between the human and the divine sphere, so in the course of fulfilling his task, besides

[53] Plautus: *Cistellaria* 316. *sqq. Sed cum dicta huius interpretor, haec herclest, ut ego opinor, meum quae corrumpit filium. Suspiciost eam esse, utpote quam numquam videro; de opinione credo.*

[54] Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte. op. cit.* 84.

[55] Plautus: *Epidicus* 552.

[56] Plautus: *Miles gloriosus* 798. 951. *sq.* 962.

[57] Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte. op. cit.* 84.

[58] Pacuvius *v.* 80. *sqq.* (*Tragicorum Romanorum Fragmenta*, ed. Ribbeck, O., Leipzig, 1871.) *Cives, antiqui amici maiorum meum, consilium socii, augurium atque extum interpretes, postquam prodigium horriferum, portentum pavos.*

[59] About the *aurures* and *haruspices cf.* Latte, K.: *Römische Religionsgeschichte*, München, 1967. 141. 158.

[60] Matius *frg.* 2. (*Fragmenta Poetarum Latinorum*, ed. W. Morel, Leipzig 1927.) *Obsceni interpres funestique ominis auctor.; Cf. Il.* 1, 106. *sq.*

[61] Pacuv. *v.* 151. *sq.* (*Tragicorum Romanorum Fragmenta*, ed. Ribbeck, O. Leipzig, 1871.) *Nil coniectura quivi interpretarier, quorsum flexiloqua dictio contenderet.*

everyday logic he had to employ certain means belonging to the realm of the irrational as well.[62]

For the religious usage of these expressions one can find ample evidence in the *Corpus Ciceronianum* and other authors from the contemporary Roman literature; *augures*, *haruspices*, *decemviri* and Persian *magi* are mentioned as *interpretes,*[63] premonitions, miraculous and sinister signs, thunderstrucks, dreams, religious phenomena, and generally the will of the gods, all pertaining to the sphere of *religio*, constitute the object of *interpretari.*[64] In many cases the expressions *interpres* and *coniector* serve as each other's explanation, highlighting each other.[65] According to Cicero, this interpretive activity is necessary because of the obscure and doubtful nature of certain religious phenomena. It is not surprising however that the concept of *interpretatio* was eagerly connected to obscure and polisemic contents outside the circle of *religio* too, e. g. in philosophical polemic.[66]

In accordance with sacral connotations the most practical, everyday use of *interpres* can also be founded, it occurs in diplomatic, administrative, military and commercial fields too. In these cases the *interpres* is noone other than interpreter or translator. In the sources the interpreter translates word for word, *verbum pro verbo*, and in this respect he can be regarded as the contrary of the rhetor, who possibly takes over a thought from somebody else, but enriches and embellishes it with elements of style when delivering it to the audience.[67] Cicero himself used these possibilities of individualisation when he translated the speeches of Greek rhetors into Latin, an in his philosophical works with respect to the employment of Greek models.[68] Horace, giving advice to poets, in his *Ars Poecita* is against word for word translation performed in the

[62] Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte. op. cit.* 85.

[63] Cicero: *De legibus* 2, 20; *Philippica in M. Antonium* 13, 12; *De natura deorum* 2, 12; 3, 5; *De divinatione* 1, 3. 4. 46; 2, 110; Livius: *Ab urbe condita* 10, 8, 2; Gellius: *Noctes Atticae* 4, 1, 1.

[64] Cicero: *De legibus* 2, 20. 30; *De divinatione* 1, 3. 45. 92. 93. 116; *Pro M. Aemilio Scauro* 30; *De domo sua* 107; Quintilianus: *Institutio oratoria* 3, 6, 30; Plinius: *Naturalis historia* 2, 141; 7, 203; Gellius: *Noctes Atticae* 4, 1, 1; Valerius Maximus: *Facta et dicta memorabilia* 1, 5. 6.

[65] Cicero: *De natura deorum* 2, 12; *De divinatione* 1, 118; 2, 62. 66. 144; Quintilianus: *Institutio oratoria* 3, 6, 30.

[66] Cicero: *De divinatione* 1, 1166; *De natura deorum* 1, 39; Quintilianus: *Institutio oratoria* 3, 4, 3.

[67] Cicero: *De finibus bonorum et malorum* 3, 15; Hieronymus: *Epistulae* 57, 5.

[68] Cicero: *De optimo genere oratorum* 14; *De legibus* 2, 17; *De officiis* 1, 6; 2, 60; *De oratore* 1, 23; *Academica priora* 2. 1, 6; *De finibus bonorum et malorum* 1, 6.

manner of the *interpres*.[69] Quintilian challenges a poet's originality precisely because of his being an *interpres*.[70] *Interpretatio* as a technical term first occurs in rhetorics namely in *Auctor ad Herennium*'s discourse concerning rhetoric figures, according to which a kind of *geminatio*; the *conduplicatio* only differs from *interpretatio* in that the *verbum pro verbo* translation is a form-and-content.true transfer of a train of thought from a different language whereas *conduplicatio* is the same activity within a single language.[71] Quintilian does not consider the *interpretatio* to be a rhetoric figure as it was previously by Cornificius, but sees in it only an exercise to be used in the course of rhetoric training.[72] In certain cases *interpretatio* means the etymological analysis of words and the most precise rendering in Latin of the Greek technical terms, in course of which, as Cicero warns, one should avoid excessive hair splitting.[73]

It can be concluded that in the Ciceromian age the expression *interpres* was used in two clearly separable meanings. On the one hand it was used as *interpres deorum*, for the definition of the person enlightening phenomena from the sphere of *religio*, transmitting the divine will towards the human realm, on the other hand (as the religious semantic content did not entirely occupy this concept) it was used for denoting the interpreter and translator mediating in human communication by bridging linguistic impediments.[74]

As a scientific technical term, the word *interpres* first became widely used in the fields of philology and legal science. Cicero does not call the philologists *interpretes,*[75] according to Suetonius's relations however Cornelius Nepos already mentions them as *poetarum interpretes*.[76] In the field of legal science Livius remembers Tullus Hostilius as *„clemens legis interpres"*,[77] though this wording is slightly anachronistic as the king did not interpret or translate the

[69] Horatius: *Ars poetica* 133. *sq. Nec verbum pro verbo curabis reddere fidus interpres.*

[70] Quintilianus: *Institutio oratoria* 10, 1, 87.

[71] *Auctor ad Herennium* 4, 38; *Cf.* Fuhrmann: *op. cit.* 1970. 88.

[72] Quintilianus: *Institutio oratoria* 9, 3, 98; 10, 5, 5.

[73] Cicero: *De divinatione* 1, 1; *Topica* 35; *De officiis* 2, 5; *De finibus bonorum et malorum* 3, 15; Livius: *Ab urbe condita* 1, 44, 4; Seneca: *De beneficiis* 1, 3, 6; Gellius: *Noctes Atticae* 4, 9, 9; Quintilianus: *Institutio oratoria* 5, 10, 8; *Cf.* Fuhrmann: *op. cit.* 1970. 89; Flashar, H.: Formen der Aneingnung griechischer Literatur durch die Übersetzung, *Arcadia* 3. 1968.

[74] Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte. op. cit.* 91.

[75] Cicero: *De divinatione* 1, 34.

[76] Suetonius: *De grammaticis* 4.

[77] Livius: *Ab urbe condita* 1, 26, 8.

law concerning *provocatio*, he only faciliated its implementation.[78] In Pliny's *Naturalis Historia* the Ephesian Hermodoros appears as the *interpres* of the *leges XII tabularum* but it means only translator,[79] just as in Pomponius's text the mentioning of Hermodoros as *auctor* means the same.[80] However in connection with the *lex Valeria*, dating from 449 BC., conferring the status of *sacrosanctus* on the *trinuni plebis*, *aediles* and the *iudices decemviri*, Livius already speaks about the *interpretes* as a genuine legal technical term, as they tried to establish the correct interpretation of this law in long legal debates.[81] Both the explanators of the *leges XII tabularum*, driven by an archeological interest, usually searching for the meaning of a forgotten word, and the *iuris prudentes* of the near past are mentioned as *interpretes* in the 1. century BC. sources.[82] Cicero does not simply call the lawyers of his time *interpretes iuris*—as it was later used by Quintilian as the equivalent of *iuris consultus*[83]—but rather he defines the task of *interpretari* as a basic component of the *iuris consultus*'s activity, at times narrowing its scope using synonyms.[84] In *De oratore*, in the parts concerned with establishing the place and importance of the auxiliary sciences of rhetorics from the point of view of the theory of science and dialectics Cicero does not mention *interpretatio*.[85] Cicero, in his work entiteled *Brutus* — dealing with the history of Roman rhetorics — in the *loci* dedicated to his friend, one of the most outstanding lawyers of the age, Servius Suplicius,[86] makes some remarks concerning certain cases of *interpretatio* (primary highlighting its task to clarify and order obscure and doubtful states of affairs), but neglects to make its methodology and inner construction an object of scrunity; in the course of this he fails to mention the

[78] Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte. op. cit.* 92.

[79] Plinius: *Naturalis historia* 43, 21.

[80] Pomp. D. 1, 2, 2, 4.

[81] Livius: *Ab urbe condita* 3, 55, 8.

[82] Cicero: *De oratore* 1, 193; *De legibus* 2, 59; *Brutus* 144; *Philippica in M. Antonium* 9, 10; *Cf.* Fuhrmann: *op. cit.* 1970. 92. *sq.*

[83] Quintilianus: *Institutio oratoria* 3, 6, 59; *Cf.* C. 1, 14, 12, 5; 7, 4, 17. pr.; 6, 29, 4. pr.; 6, 23, 30.

[84] Cicero: *Pro Balbo* 20; *Pro Caecina* 70; *De oratore* 1, 199; *De legibus* 1, 14; *De officiis* 2, 65.

[85] Cicero: *De oratore* 1, 185–192; *Cf.* K. Barwick: *Das rednerische Bildungsideal Ciceros*, Berlin 1963. 7. *sqq.*

[86] About Servius Sulpicius Rufus see Schulz, F.: *Geschichte der römischen Rechtswissenschaft*, Weimar 1961. 65; Stein, P.: The place of Servius Sulpicius Rufus in the development of Roman legal science, In: *Festschrift für Wieacker F.*, Göttingen, 1978. 176. *sqq.*

instances of *interpretatio iuris* when the *iuris consultus* is dealing with the applicability and modes of application of perfectly clearly formulated legal texts containing decrees of general validity.[87]

In legal texts, the expression *interpres* can seldom be encountered, and not as a technical term, it usually means translator or interpreter here[88] and only in specific cases does it signify the person doing the interpretation, the one searching for the meaning of texts.[89] The derivations *interpretari* and *interpretatio* beyond any doubts mean the interpretive activity performed by lawyers and forums administrating justice. Following Fuhrmann's thematization, this interpretive activity could refer to different legal transactions (e. g. *testamenta*, *stipulationes*, *contractus*), to the laws in general, to criminal laws, to verdicts in criminal cases, imperial privileges, and certain concrete decrees resulting from the *leges XII tabularum*, other laws, the pretorial edict, *senatus consulta* and *constitutiones*.[90] In certain cases the meaning of *interpretari* ranges from interpretation to assumption and establishing.[91] Based on this, the formational and developmental process of the meaning of *interpretari* become visible. In the preclassical age, *interpretatio* often occurs in the spheres of religion and mantics, i. e. indicating the mediation between the divine and human spheres. However, from Cicero's time the latest, it became to mean the translator's and interpreter's activity, i. e. a secularised activity, mediating only between

[87] Cicero: *Brutus* 152. *Cf.* Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte. op. cit.* 96. *sq.*

[88] Ulp. D. 45, 1, 1, 6; Pomp. D. 49, 15, 5, 3; Gai. *inst.* 3, 93.

[89] Paul. D. 1, 3, 37. *Optima est legum interpres consuetudo.*

[90] *Testmenta*: Iav. D. 32, 29. pr.; Nerva D. 40, 7, 17; Pomp. 50, 16, 123; Afr. D. 28, 5, 48, 2; Gai. D. 35, 1, 16; Scaev. 40, 5, 41, 10; Pap. D. 35, 1, 72. pr.; 50, 17, 12; Ulp. D. 7, 8, 12, 2; Mod. 31, 34, 1. *Stipulationes*: Proc. D. 50, 16, 125; Cels. 45, 1, 99. pr.; Nerva D. 2, 11, 14; Pomp. D. 23, 4, 9; Maecen. D. 35, 2, 32, 2; Pap. D. 2, 15, 2; Ulp. D. 45, 1, 38, 18. *Contractus*: Iav. D. 18, 1, 77, 80. pr.; Nerva D. 2, 14, 58; Marc. D. 13, 5, 24; Pap. D. 17, 2, 81; Paul. D. 50, 17, 172. pr.; Ulp. D. 23, 4, 11. *Laws in general*: Cels. D. 1, 3, 18; Iul. D. 1, 3, 11; Paul. D. 1, 3, 23. 37; Ulp. 1, 3, 13; Mod. D. 1, 3, 25. *Criminal laws and criminal cases*: Paul. 50, 17, 155, 2; Herm. D. 48, 19, 42. *Privilegs*: Iav. D. 1, 4, 3; Paul. D. 28, 6, 43. pr. *Leges XII tabularum*: Pomp. D. 40, 7, 21. pr.; 50, 16, 120. *Leges*: Gai. D. 23, 5, 4; Scaev. D. 28, 2, 29, 6. 13; Pap. D. 48, 3, 2, 1; Paul. D. 49, 14, 40. *Edicta*: Paul. D. 13, 5, 17; Ulp. D. 12, 1, 1. pr.; 13, 5, 18, 1; 13, 6, 1, 1; 25, 4, 1, 11; 37, 12, 1, 2; 43, 3, 1, 11. *Senatus consulta*: Ulp. D. 5, 3, 20, 6; 36, 1, 1. pr.; 38, 17, 1, 6. *Constitutiones*: Marc. D. 29, 1, 25; Paul. D. 50, 15, 8, 7.

[91] Cels. D. 48, 19, 21; Nerva D. 25, 1, 15; Iul. D. 50, 16, 201; Afr. D. 47, 2, 62, 6; Pomp. D. 50, 16, 246, 1; Pap. D. 22, 1, 1, 3; Herm. D. 5, 3, 52; Gai. *inst.* 4, 72 a; Pap. D. 50, 17, 79; Ulp. D. 13, 5, 5, 6.

humans. From this time both grammar and rhetorics, and on their analogy jurisprudence, began to use it as their own technical term.[92]

III. Celsus's famous statement *„ius est ars boni et aequi"*—transmitted by Ulpianus—occurs as the opening idea of Iustinian *Digesta*, according to this, whoever intends to deal with law should first know where its name comes from. *Ius* got its name from *iustitia*—as Celsus astutely defines—law is the art of the good and the equitable.[93] Following this train of thought, Ulpianus states that lawyers should exercise their profession as a priestly vocation, because they must respect justice, propagate the knowledge of the good and the equitable, separating the legal from the illegal, the permissible from the forbidden.[94] Later Ulpianus defines justice as an unceasing and eternal effort to give everybody their due right. Therefore the commandments of the law are the following: to live decently, not to hurt anyone, to give everybody their due.[95] This definition being considerably well known, there is not need of further explanation. In concordance with this Ulpianus *expressis verbis* calls the magistrates' attention to the fact that unlawful procedures are forbidden. As far as judges are concerned—for whom it is also forbidden to proceed with partiality, prejudice, or generally incorrectly—they must keep in mind the principle of *aequitas*, especially in the cases in which their personal consideration is of greater importance.[96] The mere memorization of the legal material is not equivalent with the genuine knowledge of law, as Celsus emphasises, and he strongly blames the lawyers who do not want to consider the entire law when solving a case, and who only present an arbitrarily selected portion even while justifying their *responsa*.[97] The *„suum cuique tribuere"* principle is in remarkable resonance with that locus of Cicero's *Topica* which defines the *ius civile* as the *aequitas* established for the people living in the same state with

[92] Fuhrmann: *Interpretatio—Notizen zur Wortgeschichte. op. cit.* 99. *sq.*

[93] Ulp. D. 1, 1, 1. *Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi.*

[94] Ulp. D. 1, 1, 1. *Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus, et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicto discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes.*

[95] Ulp. D. 1, 1, 10. *Iustitia est constans et perpetua voluntas suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*

[96] Ulp. D. 47, 10, 32; 5, 1, 15, 1; Gai. D. 50, 13, 6; C. 3, 1, 13, 6; Tryph. D. 16, 3, 31. pr.

[97] Cels. D. 1, 3, 17. 24. *Cf.* Polaček, A.: Ius est ars aequi et boni. In: *Studi in onore di A. Biscardi.* Milano, 1982. II. 27. *sq.*

the scope of preserving their goods.[98] Regarding the *Corpus Ciceronianum*, in the speech delivered in defence of L. Licinius Murena, this contradiction is throughly highlighted: in connection with certain legal institutions of marital law (*coemptio tutelae evitandae causa*, *coemptio sacrorum interimendorum causa*),[99] which became empty and troublesome by the time of Cicero, the rhetor formulates:[100] *„In omni denique iure civili aequitatem relinquerunt, verba ipsa tenuerunt."*[101] So, criticism is not directed against the keystone of the state, the laws,[102] only against legal practitioners and their methods of interpretation.

The loci from the *Corpus Ciceronianum* referring to *aequitas*—with special regard to Cicero's theoretical works—can be classified in the following categories.[103] In certain cases *aequitas* appears as the opposite of *ius*,[104] in other cases one can find the trinity of *aequitas–ius–lex*, which divides the concept of law in a very special way.[105] On the one hand it divides justice into a *ius* based on *lex*, on the other hand into a *ius* based on *aequitas*.[106] Elsewhere—e. g. in *Pro Caecina*—*aequitas* is none other than the means of *interpretatio iuris*.[107] A third different group is constituted by the *loci* where *aequitas* is mentioned as a synonym of *ius*.[108] In his philosophical works *aequitas* appears in many thoughts as a projection, a form of *iustitia*, being the foundation of human relationships.[109] It brings us closer to our present topic of discussion if we try to trace the occurences of *aequitas* in Cicero's speeches and his correspondence. In certain characterisations it appears as a personal

[98] Cicero: *Topica* 2, 9. *Ius civile est aequitas constituta eis, qui eiusdem civitatis sunt ad res suas obtinendas.*

[99] *Cf.* Benedek, F: *Die conventio in manum und die Förmlichkeiten der Eheschließung im römischen Recht*, PTE Dolg. Pécs, 1978. 19. *sqq.*

[100] Cic. *Mur.* 27. *Mulieres omnes propter infirmitatem consilii maiores in tutorum potestate esse voluerunt, hi invenerunt genera tutorum, quae potestate mulierum continetur. Sacra interire noluerunt, horum ingenio senes ad coempionales faciendas interimendorum sacrorum causa reperti sunt.*

[101] Cicero: *Pro Murena* 27.

[102] Cicero: *De legibus* 1, 14.

[103] Ciulei, G.: Les rapports de l'équité avec le droit et la justice dans l'oeuvre de Cicéron, RHD 1968. 640. sqq..

[104] Cicero: *De inventione* 32; *Partitiones oratoriae* 28; *Pro Caecina* 36; *De oratore* 1, 56.

[105] Cicero: *Topica* 5. 7.

[106] Ciulei: *op cit.* 642.

[107] Cicero: *Partitiones oratoriae* 39; *De re publica* 5, 2.

[108] Cicero: *Topica* 2. 24; *Partitiones oratoriae* 37.

[109] Cicero: *De re publica* 1, 2; *Laelius de amicitia* 22; *De officiis* 1, 19; *Topica* 23.

characteristic feature,[110] this is the way he characterises Scipio[111] and Servius Sulpicius,[112] and he expects every Roman in office to possess this quality, he finds it particulary desirable in the case of judges.[113] At the same time *iustitia* appears only as an exception as somebody's personal feature in Ciceronian characterisations.[114] *Aequitas*, often mentioned together with *ius*, not only as its complementary, is considered an ethical norm playing an important role in the administration of law.[115] So it does not appear as the kind of equity that would give the judge the possibility to reach a decision in contradiction with written law because this way the verdict could easily become unjust, coming to a result contradictory with its aim.[116]

Let us take a quick view—following Pringsheim's statements—to the changes that the concept of *aequitas* underwent after Cicero, as the complementary and opposite of *ius*, and see how the concepts of *ius aequum* and *ius strictum* are formed.[117] The *ius aequum* adjectival construction does not mean the legal interpretation, used in an abstract sense, based on equity, but the adjective *aequus* means, both in literary and legal sources, according to its original sense, the equal right, identically available for everybody.[118] Basically, it is not the *ius* that is divided into *ius aequum* and *ius strictum*, but *aequitas* appears as a principle regulating, at times correcting *ius*, at times harmonising with it, at times constituting a contradictory principle, which however, has never been defined at the level of an abstract definition, probably due to a lack of effort.[119] In the time of the dominate *aequitas* kept gaining terrain from *ius*, a turning point in this being was Constantinus's legislation who on the one hand declared that the emperor alone is entiteled to interpret the difference between *ius* and *aequitas*, on the other hand, he made *aequitas* the synonym of *iustitia*

[110] Cicero: *Ad Quintum fratrem* 1, 1, 45.

[111] Cicero: *In Verrem* 5, 81.

[112] Cicero: *Ad familiares* 4, 4, 3; *Philippica in M. Antonium* 9, 10.

[113] Cicero: *De lege agraria* 2, 102; *Pro M. Tullio* 8; *Pro L. Valerio Flacco* 49; *Pro Cluentio* 5. 159.

[114] Cicero: *Ad familiares* 13, 28 A, 2; 13, 66, 2; *Cf.* Bürge: *op. cit.* 49. *sqq.*

[115] Cicero: *De oratore* 1, 86. 173; *Cf.* Schulz *op. cit.* 90; F. Pringsheim: Ius aequum und ius strictum, *ZSS* 42. 1921. 643. *sqq.*

[116] Cicero: *Philippica in M. Antonium* 5, 20; *De imperio Cn. Pompei* 58; *Cf.* Bürge: *op. cit.* 52.

[117] Pringsheim: 643. *sqq.*

[118] Cicero: *In Verrem* 3, 118; Livius: *Ab urbe condita* 38, 50, 9; Tacitus: *Annales* 3, 27; Seneca: *Epistulae ad Lucilium* 86, 2; Tryph. D. 29, 1, 18, 1; Paul. D. 46, 1, 55; C. 3, 36, 11; 6, 58, 15, 1.

[119] Paul. D. 50, 17, 90; 44, 4, 1, 1; Ulp. D. 2, 14, 52, 3. *Cf.* Pringsheim: *op. cit.* 644.

and *ius iustitiaque*, ranking these above *ius (strictum)*.[120] This idea was later taken over by Iustinian legal science, so the sources reflect the clear dominance of *aequitas*, to which the concepts of *humanitas*, *iustitia*, *benignitas*, *utilitas* and *bona fides*[121] are associated,[122] leaving to ius the meaning of strict, limited and—*sit venia verbo*—narrow-minded law, clinging to a rigid, word for word interpretation.[123] The expression *ius strictum* cannot be found in the literary sources of the classical period, *iudicium strictum* is used as a technical term of rhetorical works.[124] In Statius's *Silvae strictae leges* are opposed with *aequum*;[125] *ius strictum* only becomes an unquestionable technical term in Iustinian's legal work.[126]

Returning to Cicero, the expressions *„summo iure agere"* and *„summo iure contendere"* indicate the use of the whole range of posibilities offered by the law,[127] which in itself does not mean legal practice contradictory with *aequitas*, its being proper or improper becomes clear only in the concrete situation. At times Cicero has the possibility to be lenient, but the hostile behaviour of the opponent can make him legitimately act against this with the strictest means of the law, keeping in mind not only his personal interests but the interests of the state as well.[128] (In connection with the *summum ius* being dependent on the specific situation, both Stroux[129] and Bürge[130] quote as a literary example, the scene from Shakespeare's *Merchant of Venice* in which, Portia as judge uses the literal, instead of the sensible interpretation of the law against Shylock, reluctant to accept the doge's more equitable proposal, finally making him withdraw.[131]) Although *aequitas* as the principle of interpretatio is not

[120] C. 1, 14, 1; C. Th. 1, 5, 3; 3, 1, 8.

[121] *Cf.* Földi A.: *A jóhiszeműség és tisztesség elve – Intézménytörténeti vázlat a római jogtól napjainkig*, PIIR IX. Budapest, 2001. (With German Summary: *Das Prinzip von Treu und Glauben – Abriß der Geschichte eines Rechtsgrundsatzes vom römischen Recht bis zur Gegenwart*) 9. 19. *sqq.*

[122] Ulp. D. 15, 1, 32. pr; Pap. D. 26, 7, 36; Paul. D. 39, 3, 25; Pap. D. 46, 6, 12.

[123] Pringsheim: *op. cit.* 648.

[124] Seneca: *Controversiae* 1. *praef.* 23; 4. *praef.* 3; Quintilianus: *Institutio oratoria* 12, 10, 52.

[125] Statius: *Silvae* 3, 5, 87. *sq. Nulla foro rabies aut strictae in iurgia leges; morum iura viris solum et sine fascibus aequum.*

[126] C. 4, 31, 14, 1; 5, 13, 1, 2; Pap. D. 5, 3, 50, 1; Paul. 13, 5, 30; Tryph. D. 23, 2, 67, 1; Pap. D. 29, 2, 86. pr.; Iav. D. 40, 7, 28. pr.; C. 3, 42, 8, 1; Gai. *inst.* 3, 18.

[127] Cicero: *In Verrem* 6, 4

[128] Cicero: *Epistulae ad Atticum* 16, 15, 1.

[129] Stroux: *op. cit.* 57.

[130] Bürge: *op. cit.* 54.

[131] Shakespeare: *The Merchant of Venice* 4, 1, 300. *sqq.*

formulated *expressis verbis* in connection with *causa Curiana*, treated by Cicero, the contradiction between *interpretatio restrictiva* and *interpretatio extensiva* being discussed here, regarding its content, it seems to belong to its essence. The basic question concerning the facts of the case is whether the *substitutio pupillaris*[132] can also be regarded as *substitutio vulgaris,*[133] and connected to this, the question whether the so-designed heir is also the heir of the bequeather, should also be answered.[134] Q. Mucius Scaevola argued for the restrictive, L. Licinius Crassus argued for the extending interpretation. Consequently, both of them referred to *auctores* substantiating their opinion. Moreover, Crassus, employing the weapon of humor, made fun of the obsolete formulation of the legal text, thus ridiculing its restrictive interpretation.[135] (The decision made in *causa Curiana* did not prove to be of long-lasting value from the point of view of legal science, as we know about several later *sententiae* contradictory with this.[136]) As we have seen neither Cicero, nor other Roman legal scientists, basically reluctant to abstract definitions,[137] determined the uncontradictory concept of *aequitas*. Therefore the decisiveness of the attempt to solve the *scriptum–voluntas* contradiction, emphasised by Stroux in connection with the *causa Curiana,*[138] loses its validity because the *aequitas* did not act as a basic principle of judgement, but rather as a rhetorical ornament.[139] Crassus, who in the *causa Curiana* acted as *patrocinium aequitatis*, in another case proved to be the advocate of *ius strictum*. M. Marius Gratidianus sold a plot to C. Sergius Orta, from whom he had bought the same plot a few years earlier. The plot was loaded with *servitudes,*[140] about which Sergius Orta, as the former owner must have had knowledge, however, at the signing of the contract, Gratidianus did not mention the *servitutes*, though this would have been his duty.[141] In the case of *actio empti* the seller is responsible for the *dolus*, the judge had to decide whether Gratidianus proceeded *dolose* or not; the *advocati* of the parts had a great opportunity to influence the *iudex*, using rhetoric devices based on legal science.[142] As Cicero remarks too, in this case

[132] Gai. *inst.* 2, 179. *Cf.* Finazzi, G.: *La sostituzione pupillare*, Napoli, 1997.
[133] Gai. *inst.* 2, 174. *sqq. Cf.* Földi–Hamza: *op. cit.* 626.
[134] *Cf.* d'Orta, M.: *Saggio sulla 'heredis institutio', Problemi di origine*, Torino, 1996.
[135] Cicero: *De oratore* 1, 180; *Cf.* Bürge *op. cit.* 58; Schulz: *op. cit.* 95.
[136] Treb. D. 26, 2, 33; Mod. D. 28, 6, 4. pr.
[137] Iav. D. 50, 17, 202.
[138] Stroux: *op. cit.* 57.
[139] Bürge: *op. cit.* 54.
[140] *Cf.* Grosso, G.: *Le servitù prediali nel diritto romano.* Torino, 1969.
[141] Cicero: *De officiis* 3, 67.
[142] Bürge: *op. cit.* 61.

Antonius based his reasoning on *aequitas*, opposed to him, Crassus clung to the more restrictive interpretation. The appearance of these poles in the same case strongly resonates with the training practice of rhetoricians, according to which the *magister* divided the case to be discussed among the students in a way that half of them had to defend their point of view based on the *aequitas*, the other half based on *ius strictum*, then they changed the roles.[143]

In as much as we do not consider *aequitas* to be an abstract idea in these cases, but as a freely applicable rhetoric device, Cicero's rather liberal handling of the concept of *aequitas* harmonises with the other statements dealing with the essence of eloquence.[144] Within the boundaries desingated by legal science—which in a given case can mean the facts of the case, determined by the *iuris consultus*—the *orator* can freely move concentrating his attention on the task of the defence, all the more so, as he is not striving for proving the truth, but for convincing the audience of the *veri simile*.[145] (To illustrate this, Cicero tells the following example. A simple man from the country wanted to ask P. Crassus *iuris consultus* for advice, but the jurist sent him away, as he thought that he could do nothing for him. However, Servius Galba, the rhetor, presented him so many examples, parallels, arguments interlarded with humor, based on *aequitas*, and not on *ius*, in support of the *rusticus*, that the jurist—still not sharing the rhetor's point of view—had to admit that his arguments were so probable that they almost sounded like truth.[146]) The freedom of movement of the rhetor is considerably greater than that of the jurist, as Gellius puts it, he is not closely tied to the truth content of the facts.[147] The rhetor had to be able to argue for or against the same case, as this technique constituted a substantial part of rhetoric studies.[148] The difference between legal and rhetorical methods was long preserved in Rome, as Quintilian admits in his *Institutio oratoria*, in the chapter in which he emphasises the importance of the rhetor's acquiring legal knowledge.[149] In the course of time, this difference even became wider,

[143] Cicero: *De oratore* 1, 244; Quintilianus: *Institutio oratoria* 7, 6, 1; *Cf.* Schulte, H. K.: *Orator – Untersuchungen über das ciceronianische Bildungsideal*, Frankfurt a. M., 1935. 37. *sqq.*

[144] Bürge: *op. cit.* 63.

[145] Cicero: *Partitiones oratoriae* 90; *De officiis* 2, 51. *Iudicis est semper in causis verum sequi, patroni non numquam veri simile, etiam si minus sit verum, defendere.*

[146] Cicero: *De officiis* 2, 40.

[147] Gellius: *Noctes Atticae* 1, 6, 4. *Rhetori concessum est sententiis uti falsis, audacibus, versutis, subdolis, captiosis, si vero modo similes sint et possint movendos hominum animos qualicumque astu inrepere.*

[148] Cicero: *De oratore* 2, 30.

[149] Quintilianus: *Institutio oratoria* 12, 3, 2. *sqq.*

when, at the beginning of the Principate, political eloquence faltered, whereas eloquence lost its connections with jurisprudence by dealing with fictitious examples and solving more and more artificial rhetorical situations.[150]

IV. Investigating the use and explanation of the *proverbium „summum ius summa iniuria"* in Erasmus of Rotterdam seems substantiated not so much due to the historical and depth of the Erasmian interpretation—as this idea was made the object of much more through-going legal theoretical scrutiny by numerous humanists e. g. Claudius Cantiuncula, Bonifacius Amerbach or Symon Grynaeus (if only due to Erasmus's slighter interest for historical study)—, but for the immense influence over the centuries feeding on the enormous authority of this excellent humanist.[151] Without entering a more meticulous genetic and influence study of Erasmus's *Adagia*, it can be stated that from its first edition in the XVI century until the end of the XVIII century, it was used as a widely appeciateed scholary text book, thus it can be safely assumed that the *„summum ius summa iniuria" paroemia* gained considerable popularity among humanists, theologians, philosophers, as it is proved by its being frequently quoted in the most various context.[152]

As Erasmus was taking effort to perfect the *Adagia* until the end of his life, several versions and explanations of this idea are to be encountered in the Erasmian *corpus*. The first edition dating from 1500 mentions the proverb in two places,[153] first in connection with the Terentian quotation *„summum ius summa malitia"*,[154] later referring to Plato and Cicero under the title of *„ad vivum summo iure"*.[155] The text appearing in Basel in 1540,[156] but dating from

[150] Norden, E.: *Die antike Kunstprosa*, Leipzig, 1909. I. 126. *sqq.*

[151] *Cf.* Appelt, T. C.: *Studies in the Contents and Sources of Erasmus' Adagia, with Particular Reference to the First Edition, 1500, and the Edition of 1526*, Chicago, 1942.

[152] Kisch, G.: Summum ius summa iniuria. In: *Aequitas und bona fides, Festgabe Simonius*. Basel, 1955. 211.

[153] *Desyderii Herasmi Roterdami veterum maximeque insignium paroemiarum id est adagiorum collectanea*, Parrhisiis M. Iohanne Philippo Alamanno diligentissimo impressore Anno MVc.

[154] *Summum ius summa malicia. Non asscripturus eram, ut sententias non adagia dicerer conscribere, ni a servo Comino nominatim pro adagio referretur. Verum illud Cherme dicunt „Ius summum sepe summa malicia est." Quo proverbio monemur equitatem potius quam legum litteras sequi.*

[155] *Ad vivum summo iure. Id est ad cutem usque, ita loquimur nimis exactam rationem significantes, videlicet quum rem nimis acriter urgemus. Thrasymachus apud Platonem Socratem Sicophantam appellat, id est, calumniatorem, quia orationem suam ad nimis arctam rationem exigat, depravans potius recte dicta quam incautius dicta in meliorem*

1536 synthetizes every known occurence of this idea in Latin authors.[157] Before enumerating and analysing the loci, trying to avoid the charge that he includes *sententiae* instead of *adagia* i. e. proverbs Erasmus gives a long explanation, finally finding his aquittal in quoting the Terentian *nominatim*.[158]

Erasmus himself—not being a jurist—dedicated less attention to the legal *paroemia*, except a few explanations referring to Iustitia. Only four years before his death, in 1532 Erasmus became interested in juridic regulations and asked his friend, Bonifacius Amerbach in a letter to send him some material, suitable for the completion of tha *Adagia*. Then, after having received the two-page-long collection, he urged his friend to send him some more. It is highly probable that this was how the quotations provening from the Roman sources found their way into the 1540 edition of the *Adagia*.[159] In Erasmus's interpretation the *aequitas* often mentioned to highlight the *„summum ius summa*

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sensum trahens. Additque. Quare sequundum exactam rationem, quando et tu ad vivum resecas, nullus artifex peccat. Nec huic dissimile illud apud Ciceronem pro Cecinna (§ 65). Nam caeteri, inquit tum ad istam orationem decurrunt, quum se in causa putant habere equum et bonum quod defendant, si contra, verbis et literis et (ut dici solet) summo iure contenditur, solent eiusmodi iniquitanti et boni et aequi nomen dignitatemque opponere. Est igitur summo iure contendere, leges ad vivum et nimis severam rationem exigere, und et illud: Summum ius summa malicia.

[156] *Des. Erasmi Rot. Operum Secundus Tomus Adagiorum Chiliades Quatuor cum Sesquicenturia Complectens, ex postrema ipsius auctoris recognitione accuratissima, quibus non est quod quicquam imposterum vereare accessurum*, Basileae ex Officina Frobeniana AN. M.D.XL.

[157] *Summum ius summa iniuria. Summum ius summa iniuria, hoc est, tum maxime disceditur ab aequitate, cum maxime superstitiose haeretur legum literis. Id enim summum ius appellant, cum de verbis iuris contenditur, neque spectatur quid senserit is qui scripsit. Nam voces ac litterae, quasi legum summa cutis est, Eam ineptiam quorundam superstitiosorum iuris interpretum, copiose simul et eleganter illudit M. Tullius in actione pro Murena (§§ 25–27). Terentius (IV, 5, 47; v. 796), Verum illud Cherme dicunt, ius summum saepe summa malitia est. M. Tullius Officiorum libro primo (10, 33): Ex quo illud, summum ius, summa iniuria, factum est iam tritum sermone proverbium. Columella primo rei rusticae libro (7, 2): Nec sane est vindicandum nobis, quicquid licet. Nam summum ius antiqui summam putabant crucem. Citatur et Celsus adolescens libro Pandect. Quadragesimo quinto, titulo De verborum obligatione, Cap. Si servum Stichum (D. 45. 1. 91. 3, i. f.): qui scripserit quaestionem esse de bono et equo, in quo genere plerunque sub auctoritate iuris scientiae periculose erratur. Itidem Paulus libro quinquagesimo, titulo, De regulis iuris (D. 50. 17. 90): In omnibus quidem, maxime tamen in iure aequitas spectanda est. Simili figura Seneca libro De ira primo dixit, summo animo. Si intelligis non ex alto venire nequitiam, sed summo, quod aiunt, animo inhaerere.*

[158] Kisch: *op. cit.* 207.

[159] Kisch: *op. cit.* 208.

iniuria" paroemia probably did not so much mean equity as legal interpretive principle, but rather justice, that should be enforced even against the letter of the law.[160] For the explanations Erasmus usually makes appeal to antique authors generally with the exact documentation of the sources but at times without summarizing their content; the concept of *aequitas* is most often simply used in the sense of *aequum et bonum*, as the opposite of *iniquitas*, placing the spirit of the law above its letter. One can find the type of the Ciceronian pair of concepts in the Aristotelian *Ethica Nicomachea*, according to which a man can be regarded equitable, if he is satisfied with less, even if the law is on his side, and does not stick to his own justice in the detriment of others, so equity is none other than a kind of justice.[161] It is interesting though, that Erasmus does not make reference to Aristotle in the early editions of the *Adagia*. It is only the edition of 1536 and 1540, which permit us to assume that probably he had in mind the specific locus from *Ethica Nicomachea*. In these latter editions reference is made to Cicero's *Pro Murena*, instead of *Pro Caecina*, naturally, together with the classic formulation of the proverbium, which can be read in *De officiis*. We can suspect Aristotelian influence—rather on an ideological level not so much in the concrete wording—in the reference to the intention of the legislator opposed to the letter of the law.[162] The *„voces ... quasi legum cutis est"* picture, i. e. the words constitute the skin, the outward layer, is presumably Erasmus's own; Erasmus's attention to the two legal fragments by—Celsus and Paulus respectively—from the *Digesta* by Iustinian was probably called by Bonifacius Amerbach, but he used these rather as a kind of illustration without examining either their historical or dogmatic background.[163]

Reaching the end of our introspection, we can draw the following conclusions. From the maxims of legal logic as means of legal interpretation, in the present work we made the *proverbium „summum ius summa iniuria"* the object of our scrutiny, enumerating its occurences in the antique literary sources, namely in Terence, Columella then in Cicero. In this last formulation the meaning of the proverb became the most clearly crystallized, it signifies the excessive, malevolent legal practice in the course of *interpretatio iuris*, playing the letter of the law against its spirit. Following this we tried to trace the different meanings, the formation, and developmental stages of the expression *inter-*

[160] Büchner: *op. cit.* 13. *sq.*
[161] Aristoteles: *Nicomachea ethica* 1138 a
[162] Aristoteles: *Ars rhetorica* 1374 b
[163] Kisch: *op. cit.* 210.

pretatio itself, in the course of which *interpretatio*, combining *mutatis mutandis* the nuances of the religious sphere on the one hand, and those of the grammatical field on the other hand, until it reached the semantic content of interpretive activity, becoming a determinal factor by the classical age. The Celsian *„ius est ars boni et aequi" sententia* formulates one of the most general, all-encompassing basic principles of *interpretatio* meant to offer protection against the too strictly interpreted and applied *summum ius*. Although jurists never clearly defined the concept of *aequitas*, it became a very important means of legal development as a thought emerging from the interaction of iurisprudence and eloquence. By presenting the relevant loci from Erasmus of Rotterdam's *Adagia* as a typical example of the persistence of the *paroemia „summum ius summa iniuria"*, we wanted to show the way a proverb becoming *regula iuris*—apart from its direct legal application—became an integral part of today's legal common knowledge.

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BALÁZS FEKETE *

The Fragmented Legal Vocabulary of Globalisation[1]

Reflections on the book entitled Global Law Without a State

I. Preliminary observations

The impact of globalisation has fundamentally changed the regular scientific framework of social sciences that developed throughout the 19th and 20th centuries. Each of its branches has started an adaptation process related to the profoundly transformed circumstances of the global environment. In the 21st century any social fact could attain a different meaning from the regular one as a consequence of the new global conditions. It was anticipated that legal sciences, especially legal theory must integrate into his framework the impact of globalisation. Nevertheless this process of integration has started slowly and nowadays the science of legal theory has no comprehensive framework to interpret the phenomenon of globalisation.

One of the early attempts to make use of the experiences of globalisation in order to enrich the science of legal theory and legal sciences in general, is the book entitled "Global Law Without a State." It seems to be a very promising volume, and it could prove to be useful to analytically revise its conceptual background. This conceptual background probably has suggestions about the possible interpretations of the phenomenon of globalisation within the framework of legal sciences. Prior to analysing the book in further detail, it may be useful to dedicate a few sentences to the phenomenon of globalisation.

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[1] *Global Law Without a State* edited by Gunther Teubner. Aldershot-Brookfiled USA–Singapore–Sydney, Darmouth, 1997. xvii+305 p.

II. Major words of the vocabulary

A possible way to discover the volume's main theoretical statements could be via the presentation of its conceptual background, through the peculiar system of a quasi-vocabulary. The 'message' of the whole book takes shape by collecting and analysing the most important concepts of its authors. Nevertheless, being familiar with this conceptual background does not supplant a detailed knowledge of the whole book, it can only give a sketch of the most important contours.

i. Legal pluralism

The theory of legal pluralism provides for the general theoretical background of the authors' works. Therefore it is worth knowing precisely how the authors interpret this major stream of legal thinking. In his introductory study Gunther Teubner discusses in detail his own concept of legal pluralism.[2] According to Teubner the new phenomenon of global law can only be adequately explained by the above-mentioned theory, but it is necessary to transform it parallel with the new conditions of the profoundly changed global environment.[3] Since the early years of the 1940s, when the concept of legal pluralism has firstly emerged in the work of Llewellyn and Hoebel—in their volume entitled The Cheyenne Way—, and has crystallised in the 1950s through the famous researches of Pospišil, this theory has focused on the interrelationship between the different dimensions of law: the law of the state and the diverse laws of the different communities. Teubner argues that in order to make the theory of legal pluralism eligible to the explanation of the new global legal phenomena, it is necessary to reformulate its core concepts by shifting the focus from diverse groups and communities to different discourses and communicative networks.[4] By shifting the scope of legal pluralism from the communities to the communicative processes the theory is ready to adequately explain the phenomenon of global law, because it is more able to incorporate into its general background the most of the new and thus revolutionary legal phenomena. Teubner also reminds the readers that the main distinctive feature

[2] Teubner, G.: Global Bukowina: Legal Pluralism in the World Society. In: *Global Law Without a State* (ed.: Teubner, G.). Aldershot—Brookfield USA—Singapore—Sydney—Darmouth, 1997. 3–28.

[3] Teubner: *op. cit.* 4.

[4] Teubner: *op. cit.* 7.

(*distinction directrice*) of the legal phenomena is the use of the binary code: legal/illegal.[5]

With the elaboration of this new form of legal pluralism Teubner has created a comprehensible framework, which seems to be eligible—even from a narrow theoretical point of view—to the detailed research of the new global legal phenomena. Therefore it is easy to understand Jean-Philippe Robé's statement that the theory of legal pluralism is the key concept of a post-modern understanding of law.[6]

ii. Global law

As a starting point of his discussion of the nature of global law, Teubner uses the concept of 'living law' coined by Ehrilch. Quoting a statement of Ehrlich,[7] the author declares global law a *sui generis* legal order, which has its own characteristic and therefore "should not be measured against the standards of national legal systems."[8] He claims that global law does not have any structural deficiencies compared with national laws, its special characteristics distinguish it from the 'normal' law of nation states. The most characteristic feature of the global legal regime is its lack of any form of political and institutional support and its strong connection with socio-economic processes.[9] So it is a depoliticised body of rules, however, this depoliticisation does not inevitably mean that the emerging global law is value-neutral, as, for instance, some activities of MNEs proved it.[10]

How can the origin of this new legal phenomenon be determined? In his chapter Teubner rejects the 'traditional' political and institutional theories of law-making, those processes, within which the nation state plays a prominent role.[11] After rejecting the 'traditional' concepts of legal thinking, the author

[5] Teubner: *op. cit.* 14.

[6] Robé, J.-Ph.: Multinational Enterprises: The Constitution of a Pluralistic Legal Order. In: *Global Law Without a State... op. cit.* 56.

[7] "The center of gravity of legal development therefore from time immemorial has not lain in the activity of the state, but in the society itself, and must be sought there at the present time". Teubner: *op. cit.* 3.

[8] Teubner: *op. cit.* 4.

[9] *Ibid.*

[10] Peter T. Muchlinski: 'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-making community. In: *Global Law Without a State... op. cit.* 102–103.

[11] Teubner: *op. cit.* 6.

follows the above-mentioned theory of Ehrilch concerning the autonomous law-making of society. Since globalisation is reality, it has a uniquely distinctive feature: parallel with the globalisation of economic processes the emergence of a countervailing world society under the leadership of interstate politics is missing, therefore, it is a highly contradictory and fragmented process.[12] As a result of this lack of 'world politics' "global law will grow mainly from the social peripheries not from the political centres of nation states and international institutions."[13] Thus, global law does not have any contact with the traditional political institutions of law-making, it is growing out from diverse and fragmented social institutions that are actually closely coupled with the specialised—mainly economic—dimensions of globalisation.

Teubner indicates that the lack of a global political system and some global legal institutions may cause problems in the establishment of a global legal discourse. The lack of global politics shall be a serious problem because it is very difficult to imagine a global symbol of validity that is neither rooted in national laws, nor has any political support on global level.[14] At this point Teubner establishes a unique concept to solve this theoretic problem that can be termed a paradox as well. He claims that through the "deparadoxification" of the phenomenon of the so called 'self validating contract' (*contrat sans loi*) it is possible to explain how global law, that is primarily contract based, creates its own non-contractual foundations for itself. Via impressive argumentations, using the example of a special sort of commercial contracts, the so-called "closed circuit arbitration" contracts, Teubner solves this paradox through transforming the vicious circle of contractual self-validation into a virtuous cycle of two legal processes: contracting and arbitration.[15] With this "deparadoxification" Teubner proves that it is largely possible to make law without the intervention of the state into the law-making process. From this point on, a private legal order, that has global validity, is not longer unthinkable, for instance, the law of multinationals or *lex mercatoria,* both of which shall be discussed later.

Finally, the author collects four important features of the emerging legal phenomenon: (i.) the boundaries of this sort of a legal phenomenon are determined by 'invisible social networks' or 'invisible professional communities,' therefore they transcend territorial boundaries, (ii.) "global law is produced in

[12] Teubner: *op. cit.* 5.
[13] Teubner: *op. cit.* 7.
[14] Teubner: *op. cit.* 15.
[15] Teubner: *op. cit.* 16–17.

self-organized processes of 'structural coupling' of law with ongoing globalised processes of a highly specialized and technical nature,"[16] (iii.) global law is not as insulated from the on-going socio-economic processes than 'normal' national law, it is closely dependent on them, (iv.) it is necessary to preserve the variety of legal sources of the globally unified law, because a total unity of global law would become a real threat to legal culture.[17]

iii. Lex mercatoria

We can define *lex mercatoria* as a body of transnational law serving for the special purposes of world-wide economic transactions. Teubner argues that *lex mercatoria* is the most successful example of global law,[18] he indicates that this legal phenomenon incorporates all the characteristics that would be able to surpass—and to refute partly—the nation state based 'traditional' theories of law-making. *Lex mercatoria* is a paradigmatic case, and the experiences arising from it shall be important for all other emerging field of global law, therefore it is worth going into the details of this unique legal phenomenon.[19] The author expounds briefly the history of the "thirty years" war over the independence of global *lex mercatoria* and emphasises that the traditional schools of legal thought dominated by the overestimated role of the nation state—represented mainly by French and American scholars—were incapable of properly explaining the fundamental questions of global *lex mercatoria*. In order to give a proper explanation, it is necessary to break the taboo of the necessary connection of law and state. The phenomenon of *lex mercatoria* breaks down this taboo from two different directions. Firstly, it claims that 'private orders' can make law valid law, without the control and authorisation of the state. Secondly, this means that this body of legal rules—produced merely by 'private orders'—is valid outside the nation state and international relations also.[20]

At this point Teubner poses a crucial question: does a global "rule of recognition" exist for *lex mercatoria*? He claims that it is a law with an under-developed 'centre' and highly developed 'peripheres', therefore one shall look

[16] Teubner: *op. cit.* 8.
[17] Teubner: *op. cit.* 7–8.
[18] Teubner: *op. cit.* 3.
[19] Teubner: *op. cit.* 8.
[20] Teubner. *op. cit.* 10–11.

for the "rule of recognition" on these 'peripheres'.[21] So this legal regime of international business can be typified by the asymmetries of a weak institutional centre, which depends on strong socio-economic 'peripheries' stamming from the special circumstances of its global environment. As in the case of global law, Teubner here also tries to outline the main features of the examined legal phenomenon. The overriding feature is that *Lex mercatoira* is structurally coupled with economic processes, therefore it is very vulnerable to the interests and power pressure of economy. This openness might corrupt the originally value-neutral *lex mercatoria.*[22] *Lex mercatoira* seems to be an "uncoordinated ensemble of many small domains, a patchwork of legal regimes"[23] as the legal system of the *Heilige Römische Reich Deutscher Nation.* This means that commercial arbitration institutions—for instance the *Chambre de Commerce International*—are strong in the production of precedents (episodes), but they are inefficient communicatively linking them up with each other in order to produce a unified legal doctrine. Thus, the institutional background of *lex mercatoria* seems to be not as efficient and solid as the actors would need it, moreover, it is weak from the point of view of the—above mentioned—communicative links.[24] Lastly, *lex mercatoria* is a soft law mainly consisting of broad principles, not precise rules. Teubner argues that this is not a deficiency because it compensates the lack of global enforceability by making it more flexible and adaptive to the rapidly changing global circumstances and unprecedented cases.[25]

iv. Multinational enterprises

MNEs are the most important players of today's economic world order. Until the publication of this volume the *communis opinio doctorum* regarded them as major economic actors from an exclusively economic point of view. It made no attempt to develop a comprehensible framework to interpret their legal aspects. Therefore the two studies of the book dedicated to the issue can be regarded as serious efforts towards the establishment of such a framework, which can deal with the legal dimensions of the existence of MNEs. Jean-

[21] Teubner: *op. cit.* 12.
[22] Teubner: *op. cit.* 19.
[23] Teubner: *op. cit.* 20.
[24] *Ibid.*
[25] Teubner. *op. cit.* 21.

Philippe Robé[26] sets out to analyse the fundamental questions of MNEs, while Peter T. Muchlinski[27] observes MNEs as transnational law-making bodies.

The main issue of Robé's work is the nature of multinationals. According to his opinion the enterprise is only a socio-economic paradigm, not a legal concept, because it does not exist in the positive law of states. The positive national legal systems work with different concepts of legal persons (or *personnes morales*) but they never define the enterprise as an explicit legal person. Therefore Robé claims that the enterprise is an autonomous legal order, which does not need state recognition as a prerequisite to its existence. The author describes it as a unitary, closed and unique order that can define 'norms' for the persons under its jurisdiction and can create coercive means to guarantee respect for these 'norms'. Thus with the use of these mandatory internal behavioural rules the enterprise constitutes a legal order in the classical Werberian meaning.[28]

According to Robé's hypothesis, each MNE constitutes an autonomous legal order. The next question is thus given: what is the origin of this constitutive power? He argues that this situation is an unambiguous consequence of classical liberal principles, that were incorporated into all liberal constitutions. The protection of property and the acknowledgement of the freedom of contract has produced such a legal framework where enterprises and after them MNEs could be born. So the nationalisation of law never resulted in the disappearance of legal pluralism in modern nation states.[29] Hence, the power of MNEs is derived from the classical principles of liberal constitutions, and this fact opened the possibility to create autonomous legal orders that are equivalent to that of the states from a legal point of view. The internationalisation of these liberal principles facilitated the evolution of a transnational civil society, where the major players are the MNEs and—maybe—the states.[30] For instance, in the US a newly emerging constitutional order is imaginable based on the separation of powers between MNEs, states and the federal government.[31] This

[26] Robé: *op. cit.* 45–77.

[27] Muchlinski. P. T. 'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community. In: *Global Law Without a... op. cit.* 79–108.

[28] Robé: *op. cit* 52.

[29] Robé: *op. cit* 57.

[30] Robé: *op. cit* 62.

[31] Robé: *op. cit* 71.

new 'style' of the division of power illustrates how the existence of MNEs can transform the realm of traditional legal concepts and theories.

In the other above-mentioned chapter Muchlinski sets out from a statement of Teubner; the new living law of the world can be defined as "the proto law of specialized organizational and functional networks which are forming a global, but sharply limited, identity."[32] Muchlinski claims that some of the operational activities of MNEs show such a 'proto law' or 'law like' qualities, therefore it is worth examining them in detail. On the one hand the internal system of business organisations can be regarded as aspects of an emerging global law according to the meaning given by Teubner. If we think about law as communicative process based on the distinction of legal/illegal, three major groups of MNEs' internal activities can partially fall under this standard. According to Muchlinski certain cases within the managerial control, some of the contractual relations between the affiliated entities in the whole transnational network, and lastly, the adoption of intraenterprise codes of conducts as general guidance of behaviour.[33] Muchlinksi also indicates that these are not solid concepts with precise boundaries, there are many uncertainties in the interpretation of them, but some of them can be defined as cases of such a 'proto law'. If these operational activities demonstrate a considerable degree of consistency and generality of practice, these two characteristics can facilitate the acknowledgement of their 'proto law' nature. The existence of a binding duty shared by not only the directly involved persons can also strengthen the 'law like' quality of those internal activities.[34] On the other hand, MNEs can influence the external legal environment, and this activity can be an important way to convert their own 'proto law' into 'hard law' status. Henceforth, they can affect the generation of whole national and international regimes via lobbying activities.[35] A result of these influencing activities could be the emergence of a global business law that may constitute a new world order with newly born legal principles and institutions.[36]

[32] Teubner:. *op. cit.* 7.
[33] Muchlinski: *op. cit* 80–81.
[34] Muchlinski: *op. cit* 85.
[35] *Ibid.*
[36] Muchlinski. *op. cit* 86.

v. State

Although neither chapter of the book specialises on the questions of state explicitly, the studies reflect a solid attitude concerning it. Starting from the theory of legal pluralism it is unambiguous that the authors want to liberate the legal thinking from the dominance of the nation state. Before the emergence of global law the centre of gravity of law and politics obviously was in the nations state, the authors argue, but by the appearance of the first fragments of global law this situation has been seriously challenged. In consequence of the prominent role of the internal dynamics and plurality of 'global society,' moreover, its highly specialised sub-systems in the evolution of global law the traditional political theories of law are not capable any longer of understanding the global law, argues Teubner.[37] Thus, the emergence of global law could be a serious chance to rethink the role of the state in the legal thinking or in legal processes.

Talking of *lex mercatoria,* Teubner proves in detail that it is possible to create law exclusively by 'private orders' and this type of law will be valid without the recognition of the state. Mertens supports this approach when he claims that the national monopoly of law-making is a simple illusion, because the arbitrators can base their decision on the rules of *lex mercatoria* independent of state, without any material obstacles.[38] It can clearly be observed that the authors try to establish the foundations of such a legal science where the state does not have a prominent role in legal issues, it is no more than an actor in the field of law amongst many equally significant actors. In the global or world society of the future the cases of autonomous law-making—*lex mercatoria*, internal law of MNEs, and other meanwhile appearing special areas for instance the *lex sportiva internationalis*—could be much more important than the 'normal' field of law-making where the dethronised state might be involved. Following this line of thought it is easy to imagine that in the affairs of the world society of the future the state will not have any serious relevance.

The growing significance of MNEs as independent legal orders strengthens the earlier conclusion. If every MNEs constitutes an independent and unique legal order, and these legal entities are diffusing beyond and between national borders the exclusivity of state sovereignty will not be maintainable in the long run. The proliferation of international organizations as representatives of

[37] See: Teubner: *op. cit.* 5–6.

[38] See: Mertens, H.-J.: *Lex Mercatoria*: A Self-applying System Beyond National Law? In: *Global Law Without a State... op. cit.* 31–43.

partial economic interests—for example: WTO, certain free-trade zones and specialised representative bodies—has also altered the traditional 'playground' of interstate diplomacy.[39]

The main question raised by these well-founded conclusions concerning the state is the following: does the fundamental transformation of the modern context of statehood, indicated by the emergence of global society and law, follow the disappearance of the state as a general social phenomenon? It shall not be forgotten that the main characteristic of this developing global regime is the lack of any 'traditional' political background at global level, or the lack of politicisation, in accordance with Teubner. Is it possible that the dream of Engels shall be realised via the gradual emergence of global law and society? Nobody can be brave enough to answer this question with full certainty. It is only possible to indicate a contribution to the interpretation of this serious question. Statehood was never a monolithical concept, its precise outlines have changed continuously parallel to the transformation of the social context. The Greek idea of *polis* differs from the medieval concept of *regnum* and both notions differ from the modern concept of the nation state. Therefore, it is thinkable that parallel to the emergence of global law and society a new idea of the state will appear via the continuous adaptation to the radically changed global context, instead of the definitive disintegration of statehood.

III. Concluding remarks

The reviewer does not feel to be competent enough—due to his young age and relatively "inexperienced" status—to draft an overall evaluation of the above-observed book. Therefore the reader must be contented only with some special remarks.

The volume reflects the general uncertainty concerning the essence of globalisation within social sciences. With respect to the majority of the observed problems the authors did not intend to formulate as exact or definite statements as the greatest classicals of legal and political science—for example Kelsen or Duverger—have done it. But this lack of certainty—if we think about it more thoroughly—is not necessarily a serious deficiency. Moreover, it could be even considered a merit of the book. Through the indication of the terminological, interpretative or other-like difficulties the authors suggest the necessity of self-restriction in scientific attitude. In the age of globalisation the

[39] Robé: *op. cit.* 46–47.

belief in omniscience is not more than a mere—and a little bit ridiculous—illusion. In our age, when the availability of information is much more rich than ever before, the possibility of erring or at least the fact of uncertainty has to be accepted.

The editor and the authors have a consistent conceptual and philosophical background. They primarily applied the concepts and philosophical ideas of Luhman, Habermas, Foucault and Teubner. To sum up, the editorial concept of this volume is based partly on the post-modern results of social sciences and incorporates the political presuppositions of modern liberalism. This alloy of post-modernity and modern liberalism formulates a solid and sure conceptual background and ensures the unity of the authors' attitudes. Furthermore, it proves to be truly practical because the book can represent a unified attitude with solid common points contrary to many other articles or books. Solely one question remains in this respect: stamming from differing streams of thinking, take conservative ideas or the doctrine of Marxism for instance, would it is possible to arrive—at least in the major points—at similar conclusions?

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BOOK REVIEW

Földi András: **A másért való felelősség a római jogban, jogelméleti és összehasonlító polgári jogi kitekintéssel** [Vicarious Liability in Roman Law with Regard to the Legal Theory and Comparative Civil Law]. Budapest, Rejtjel, 2004. pp. 436.

It was the spring of 2004 when the book entitled *A másért való felelősség a római jogban* by Professor András Földi was published in Budapest. The author is full professor at the Department of Roman law of the Eötvös Loránd University (Budapest). The present book is András Földi's dissertation for the so-called academic doctorate. The dissertation had been submitted to the Hungarian Academy of Sciences in 2000, and it was the year 2002 when the title of academic doctorate was obtained by András Földi. Nevertheless the present book has been revised in many aspects since then, as the author took into consideration the legal literature, which has been published since 2000.

The beginnings of this research however were initiated as many as twenty years ago. András Földi has been researching this question since then, nevertheless he has been dealing with other important problems of Roman law in the past twenty years, as well. He wrote his dissertation for obtaining the degree "candidate of sciences" on questions of commercial institutions in Roman law, his monograph on this topic came out in 1997.[1] He published a book on the principle of good faith (*bona fides*) in 2001.[2] He is the co-author with Professor Gábor Hamza of the textbook of Roman law, which was published in the ninth, revised and enlarged edition in 2004.[3] Professor Földi published several articles of other questions of Roman law and contemporary civil law, too.

Regarding the present book first of all we have to underline the extremely wide range of legal literature, which is worked up in the monograph. The author has taken into consideration many important works on general—also

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[1] A. Földi: *Kereskedelmi jogintézmények a római jogban.* (Commercial Institutions in Roman Law.) Budapest, 1997. that András Földi obtained the candidate's degree in 1990.

[2] A. Földi: *A jóhiszeműség és tisztesség elve. Intézménytörténeti vázlat a római jogtól napjainkig.* (The Principle of Good Faith and Honesty. A Draft for the History of a Legal Principle from Roman Law up until the Present.) Budapest, 2001.

[3] A. Földi—G. Hamza: *A római jog története és institúciói.* (History and Institutes of Roman Law). Budapest, 2004[9].

philosophical—problems of liability for the other person's deed in Roman law and in modern civil law in several languages (German, Italian, English, French, Spanish and Hungarian). As a matter of course, the author also presents the sources of Roman Law in Latin also providing analysis based on the text of the sources. We have to state that Földi has accomplished a really thorough research on this topic. This circumstance gives the possibility for the inquiring reader to find important works on liability for other person's deed and on liability in general in the bibliography of the book. The properly edited index and bibliography is very helpful for further inquiries.

Surprising as it may seem the title of the book—without reading the subtitle—can be a little bit misleading. The book does not study merely the Roman law but contains important analysis on comparative civil law and theory of law, as well.

The monograph is divided into four chapters, and each of them has several subdivisions. The first chapter is devoted to the theoretical problems of the notions of liability, legal liability and liability for other person. The second chapter deals with the delictual liability for other person's deed in Roman law. The third chapter analyzes the question of contractual liability for other person's conduct in Roman law. The fourth chapter gives a comparative presentation on vicarious liability in some modern civil codes with special emphasis on the survival of Roman law.

I reckon that the structure of the book is very logical and makes the whole work an easy-to-read one. The first part creates a good theoretical establishment for the entire problem showing many dogmatic difficulties. The second and the third chapters can be regarded as the core of the work being a dissertation on Roman law. The last chapter can be considered as a proper proof for the inevitable relationship between modern law and Roman law. Thus, reading the last chapter the reader can be impressed by the significance of Roman law for the comprehensive study of the present-day civil law.

At the beginning of the first chapter Professor Földi presents a definition of vicarious liability. According to him one can speak about vicarious liability when somebody has to compensate the damage, which was caused by a third person illegally and—at least presumably—culpably because of the sole circumstance that this person does have a contractual or other legal relationship with the person causing the damage.

The author makes it clear that the vicarious liability is a relatively independent part of the civil law liability. Földi refers to several terms of this liability: *Dritthaftung*, *Haftung für Dritte*, *Haftung für andere*, *Haftung für fremde Schuld*, *Verantwortlichkeit für fremdes Verschulden* in German,

responsabilité du (or *pour*) *fait d'autrui* in French, *responsabilità per fatto altrui* in Italian and *vicarious liability* in English.[4] The author presents also the differences of the meanings of the various terms.

Földi takes the standpoint that the dogmatic essence of the liability for other person is the legal relationship between the person compensating and the one causing the damage. Nevertheless this relationship—which *nolente-volente* creates the liability—may have various forms.

After drafting the history of researches of Roman law on the field of vicarious liability the author provides an analysis of the question of legal liability. Földi reveals that—according to the researches of Zucker—the first appearance of the idea of liability can be found in *Persians*, which is a tragedy of Aischylos, in which the term υπευθυνος is used in the sense 'responsible'. This term is also used by several Greek writers (e.g. Demosthenes) for the liability of the leaders of the *polis*.

After introducing the most important terms for liability in Roman law, the author analyzes the evolution of the modern notion of liability (responsibility) from the Middle Ages to the emergence of the corresponding terms (responsibility, responsabilité, responsabilità) in the English, French and Italian languages in the second half of the 18th century. French *responsabilité* and German *Verantwortlichkeit*. Földi states that it was the French term that had an important role in the formation of the modern notion of responsibility.

The author describes several modern Hungarian and foreign liability-conceptions. The author presents a good summary of the newest Hungarian literature of this field: he is also familiar with the recent foreign ideas, as well. One should especially underline the theory of HART concerning the meaning of responsibility, which is also discussed by the author.[5]

Földi pays special attention to the modern Hungarian term of culpability (*felróhatóság*), which was newly interpreted by Gyula Eörsi in the Hungarian literature.[6] Accepting more or less Eörsi's conception Földi thinks that the

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[4] Concerning *vicarious liability* András Földi refers to the deep roots of this term in the English Common Law referring to the fact that the vicarious liability is recognized by the law of contracts on the basis of the *principal* and *agent* and by the law of torts in the relationship of *master* and *servant*.

[5] András Földi refers to the fact that in modern English literature *responsibility* is often used as a synonym for liability. The origin of term liability may be leaded back to the Latin verb *ligare*. The author sums up the origin and the sources of this *terminus technicus*, as well.

[6] See esp.: Eörsi, Gy.: *A jogi felelősség alapproblémái. A polgári jogi felelősség* (The Basic Problems of the Legal Liability. The Civil Law Liability). Budapest, 1961.

Hungarian technical term introduced by Eörsi is problematical as it can terminologically seem a subjective standard.

I think that the first chapter of Professor Földi's book can be also considered as an independent part from the rest of the book. As a precise and well-founded study this chapter can be used as a proper guide for those who would like to conduct further researches on the field of the notion of liability. Hence, this chapter can be very useful not only for researchers of Roman law or civil law but also for jurists, dealing with legal theory and legal philosophy, as well.

The second chapter of the book discusses vicarious liability on the field of delictal liability in Roman law. In this section of the book describes two levels of vicarious liability are distinguished, namely the noxal liability as a general form of delictal liability for others and with some special forms of the delictal vicarious liability.

It is absolutely beyond any doubts that the noxal liability is a typical example for the delictual liability for other person. In the literature of Roman law there are even opinions, which state that the clearest forms of the vicarious liability is the noxal liability. For example, Thomas writes the following in his English textbook of Roman law: " *In Roman law, however, the truest instances of vicarious liability were these of noxal liability for the acts of members of the family and of liability for animals.*"[7]

The author analyzes the so-called principle `*noxa caput sequitur*´ and mentions that the possible translation of this rule is quite problematical. András Földi refers among others to a text of Festus, in which the Latin *noxa* did even have the meaning of damage. The author also takes into consideration the dogmatic problem whether *noxae deditio* could be interpreted as *facultas alternativa.* In another context the author underlines that according to the sources of Roman law in case of concurrence between the noxal liability and the quasi-delictal liability, one has to apply the rules of the noxal liability. As a consequence of it this institution seems to be stronger concerning the vicarious liability. The author also emphasizes the theoretical problem of the culpability of the *dominus* who should be considered finally liable for the deed of the *alieni iuris.*

It is very interesting and original that Földi points out the economic arguments for *noxae deditio*, too. He explains arguments why it had been simply more economical to compensate the damages by *noxae deditio* than to pay for compensation. The author also emphasizes the theoretical problem of the

[7] See: Thomas, J. A. C.: *Textbook of Roman Law.* Amsterdam–New York–Oxford, 1976. 384.

culpability of the *dominus* who should be considered finally liable for the deed of the *alieni iuris*.

Földi presents a detailed discussion on the special forms of vicarious liability. From this I would like to underline the so called *edictum de deiectis et effusis*. According to this *edictum*—which is thoroughly analyzed by the author—the owner of a house (or apartment) was held liable for the damages caused by things, which had been thrown out or had been poured out from the window. The author describes the cultural and historical background of this institution, quoting Roman poets and other non legal sources, as well. The reader may learn that in Rome from the beginning of the 3rd century B.C. higher and higher buildings had been built, and at the same time the public services, public utilities (e.g. channels) did not follow this development. This could result that there were many cases, when the garbage, etc. had been thrown out from the window.

The author introduces the *edictum de posito et suspenso*, which regulated the liability for things suspended and placed to certain parts of the building. He mentions that only some certain parts of the building—the so-called *suggrunda* or *protectum*—fell into the scope of this *edictum*. The aim of this regulation can be reasoned with the architectural characteristics of Rome, i.e. that there were certain buildings with projections almost connecting the two buildings and almost hiding the sky. András Földi mentions that one can find even today examples for these particularities in Italian towns. The author analyses thoroughly the complicated and discussed problems of passive legitimation regarding both edicts.

I guess that these explanations of the book give a special atmosphere to the whole work by proving the close relationship between the everyday of the Roman citizen and Roman law. It helps the reader to understand the value and the role of Roman law in the Roman society, as well.

The author also pays attention to the liability of the slaves of the *publicani*, who were in charge of collecting the public taxes after leasing them from the state. As we can see the *publicani* can be regarded as predecessors of the modern factoring-companies, which deal with buying claims from creditors with the intention of enforcing them against the debtors.[8] According to Wicke the liability of the *publicanus* for his apprentice is a functionally limited liability (*funktionelle begrenzte Gehilfenhaftung*).

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[8] It is worthy mentioning that Antonio Guarino even detects the antecedents of the modern leasing-transactions in Roman law. See esp.: Guarino, A.: *Il «leasing» del gladiatori*. Index 13 (1985).

Földi discusses the liability of the sailors and landlords for their employees. In this respect we have to refer to Professor Földi's monograph, in which he—*inter alia*—deeply analyzes also the structure of the so-called *receptum nautarum cauponum stabulariorum*.[9]

It is a crucial question of Roman law how one can find the common characteristics of the *quasi-delicta*. According to Földi it is just the vicarious liability, which should be considered as a common denominator of the *quasi-delicta*. According to his original but hardly provable hypothesis the liability of *iudex qui litem suam fecit* was substituted in the postclassical age for the liability of *publicani* in the list of the four *quasi-delicts*.

In chapter three the author deals with the question of vicarious liability in the field of the *bonae fidei contractus*. In this chapter the author touches upon the real and consensual contracts except the mutuum, providing and analyzing the relevant sources. Among the real contracts he pays special attention to *commodatum*. In the case of *commodatum* it was very often the slave of the contracting party who committed a theft, which resulted in the vicarious liability. Analyzing the sources Földi draws the conclusion that the classical Roman law recognized the principle that the debtor should be considered liable for his assistant as for his own conduct. It means that if the assistant's *culpa* can be detected there is no need for the *culpa in eligendo* of the debtor.

As for the consensual contracts, Földi deals first with the famous case on a sale of a house.[10] According to the law-case the sold house was burned down because of the misconduct of the slaves of the seller. The final consequence of the legal scholar Alfenus is that the seller cannot be held liable for this damage, if he had conducted such diligence, which can be expected from honest and careful people (*homines frugi et diligentes*).

Concerning the *contractus consensuales* it is undoubtedly the *locatio conductio* where the most cases on vicarious liability appeared. One of the reasons for that is that *locatio conductio*—as it is known—included in fact many contracts. It is also relevant in this respect that in the *locatio conduction operis* there can be many assistants and other persons working for the efficiency of the whole contract. Földi shows out—based on a text of Venuleius[11]—that in case of a building contract the prime contractor is obliged to select the workers on a diligent and careful way even if it results in some loss of time for him. This is an appearance of the *diligentia in eligendo*, which idea may seem very useful for the modern building contracts, as well. As it is

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[9] See Földi: *Kereskedelmi jogintézmények a római jogban*. For details: see footnote 2.

[10] Cf. Alf. II *dig.* D. 18, 6, 12.

[11] Cf. Ven. I. *stip.* D. 45, 1, 37, 3.

known a modern building contract means a wide network of sub-contractors where the *diligentia in eligendo* should serve as an important guideline for the main contractor.

Földi devotes a detailed discussion to the very famous case on transporting columns.[12] According to this case there was a contract on transporting columns. During the transportation one of the columns was broken. The crucial point of the case is the legal relationship between the contractor and his assistants. Földi refers to several theories of the modern literature, which try to reconstruct the original view of Gaius.[13]

One should underline that concerning the *societas* it is rather the inner relationship of the parties where the liability for the other person's deed may appear. It is a consequence of the particular structure of the *societas*, as *societas*—in spite of e.g. *collegium* or *corpus*—was not recognized as a legal entity by Roman law.

Chapter 4 of Professor Földi's monograph discusses the liability for other person's deed in some modern civil codes with special regard to the survival of the Roman law traditions. The author deals with the French *Code civil*, the Austrian ABGB, the Swiss ZGB and OR, the German BGB, the Italian *Codice civile* of 1942. Professor Földi also analyzes the vicarious liability in the Hungarian private law concerning the regulations of the Draft Hungarian Code of 1928 and the Hungarian Civil Code of 1959.

The author refers to the fact that in France at the time of the *ancien régime* the term of *quasi-délits* became a synonym for the negligent damage. The influence of this can be detected in the French *Code civil* and in the French jurisprudence, as well. The author highlights that French law contains no general provision for vicarious liability (*responsabilité du fait d'autrui*) concerning contractual relationships. In French law however there are several acts which contain provisions concerning the *responsabilité du fait d'autrui* in contractual relationships. I refer as an example to the *Code de l'aviation civile* of 1967.

Földi points out that in the Austrian ABGB, in par. 1316 ff. we can see perhaps the clearest example of the survival of the quasi-delictal liability in Roman law.

Concerning German law the author describes the origin of par. 831 of BGB. This paragraph—which can be found under title *Unerlaubte Handlungen* in BGB—contains the general rule for the vicarious liability in delictal

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[12] Cf. Gai. X. *ed. prov.* D. 19, 2, 25, 7.

[13] András Földi also refers to the interpolatioinistic researches and theories of *Textstufenforschung* in connection with this case.

relationships. It is par. 278, which provides provisions for vicarious liability on the field of contract law. One should take into consideration that this rule did have influence on the Swiss *Obligationenrecht* and on the development of Hungarian private law, as well.

Regarding the Hungarian law Professor Földi sums up the most important scientific tendencies concerning vicarious liability. Thus he presents—*inter alia*—the theories of Béni Grosschmid and Géza Marton.[14] The author also analyzes the provisions of the draft Hungarian Civil Code of 1928, which shows the influence the German BGB and the Saxon Civil Code of 1863. He also outlines the provisions of the effective Hungarian Civil Code concerning vicarious liability.[15]

András Földi takes also into consideration that the composition of a new Hungarian Civil Code is under process based on the Government-Resolution 1050/1998. (IV. 24.). Therefore he enumerates those problems with which the codificators of the Code have to face regarding vicarious liability.

I think that Professor András Földi has written an excellent monograph on the questions of vicarious liability. The book contains very important information not only to Romanists and legal historians but also to jurists in general and even to historians dealing with ancient Roman history. As I have mentioned the first chapter of the book is very interesting for researchers of theory of law. At the same time this work is also very significant for lawyers, dealing with comparative law, civil law, law of the torts.

I have high hopes that I could give a brief summary of this book, which can under no circumstances substitute the reading of the whole monograph. Nevertheless it would be the most desirable if an English, a German or a French translation of the book could appear in the close future to make the entire work available for the non-Hungarian readers, as well.

Ádám Boóc

[14] In this aspect see especially: Marton, G.: *A polgári jogi felelősség* (The Civil Law Liability), (red. Zlinszky, J.). Budapest, 1992.

[15] A very important Hungarian monograph ont he contractual vicarious liability is due to Harmathy, A. Cf.: Harmathy, A.: *Felelősség a közreműködőért* (Liability for the Assistant). Budapest, 1974.

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