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CSABA VARGA*

Rule of Law between the Scylla of Imported Patterns and the Charybdis of Actual Realisation

(The Experience of Lithuania)

Abstract. Nations of Central and Eastern Europe in the near past have all faced the same dilemma: how can they manage international encouragement to adopt atlantic patterns in promise of ready-made routes with immediate success, in a way also promoting the paths of organic development, relying on own resources and potentialities that can only be gained from tradition? Or, otherwise speaking, is it feasible at all to rush forward by rapidly learning all the responses others elaborated elsewhere at a past time? Or are they expected themselves to become Sisyphus bearing his own way, at the price of suffering and bitter disillusionment? The question was not raised by each country individually in the region as not much time was left for pondering in the rapid drift of events. Anyhow, cost-free solutions adopted from without may easily lead to adverse results, far away from expectations for the time being. The principles of free market, democracy and parliamentarism–with rule of law and human rights in the background–are usually believed to offer a kind of panacea curing the basic ills in the contemporary world. Generalised experience notwithstanding, social science has to be given the chance to record–if found so–that the same staff may not work at some places where it has just recently been transplanted as it is used to work amidst its natural surrounding in the western hemisphera, not with the same cost/benefit ratio at the least. For that reason, scholarship in Central and Eastern Europe is growingly aware of the fact that what it can provide is by far not marginal feedback but the very first testing and teasing proof on social embeddedness of some ideas and ideals, deservedly fundamental for the atlantic world. Realistically speaking, not even western social development is separable from the economic reserves of the development actually run. Or, operation of any societal complexity requires resources in both social organisation and material production.

Keywords: transition, rule of law, Lithuania, open society, social balance, *ius* and *lex*, rights and duties

Having recovered from the trauma of surviving Soviet imperial socialism and compelled to open up new ways in independent state-building in parallel with the readjustment of what is left as local legal arrangement to common European standards, nations of Central and Eastern Europe all have faced the

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same dilemma: how can they manage international encouragement to adopt foreign patterns in promise of ready-made routes with immediate success, in a way also promoting the paths of organic development, relying on own resources and potentialities that can only be gained from tradition? Is it feasible at all to rush forward by rapidly learning all the responses others elaborated elsewhere at a past time? Or are they expected themselves to become Sisyphus bearing his own way, at the price of suffering and bitter disillusionment? The question was not raised by each country individually as not much time was left for pondering in the rapid drift of events. Anyhow, cost-free solutions adopted from without may easily lead to adverse results far away from expectations. By the time of awakening, however, posterior wisdom may show that there is an alternative always available, even if its practicability is not clear to those affected at the urgently given moment.

One and a half decades after the collapse of the Soviet empire we fully realise now how painful the fact is that each country embarking on dramatic changes was completely left in isolation to face its national renewal programme, drifted by accidental circumstances. Neither the consciousness nor the organisational framework of the mutual dependence of those concerned was strong enough, and Moscow as the focus was this time substituted by another centre of power, even less interested in the target countries which were just awakening either in self-esteem or as a potential counterpole.[1] In consequence, each country had to embark upon separate efforts at reform, channelled by so-called open society agencies;[2] however, as we all know, improvisation is not likely to outcome products worth of consolidation.

The early and total failure of the Hungarian efforts at coming to terms with the past[3] was only one among a few shocking episodes. This alone might have made us realise that we should not have attempted to respond to a considerably universal challenge just on our own, and perhaps a genuine transnational co-

[1] Cf. Varga, Cs.: Amerikai önbizalom, orosz katasztrófa: Kudarcot vallott keresztes-hadjárat? [American self-confidence, Russian catastrophe: failed crusade?]. *PoLísz*, 2002–2003, No. 68, 18–28.

[2] See e.g. Cohen, St.: *Failed Crusade: America and the Tragedy of Post-communist Russia.* New York, 2000 and–as a by-admission–Holmes, St.: Transitology. *London Review of Books*, vol. 23. 2001/8. 32–35.

[3] Cf. e.g. from Varga, Cs.: *Transition to Rule of Law: On the Democratic Transformation in Hungary.* Budapest, 1995. Part on Coming to Terms with the Past, 119–155. [Philosophiae Iuris.] and *Coming to Terms with the Past under the Rule of Law: The German Model.* Budapest, 1994. [Windsor Klub.] as well as A »gyökeresen gonosz« a jog mérlegén [»Radical evil« on trial]. *Magyar Jog*, vol. 49. 2002/6. 332–337.

operation might have evolved, had not been our initiative in Hungary too early, even pioneering.

*

A Lithuanian theoretical response[4] will be overviewed in the following. It is certainly not the earliest one as its the author may have learned from the experience of others.[5] Yet it is remarkably rational and systematic. For he reconsiders ancient wisdoms in the light of our days' ideals, and draws historical lessons from his Lithuanian case study by responding to the shared failures of our global new world.

The ideal of rule of law–formulated also in the preamble of the Constitution of Lithuania (1992) after she has returned to the path of independent state-building by 1990[6]–indicates a recognition according to which the unlimitedness of observing any law in a *Rechtsstaat* can be restricted by the value-centredness of a *rule of law*, which value shall be fully implemented by the principle of intervention of a *Sozialrechtsstaat* when care for "strengthening those socially weak

[4] Vaišvila, A.: *Teisinės valstybės koncepcija lietuvoje* [The Lithuanian approach to rule of law]. Vilnius, 2000. [with abstracts: Law-governed State and its Problems of the Formation in Lithuania: The Outline of State Ideology. 611–631. and Правовое государство и проблеми его становления в Литве: Поиски государственной идеологии. 632–635.]. Cf. also from Vaišvila, A.: *Conception of the State Ruled by Law in Lithuania.* (Summary of the Research Report Presented for Habilitation.) Vilnius, 2001. [The Law University of Lithuania.] as well as–in multiplication–Rechtspersonalismus (Zusammenfassung)., Die Rechtsaxiomatik oder das Modell der vier Axiome als inhaltliche Grundlage des Rechtspersonalismus., Die geometrische Formel des Rechtes als des mehrstelligen Prädikats. and Das Recht als Prozess (als das Werden). Chairholder for legal philosophy at the Faculty of Jurisprudence of the Law University of Vilnius, Professor Alfonsas Vaišvila has authored a number of books covering ranges of topics spanning from Lithuanian history of ideas (including philosophy and logic) via social compromise, liberalism, tolerance, democracy and state of law to statism as well as crime control.

[5] As a summary of the debates in Poland, see Wronkowska, Sł. (red.) *Polskie dyskusje o państwie prawa: Zarys koncepcji państwa prawnego w polskiej literaturze politicznej i prawnej* [Polish discussions on the state of law: summary of the concepts of the state of law in the Polish political and legal literature]. Warszawa, 1995. Also cf. Varga, Cs. (ed.) *Kiáltás gyakorlatiasságért a jogállami átmenetben* [A call for practicality in the transition to rule of law]. Budapest, 1998. [A Windsor Klub könyvei II.]

[6] "The Lithuanian nation strives for an open, just and harmonious civil society and a state ruled by law." The expression 'state of law' was first used in Lithuanian literature by M. Cimkauskas (1922) and described historically and systemically by M. Römeris–Teisinės valstybės organizacija. In: *Lietuvos universitetas: 1927–1928 mokslo metais.* Kaunas, 1928. 6–31.–, followed by contemporaries as P. Leonas and others.

and weakening the strong"[7] is at stake. Looking back in history, Lithuanians may now realise that their ancestors in the 16th to 17th centuries[8] had already separated–in their search for a "well-organised" and "organic" state–law [*ius*] from the laws [*lex*] and demanded law to be right (by serving everyone's good with sound reason), moreover, that the presumed original freedom which may have led to their first integrative social contract could not entitle to anarchy but only prepare for balancing. The Lithuanian Statutes (1529, 1566 and 1588) ensured an extremely all-covering rule of law for the nobility. This was even further restricted by the Polish *liberum veto*.[9] After all, the disintegration of the ruler's power and responsibility could only result in either the tyranny of nobles (as beneficiaries) against everyone or the coming of foreigners to rule (free of any limitation whatsoever) with at least some promise of order. Well, as known from history, both alternatives did subsequently materialise in Lithuania.

Reconsideration is imperative for all concerned, only if in order to avoid the traps of the past. One has to be careful to escape the temptation of any kind of dogmatism–foremost that of absolutising universalisation–, even if some of the issues now crop up in global proportions, as a consequence of the new role assumed by the American foreign policy after the cold war and the Soviet might are over. The early 20th-century Lithuanian classic of public law already emphasised that the rule of law is hardly more than a specifically disciplined ethos, only conceivable as the direction of a constantly renewing ambition: it never arrives at completion for "it cannot be answered once and for all".[10] Or, it is not even an external pattern to be simply followed and implemented, for it is not of the kind to presume the mechanically "obedient execution or imitation" of requirements once stipulated by others.[11] This is all the more remarkable now when the course of globalisation, maximising the rule by rule of law and human rights with a growing disregard to other considerations and values, is about to tumble on disintegrating contradictions and dysfunctions. While eliminating certain threats to human rights, the state ruled by law–writes the author–originates new ones immediately, which are inherent in the notion of human rights itself,[12] that is, in their abstract conceptualisation, totally insensitive

[7] Stein, E. *Staatsrecht*. 14., völlig neu bearb. Auflage. Tübingen, 1993.

[8] E.g. J. Chondzinskis, A. Goštautas, M. Lietuvis, P. Roizijus, A. Rotundas, L. Sapiega, P. Skarga, A. Volanas.

[9] Cf. Konopczyński, L.: *Le liberum veto: Étude sur le développement du principe majoritaire*. Paris et Varsovie, 1930. [Institut d'Études slaves de l'Université de Paris: Bibliothèque polonaise II.].

[10] Römeris: *op. cit.* 6.

[11] Vaišvila: *op. cit.* (2001), 11.

[12] *Ibid.* 6.

to their own social (pre)conditions, ways of operation and consequences in the short as well as the long run.

The author inquires into the conditions of reaching *states of genuine balance* upon the basis of reciprocity between law and social solidarity, on the one hand, as well as between (with regards to the openness of social order) full social consent and (with regards to the openness of law and order) the inseparable unity of rights and duties, on the other. He reminds that just as the downfall of the first (1572–1795) and the second (1918–1926) republic of Lithuania was due to the over-limitation of the sovereign, exposing the country to external despotism, what happens today is the liberalisation of anti-sociality through the restriction of the executive power with reference to abstract human rights.[13]

Preliminary to raising any issue relating to the rule of law is the assessment of the state of actual social conditions. For the author, the acknowledgement of the priority of human person with inborn rights, taken as the source of his autonomy, as well as overwhelming social co-operation based on contracts and mutual concessions and the social majority's active and organised participation are of utmost importance. In contrast, what reality shows now is rather legal statism and exclusivity of the dominance of formal law. Even rule of law is mostly conceived of as formal institutionalisation, mere dictate of the law [lex]. However, until the Lithuanian Constitution (§ 109, Section 3) provides for the judges to proceed "exclusively according to the laws"–instead of laws "and law [ius]" as he claims–, no genuine division of powers can be achieved.

Functionally, law is based upon the unity of subjective rights and legal duties. Rights cannot be but relative, otherwise they degenerate into aggressive privileges. This mutual dependence arises as part of the natural order from the natural state of humankind, open to exchange equivalent services. Such an interconnection is not made by the state. All that the state can do is to make statements about. Law [ius] in a democratic society can therefore only be built on a legal conception not reduced to mere laws [lex]. In a democratic society only such claims can be posited as law that are in compliance with human rights, express social agreement and formulate as legal imperatives only provisions whose realisation is also guaranteed by the state's instruments (i.e., to the extent of the state's economic capacity and approval by citizens) (ch. 4).

Or, the state is not in a position to met out justice or punish, moreover, it is not even the state to deprive anyone of his/her freedom, At the most, all a state does is to officially establish the new status of the rights of a person when it gets diminished by his/her own action of rejecting the fulfilment of certain duties. Consequently, neither capital punishment, nor its possible abolishment

[13] *Ibid.* 12.

is within the state's but exclusively within the perpetrator's discretion. Anyone who kills, by negating the right to life of others, deprives himself of his right to his own life. The act of the Lithuanian Constitutional Court–argues the author–, having decided for the abolishment on December 9, 1998, declaring § 105 of the Lithuanian Criminal Code to be unconstitutional, can only be construed in that it either denied its citizens their natural right to equality in reciprocity or pardoned for the future in general terms on a non-legal basis (unauthorised by citizens, yet normatively). Moreover, not even the failure of regulation can result in breaking up the necessary balance between rights and duties or in impunishment, because otherwise criminal aggression would be encouraged. Therefore the formal, exhaustive and exclusive statutory definition of crimes needs to be complemented by the availability of judicial–casual–correction.[14] Entering the 21st century, the author perceives that the absolute prohibition of analogy in criminal law may have fairly been motivated by past experience of totalitarianism, on the one hand. On the other, he generalises from the data of 20th-century international criminal practice, Anglo–American jurisprudence and continental penalising trends that the actual boundaries of today's formally absolute prohibition are becoming increasingly flexible under contemporary well-balanced rule of law conditions (ch. 5).[15]

According to his vision, the prevalence of capital concentration with the split of society to the rich and the poor has been generating a sui generis type of authoritarianism-cum-totalitarianism under the guise of total liberalism. Situations come about by threatening effects in terms of which enlarging groups of addressees will have to practically resign of their rights and legal rights-protection on the command of biological survival. The present degree of actual poverty and defencelessness in Lithuania is already about to genuinely erode the predisposition of the state. The shameful fact that only 40 to 42 per cent of the officially known criminal acts are actually prosecuted against can only mean that the other 60 to 58 per cent of national sovereignty on the field of crime control is lost. However, this other part must not benefit the criminals–as is the case today– but the victims, either by providing them efficient protection or by giving them back the right to protect themselves against crime at least to a viable extent. It is

[14] For case-law can only counterbalance the fact actualised by a specific case that legislation cannot be exhaustive, by ensuring the universality of implementation of the basic principles of criminal law. *Ibid.* 23.

[15] Arnold, J.: Prinzipien und Grundsätze im deutschen Strafrecht und im Entwurf des Allgemeinen Teils des Litauischen Strafgesetzbuches. *Jurisprudencija* [Vilnius], vol. 9. 1998/1. 62–74., in particular–using the expression '*fließend*' when surveying the German practice of *Analogieverbot*–on 68.

little wonder if in situations like this, citizens' traditional confidence in the state is withdrawn, only to be replaced, instead, either in their own hands or in powers beyond this world. In 1996, only 25 per cent of the Lithuanian population claimed they trusted their own Parliament yet 74 per cent claimed they trusted the Catholic Church. After many decades of Soviet occupation, it is tragic to recall that there was a time when power in Lithuania was seized by foreigners with promise of order they provided against the tyranny of Lithuanian nobles. Anyway, Lithuanian officials ascertain that their justice system is hardly sufficiently operable today. A criminal environment can be effective enough to deter injured parties and witnesses from taking part in the administration of justice. Law is not a protective power any more. Legal proceeding may have lost any sense. Criminals have in fact extended their control over law and order, practically depriving society of the chance of legal protection, degrading citizens to growingly becoming partners themselves to the very aggression criminals are used to commit against them. It is the aggression by criminal asociality that gets eventually supported by the abstract protection of human rights.

Is it possible that after a totalitarian past, democracy will only arrive later on, when the present mixture of liberalism-cum-authoritarianism will have been left behind? Is there any logic of history in that the former lack of freedom is now compensated by immoderate, even asocial libertinism?[16] What are the symptomatic indicators here? According to the author, the weakness of a middle-class in substantiation of democracy, the miserable state of economy, the lack of chance for any genuine civil initiative, the feeble self-assertivity of the populace (e.g., when all personal bank-savings of Soviet times were frozen by the Parliament once and for all on July 19, 1995, by a posterior unilateral statutory modification of the conditions of fulfilment of contractual obligations laid down in § 471 of the Lithuanian Civil Code), the want of high state officials' respect for the law (e.g., when the president of the republic or the Seym may fail to observe their formal duties without any legal consequences, or the state elite defines ad hoc measures when own remuneration is at stake), as well as the undisturbed misappropriation of public property (through commercial banks and companies with a state share) are among the first to be considered.

Rule of law is hardly imaginable without proper social and psychological, ideological and constitutional foundations. As to the current political experience in Lithuania, it calls for a stronger presidency as well as for a parliament with more effectivity in balancing. For what the constitutionalist Römeris wrote about parliamentocracy as a mere theoretical potentiality three quarters of a century ago had by now become everyday reality, until the last election in October 2000

[16] For the term, cf. Meyer, F. S.: Libertarianism and Libertinism? *National Review*, 1969.

brake the continuation of communists' domination. In fact, pursuant to § 72, Sections 2–3, of the Constitution, any bill can be–even repeatedly and without the slightest alteration–passed by absolute majority, despite any veto of the president of the state. So, nine protests by president Brazauskas could be constitutionally ignored in 1997 without paying the least attention to his motifs. As to historical antecedents, § 51 Section 2 of their Constitution of 1928 followed the American model by providing for a qualified two-third majority in case a bill had been vetoed against. As fairly recalled, president Roosevelt interposed official veto 631 times until the New Deal could be implemented, moreover, Lithuania herself was in favour of a strong presidency both in far-away and recent past.[17] The population still trusts significantly more even a weak president than a Parliament formed by random circumstances and, as the case may be, sometimes tragically exposed to the play of mere chance. This is clearly indicated by the contrasted support through varying periods and circumstances notwithstanding:

president *Algirdas Brazauskas*		**Parliament**
December 1993	60,0 %	34,0 %
June 1996	20,0 %	14,0 %
president *Valdas Adamkus*		**Parliament**
June 1998	71,2 %	12,7 %
December 1998	76,4 %	13,4 %

Thus, there is a contradiction that can barely be eliminated by means of mere rhetoric: while the country is actually ruled by a power of a rather low esteem,

[17] De-stabilisation efforts were also made in 1922, at the dawn of the young republic, under the pretext of stabilising the legal status of Parliament.

The partisan movement *Žalioji rinktinė*, continuing the fight against the Soviet occupying powers in Eastern Lithuania, declared in 1945: "We want a presidential republic, similar to the one of the United States of America, with a powerful president." [*V. Kuročkos apklausos protokolas* (archive manuscript). 15.]–The World Congress of Lithuanian Lawyers declared on May 24–31, 1992: "Exclusively a strong presidency can ensure the stability of social processes, block the way to chaos and neutralise the destructivity of those thirsting for revenge, in order to become the buttress of the further development of democracy." [Kaganas, I.: *Lietuvos Respublikos valdymo forma–Lietuvos valstybingumo teisinės problemos: Pirmojo pasaulio leituvių teisininkų kongreso straipsnių ir tezių rinkinys*. Vilnius, 1993. 7.]–It was President Algirdas Brazauskas who took a stand when his vetos were ignored, in that "To be able to operate efficiently, the President should also be given more power, following the introduction of the democratic pattern of governance." [*Lietuvos rytas*, 1997. February 14.]

the power preponderably trusted by the nation is without almost any sensible competence (ch. 8, para 2).[18]

Or, the exclusive way to, standard and criterion of a "well-organised" and "organic" state now are on the final analysis nothing but the "maintenance of comprehensive balance" in each field of the entire social, political and legal set-up as the exclusively available guarantee of political stability, social equality and legal reciprocity.[19]

This is the reason why the author developed his theory of so-called *legal personalism,* based on the axiomatics of the geometrical formula of law taken as a compound predicate. I avail just to mention some of its fundamental tenets. Accordingly, the equivalence in reciprocity of social relations is the pre-requisite of any *open society.* It follows therefrom that "subjective right is not the property of the individual but, as a compound predicate, is a relation established for the mutual protection of the interests of all persons concerned." Consequently, on the ground of the reciprocity having come about with the "unity of rights and duties", the individual is, depending upon his/her deeds, always in balance with his/her own respective rights and duties, because "by fulfilling or rejecting the latter, he has the former recognised, legalised or annihilated" automatically. And, indeed, there is no other way, for "Rights without obligations are nothing but downright privileges, while duties without rights can only stand for sheer violence."[20]

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[18] Vaišvila: *op. cit.* (2001), 32–36.

[19] Also see from Vaišvila: Место наказания в правовом государстве [Mesto nakazaniia v pravovom gossudarstve; The place of punishment in a state of law]. In: *Проблеми вдосконалення законодавства та практика його застосування з урахуванням прогнозу злочинности* [Problemi vdoskonaleniia zakonodavstva ta praktika iogo zastoczvaniia z urakhuvanniam prognozu zlotsinnosti]. 1. Луганськ [Lugansk], 1999. 44–49. [Вісник Луганського інституту внутрішніх справ МВС України.] and Социальное правовое государство: Приобретамая и теряемая реальность [Sotsialnoe pravovoe gossudarstvo: Priobretamaia i teriaemaia realnost'; The social state of law]. In: *Конституционно-правовое проблемы формирования социального правового государства: Материалы международной конференции* [Konstitutsionno-pravovoe problemi formirovaniia sotsial'nogo pravovogo gossudarstva: Materiali mezhdunarodnoi konferentsii]. Минск [Minsk], 2000. 24–28.

[20] "Die Äquivalenz der Austausche [...ist...] die Einheit von Rechten (der Erlaubnis) und Pflichten (dem Gebot) zu bestimmen [...:...] die Menschenrechte werden nach der Erfüllung oder der Verzicht der entsprechenden Pflichten erworben, legalisiert oder verloren." "Das subjektive Recht ist nicht die Eigenschaft des Individuums, es ist ein mehrstelliges Prädikat bzw. das Verhältnis, das für den gegenseitigen Schutz der Interessen der Personen geschaffen ist." "Das Recht ohne Pflicht gleicht einen Privilegien, die Pflicht ohne Recht ist bloße Gewalt."

The oeuvre herewith presented is not a cry for help but the manifestation of a responsible scholarship gradually realising its own strength and independence. It is rewarding to learn that the same ethos that, after the Soviet regime is bygone, can introduce Western trends as desirable patterns to be followed with natural ease, also indicates the need for new foundations, by building up–having left behind its earlier forms rooted in Bolshevik ideology–own world-view consequently. This is exactly what the oeuvre just surveyed did. Having overviewed the mostly pattern-following and more or less promising or disappointing results of Lithuanian domestic development spanning over nearly one and a half decades as givens of their history, it assessed them monographically. His very approach presumed sound scepticism as pre-requisite to any responsibly constructive thought, subjecting any result to scrutiny, omitting reliance on either clearly personal [*ad hominem*] or exclusively authoritarian [*ad autoritatem*] reasons in their evaluation.

It would be a shock if the arrogance of force could define again itself in the guise of the renewed ideology of "So much the worse for the facts"–this time at the overture to the 21st century. It is a fact notwithstanding that ideas and constructions that stream towards us from overseas are expected to get rooted in a soil poor in resources, targeting a disintegrated society with distorted morals, in which only reliance to individual surviving strategies proves to be exclusively adequate a personal response amidst an economy fallen prey to the stronger and professionally only preoccupied with the exhaustion of national property.

According to the creed of many, the principles of free market, democracy and parliamentarism (with rule of law and human rights in the background) offer a kind of panacea curing all the ills in the world. Still, social science should be given the chance to record–if found so–that the same staff may not work here as it is used to work there amidst its natural surrounding; not with the same cost/benefit ratio at the least. Social science is open for ideas to both receive in test and reject upon criticism. Moreover, scholarship in Central and Eastern Europe is growingly aware of the fact that what it can provide is by far not marginal feedback but the very first testing and teasing proof on social embeddedness of ideas and ideals exported. For whatever we think of the cultural anthropological preconditions of such guiding stars of modernity and of the scientific verifiability of the concept of man they postulate,[21] Western

[21] If the presuppositions of democracy are not provable, only tradition axiomatically taken from the credo of Enlightenment can be the case. Cf. Frivaldszky, J.: Gondolatok az emberi jogok radikális szemléletéből fakadó problémákról [Thoughts on problems arising from the radical approach to human rights]. In: Frivaldszky, J. (ed.) *Egy európai alkotmány felé: A nizzai Alapvető Jogok Chartája és a Konvent* [Towards a European constitution: the

social development (with the ideocracy of Dworkin, Habermas and Rawls, in terms of which values are just a random function of supporting majority and rights are made one of the gratuitous accessories of any human existence) is by no means separable from the economic reserves of such a development. Or, operation of any societal complexity requires resources in both social organisation and material production. In the Atlantic world, presently they seem they are available either through economic reproduction or by using up reserves. Consequently, if it proves to be too wasteful or costly, less powerful regions of the world may encounter problems of financing, for they are in want of reserves.

Scholarly sensitivity to issues like this has developed in the western world as well,[22] even if not yet transcending local self-analysis. Until now, scholars have failed to address either other regions or their ideals' very preconditions. This is why the issues raised above are still questions–on and for us. This is why they shall have to be tackled at least by those concerned.

Charter of Fundamental Rights and the European Convention on Human Rights]. Budapest, 2003. 63–74. [Agóra II.].

[22] Cf. e.g. Holmes, St. & Sunstein, C. R.: *The Cost of Rights: Why Liberty Defends on Taxes*. New York, 1999. as well as, by Posner, R. A.: *The Economics of Justice*. Cambridge (Mass.), 1983. and *Economic Analysis of Law*. New York, 1998. As an outlook, see also Sajó, A. (ed.) *Western Rights? Post-communist Application*. The Hague, 1996.

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MARIJAN PAVČNIK*

The Transition from Socialist Law and Resurgence of Traditional Law

(The Case of Slovenia: The (In)adequacy of Legal Positivism)

Abstract. In 1918, Slovenia became a constituent part of Yugoslavia. After the Second World War, Yugoslavia was reconstituted as a socialist state. When the attempts to turn Yugoslavia into a democratic country failed, Slovenia decided to become independent. As it is reflected in its new Constitution (1991), Slovenia is designed as a parliamentary republic, as a unitary state with local self-government and is strives to become a social state. During the transition from socialism, Slovenian law faced numerous challenges like the privatization of economy. The political and legal transition is still taking place. Hopefully, the entry to the European Union will give it new dimensions.

Between the two world wars, Slovenian legal science was especially influenced by Austrian-German legal positivism; although the legal-comparative, sociological and axiological methods were important as well. After the Second World War, in some critical periods an apologetic legal positivism gained the upper hand in certain areas. On the other hand, new legal institutes and departments furthered the development of new sciences (criminology, sociology of law, political economy, public administration). New scientific areas emerged (comparative commercial law, comparative labour law and the law of the European Union). Some legal sciences (like criminal law) have been enriched by additional (sociological, axiological and comparative methods) methods.

Keywords: apologetic and scientific legal positivism, legal dogmatics, science of positive law, socialist and traditional law, constitutional organisation, transition from socialism, political culture

I. Introductory Explanation

This paper is based on an article I wrote on Slovenian legal science in the 20th century.[1] When preparing that article I did not specifically ask myself about the transition from socialist law to traditional law and its resurgence. I was

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[1] See *Marijan Pavčnik:* (Ne)vrednost pravoznanstva [The Worth(lessness) of Jurisprudence], in: Jančar, *D.*–Vodopivec, P. (Eds.): *Slovenci v XX. stoletju* (Slovenes in the 20th Century). Ljubljana, 2001. 77–78.

especially interested in the approach and the nature of the object studied by the sciences of positive law. I was interested in the concepts of law and legal science and tried to cover it completely and to pay attention to the roles we play, either as legal observers or legal participants. It is of special importance that throughout I was centred on a longer period of time than just the period of socialism and that I also dealt with so-called socialist law as just a part of the legal phenomenon. These are the reasons for my belief that an article on Slovenian legal science in the 20th century can also be the basis for observations on the theme I will here deal with.

II. The (In)adequacy of Legal Positivism

1. Introduction

I believe that a good starting point would be von Kirchmann's critical and provocative treatise "The Worthlessness of Jurisprudence as Science",[2] which was published in the middle of the 19th century. Von Kirchmann maintained that legal science does not deal with the real, that is, intrinsic law (Germ. *das natürliche Recht*).[3] Intrinsic law is independent and free and does not bother with whether science exists and whether it is understood by science (p. 7). It is the law that lives amongst people and that is put into effect by each individual in his environment (p. 7). Intrinsic law encompasses the rich institutions of marriage, family, property, contracts, inheritance, status differences, the relationship of the government to the people and the relations between nations (p. 8). Von Kirchmann expressly maintains that people can live without legal science, but certainly cannot live without law (p. 8). It is characteristic of intrinsic law that we are not only aware of it, but also feel it, that it is not only in our heads, but also in our hearts (p. 17). One problem of legal science is that it only deals with intrinsic law within a very limited scope. Nine tenths and even more of its object correspond to positive legislation with its numerous

[2] von Kirchmann, J. H.: *Die Wertlosigkeit der Jurisprudenz als Wissenschaft.* Berlin, 1848. Reprint: Rudolf Haufe Verlag, Freiburg, Berlin 1990. See also Klenner, H.: Kirchmann oder: Die Provokation als Produktivkraft. In: von Kirchmann, J. H.: *Die Wertlosigkeit der Jurisprudenz als Wissenschaft.* Freiburg–Berlin, 1990. 79–98., and Sprenger, G.: Recht und Werte. Reflexionen über eine philosophische Verlegenheit. In: *Der Staat*, 2000. 1, 1–22.

[3] I deliberately translate the German expression as "intrinsic law", which has to be distinguished from "natural law" (Germ. *Naturrecht*).

weaknesses and shortcomings; positive statute is rigid, abstract, it contains gaps, contradictions and unclear points (pp. 20–21). Within this scope, the object of legal science is purely accidental; the accidental positive statute drives out intrinsic law and the legal science dealing with positive statutes is itself accidental as well. "Three legislative changes suffice to turn whole libraries into wastepaper" (p. 23). And also: lawyers have become "little worms living only on rotten wood" (p. 23). In short, what is of permanent existence is only the legal science dealing with intrinsic law, that is, with the law corresponding to the nature of things.

Von Kirchmann certainly provokes and exaggerates. Legal science cannot avoid positive legislation; it has to analyse, systemize and interpret it. Intrinsic law does not suffice unless it is supplemented and elaborated by positive legislation. This was the case already in von Kirchmann's times, even more so in the 20th century and still more nowadays. And, last but not least, it is simply not true that positive legislation as a whole is porous, inconsistent, and unclear. Let us just think of the great codes (such as the Austrian General Civil Code of 1811) that are still valid today.

On the other hand, von Kirchmann's criticism is also creative. The basic question is what the science of positive law should concentrate on and what its attitude to its object of research should be. If the results of scientific work quickly turn into wastepaper, it is evident that the object and the manner of research were badly chosen and realized. In Slovenia, the constitutional system of socialist self-management, the laws on associated labour, social property, the association of labour and means, labour law, self-management law, etc., were certainly examples of the ephemeral results of legal research.

2. Legal Dogmatics, its Objects and its Limits

The science of positive law cannot avoid the valid (positive) legislation. One of its tasks is also to dogmatically study positive law, to analyse it concerning its meaning and to systemize it. One cannot speak of good law if it is not accompanied by qualified and even finely finished legal dogmatics.

The object of legal dogmatics is given and is not created by legal science. None of its aims is to declare itself for or against its object from the points of view of values and legal politics. Legal dogmatics is based on scientific and specialist traditions (e.g. those of civil, criminal or administrative law) and, on this basis, it studies the valid law. First comes the so-called lower jurisprudence of concepts, which interprets the statute, establishes its content and removes any unclear points and contradictions contained therein. Then comes the higher jurisprudence of concepts, which logically and systematically

analyses legal concepts and institutions and combines them into a suitable system.

Such legal dogmatics is a typical representative of scientific positivism, which presupposes that the content of positive law is legitimate. A problem arises when the object of study is not legitimate or when it begins to lose legitimacy partly or completely. The worst solution is for legal science to "overlook" this circumstance and to behave as if everything were in the best of order. This is already apologetic positivism, which identifies with the valid system and–whether willing or unwilling–justifies it.

Apologetic legal positivism was–at least to a certain extent–characteristic of the socialist period of the 20th century. It was especially emphasized in the areas that wanted to radically differ from the traditional Roman-Germanic legal family covering the continental part of non-socialist European law. I have already enumerated the areas of constitutional law, associated labour law and self-management law.

Also in the so-called "new" legal areas, responsible theoreticians remained true to the scientific character of their basic science, restrained and sometimes very critical. As examples, the following deserve mention: Šmidovnik's research of the communal system,[4] Bučar's treatment of public administration and his criticism of self-managing communities of interest[5] and Cigoj's insistence on traditional civil law.[6] Finžgar's work on social property is a special case; the astute expert on civil law did not reject it, but constantly illuminated and analysed it with the instruments of civil law and especially property law. The final result is well-known: social property law is no longer valid law, yet Finžgar's theory remains and it can also explain how social property should be transformed into other forms of property.[7]

[4] Šmidovnik, J.: *Koncepcija jugoslovanske* občine (The Concept of Yugoslavian Municipality). Ljubljana, 1970.

[5] Bučar, F.: *Uvod v javno upravo* (Introduction to Public Administration). Ljubljana, 1969.

[6] Cigoj, S.: *Obligacije – sistem obligacijskega prava v teoriji, sodstvu in primerjalnem pravu* (Obligations–the System of the General Law of Obligations in Theory, Jurisdiction and Comparative Law). Ljubljana, 1976.

[7] Finžgar, A.: Preoblikovanje družbene lastnine v drugo obliko lastnine (The Transformation of Social Property into Other Forms of Property). In: *Zbornik znanstvenih razprav*, 1992. 5–16.

3. Apologetic and Scientific Legal Positivism

The dividing line between apologetic and scientific legal positivism is not clearly drawn; it is in the nature of any legal positivism to reject a metaphysical approach to the treatment of law and thus sharply separate positive law from any value criterion which would be a criterion of law concerning its content. The legitimacy of legal positivism can only be judged by someone who tries to give meaning to what he does and who is at the same time aware of the fact that legal dogmatics is not and cannot be self-sufficient. It is in the nature of law that it is a normative phenomenon which in the name of some value presupposes and defines which legal consequence should occur if we find ourselves in certain circumstances. Phrased even more clearly: law is a normative phenomenon that regulates social relations and puts values into effect. A legal positivist who overlooks that law has a value dimension or even tries to avoid it does not have a criterion for distinguishing between apologetic and scientific legal positivism.

And this is the greatest danger he finds himself in and which even increases when he is surrounded by a single-party and monopolistic political system. The danger is less marked in those legal areas that are traditionally relatively independent (e.g. in the areas of traditional civil law) and much greater in the areas that are politically sensitive and simultaneously approached the prototypes of a new (e.g. self-management) law.

The main works on the science of positive law were produced in the period between the two World Wars (especially in the areas of criminal and civil law). The conditions after the Second World War were less favourable to science. The Stalinist period forced it to adopt apologetic legal positivism, more liberal periods broadened the scientific horizons. Throughout this period, however, it was also important whether one was dealing with traditional legal areas domiciled also in the new system or with areas that were supposed to be typical of the new self-management system.

These are external circumstances that are certainly important, yet not so decisive as to drown out the power and creativity of individuals. While it is probably true that the sciences of legal history were more sheltered than the sciences of positive law, it nevertheless took the personal contributions of Viktor Korošec[8] and Sergej Vilfan[9] to write excellent works on legal history:

[8] See e.g. Korošec, V.: *Die Erbenhaftung nach römischem Recht I. Das Zivil- und Amtsrecht.* Leipzig, 1927; *Hethitische Staatsverträge. Ein Beitrag zu ihrer juristischen Wertung.* Leipzig, 1931; *Hethitica. Prispevek k razvoju hetitskega prava* (Hethitica. Contribution to the Development of Hethitic Law). Ljubljana, 1958; Keilschriftrecht, in:

the former in the field of cuneiform laws and Roman law and the latter in the field of the legal history of Slovenes.

Individuals reacted to external circumstances in different ways: some accepted a good many imaginary innovations and tried to justify them, others were aware of the limitations and tried to salvage what could be salvaged within the limits of what was possible, another group moved on the margins and broadened the scientific space, again others stuck to the legal comparative method and discussed foreign law, whereas in reality they were critical of the national (e.g. constitutional) law, some stated a few cheap Marxist truths in the introduction and then fully applied themselves to their science and there were very few who did not show any consideration for external circumstances and deal with them in a polemical manner as well.

What I would like to say is: irrespective of the fact that some periods were really not favourable to science, we have high quality works in most legal areas. If some areas are still lacking, it is not just the dark periods of recent history that are to blame. The causes lie with ourselves and with the where and how of directing our energies.

The knowledge I have does not allow me to pass judgment on individual works. Nor is such the aim of this paper. I am actually concerned with something else, namely with the concept of the science of positive law.

4. The Concept of the Science of Positive Law

Historic experience proves that legal dogmatics, which is methodologically characteristic of individual sciences of positive law, can never be self-sufficient. At least, the science must continuously check whether the positive legal regulation expresses the "normative power of the factual" (Germ. *die normative Kraft des Faktischen*). Positive legal regulation always has certain value and sociological backgrounds, the social and value contexts co-determine the understanding of the statutes and it is the social reality to which the legal behaviour, legal violations and legal decision-making lead. These reasons and numerous others

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Handbuch der Orientalistik, I/3. Leiden, 1964, and *Očrt rimskega prava* (Outline of Roman Law), 2nd edition. Ljubljana, 1980.

[9] See e.g. Vilfan, S.: *Pravna zgodovina Slovencev* (The Legal History of Slovenes). Ljubljana, 1961; Rechtsgeschichte der Slowenen (= Grazer Rechts- und Staatswissenschaftliche Studien 21). Graz, 1968; Jugoslawien, in: *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte,* III/5. München, 1988. 323–470.; *Zgodovinska pravotvornost in Slovenci* (Historische Fähigkeit zur Rechtsbildung und die Slowenen). Ljubljana, 1996.

confirm that the science of positive law must not live in an ivory tower of normativity. If it does, it may easily turn into a dead letter or into an ideological ornament used by the political authority.

Legal dogmatics loses its firm ground when it deals with positive law past its expiration date or when positive law has been false and contrary to the nature of things from the very beginning. If positive law is such, life rebels against it sooner or later; life demands new criteria that enable it to remain in good condition, operate normally and develop further. Legal theory knows numerous schools of thought that have rebelled against fossilized legal dogmatics–e.g. free law theory, Interessenjurisprudenz, sociological jurisprudence, Wertungsjurisprudenz. Several new sciences have developed–e.g. the sociology of law, criminology, various legal and economic sciences, in the United States various critical jurisprudences have also developed in recent decades.

Between the two world wars, Slovenian legal science was especially influenced by Austrian-German legal positivism based on the normative-dogmatic method; additionally, the legal-comparative, sociological and axiological methods gradually became important as well. After the Second World War the development was rather uneven. In some critical periods an apologetic legal positivism gained the upper hand to a certain extent and in certain areas. It should not be overlooked, however, that legal positivism was also a defensive barrier against the invasion of legal science by political irrationality and despotism. The foundation of several new institutes and departments at the Faculty of Law furthered the development of a growing number of sciences (e.g. criminology, the sociology of law, political economics, public administration), which noticeably broadened the knowledge of law and at the same time connected law with the phenomena to which it is vitally linked. It is also important that several new scientific areas developed (for example, comparative commercial law, recently also comparative labour law and the law of the European Union), which are all legally comparative, and among the classical legal sciences, some (such as criminal law) have been enriched by additional methods (e.g. by sociological, axiological and comparative methods). Concerning the legal-comparative method, it should probably be added that it has been intensively gaining acceptance in all areas of civil law and recently again in the field of constitutional law.

5. The Worthlessness of Jurisprudence

And now we should return to von Kirchmann and to his statement that jurisprudence is "worthless" because its object constantly changes. If the sciences of positive law only studied the valid legislation of the day in a normative-

dogmatic manner, von Kirchmann's objection would be almost completely justified. It is not the task of science to identify with any enacted law, neither is its task for the method of research to create its own object of research. Most probably, the task of science is to choose the aspect of research, these aspects must correspond to the legal phenomenon and the legal phenomenon is certainly not encompassed by the positive legislation of the day. Evidently, the science of positive law cannot evade positive legislation, yet its mission is also to build on previous knowledge, to verify, complement and, if necessary, change this knowledge, to consider legal-comparative findings, to assess whether the enacted law is rationally designed and in accordance with life (with the so-called "nature of things"), to accompany and judge how this law is enforced in life and in legal (court) practice, and, last but not least, to propose how some areas could be differently and better regulated. If legal science really does this and if its research is of good quality, the results thereof are extremely valuable and outlive whole generations of legislators. Also in Slovenia numerous works have outlived their authors. A classic example is The State (1927) by Leonid Pitamic, the content and language of which still make for stimulating reading.[10]

Certainly, fewer works would be falling into oblivion if they had been true to the scientific postulates I mentioned above. A frequent weakness is that individual researchers focus on so-called "law in books" and neglect "law in action". An important element of living law is court practice, which, within a limited scope, also has the nature of case law. During the last decade constitutional law practice has also developed, which, however, is not really considered in theoretical works either. The shining exception has always been civil law specialists (Cigoj's school), who probably follow court practice in the most intensive manner.

Let me stress once more that the science of positive law is certainly not "worthless", but it is evidently not good if the legal positive regulation changes too frequently. But things do not change so quickly as it seems at first sight. Apart from the novelties introduced by socialism, the basic legal concepts and institutions have been changing organically and gradually and, if necessary, newly formed (for example, in the field of commercial law). The great codifications of the 19th century already played an important role whereby the core of modern law was consolidated. Neither should it be overlooked that the norms regarding closing legal gaps made it possible after the foundation of the Kingdom of Serbs, Croats and Slovenes in 1918, for the legislation valid in the territory of Slovenia when it entered the former common state to be used for

[10] Pitamic, L.: *Država* (The State). Celje, 1927. Reprint: Cankarjeva založba, Ljubljana, 1996. See also the English edition: *A Treatise on the State*. J. H. Furst Company, Baltimore, 1933.

unregulated areas. This means that practically continuously, including to a limited extent even in the period of socialism, the classical thought of civil law was maintained in Slovenia.

6. Arguments of Unlawfulness, Legal Principles and Understanding of Legal Norms

Von Kirchmann's critical questions are not sufficient. In the 20th century it was again clearly shown that any science, even a positivistic one, does itself a disservice if it is not aware of its own limitations. The main drawback is that legal positivism does not answer the question of how it should be legally evaluated. Legal positivism shuts itself off from the arguments of unlawfulness, legal principles and of the understanding of legal norms. All three arguments are of an over-positivistic nature and each of them requires answers to value questions. The argument of unlawfulness concedes that a valid (positive) legal system may be humanly intolerable to such a degree that it has to be denied the nature of law. The argument of legal principles considers that each legal system comprises value standards directing the definition of legal norms concerning their content and the manner of their application. And the argument of the understanding of legal norms emphasizes that legal norms are only a result of the understanding of a statute in view of factual (practical interpretation) and imagined (methodical interpretation) life cases.

In the Slovenian legal sphere it was the objection of unlawfulness that fared worst. Between the two world wars legal positivism was too strong for this question to be raised at all. The most astute thinker was Leonid Pitamic, who already in 1917 maintained that also the science of positive law needed appropriate prerequisites.[11] The criticism of Pure Theory of Law finally led him to state that legal regulation "must consider its subject at least to such an extent that it does not take away its nature. If law is to remain law, it may only command or allow external human behaviour, but not its opposite, 'inhuman behaviour', if it does not want to lose the nature of law".[12] If I may quote myself, let me say that legal regulation must always be within the limits of legal rightness and the measure of this rightness comprises–at least in the world we belong to–basic human rights, the principles of a state under the rule

[11] See Pitamic, L.: Denkökonomische Voraussetzungen der Rechtswissenschaft. In: *Österreichische Zeitschrift für öffentliches Recht*, 1917, 339–367.

[12] See Pitamic, L.: Naturrecht und Natur des Rechts. In: *Österreichische Zeitschrift für öffentliches Recht*, 7 – N. F. 1956, 194.

of law and the institutions of democracy.[13] In three cases the argument of unlawfulness was also used by the Slovenian Constitutional Court in referring to general legal principles acknowledged by civilized nations.[14]

The second objection against legal positivism, i.e. the argument of legal principles, fares a little better. It is a majority standpoint that law is only a system of legal norms (some speak merely of legal provisions!), yet this does not mean that the meaning of legal principles is completely overlooked. The theory considers them especially at the level of basic principles characterizing individual legal fields and much less as important standards of interpretation. The main exceptions are the standpoints of experts in civil and criminal law. It is encouraging that the argument of legal principles (especially that of a state under the rule of law) has been applied more and more often in the recent practice of the Constitutional Court.

Of the greatest practical value is the third objection, i.e. the argument of the understanding of legal norms. It is an invaluable argument for legal participants (for example, for judges), but also for all those legal observers–I am one of them– who are of the opinion that legal science must also deal with the nature of legal decision-making in concrete cases.[15] A chapter on the interpretation of statute is contained in practically every systematic work dealing with any legal branch. For the most part it does not concern the theory of argumentation and legal valuation with special emphasis on the peculiarities of the branch in question, but it is more a general review of classical interpretation arguments as phrased by von Savigny.

We find ourselves in a very sensitive, sometimes even fragile and very important legal area. Law is a linguistic and cultural phenomenon which is an object of understanding. Legal understanding is not just a reconstruction of a thought (a legal norm) reported by the legislator, legal understanding is also the final shaping of a legal norm that must lead to a legal decision. The lawyer's (e.g. the judge's) decision is a value synthesis assessing the normative starting point with regard to the factual starting point, and *vice versa*. In this context the interpreter is the one to "reconstruct" the possibilities of the statute, to state the content of these possibilities more precisely (if they are uncertain in the statute) and to choose the combination that is in the closest accordance with the legally

[13] Pavčnik, M.: *Teorija prava* (Theory of Law). 2nd Edition. Ljubljana, 2001. 20 and 479.

[14] See Pavčnik, M.: Pravni in ustavni temelji prava (Legal and Constitutional Foundations of Law). In: *Ustavno sodstvo (Constitutional Judiciary)*. Pavčnik, M. and Mavčič, A. (Eds.) Ljubljana, 2000. 396–397.

[15] Cf. Pavčnik, M.: *Juristisches Verstehen und Entscheiden*. Wien–New York, 1993.

relevant characteristics of the life case. It is in the nature of legal understanding and decision-making that it is a creative or at least a co-creative legal act.

It is a matter for each theory of law (in the broader sense of the word) how it reacts to these questions. The worst solution is to accept the thesis that everything has been decided by the legislator and that it is only a question of mechanically recreating his decision in a concrete case. This is the so-called ideology of the application of law, which always suits the political forces laying claim to "creativity" and a monopoly on law-giving. Behind this "ideological veil" lies the actual creativity, which is all the more bound to the "ideological cliché" the more politically sensitive and important the legal decision is. It is in the nature of things that the decision-making in civil law cases is, in principle, more autonomous than in administrative and criminal cases where the "ideological cliché" is much more pronounced. Yet also here there are differences between the classic crime and the "socially" especially dangerous "crime", which can be fully exploited as "political crime".

The subject of my paper is not the concrete abuses that were most numerous and terrible in the Stalinist period. I would like to say that the ideology of the application of law disarms the legal participant and leaves him to his own devices. I do not at all wish to blame legal dogmatics for any abuses. I only think that it should also be accompanied and supplemented by other theoretical approaches, among them especially the theory of interpretation and argumentation in law, i.e. approaches that make the legal participant aware of the nature of legal understanding and offer him arguments for good decision-making and substantiating. I know very well that abuse cannot be avoided in such cases either. It does not lie within the power of theory to make abuse impossible, yet it is within its power to clearly tell the legal participant that he is also a decision-maker.

7. Law as a Phenomenon of Understanding and Interpretation

The fact that the law is a phenomenon to be understood and interpreted offers numerous creative possibilities to legal observers as well as to legal participants. If the legal system is to be stable, legal science must assume its share of responsibility as well. The constitution, legal codes and basic statutes can only live with the help of interpretation. The free law theory, Interessenjurisprudenz, Wertungsjurisprudenz are typical foreign examples that enable, for instance, the French and the German Civil Codes to still be valid without difficulty: the former is nearly two hundred years old and the latter turned one hundred years old at the turn of the millennium.

The same is true of the Austrian General Civil Code (of 1811), to which Slovenes have the closest relation and which was mentioned above in another

connection. This code was of special importance before 1978, when the new Act on Torts and Contracts was passed. Until then, torts and contracts were actually regulated by the rules of the Austrian General Civil Code of 1811, which were actively applied by the courts with the full and firm support of civil law theory with its interpretations and comments. The norms of the Austrian Civil Code also had an important role in classical law as regards real property and movables.

This also shows that court practice has an important role as well. It would be an exaggeration to say that it is a role approaching that of Anglo-American case law; there are certainly numerous similarities between both systems, but there are also numerous differences with their own historical background. In continental and also in Slovenian law, established court practice supplements statute law, normatively implements and rejuvenates it in the long term by preventing it from becoming rigid and losing touch with life. In this respect much has been achieved in Slovenia in the field of classic civil law. In the last ten years, especially since 1994, when the constitutional complaint was instituted in practice, the Constitutional Court has done much towards making case law statements obligatory; if regular courts do not act in accordance with established court practice, they violate the basic constitutional right of equality before the law, which is also a reason for constitutional complaints to be brought before the Constitutional Court.

The shift I am referring to will become more and more noticeable: the significance of court practice and Constitutional Court practice rises when legislation calms down and all main codes and statutes have been adopted, which at the same time requires that the theory of positive law also deals intensively with the theory of interpretation and argumentation in law. The statute is an object of understanding, but this understanding can only be of good quality and legally safe if it is ennobled by theory as well as by court practice. The statute–however excellent it may be–is just an element of the legal phenomenon; legal theory and court practice are responsible for it as well.

III. The transition from socialist law and the resurgence of traditional law

8. The so-called Socialist Law

The so-called socialist law had several complexions and did not represent a uniform, generally accepted concept. On the one hand, there were some classic Marxist standpoints (among them, especially Marx's) on the nature of socialist law, on the other hand there were different interpretations and reactions to these

standpoints, and, additionally, also the practices in individual socialist countries were different.[16] A very characteristic example was the former Yugoslavia–Slovenia was its most-developed republic–which after the conflict with the Soviet Union in 1948 began to look for new solutions and after 1950 began to build up the political system of self-managing socialism. Self-managing socialism made it possible for the concept of socialist law to be less *etatistic* and more pluralistic than in the countries of the so-called "real socialism". Yet it was also true of socialist Yugoslavia (and thus of socialist Slovenia) that the "bourgeois boundaries"[17] of socialist law did not allow formal democracy. This was a very sensitive point and also the point that put the socialist state far below the standards of the capitalist state.

The so-called socialist law was not a uniform concept that could be compared to traditional law. If I look at former Yugoslavian and Slovenian law, the greatest differences with respect to traditional law can be found in the following areas: in constitutional law, which was supposed to have been surpassed by the political system of socialist self-management; in classic property law, wherein social property was to become the foundation of a new system; in labour law, which was characterised by workers' self-management; in commercial law where instead of contract law, a social compact should have developed (the so-called association of labour and means); in administrative law, wherein the administration was professionally degraded and fragmented into individual areas of interest, etc. In addition, all legal areas were eschatologically marked by the principles of socialist self-management and socialist morals. These principles were mostly just an ideological ornament and did not carry much weight in practice. An exception were the so-called reserve clauses, which enabled the authorities to put their political will into effect in an ostensibly legal manner. A classic example were some very loose definitions of criminal offences that were contrary to the principle *Nullum crimen sine lege certa.*[18]

Among the characteristics of socialist law self-management law was often mentioned. Strictly speaking, self-management law was not a new kind of law or even a legal area (such as constitutional, civil or criminal law), but it was only a question of new formal sources of law comprising legal norms. These

[16] Cf. Reich, N. (Ed.): *Marxistische und sozialistische Rechtstheorie.* Frankfurt/Main, 1972.

[17] Cf. Marx, K.: Kritik des Gothaer Programms. In: *MEW* 19. Berlin, 1972. 20–21.

[18] Cf. Pavčnik, M.: Nullum crimen sine lege certa. Beitrag zur Gesetzesauslegung am Beispiel des jugoslawischen Rechts. In: Weinberger, O. und W. Fischer, M. W. (Eds.): *Demokratie und Rationalität.* Wien, 1992. 191–199.

new sources of law were charters (internal statutes), self-managing agreements, social compacts, etc., they were implemented especially in the areas of labour and commercial law. One great problem of self-management sources of law was that they were ostensible and thereby ideological, since they created the appearance of real self-management, whereas actually the questions had already been regulated in the statutes in much detail.

9. Traditional Law in the Socialist Period

I have already partially dealt with this question above. It was a characteristic of Yugoslavian and Slovenian law that they were always closely connected with traditional law. This law was still active in all areas that were not taken over by the so-called socialist law that was supposed to "surpass" traditional law (see especially point 8). The connection to traditional law was also made possible by the norms regarding the filling in of legal gaps. As mentioned above, in Slovenia the regulations of the Austrian Civil Code were applied, especially for the legal areas of the general part of civil law, for property law and for the law of contracts and torts, which were largely codified only in 1978 and 1980.

An important role was also played by the system of legal education, which was mostly based on traditional law and traditional legal thinking. Of course, also the new socialist law was taught, yet it never dominated. One should also bear in mind that the older professors, who had studied in the period between the two world wars (often at first-rate foreign universities), mostly remained true to scientific legal positivism. A typical representative was the above-mentioned Professor Finžgar, who dealt with social property by interpreting and explaining it with the tools of classic civil law (especially property law). Moreover, a number of professors studied in the West (e.g. in the United States) also after the Second World War. Among them were Cigoj, a professor of civil law who developed case law thinking, and Bučar, an administrative law professor who also used system theory.

Compared to other former socialist countries, Yugoslavian and Slovenian theories were relatively well informed of what was happening elsewhere. If I take the theory of law, which is my subject, I can say that it was substantially more open and diverse than in other countries of "real socialism".[19] I do not want to say that the political system did not place ideological obstacles in the way of researchers (e.g. in discussions about natural law), yet they were not so

[19] Cf. Perenič, A.: Relativna samostojnost prava (Relative Independence of Law). Ljubljana, 1981. and Pavčnik, M.: Der Begriff des Rechts in der jugoslawischen Rechtslehre, in: *Jahrbuch für Ostrecht* (München), 1989, 93–112.

high and formidable as if there were only one truth, without allowing for new research and new conclusions.[20]

10. The New Constitutional Organisation

In the transition from socialism to the new state organisation, an important and even key role was played by the new Constitution of the Republic of Slovenia that was adopted on 28 December 1991. The quality and the essence of the new Constitution are very different from the previous constitutional order of 1974 when Slovenia was still a part of the Socialist Federative Republic of Yugoslavia. In the socialist era the foundations of the system were the right to self-management and social ownership (of the means of production), which were incorporated into a vision of a self-managing society and state that was determined right down to the last detail (which made it totalitarian in a certain sense). Basic human rights and freedoms were drowned in this vision.

Basic human rights were not the starting point of the system but just an element thereof, the scope of which was precisely measured off in advance. It was characteristic of this system that it accepted the thesis of the pluralism of self-managing interests, yet it was not ready to institutionalise this pluralism legally and politically. Pluralism was acceptable as long as it remained within the system. Once it began to doubt the system and tried to change it, however, it became suspect and even open to criminal prosecution. Thus, it is certainly not accidental that the Communist Party was defined already in the Constitution as the "leading ideological and political force of the working class and of all working people".

The form of the authority of the state corresponded to a directorial (assembly) system (with elements of a parliamentary and even presidential system). It is typical that the system as designed in the constitution did not work and the elements of the principle of the division of powers were more a kind of an ideological ornament than serious institutions. The rules of the "division of powers" only make sense if at the same time cultural, economic and political conditions are also provided that activate this "game" (of the system of checks and balances). The system that was *de jure* and *de facto* dominated by only one political party (i.e. the communist party) certainly did not harbour this ambition. And this made the legal form ideological: it offered exactly what its actual designers did not at all want. Nevertheless, the right to self-management, social property and the pluralism of self-managing interests made possible

[20] Cf. Bröstl, A.: Troubles with Law, Justice and Nationalism. In: *Rechtstheorie*, 1993, 84–85.

numerous particular features of the Yugoslavian order and thus distanced it from the typical countries of "real socialism".

And now, let us return to the Constitution of independent Slovenia, which is centred on the classic constitutional matter (*materia constitutionis*).[21] On the one hand, there are the provisions that determine the form of the (Slovenian) state. Slovenia is defined as a republic with a parliamentary system, as a democratic state wherein power is vested in the people, a territorially unified and indivisible state with local self-government, as a state under the rule of law and as a social state. The second group of provisions encompasses a catalogue of the classic basic human rights and freedoms, which is completely in accordance with modern standards and modern constitutions. The third group of constitutional provisions refers to the organisation of the state. It comprises norms about the organisation of the central state bodies (legislative, executive and judicial bodies), their competencies and the relations between them. The relation between the legislative and the executive branches of power is designed in accordance with the parliamentary system (with the variant of a constructive vote of no confidence) and the design of the state order corresponds to the principle of "checks and balances".

The principle of "checks and balances" is important not only in the relation between the legislative and the executive branches of powers, but also the composition and the manner of the operation of individual state bodies are such that a balanced operation is made possible within each body as well. A logical consequence of this regulation and of these principles is that also the judicial branch of power acquires a new position and a new quality.[22] The Constitution especially emphasizes the independence of judges, the right to a natural judge (Germ. *gesetzlicher Richter*) and the principle of the permanence of judicial office. It is very important that the Constitution maintained the institution of the Constitutional Court, strengthened it and conferred numerous new responsibilities upon it.[23] *De jure* and *de facto*, the Constitutional Court is the "highest

[21] Cf. Šturm, L. (Editor): *Komentar Ustave Republike Slovenije* (Commentary to the Constitution of the Republic of Slovenia). Ljubljana, 2002.

[22] Cf. Přibáň, J.–Roberts, P.–Young, J. (Eds.): *Systems of Justice in Transition. Central European Experiences since 1989*. Aldershot, 2003. See especially the articles by Marko Novak (The Promising Gift of Precedents: Changes in Culture and Techniques of Judicial Decision-Making in Slovenia, 94–108) and Albin Igličar (The Judiciary in Slovenia: a Profession in the Ascendancy, 180–182).

[23] Cf. Mavčič, A.: *Slovenian Constitutional Review*. Ljubljana, 1995. and Pavčnik, M.–Mavčič, A. (Eds.): *Ustavno sodstvo* (Constitutional Judiciary). Ljubljana, 2000.–As regards the Czech experience, see the excellent monograph of Pavel Holländer: Ústavněprávní

office of judicial power" deciding whether general legal acts are constitutional and legal, deciding on constitutional complaints (due to violations of human rights and fundamental freedoms by individual acts of the authorities) and on some other matters (e.g. on the possible impeachment of the President of the Republic, the Prime Minister and individual ministers).

11. Transitional Problems and New Challenges

Since I look at the problem of transition from a broader point of view and from within a broader period of time, this possibly makes it easier for me not to dramatize the situation. Therein, I am also supported by the thought of the Slovenian legal historian Vilfan, who was convinced that the "Slovenian language as the basis of national consciousness (...) was preserved in suitable historical circumstances" and that "thus, Slovenes–in accordance with their historical situation and environment–have always been completely normal people."[24]

I do not quote this in order to show any kind of self-satisfaction or as if I did not want to admit there are any problems, but simply because I think that the problems are anything but black and white. Neither is this purely a transition from the period of socialist law because this law has always been connected with traditional law nor are we entering a new period of traditional law that would be wide open and waiting for us. The traditional law to which we are returning is not static, but is in constant movement and itself confronted with challenges and open questions.[25]

It is undisputable, however, that foreign examples and foreign solutions cannot be uncritically transferred to the local legal system. The revival of traditional law must occur in accordance with historical and legal tradition, it must consider comparable foreign examples and decide in favour of those solutions and developments that fit into the local conditions.[26] Von Kirchmann

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argumentace. Ohlédnutí po deseti letech Ústavního soudu (Constitutional Argumentation. Considerations after Ten Years of the Constitutional Court). Praha, 2003.

[24] Vilfan, S.: *Zgodovinska pravotvornost in Slovenci* (Historische Fähigkeit zur Rechtsbildung und die Slowenen). Ljubljana, 1996. 481.

[25] At the level of principles, cf. Nahtigal, M.: *Vloga prava v tranziciji* (The Role of Law in Transition). Ljubljana, 2002.

[26] Compare with the instructions on how to fill legal gaps. See the Courts Act (1994): "If a civil law matter cannot be solved on the basis of valid regulations, the judge considers a regulation intended for similar cases. If the solution of the matter is nevertheless legally doubtful, he decides in accordance with the general principles of legal order in the country.

would probably say that it must be the law which is the most intrinsic with regard to the local conditions. Attention must also be paid to the fact that no solutions (either local or foreign or both) are introduced which are not in mutual harmony or are even mutually exclusive.

The transition from socialism to traditional law evidently has taken more time than originally expected. This is especially true of the privatisation of the economy and the denationalisation of once nationalized property. These processes are often legally very demanding and take much time (especially if the complications are dealt with in administrative as well as in court proceedings). It is equally–and possibly even more–important that no durable and firm political blocks (with corresponding political parties) have developed as yet and that a political culture which accepts the values of a state governed by the rule of law and those of a social state (together with the system of checks and balances) is still under development.

The question of an appropriate political culture[27] is among the most sensitive of issues. New political parties often hide behind the principle of the division of powers and are more interested in the division itself (somehow in the spirit of *Divide et impera!*) than in the divided exercise of power that has to be mutually harmonized and controlled. A logical continuation of these views is that most parties do not have a well thought-out attitude to the social state and to social justice. Market fundamentalism and the "liberal paradigm" that any acquisition on the basis of (non-monopolistic) market exchange is legal, legitimate and just[28] are just too strong and without any real competition that would stand up to them to any significant degree and in an efficient manner. Major positive changes will only occur when a sufficiently strong socially oriented political group is formed and when also the Constitutional Court has the opportunity to intervene more frequently by means of its decisions. If the Constitutional Court received a greater number of proposals, it could react in an appropriate manner because the principle of a social state is one of the most important constitutional principles.

The reactions to the new challenges of traditional law are and will be somehow different in individual (former socialist) states because also their historical

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In this he acts in accordance *with legal tradition and fixed findings of legal knowledge"* (italics added by M. P., Art. 3/2).

[27] Cf. Gessner, V.–Hoeland, A.–Varga, Cs. (eds): *European Legal Cultures.* Aldershot (etc.) 1996.

[28] Rus, V.: Enakost in pravičnost (Equality and Justice). In: Zalar, A. (Ed.): *Enakost in pravičnost v pravni in socialni državi* (Equality and Justice in a State that is Social and Governed by the Rule of Law). Ljubljana, 1998, 14.

development and their present starting points are different. Concerning Slovenia, I have already explained its peculiarities and certain advantages in comparison with the former countries of "real socialism". But there are also new challenges and new circumstances that cannot be avoided. Fortunately, the approaching membership in the European Union has acted in a cohesive manner. The task of the new members of the EU is to adopt and realize the fundamental economic freedoms that refer to the free movement of goods, the free movement of workers, the right of establishment, the free movement of services and the free movement of capital and payments. A prerequisite for all four said freedoms is that traditional civil and commercial law are valid in all countries. Slovenia has already adopted appropriate laws in these areas. There should especially be mentioned the Companies Act (1993), Protection of Competition Act (1993), Prevention of Restriction of Competition Act (1999), Securities Market Act (1999), Maritime Code (2001), Code of Obligations (2001) and Property Code (2002).

European unification and even wider globalisation processes also contain numerous hidden traps and dangers. For a small country and a small nation, it is of special importance to maintain the cultural and national identity. In principle, small countries will probably not be able to design the economic and political form of the EU and other broader international communities in a decisive manner. The power of small countries resides in their mutual cooperation and the preservation of the differences that are a *conditio sine qua non* of any national identity. At the same time, this is also the reserve clause and the limit beyond which the exercise of a part of national competence cannot be transferred to international organisations and communities. The European Union is "unity in variety" and "variety in unity".[29] If the European Union does not accept this condition, it would make itself look ridiculous. Thus, the real question is not whether there should be variety or not, the real question is how and to what degree this variety should be put into effect and how harmoniously (and colourfully) the European orchestra should play.

[29] Cf. the special issue "Evropski izziv" ("European Challenge"), in: *Nova revija* (Ljubljana), 2003, 252–253, 1–473.

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The Political Character of Legal Institutions and Its Conceptual Significance

Abstract. The essay seeks to make contributions to the clarification of the conceptual relation between law and politics. It characterizes law as an institutionalized and normative social practice that makes authority claims on its participants. On this basis, legal institutions are defined as institutions that systematically seek to influence human conduct by providing authoritatively binding practical reasons. The essay claims that the elucidation of the conceptual features of legal institutions touches upon a series of issues of justification that belong to the realm of political philosophy. This makes concepts like political institution and political obligation relevant for conceptual legal theory. After an analysis of the concept of political institution, the essay claims that the concept of legal institution and the concept of political institution have the same applications. This conclusion is used in support of the main thesis of essay: legal institutions are to be treated as political institutions in conceptual legal theory. The essay also examines whether the conceptual framework outlined here can be compatible with a viable notion of political communities. The essay makes an attempt to clarify the relevance of the main thesis in respect to legal reasoning; it insists that the position taken here is unlikely to lead to some radical reorientation of legal reasoning.

Keywords: legal institution, the normativity of law, authority, obligation, political institution, political obligation, political community, political legitimacy, legal reasoning

There have been several attempts in legal theory to clarify the conceptual relation of law to politics. The present paper is a part of one of those attempts. I do not undertake to present here my standpoint on this conceptual relationship in its entirety. I have done that elsewhere.[1] This paper will have a distinctive emphasis: it concentrates on the conceptual characteristics of legal institutions. It is only one part of a full analysis of the conceptual relation of law to politics, but certainly a crucial part of it.

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[1] See Bódig, M.: A jog és a politika közötti fogalmi kapcsolat: Egy tisztázási kísérlet. (The Conceptual Relation of Law to Politics: An Attempt of Clarification). *Állam- és Jogtudomány*, 2004. 51–86. See also Bódig, M.: *Jogelmélet és gyakorlati filozófia: Jogelméleti módszertani vizsgálódások* (Jurisprudence and Practical Philosophy: Jurisprudential Methodological Investigations). Miskolc, 2004, 525–553.

First, I shall outline my views on the basic conceptual characteristics of law. Then I compare it to an analysis of the conceptual nature of the "political". This will serve to establish my main thesis that legal institutions are to be treated as political institutions in conceptual legal theory. Later, I deal with some possible objections to my position. In the closing section of my paper, I consider some implications of my thesis in respect to legal reasoning.

My thesis is neither new nor radical, and I have no wish to present it as a revolutionary discovery. Several authors have put forward similar views concerning the nature of legal institutions,[2] and several authors have encouraged us to connect legal theory to political philosophy in some similar way.[3] Nevertheless, I think there is room for further improvement in this region of conceptual legal theory. It is also important that, as far as I can see, the position I take deviates from any similar position. I hope I can make some contributions to the clarification of the complicated conceptual relationship between law and politics.

Some Conceptual Characteristics of Law

To put ourselves into perspective, we need a good grasp of the basic conceptual characteristics of law. In the following paragraphs I put forward some claims that concern these characteristics. The claims I make summarize the results of an interpretive analysis that I have carried out elsewhere in detail, and that I will not repeat here.[4] This time around, I use these claims to outline my starting point.

Law consists of purposive human activities that are connected to one another in several ways and that are subjects of specialized communication among the affected agents. This basic feature can be summarized by saying that law is a social practice. Law as a social practice serves various individual and communal goals, so it cannot be characterized adequately in terms of its objectives, points or functions.[5] The basic conceptual character of law lies in its distinctive way of serving any function. Law treats human beings as rational agents who are capable

[2] Joseph Raz took it as one of Hart's main achievements that he depicted law as a kind of political institution. See Raz, J.: *Ethics in the Public Domain*. Oxford, 1994, 204. Cf. Bódig: *Jogelmélet és gyakorlati filozófia. op. cit.* 540–551.

[3] See Lloyd L. Weinreb: *Natural Law and Justice*. Cambridge, Mass., 1987, vii.

[4] See Bódig: *Jogelmélet és gyakorlati filozófia. op. cit.* 509–535.

[5] See Coleman, J.: *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*. Oxford, 2001. 184.

of acting on reasons. Law is one of the social practices that influence human conduct by way of providing (practical) reasons to the participants of the practice. It is its reason-giving character that makes law a *normative* social practice. "Legal" reasons addressed to the participants of the practice are not simply given: they are systematically provided. It is a further characteristic feature of the legal practice that certain individuals and groups (bodies) have the task of systematically providing reasons to other participants. I call these individuals and bodies "legal institutions". This feature makes law a characteristically *institutionalized* normative social practice.

If law is only one of the social practices that influence human conduct by way of providing practical reasons there must be something distinctively "legal" in the reasons provided by legal institutions. Or, more exactly, if law is to be taken as having practical relevance some reasons must owe their distinctive practical force to their "legal" character. Law seeks to make some practical difference in respect to participant behaviour. And law can be treated as a separate social practice if the practical difference it makes cannot be attained in any other way. This is one of the considerations that are summed up in the so called "practical difference thesis" put forward by several contemporary legal positivists.[6]

It is now a commonplace that legal reasons are typically *authoritative* reasons. Law seeks to make a practical difference by way of providing authoritative reasons.[7] This is what we normally mean by saying that law claims *authority* over its addressees.[8] However, pointing to the way the legal practice is based on authority relations is only one step towards clarifying the distinctiveness of law. Authority relations are pervasive features of social life. Law must be differentiated from the non-legal forms of authority like the parental authority over the children, the teacher's authority over the students, the referee's authority over the football players, etc. The key to drawing the relevant distinction can be found if we concentrate on the way law is related to the public life of communities. As opposed to many other alleged authorities, law claims

[6] See *ibid.* 69. See also Shapiro, S. J.: The Difference That Rules Make. In: *Analyzing Law: New Essays in Legal Theory* (Ed.: Brian Bix), Oxford, 1998.

[7] Recently, several authors challenged the standard view that law's normative claims are to be characterized in terms of authoritative reasons. See Soper, Ph.: The Ethics of Deference: Learning from Law's Morals. Cambridge, 2002. p. xiv. I reject those views for reasons not to be explicated here. See, however, my *Jogelmélet és gyakorlati filozófia... op. cit.* 189–193.

[8] See Raz: *Ethics in the Public Domain. op. cit.* 215.

public authority. And, as a public authority, law claims superiority over rival authorities in cases of collision.[9]

Let me dwell a little more on the issue of authority. I chose to characterize law in terms of the (authoritative) reasons it seeks to provide, and I find it particularly instructive if we reveal some features of those reasons. Of course, authoritative reasons have several essential features. However, one can point to two particularly important ones: these reasons are both *pre-emptive* and *content-independent*. We might call a reason pre-emptive if it plays a distinctive role in practical deliberation: it "is not to be added to all other relevant reasons when assessing what to do, but should replace some of them".[10] The practical reasons generated by legal provisions are not to "beat" rival reasons in a deliberative process that takes all of them into consideration. Legal reasons claim to render most of the potentially rival reasons ineffective and irrelevant in respect to the practical situation they address. If they provide a clear determination of what to do in themselves, no other reasons should play any role in the process of deliberation. In respect to law, the functioning of pre-emptive reasons can be characterized quite effectively by pointing to an age-old legal principle: *contra legem non est argumentum.*

I take a reason to be content-independent if it is "intended to function as a reason independently of the nature and the character of the actions to be done".[11] This is implied in the widely accepted claim that statutes and judicial decisions are to be followed not because they always provide good guidance to human actions but because they are the decisions of the proper legal authority. The practical force of reasons is dependent upon their sources rather than their content.

For me, these two characteristic features of authoritative reasons have an obvious implication: the addressee who has an authoritative reason to act upon can be said to be *bound* to act in a certain way. In other words, the notion of authority conjures up a correlative notion: *obligation.* I do not claim that obligations are always generated within the framework of some authority relation. That would be a pretty silly claim. Promises and contracts are obvious sources of obligations, and they presuppose no authority relation between the affected parties. Nevertheless, authority relations are also sources of obligations. One of the implications of exercising authority over a person is that the one exercising authority can obligate the addressee by her unilateral acts. There is no

[9] See Raz, J.: *Practical Reason and Norms.* Princeton, N. J., 1990. 149–154.

[10] Raz: *Ethics in the Public Domain. op. cit.* 214.

[11] Hart, H. L. A.: *Essays on Bentham: Jurisprudence and Political Theory.* Oxford, 1982. 254.

need for the endorsement of either the addressee or any other agent. As my readers will see, the notion of legal obligation will have a central position in my analysis. In insist that one can hardly have any grasp of the nature of law without understanding that law provides reasons to its addressees that are meant to be obligating (authoritatively binding).

One could carry on listing and elucidating conceptual features of law but this will be enough for my present purposes. The summary I have provided concerns several conceptual features of law. In the present analysis, however, we have a special emphasis: we concentrate on legal institutions. So we can formulate the claim that is of central significance for us now as follows: when we are talking about legal institutions we are referring to institutions that systematically seek to influence human conduct by providing practical reasons that authoritatively bind the affected parties.

Why Should the Concept of Political Institution Figure in our Analysis?

The thesis I am defending here states that legal institutions are to be taken as political institutions. One can quite rightly ask why we need this thesis. What would it add to the conceptual characteristics that I have listed above and that made no reference to political institutions?

The basic point I have emphasized above concerns the bindingness of law. Legal institutions claim that they can provide practical reasons that are authoritatively binding on the addressees. However, this normative claim is problematic. It is so problematic that one can doubt whether it can ever be made intelligibly. It is far from self-evident that one can provide authoritatively binding reasons to other persons. First, seeking to influence other people's behaviour this way is an intervention that is always in conflict with their autonomy.[12] So the very concept of authoritative reason might require us to show that there are situations in which such reasons can be provided in some justifiable way. I take this as an intelligibility condition. And, even if we successfully formulate an overall justification of authority, we will still need to find the way it can be applied to the case of law. One can quite easily admit that there are cases in which the normative claim we are talking about is absurd rather than simply problematic. It would be absurd if an Argentinean in Buenos Aires claimed that he can provide reasons that are authoritatively binding on me.

[12] This is the point around which philosophical anarchism typically centres. See Wolff, R. P.: *In Defense of Anarchism.* Berkeley, Cal., 1998. Cf. Simmons, J. A.: Philosophical Anarchism. In: Simmons: *Justification and Legitimacy.* Cambridge, 2001.

For me, the upshot of these considerations is that the normative claim of law we are talking about would be absurd without the possibility of pointing to some "normative state of affairs"[13] that provides the framework within which one can provide binding legal reasons to certain addressees.

So if we wish to argue that law's normative claims make sense (that they are intelligible in the sense of being potentially justifiable), we have to show that the functioning of legal institutions takes place within the framework of some normatively relevant relationship between legal institutions and their addresses. The normative claims that legal institutions typically make cannot be taken as (at least potentially) justifiable outside that framework, and one can hardly regard a normative claim intelligible (i.e. not absurd) if it cannot be taken as reasonably justifiable.

The conceptual structure that I have outlined above would collapse without finding some solution to this problem of potential justifiability, and I am convinced that there is only one way we can do it: by invoking considerations that belong to the realm of *political philosophy*. Ultimately, the issue of the practical force of law is to be clarified by political philosophy.[14] This conviction can be based on several theoretical sources but there is one particular consideration that has a prominent role for me. As far as I can see, the problem of intelligibility I referred to above is very much like the issue of *political obligation* in political philosophy.[15]

The issue of political obligation concerns certain institutional practices (political practices) that claim to provide binding reasons. Those reasons can be treated as binding if the addressees can be said to have an obligation to obey the reasons provided by the institutions in question. The analogy between the conceptual problem of political obligation and the normative claims of law is so strong that it might justify in itself the claim that the conceptual clarification of law's distinctive normativity is connected to one of the central issues of political philosophy. Although I do believe that the concept of legal obligation is conceptually connected to the issue of political obligation and that the authority claims inherent in law are claims to political authority, I would not be content with relying on this analogy alone. I think the thesis that legal institutions are to

[13] Cf. Dworkin, R.: *Taking Rights Seriously*. Cambridge, Mass., 1978. 51.

[14] Cf. Dworkin, R.: *Law's Empire*. London, 1986. 108–113.

[15] See Bódig: *Jogelmélet és gyakorlati filozófia. op. cit.* 530–531. See also Győrfi, T.: Politikai kötelezettség (Political Obligation). In: *Államelmélet: A mérsékelt állam eszméje és elemei II. Alapelvek és alapintézmények* (The Theory of State: The Idea and the Elements of the Moderated State II. Basic Principles and Basic Institutions.) (Ed.: Bódig, M. and Győrfi, T.). Miskolc, 2002.

be understood as political institutions (institutions claiming political authority) can be supported by deeper conceptual considerations.

The point I try to make is that the conceptual clarification of both legal and political institutions leads us to the problem of authority claims. And if we identify the institutions that can be taken as making these claims we will identify the same institutions in both cases.

Political Institutions

I suppose that there are political institutions and there must be something distinctive that makes them political. We often speak of political institutions, and, by doing that, we apply criteria that are supposed to identify political institutions. There might be something about the discourse on political institutions that helps us outline a conceptual construction that can be associated with political institutions.[16]

Let me start with a sort of a definition of institutions that was already inherent in my analysis of the conceptual characteristics of law. I would define institutions as frameworks of human interaction that have the function of shaping human conduct in certain ways. It might mean to change the conditions (i.e. risks or prospective benefits) of human conduct, to provide access to certain goods people want to acquire, to change the ways people can have access to what they want, to change the ways they perceive what they want, etc. Most institutions base their activities on the realization that human beings are rational agents so their conduct can be influenced by providing reasons to act in certain ways. Most of the institutions can be adequately characterized in terms of the reasons they provide to rational agents.

If we look for the distinctive features of political institutions that differentiate them from any other institution we are likely to find an important clue in the popular and professional discourse on politics. We can quite naturally arrive at the suggestion that the political character of anything must have a lot to do with issues of *power*. It sounds really promising, as the concept of power is capable of accounting for the reason-giving character of political institutions. Power is a typical and important source of practical reasons. Powerful people can motivate others to cooperate with them by offering to distribute goods that they have and that others need. Powerful people can also have an influence on other people by

[16] This is a roundabout way of indicating that I am about to reveal the conceptual characteristics of political institutions by an interpretive analysis. On my views on the interpretive methodology, see Bódig: *Jogelmélet és gyakorlati filozófia. op. cit.* 423–506.

being able to make credible threats. In these cases, the power of the powerful people is a source of various practical reasons for others: power can be used to motivate people to act in certain ways and scare them off from certain acts.

This way of approaching the conceptual problem of the "political" seems to be encouraged by the fact one can hardly imagine any political institution without possessing considerable amount of material power. This seems to be a good basis of accounting for even the most complex political concepts like "political sovereignty".[17] The reasons political institutions provide may prove stronger (and, in this sense, "superior") to any conflicting reasons. These are institutions that have enough material power to have a decisive influence on certain people's conduct–they can outweigh any rival institution in this respect.

Yet, there are problems with treating political institutions as mere "institutions of power". Not simply because this way of approaching the conceptual issues might have difficulties with differentiating between familiar political institutions like governments and others that we never call political (like well-organized criminal gangs). The basic trouble is that the conceptual account centring around power relations could hardly handle one aspect of political institutions. These institutions do not simply claim that they are in the position to provide reasons of supreme significance: they claim that they have the *right* to provide those kind of supreme reasons.[18] By having the right I mean that their claim can be regarded as *legitimate*. Officials of political institutions often do their jobs thinking that their activities are supported by justifications that can be reasonably accepted by the addressees of their activities: they have a right "to rule". Of course, I do not believe that such a conviction is always characteristic of the officials of political institutions. Nor do I believe that this conviction is always reasonably acceptable. However, this conviction makes sense in respect to political institutions in a way that it never does in respect to some "institutions of power" like large criminal gangs.

This point must not be confused even if we admit that, in our sublunar circumstances, we cannot imagine successful political institutions without enormous material power. Of course, political institutions often attain their objectives by displaying and exercising their material power. However, we can easily end up with a series of misconceptions if we push this line of reasoning too far. Political institutions do exercise power but they do it in a remarkable way. They present

[17] For an elucidation of the concept of political sovereignty in terms of power, see Benn, S. I.: The Uses of "Sovereignty". *Political Studies,* 1955. 109–122.

[18] Cf. Strauss, L.: *Természetjog és történelem* (Natural Right and History). Budapest, 1999. 136.

their power as justified by their right to rule. In other words, they exercise their power in the name of their *authority*.

The conceptual consideration to be emphasized here is that a sufficient grasp of the political nature of certain institutions will have a normative dimension. The claim to legitimacy made by political institutions raises several issues of justification that have some conceptual relevance. As a matter of conceptual explanation, the political character of certain institutions lies, at least partly, in the normative aspects of their functioning. Some institutions are able to make very strong claims on human conduct without making any intelligible claim to being political institutions. So referring to power relations is not enough to single out the conceptual characteristics of political institutions.[19] As the functioning of political institutions has a lot to do with normative notions (like sovereignty), the need to find the conceptual characteristics of political institutions once again conjures up the concept of authority. We cannot have an adequate grasp of the nature of political institutions without raising the issue of authority.

If we encounter again the issue of authority we are also faced with the issue of distinguishing political institutions from other institutions that are authoritative in other ways. We have already admitted that it might be characteristic of many institutions that they seek to provide authoritative reasons. I do believe that the distinctiveness of political institutions is to be revealed by reflecting on the claim to *sovereignty* that can be taken as characteristic of such institutions. Sovereignty is to be understood here as a kind of "superior authority".[20] What distinguishes political institutions from other authoritative institutions is the way they are related to rival authority claims. It is quite obvious from the fact that there are several kinds of authoritative institutions that there can be and there are cases when they make conflicting claims on certain people's conduct. In these cases, some institutions might claim that the authoritative reasons provided by

[19] The same applies to any attempt to define the political in terms of the influence on social relations. As an example of this approach, see Győrfi, T.: *Az alkotmánybíráskodás politikai karaktere* (The Political Character of the Constitutional Review). Budapest, 2001. 11. The influence-based approach is but a more abstract version of the power-based approach. It is to be remarked, however, that Győrfi's other works reflect a view on the concept of the "political" more similar to the one taken here. See Győrfi: A politikai kötelezettség. *op. cit.* 65.

[20] I have provided a conceptual analysis of sovereignty elsewhere. See Bódig, M.: Szuverenitás és joguralom (Sovereignty and the Rule of Law). In: *Államelmélet... op. cit.* That analysis, however, had a different emphasis, and did not give this role to the claim concerning superior authority. On this occasion, I do not attempt to explain how that analysis is related to this one.

them are superior to any conflicting authority claims. Or, more exactly, they claim that within a designated territory, over a designated group of people and in respect to designated forms of conduct they exercise supreme authority. I call institutions that make this claim *political institutions*.

It is worth making a remark here concerning my terminology. I follow Joseph Raz in distinguishing political institutions from political organizations (like political parties).[21] Political institutions are authoritative–they systematically provide reasons that are supposed to be authoritatively binding. Political organizations lack this feature.[22] They organize human activities with the purpose of influencing authoritative institutions. It can be done in various ways: helping their members to become officials in political institutions (through elections), putting pressure in political institutions (by way of demonstrations, petitions), etc. It clearly implies that political institutions have a sort of conceptual priority over political organizations. The activity of political organizations could not be described intelligibly without making reference to political institutions. As a matter of fact, the whole point of any political activity concerns the existence and the functioning of political institutions. It would be odd to call "political" any activity that is not related to political institutions–i. e. not directed to taking part in the activities of political institutions, or influencing political institutions from without, or shaping other people's views on the political institutions, or protecting human beings from the influence of the political institutions, etc.

This way of clarifying the conceptual structure of the "political" allows for a better understanding of the issues of justification that figure in our analysis. Especially the significance of the concept of political obligation. It seems obvious that the claim of political institutions to supreme authority is problematic. It is a relevant question whether an institution can ever exercise such an authority over human beings. It is even more relevant whether certain actual institutions can justifiably claim this kind of authority over certain people in actual situations. The fact that the normative claims of political institutions are problematic makes issues of intelligibility dependent upon the answerability of several issues of justification here. And this is where the conceptual significance of the issues of political obligation become manifest.

[21] See Raz, J.: *The Morality of Freedom*. Oxford, 1986. 4.

[22] The terminology I use here may seem a bit misleading. Political organizations like political parties clearly fall under my definition of institutions. However, they might lack the necessary features of political institutions. They are institutions but not political institutions.

The "Legal" and the "Political"

We have now some conceptual claims on legal institutions and a short analysis of the nature of political institutions behind us. It is time to connect them if we want to use them in support of the thesis I defend in this paper. Of course, there are striking analogies between the two analyses. But what is the significance of those analogies? In order to clarify that, we need to concentrate on the real life applications of my abstract conceptual constructions. We need to try to identify institutions that fit in my analysis, which can be taken to provide practical reasons the way I indicated.

Unfortunately, this issue of application concerns a series of complicated methodological problems, and this is not the proper occasion to explore those problems. As I have tried to handle those problems elsewhere,[23] I simply put forward the conclusion of that analysis here. I hope that my claims will not be counter-intuitive. The relevant conclusion has two elements. The first is that the characterization of political institutions that I have provided can be applied, among others, to courts, legislative assemblies, and administrative agencies. The second element is that the way I characterized legal institutions would single out very much the same institutions: courts, legislative assemblies, administrative agencies. On the level of applications, there is no difference in respect to the implications of my two analyses. And the best explanation of this conclusion is that legal institutions are political institutions.

There are two further questions still to be considered here. The first is about the possibility of other plausible explanations of this identity of applications. Are we bound to accept that the identity of the applications is enough to establish my thesis? As far as I can see, there is only one possible alternative to my explanation of this identity. One could claim that the issue of application is not conclusive here for it is possible that the legal and the political character are two different dimensions of the institutions we have singled out. Just like a novel can be the source of historical knowledge and artistic experience at the same time, the legal and the political character of the same institutions might be analytically distinguishable. A version of this position is represented by some advocates of system theory.[24] They claim that the social system is divided into autopoietic subsystems. The "legal" and the "political" mark two of these subsystems. And although there are institutions (like legislative assemblies) that play a role in both subsystems, they can be clearly differentiated if we concentrate on their different functions and their different ways of selecting information.

[23] See Bódig: *Jogelmélet és gyakorlati filozófia. op. cit.* 509–535.

[24] See Pokol, B.: *A jog szerkezete* (The Structure of Law). Budapest, 1991. 65–67.

Can we be forced to accept this approach? I do not think so. If the above analyses were not basically mistaken, the legal and the political character cannot belong to different conceptual dimensions of the same institutions. We should not forget that the characterization of the "legal" and the "political" were related to the same aspects of the institutional practice: the distinctive character of the reasons they seek to provide. The conceptual characteristics were heavily dependent upon the authority claims of the institutions in both cases.

The second question to be considered here concerns a possible incongruence of my thesis and its justification. My thesis was that legal institutions are actually political. However, when I tried to provide arguments to support it I claimed that some institutions are both legal and political. My thesis suggests that the "political" is conceptually more basic than the "legal", and my arguments did not justify this priority claim. On the basis of my analysis, one could claim with equal plausibility that political institutions are necessarily legal in their character.

Of course, I claim that the "political" must have some conceptual priority if we try to clarify the nature of legal institutions. My justification for this claim is a consequence of the realization that the conceptual analysis of legal institutions will necessarily encounter problems that belong to the realm of political philosophy. Referring to the political nature of legal institutions provides the key to the solution of several conceptual issues concerning law. I do not think that the same can be said of the legal character of political institutions. Referring to the legal character of political institutions would not open up an analytic dimension that would not be revealed otherwise. This methodological consideration is the heart of the thesis that I defend in this paper.

Vicious Circularity?

There is a further question that is to be handled here and that deserves even more attention. I have argued that conceptual legal theory must treat legal institutions as political institutions. Someone might object that my justification for this claim is straightforwardly implausible. When I provided a basic characterization of law, I emphasized that law claims public authority. Although I failed to provide even the outlines of an adequate clarification of the meaning of "public" here, a careful analysis would reveal that I tacitly assumed that the public life to which law is to be taken to belong is something that we normally associate with political communities. When I reached the conclusion that legal institutions *are* political institutions it was no more then a mere consequence of this tacit

assumption. And, as the underlying point was not justified, I was begging the question here in a quite damaging way. I failed to inform my readers on the conceptual significance of political communities (that have public lives in the relevant sense). I still owe them a useful definition of political communities and their public lives.

Even more unfortunately for me, my analysis does not seem to have the resources for providing such a definition. I relied heavily on the concept of political institutions. But we do not have any clear idea of political institutions without understanding that they are to be taken as representatives of political communities. They would not be political without having a political community they could represent. So I am in a lot of trouble if we realize that my analysis contained nothing that could allow for a clarification of the concept of political communities or, more exactly, the criteria that make certain communities political. My analysis is so strongly and thoroughly tied to the conceptual characteristics of institutional practice that I would not be able to provide any elucidation of the nature of the "political" without making reference to institutions. That would force me to describe political communities as communities having political institutions: a community would not be political without being dominated by political institutions. Then it would be terrible confusion around the claim that political institutions represent political communities. It would involve a pretty vicious circularity.

This is undoubtedly a formidable challenge to my position. But I am confident that it can be met. I admit that my way of elucidating the nature of the "political" is strongly tied to the issues of institutional practice. I have no wish to deny this. What I have got to deny is the dependence of my position on a "pre-institutional" notion of political community. I think there is one point in my reasoning that can be used as a starting point here. We can guarantee a sort of conceptual priority to the claim that some institutions claim superior authority over rival authorities. Then we could point to this as the heart of nature of the "political". And, as we have a chance of clarifying the conceptual character of authority in terms of the distinctive reasons they provide, this superiority claim can provide a first approximation of the concept of political institutions without begging any question.

Then, in the next phase, we could point to the problematic nature of such an authority claim. It is not self-evident that such an authority claim can ever be justified. In order to make it intelligible, we need to show the relevant context in which it can be made with any chance of being justified. Such an authority claim should be situated in the framework of some distinctive relationship among persons. This framework cannot be generated by some "private" relation-

ship based on direct interpersonal connections (like ordinary contracts or family ties). This is where the need for making reference to something like the "public" character comes from. Then, we could argue that the practice of an institution cannot involve such an authority claim without taking the addressees to belong to a community that the institution in question can represent. It must be a community that could not be maintained without the contribution of institutions that claim superior authority over the members of the community. We might call this kind of communities (for which the functioning of political institutions is an existence condition) "political".

In this case the clarification of the conceptual nature of communities would have two essential elements: the concept of political institution and the considerations concerning the need for such institutions in certain communities. I do not think that such a clarification would involve any vicious circularity. In this case, we can define political institutions without even mentioning political communities. The concept of political community figures in our reasoning when we ask what gives rise to the need for political institutions in certain communities. In other words, the concept of political institution is given to us as a conceptual possibility on the basis of our reflection on the various forms of providing practical reasons to rational agents, while the concept of political community figures in the analysis when we begin to raise questions concerning the applications of such a conceptual possibility. The concept of political community has no constitutive role in the basic conceptual characterization of political institutions. Political communities become a factor in the conceptual analysis when we begin to elucidate the issues of justification concerning political institutions.[25]

What about Legal Reasoning?

I would like to make one last point. If the conceptual claim I have made is acceptable we need to raise questions concerning its significance. Of course, a

[25] It sounds like separating conceptual issues and issues of justification. Yet, I claim that the issue of justification is relevant in respect to singling out the conceptual characteristics of political institutions. Is not it a straightforward contradiction? No. Issues of justification play two roles here. They have a conceptual significance: in respect to some concepts, we have to realize that their elucidation must make reference to issues of justification. But making that reference is still a conceptual claim. When we go further and try to answer substantial issues of justification we leave the territory of conceptual analysis. So what I was referring to was partly based on the difference between determining the conceptual characteristics of issues of justification and providing substantial answers to issues of justification.

conceptual claim can be significant in several respects. What I am particularly interested in is its bearing on issues of legal reasoning. Lawyers normally believe that legal reasoning can be clearly differentiated from political deliberation. The conceptual claim I have made seems to undermine this way of perceiving legal reasoning.

One could object that my highly abstract analysis cannot have such far-reaching consequences in respect to legal reasoning. The way I attributed political characteristics to legal institutions was hardly more than a way of emphasizing their authoritative nature. And that is something already inherent in the way lawyers perceive the task of legal reasoning. Although I warn anyone against drawing some hasty conclusions from my standpoint concerning legal reasoning, I would hesitate to downplay its practical significance this way. One aspect of my analysis suggests possibly far-reaching consequences. I have tried to reveal a conceptual connection between legal and political obligation. Everyone knows that legal obligations play a central law in legal reasoning. Legal reasoning normally concerns issues of personal legal responsibility, and legal responsibility is always a matter performing legal obligations. On the other hand, political obligation is a matter of justifying obedience. In other words, it has a lot to do with the problems of political legitimacy. If legal obligations are conceptually connected to some construction of political obligation, legal obligations might become heavily dependent upon political legitimacy. And political legitimacy is something that is notoriously controversial.

Of course, I cannot clarify this issue now. I admit that I have a lot to do to clarify the implications of my conception concerning the issues of legal reasoning. I use this occasion only to deepen our understanding of the way issues of political legitimacy concern legal reasoning. I will indicate that it is highly unlikely that I could end up with requiring some radical reorientation of legal reasoning.

How could issues of political legitimacy have a profound effect on legal reasoning? Let me outline one possibility. Political legitimacy presupposes justifying reasons that are addressed to every member of the community. And as some people can hardly be motivated by moral reasons, such a comprehensive justification may be destined to be tied to some very basic forms of self-interest. (Like avoiding violent death.) It may be that only those interests can have equal justifying force in an existing community. In this case, the basic justification of political obligation will centre around prudential reasons originating from self-interests. And if legal obligations are conceptually connected to the relevant construction of political obligation they will be tied to certain prudential reasons as well. The whole point of legal institutions will be the service of self-interest. And this may deprive legal reasoning of its value-content–of its moral worth. It

provides a basis for deeply amoral practical orientations concerning law that are sensitive only to the relevant prudential reasons. Law will have to be depicted as a web of strategic interactions. Treating legal institutions as political institutions will turn out to be a demoralizing aspiration. In other words, we might end up with Holmes' suggestions that we should see the law from the "bad man's" point of view when we consider issues of legal reasoning.[26]

I am quite sure that some legal theorists would happily accept these consequences, but I do not share their views on law. I would hesitate to subscribe to a conceptual explanation of law that treats it as a web of strategic interactions and that renders legal reasoning a competition of mere prudential reasons. However, I am convinced that it is not to be taken as a necessary implication of my conception.

Let me try to elucidate my views on this matter with the help of a highly relevant example. Very similar considerations can be put forward when we are discussing the justificatory issues of democracy. It might seem unrealistic to claim that democratic institutions are to be treated as manifestations of a self-governing political community consisting of morally committed members. It is more realistic and reasonable to claim that the democratic process provides a framework for making political decisions that have considerable advantages over rival institutional solutions. And the advantages are to be explained only in terms of the self-interests of the affected parties. Democracy might be acceptable for everyone because it guarantees that his or her interests will have an effect on the political process. We may reasonably hope that elected officials in a democratic regime will understand that they will not stay in power if they frequently and openly ignore the interests of those they seek to govern. (Or, more exactly, if they do not even make an attempt to justify their activities in terms of the interests of the governed.) The democratic process links the interest to stay in power with the perceived interests of the governed.[27] Of course, it will not guarantee that merely self-interested practices by the officials will be impossible or will always be revealed and eradicated. We have got to settle for a more modest claim: the democratic process seems to be the most effective of the available measures against ignoring the interests of the governed.

[26] See Holmes, O. W.: The Path of the Law. In: *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Ed.: Burton, S. J.). Cambridge, 2000. 200–204.

[27] See Kis, J.: *A politika mint erkölcsi probléma* (Politics as a Moral Problem). Budapest, 2004. 66–73. See also Bentham, J.: Plan for Parliamentary Reform. In: *Works of Jeremy Bentham* (Ed.: Bowring, J.), vol. 3, Edinburgh, 1843.

Does this mean that a viable justificatory theory of democracy must be based solely on prudential reasons generated by the perceived interests of the officials and the governed? I do not think so. When we describe the actual operation of democratic institutions and its effect on ordinary people we need a framework that is not tied to ideal assumptions concerning human conduct and that does not presuppose attitudes and patterns of behaviour that are unlikely to prevail amongst members of existing communities. What makes democracy work effectively is to be explained largely in terms of the self-interest of the participants. And certain issues of justification are to be answered along the lines of this explanation. In this case, democracy appears to be a web of strategic interactions. However, it does not mean that the issue of justification is exhausted by such an explanation.

The fact that democracy as a working institutional framework does not presuppose a community of moral heroes says not much on the moral worth of democracy. When we turn to issues of moral worth we need more elevated conceptions that go beyond what makes political institutions effective. These elevated conceptions reflect several normative (value-related) aspects of the democratic process that are also embodied in the operation of democratic institutions. It becomes pretty obvious when we are faced with the language of the democratic discourse. That language is permeated by ideals and ideal assumptions that have a significant effect on the outcome of democratic decision-making. If we are to account for this fact we need to depict democracy as a system that makes use of various forms of self-interested behaviour without losing its deeper moral point. And that way of depicting democracy will reveal some moral aspects of democratic policy that are highly relevant even if they are ignored by many members of the democratic community. Without taking these moral aspects into account, we would not be able to elucidate what makes democracy valuable for us, what makes democratic institutions worthy of our support.

There are aspects of the theoretical and practical problems of democracy that may steer us towards a rather mundane view. However, the mundane view of democracy often breaks down. So we need to pay attention to other issues as well (like the issue of what makes democracy worthy of our respect) that steer us towards less mundane views–elevated by substantial practical principles and several ideal assumptions.

Although it would be too early to claim that I have elucidated the implications of these theoretical problems, I suspect that we would reach very similar conclusions in respect to legal reasoning. Of course, there are aspects of the legal practice that would not be effective without addressing the prudential reasons available to the affected parties. It well may be that we will be more sensitive to those aspects if we claim that legal obligations are conceptually connected to

issues of political legitimacy. But there are other relevant aspects as well that cannot be explained in terms of mere prudential reasons. Claiming that issues of political legitimacy figure in legal reasoning is unlikely to force us into a sort of demoralization of legal reasoning. I am quite sure that this suggestion would be reinforced if we considered the most characteristic cases where issues of political legitimacy are linked with issues of legal obligation: cases of civil disobedience.[28]

[28] Cf. Bódig, M.: Rendszerváltás, politikai moralitás, legalitás (Political Transition, Political Morality, Legality). *Fundamentum*, 2003, 87–94.

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The Right to Effective Judicial Protection in Community Law: Intervention before Community Courts

Abstract. The principle of fair administration of justice requires that formal restrictions on initiating procedures before courts correspond to the right to access to a court. Based on the rule of law–Community law shall ensure that its provisions on the administration of justice are in accord with the fundamental law requirements established in Community law. The provisions on intervention before Community courts contain certain restraints on access to a court that are worth scrutinising on a fundamental right basis. The aim of the paper is threefold. First, it wishes to recover the jurisprudence of Community courts interpreting the conditions of intervention. Second, it attempts to reveal the jurisprudence of the Strasbourg and Luxembourg courts on access to justice with respect to formal restrictions. Third, it essays to implement the access to court test on the restraints of access to justice in intervention.

Keywords: European Community law, European Convention on Human Rights, fundamental rights, access to justice, right to effective judicial protection, intervention, fair administration of justice

Introduction

Formal restrictions on initiating procedures before Community courts have always been in the centre of debate in Community law. The *locus standi* conditions of annulment actions under Art. 230 EC attracted much of attention in the past mainly due to the notoriously strict interpretation on the postulate of individual concern anchored by the European Court of Justice. The ever since growing importance of fundamental rights in Community law established a new source of standards not only set against the legal provisions of the Member States but against the Community legal system. It became evident that the Community provisions restricting access to justice cannot avoid the binding criteria of fundamental rights.

The expressed correspondence of the Community system of fundamental rights protection to the law of the European Convention on Human Rights (ECHR) premised that the two separate orders of European human rights'

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protection apply similar elements when determining the limits of a basic right. The in Community law recognised right to effective judicial protection covers the right to a fair trial and the right to an effective remedy as named in the ECHR.

The right to access to a court–developed form the right to a fair trial–provides that according to the principle of fair administration of justice the formal restrictions on the initiation of procedures before a court shall not result in a denial of justice. Furthermore, it requires the restrictions to be supported by a proportionate legitimate interest.

The intervention before a court allows the interveners to support the parties in a pending procedure to attain the form of order sought. This way the interests can be represented before a court without launching a separate action which in some circumstances may be extensively difficult. It follows that the rules governing intervention that establish formal restrictions on applying for a leave to intervene before Community courts shall also correspond to the conditions mounted by the right to access to a court.

How is Intervention Regulated in Community Law?

According to Art. 40 (former 37) of the Statute of the European Court of Justice (Statute) in direct actions[1] before Community courts the Member States and the Community institutions have the right to intervene in any case before the Courts. Any other person may intervene in any case except for cases between the Member States, between the Community institutions or between the Member States and the Community institutions, if the intervener is able to establish an interest in the result of the case.

Art. 93 of the Rules of Procedure of the European Court of Justice[2] provides that either the President of the Court or the Court decides on the application for intervention. The application must be presented after six weeks of the publication of the original procedure in the Official Journal. An application may be accepted after the expiry of the above period, but before the opening of the oral procedure. In appeal the intervention is open until one month after the publication of the appeal in the Official Journal.[3] The intervener shall

[1] The request for a preliminary ruling (Art. 234 EC) can be characterised as an indirect action.

[2] Art. 115 of the Rules of Procedure of the Court of First Instance contains similar provisions.

[3] Art. 123 of the Rules of Procedure of the European Court of Justice.

accept the case as he finds it at the time of his intervention and shall support only one of the parties.[4]

Art. 34 of the Statute of the Court of Justice of the European Coal and Steel Community, however, did not apply the limitation based on the types of actions. It provided that any natural or legal person in any case before the Court may intervene, if the intervener establishes an interest in the result of the case. In addition, it limited the intervention to supporting or requesting the rejection of the submissions of one of the parties.

In preliminary ruling proceedings the possibility of intervention does not exist. However, those who have intervened in the proceedings in the national court may participate in the procedure before the ECJ. This has been clarified by the Court in *Biogen* v. *Smithkline and Beecham Biologicals*.[5] In this case an application to intervene in a preliminary ruling procedure was found inadmissible as the Court ruled that the right to intervene before the Court only applied "to contentious proceedings before the Court, designed to settle a dispute."[6] The Court found that the preliminary ruling procedure was not such procedure, as its aim is to ensure the uniform interpretation of Community law by ensuring co-operation between the national courts and the ECJ. The Court then referred to Art. 20 (now 23) of the Statute governing the participation in preliminary ruling cases, which states that "the parties (...) shall be entitled to submit statements of the case or written observations to the Court". The Court asserted that the term "parties" referred only to the parties in the procedure before the national court. Consequently, a person who has not been granted a leave to intervene before the national court is not entitled to submit observations in the procedure before the Court.

Even tough it is not named intervention, Art. 23 of the Statute orders that in cases governed by Art. 234 EC the Member States, the Commission and, where appropriate, the European Parliament, the Council and the European Central Bank are entitled to make written and oral observations of the case to the Court. The last paragraph of the same article provides that in cases with EEA or EFTA relevance non-member states are also allowed to submit written or oral observations of the case to the Court. In spite of the fact that it is clear that this intervention-like procedure is justifiable on functional grounds, so that the uniform interpretation and application of Community law is observed, in case of

[4] Art. 40 of the Statute of the European Court of Justice.

[5] C-181/95, Order of the President of the Court of 26 February 1996, *Biogen Inc.* v. *Smithkline and Beecham Biologicals SA* [1997] ECR 0357.

[6] Par. 4; the Court also refers to C-6/64 *Costa* v. *ENEL* [1964] ECR 614 and C-19/68 *De Cicco* v. *Landesversicherungsanstalt Schwaben* [1968] ECR 473.

a request for preliminary ruling on validity of Community acts it is questionable that the lawmaker(s) are able to participate in the procedure, the legal subjects of the act in question, however, not. Finally, the legal construction applied in preliminary ruling cases may be controversial in cases of a request for a preliminary ruling on the validity of Community acts, as this question may not be assessed in the procedure in the national court, thus the person having interest in this matter does not apply to intervene before the national court.[7]

The Intervention of Private Parties in Direct Actions

With the exclusion of certain cases private parties may intervene in cases before the Community courts, if they are able to prove sufficient interest in the result of the proceedings. It is for the Community courts to decide upon this question, which produced a large amount of case-law. The analysis of these cases will provide us information to establish the major tendencies on the admissibility of applications for intervention by private parties. The cases in which applications for intervention the most frequently take place, due to the restrictions in Art. 40 of the Statue, are mainly actions for annulments under Art. 230 EC and procedures for interim relief. The disputes cover almost all fields of substantive Community law from staff cases to competition law.

How is the Concept of an Interest in the Result of the Case Interpreted by Community Courts?

An important line of interpretation can be outlined from *Rijnoudt and Hocken*[8] in which a Community official wanted to intervene in an action for annulment of salary statements brought by other officials. The CFI ruled that the concept of an interest in the result of the case must be interpreted as a direct interest in the decision on the claims. The CFI dismissed the application by stating that an official who did not bring an action in relation to his own salary statement,

[7] Schermers, H. and Waelbroeck, M.: *Judicial Protection in the EU*, 6th ed, Kluwer, 2001, 724, § 1452.

[8] T-97/92 and T-111/92, *Loek Rijnoudt and Michael Hocken* v. *Commission* [1994] ECR staff cases.

although he could have done so, can only establish an indirect interest in the result of the case.[9]

The CFI in *Elena Candiotte*[10] went further and declared that

> "an interest in the result of the case within the meaning of the second paragraph of Art. 37 of the (...) Statute of the Court of Justice must be understood as a direct, existing interest in the success and failure of the submissions which relate specifically to the measure whose annulment or suspension is sought."[11]

In this case some members of the institutions' Staff Committee applied to intervene in support of the applicant who sought the annulment of a decision not admitting a self-employed artist to the second stage of a competition for selecting the works of art to be installed in a new building of a Community institution. The CFI found that these persons lacked direct interest in the outcome of the case, as they were unable to demonstrate any personal interest in the admission of the applicant to the second stage of the competition or to show that their position could be affected by the result of the case.

In *ACAV*[12] the President of the Fist Chamber of the CFI ordered that the concept of an interest in the result of the case must be understood as a direct and actual interest in the manner in which applications for forms of order are dealt with. In particular, traders established in a Member State have an interest in the outcome of the dispute, in so far as the contested measure prevents them form carrying on part of their activities and affect their income. Moreover, the court concluded that a local or regional body also establishes such interest, if it is able to prove that its economic and social structure essentially depends on the sector affected by the contested measure, and the contested measure could require a conversion plan for the whole area concerned. However, to evade the risk of unemployment and loss of business of traders in the area as a favourable result to obtain is an interest indirect and remote. In order to prove direct and actual interest the local or regional body must show that the economical and social structure as a whole is essentially dependent of that sector of activity.

[9] This ruling was repeated in an order in the very similar C-76/93 P, *Piera Scaramuzza* v. *Commission* [1993] ECR I-5715 case.

[10] T-108/94, *Elena Candiotte* v. *Council* [1994] ECR II-0249.

[11] Par. 5.

[12] T-138/98, *ACAV* v. *Council* [1999] ECR II-1797.

A different approach was introduced in *Compagnie Maritime Belge*[13] in which the CFI held that an interest in the result of the case was established as the contested decision closed the procedure initiated by the Commission following the complaints of a trade association, whose members included the companies applying to intervene. The court supported its argument by stating that these companies participated in the procedure before the Commission by submitting written observations and attending at the hearings. This argument was further affirmed by the CFI in *Eurosport*[14] in which it stated that an undertaking whose complaint caused the proceedings of the Commission to be initiated which was concluded by the contested decision has an interest in the result of the case. In another case[15] the leave to intervene was granted partly on the basis that certain interveners took part in the procedure as complainants, in which the contested decision was adopted.

In *Eurosport* the CFI found another specific situation in which an interest in the outcome of the dispute is established. It declared that an undertaking who was the addressee of the contested decision and, as a result, enjoyed an independent right of action under Art. 230 EC also possessed such interest without the obligation to initiate the action for annulment. This approach was upheld in a later case[16] in which the Court granted a leave intervene to a company which had an independent right to launch an action for annulment against the contested regulation under Art. 230 EC, as the company was of direct and individual concern of the contested measure. The fact, however, that it did not bring a separate action for annulment confined its rights as an intervener to support the forms of order sought by the respondent.

It is also worth analysing the intervention cases under Art. 34 of the Statute of the Court of Justice of the European Coal and Steel Community as it applies the same test of having an interest in the result of the case. In a very early case[17] the Court decided to examine precisely which provision the interveners had an interest in having annulled. The Court concluded that the interveners could only prove their interest in the result of the case in relation to a small segment of the case. This meant that the Court allowed their intervention to support The

[13] T-24/93 R, *Compagnie Maritime Belge Transport NV* v. *Commission* [1993] ECR II-0543.

[14] T-35/91, *Eurosport Consortium* v. *Commission* [1991] ECR II-1359.

[15] T-395/94 R, *Atlantic Container Line AB and Others* v. *Commission* [1995] ECR II-0595.

[16] C-245/95 P, *Commission* v. *NTN Corporation and Koyo Seiko Co. Ltd.* [1996] ECR I-0553.

[17] C-25/69, *The Netherlands* v. *High Authority of the ECSC*.

Netherlands to have only a limited part of the contested decision annulled. Furthermore, as a condition for intervention in this case the Court examined whether the interveners were directly affected by the contested decision.

In *Lemmerz-Werke*[18] the Court assessed that the intervener must show a direct and existing interest in the acceptance by the Court of the submissions of one of the parties. The Court rejected the application to intervene because the only interest the intervener claimed was in the success of certain of the applicants arguments. In *British Coal*[19] the CFI held that the intervention of a person showing direct and present interest in the result of the case was admissible. On these grounds it ruled that the company which made the complaint before the Commission was entitled to intervene, since the application sought the annulment of a decision favourable to it. On the other hand a purchaser of coal was not granted a leave to intervene in the action for annulment initiated by a producer of coal of the Commission's refusal to reject the complaint, even though the Commission instituted proceedings against both of them on the basis of the same complaint, however by reason of different infringements of Community law, since the infringements were distinct and did not share the same legal framework. The President of the Court in *National Power*[20] ruled in the following way:

> "For the purposes of granting leave to intervene, the Community judicature ascertains whether those seeking it are directly affected by the contested act and whether their interest in the result of the case is established. Similarly, it is necessary to establish a direct, existing interest in the grant by the Court of the order as sought and not an interest in relation to the pleas in law put forward. The interest necessary in this respect must relate not merely to abstract legal arguments but to the actual form of order sought by a party in the main action."

Just as in case of the action for annulment under Art. 230 EC[21] the Community courts developed a separate interpretation of the admissibility conditions of

[18] C-111/63, *Lemmerz-Werke GmbH* v. *High Authority of the ECSC*.

[19] T-367/94, *British Coal Corporation* v. *Commission* [1997] ECR II-0469.

[20] C-151/97 P(I) and C-157/97 P(I), *National Power plc and PowerGen plc* v. *British Coal Corp. and Commission* [1997] ECR I-3491.

[21] See cases: C-67/85, C-68/85 and C-70/85, *Van der Kooy* v. *Commission* par. 21–24 [1988] ECR 219; T-585/93, *Greenpeace* v. *Commission* par. 59 (and the cited cases) [1995] ECR II-2205; T-122/96, *Federolio* v. *Commission* [1997] ECR II-1559, T-84/01; T-173/98, *UPA* v. *Council* par. 47 [1999] ECR II-3357; T-84/01, *ACHE* v. *European Parliament and Council* par. 25 [2002] ECR II-0099.

intervention for (trade)associations. In the *Kruidvat* case[22] the CFI ruled that the as *FEPD* (*Fédération Européenne des Parfumeurs Détaillants*) represented a large number of undertakings in the sector. Since its objective was to protect their interests in particular in relation to the institutions of the European Union, it had an interest to intervene in a case in which the operation of selective distribution systems in the field of *de luxe* cosmetics was at stake. In *Atlantic Container*[23] the intervention was found admissible, as it was ascertained that the immediate application of the contested measure was likely, *prima facie*, to affect the activities of the members of the intervening trade associations. The President of the Court in *Pharos*[24] granted a leave to intervene an association comprising of national associations from the animal health industry in Europe and manufacturers of animal health products, since the outcome of the case was of direct concern to the members of this association. In another two cases[25] the intervention of representative associations was dependent on whether their objective was to protect the interest of their members in cases dealing with questions of principle liable to affect their members.

The specific nature of the *AAC* case[26] lies in the fact that the CFI decided upon the intervention on the basis of the termination of the interest in the result of the case. *Casillo Grani* and *Italigrani* were granted a leave to intervene in the procedure. Later, however, the lawyer of *Casillo Grani* submitted a declaration to the CFI that *Casillo Grani* was in liquidation. The CFI ruled that in spite of the fact that *Casillo Grani*'s interest in the case was constituted by the fact that it was in competition with the company in receipt of the aid in question in the proceedings, this interest no longer existed as *Casillo Grani* was in liquidation. Moreover, the CFI added that because of the fact that the aid had not yet been paid to the recipient, the competitive position of *Cassilo Grani* could not have been affected before it was declared to be in liquidation.

[22] T-87/92, *Kruidvat BVBA* v. *Commission* [1993] ECR II-1375.

[23] *Atlantic Container Line AB and Others* v. *Commission... op. cit.*

[24] C-151/98 P(I), *Pharos SA* v. *Commission* [1999] ECR I-8157.

[25] Orders in C-151/97 P(I) and C-157/97 P(I), *National Power plc and PowerGen plc* v. *British Coal Corp. and Commission... op. cit.* par. 66 and T-13/99 R *Pfizer Animal Health SA* v. *Council* par. 15 (not published in ECR).

[26] T-442/93, *Association des Amidonneries de Céréales de la CEE and Others* v. *Commission* [1995] ECR II-1329.

Summary

Generally speaking the Community courts interpret the condition of an interest in the result of the case under Art. 40 of the Statute as a direct and actual (existing, present) interest in the forms of orders sought by one of the parties. The decisions of the courts in this matter are based on the submissions of the prospective interveners and/or on the facts of the case. In certain cases the courts see the interest in the result of the case established, if the administrative procedure preceding the procedure in the court was instrumented on the basis of the complaint of the intervener and/or the intervener took part in the administrative procedure. In (trade)association cases the intervener's aim to protect its members proves to be sufficient to fulfil the condition provided in Art. 40 of the Statute. In case of local or regional bodies such interest is established, if they are able to prove that their economic and social structure essentially depends on the sector affected by the contested measure. One specific case when the interest in the result of the case is established, when the intervener has the right to initiate an independent action for annulment under Art. 230 EC against the contested measure in the main procedure. This may seem to be overtly restrictive, as the courts examine, whether the standing conditions of Art. 230 (4) EC are fulfilled, however, the Community courts only applied this construction, when the intervener's action for annulment would have been found admissible. In some cases the Community courts required the prospective interveners to prove that the contested measure in the main procedure directly affected them. Finally, the power of Community courts to decide upon the admissibility of applications to intervene not only allows them to assign the intervention in support of one of the parties, but the are able restrict the intervention to certain claims of the supported party on the basis of the interest in the result of the case.

Are There Cases of Specific Nature?

The special circumstances in these cases allow to treat them separately from the main line of cases since considerations other than the conditions in the Statute may be discovered to be taken account of. In both *Roquette Frères* and *Maizena*[27] the European Parliament applied to intervene in the cases. The Council argued, however, that the right to intervene was to be equated with the right of action, in particular the initiation of an action for annulment and the

[27] C-138/79, *SA Roquette Frères* v. *Council* [1980] ECR 3333 and C-139/79, *Maizena GmbH* v. *Council* [1980] ECR 3393.

submission of observations in a preliminary ruling procedure, which the Parliament lacked. Furthermore, the Council asserted that the Parliament's right to intervene would depend upon the existence of a legal interest. The Court, however, rejected the Council's submissions and stated that such restrictions would adversely affect the institutional position of the Parliament and would be incompatible with Art. 37 (now 40) of the Statute.

The Staff Committee of the European Parliament applied to intervene in the *Lassalle*[28] case on the grounds that the word "person" in Art. 37 (now 40) of the Statute extend the right to intervene to all parties representing an organised focus of legitimate interests. The Court, on the contrary, ruled that there was no reason to believe that the treatymakers intended to extend the right to intervene to entities lacking legal personality or even its basic aspects. The Court pointed out that the independence, the responsibility and the functions of a body or organ would be decisive in ascertaining its capacity to bring legal proceedings, in particular to intervene in a case.

The intervention is a major instrument in the hands of public interest litigation, however, the restrictions on the type of actions in Art. 40 of the Statue largely limit its elbow-room. Nevertheless, there are numerous examples of public interest litigation in intervention cases. In the *Ford* case[29] the *BEUC* (*Bureau Européen des Union Consummateurs*), an international consumer protection organisation incorporated under Belgian law was granted a leave to intervene on grounds that the procedure of the Commission had originated from its complaints. The *BEUC* applied to intervene in a very similar procedure for interim relief in the *Peugeot* case.[30] The *Unione Nazionale Consumatori* applied for a leave to intervene in support of the Commission against the companies allegedly violating the Community competition rules in *Suiker Unie*.[31] In *AM&S*[32] the Consultative Committee of the Bars and Law Societies of the EC applied to intervene in order to support the protection of the right to confidential communication between lawyer and client. The *IPO* (Intellectual Property Owners Association) sought to intervene in the *Magill* case,[33] in which the relationship between intellectual property and competition law was discussed.

[28] C-15/63, *M. Claude Lassalle* v. *European Parliament* ??ECR??

[29] C-228 and 229/82, *Ford* v. *Commission* [1982] ECR 3091.

[30] T-23/90 R, *Peugeot* v. *Commission* [1990] ECR II-195.

[31] C-40-48/73 and C-50, 54 to 56, 111, 113 and 114/73, *Suiker Unie* v. *Commission* [1975] ECR 1663.

[32] C-155/79, *AM&S Europe* v. *Commission* [1982] ECR 1575.

[33] C-241/91 P and 242/91 P, *RTE and ITP* v. *Commission* [1995] ECR I-0743.

The overtly restrictive nature[34] of the limitation on the types of actions in Art. 40 of the Statue is exposed in a case, in which various Italian car importers applied to intervene in the dispute between the Commission and Italy.[35] Italy was found to be in breach of Community law as it introduced new administrative requirements involving the production of documents necessary for parallel import of vehicles. Since Art. 40 of the Statute excludes the intervention of natural or legal persons in cases between a Member State and a Community institution, the undertakings involved in the imports of vehicles could not represent their presumably direct interest in the case by supporting one of the parties. The approach to this restrictive rule was, however, given a peculiar twist in the *Italy and Sardegna Lines* case.[36] Two actions for annulment were initiated side by side against the Commission on the same basis. In the one case launched by Sardegna Lines the CFI declined its jurisdiction in order to enable the ECJ to hear the claim. The case was registered anew and was joined with the other action instituted by Italy. This meant that Sardegna Lines was able to participate in a dispute between a Member State and a Community Institution, which would have been impossible under Art. 40 of the Statute, if the two actions had not been joined.

Some Recent Cases on Intervention

In *Pescadores*[37] the CFI ruled that an interest in the result of the case meant a direct and present interest in the decision on the claims. The CFI added that it must ascertain that the intervener is directly affected by the measure and that his interest in the result of the case is certain. It continued that an application to intervene by a local or regional body of a Member State must be dismissed, if it has not been proven that the economic and social structure of that entity depends primarily on the given economic sector. The *Autoritá Portuale di Ancona* (APA) applied for a leave to intervene in the case *Coe Clerici*,[38] in which the applicant sought the annulment of a Commission letter refusing to act on the applicant's complaint against the bye-law of governing the carrying on of self-handling

[34] Schermers–Waelbroeck: *Judicial Protection in the EU... op. cit.* 718, § 1443.

[35] C-154/85 R, *Commission* v. *Italy* [1985] ECR 1753.

[36] C-15/98 and C-105/99, *Italy and Sardegna Lines* v. *Commission* [2000] ECR I-8855.

[37] T-54/00 R, *Federacion de Cofradías de Pescadores de Guipuzcoa, Federacion de Cofradías de Pescadores de Vizcaya, Federacion de Cofradías de Pescadores de Cantabria and others* v. *Council* [2000] ECR II-2875.

[38] T-52/00, *Coe Clerici Logistics Spa* v. *Commission* [2002] ECR II-2553.

operations in the Port of Ancona passed by APA. The CFI ordered that in its capacity as a party, against who the applicant's complaint was addressed, APA has a direct and existing interest in the grant of the order sought. In *Comafrica Dole*[39] the court declared that it is settled case law that the interest in the result of the case must be understood as a direct and existing interest in the grant of the order sought. The CFI ordered that in spite of the fact that the applicant established a certain interest in the result of the case, the application must be dismissed, as the applicant did not prove the existence of a direct and existing interest in the grant of the claims.

In *Poste Italiana*[40] the CFI examined the admissibility of applications to intervene by *Recapitalia Consorzio Italiano delle Agenzie di Recapito Licenziatarie del Ministerio delle Comunicazioni* and by the TNT Post Group. With respect to the application of *Recapitalia Consorzio* the CFI ordered that representative associations, whose object is to protect their members in cases raising questions of principle liable to affect those members are allowed to intervene. The CFI also pointed out that the member undertakings of *Recapitalia Consorzio* lodged complaints against Italy in the Commission in connection with the activity of *Poste Italia*. Furthermore, these members of *Recapitalia Consorzio* are able to establish interest in the result of the case, as their functioning depends on the final decision in the main proceedings. Concerning the application by the TNT Post Group the President of the CFI granted a leave to intervene, since the final order in the main procedure would determine whether it could continue its business activity. In addition, the complaint lodged by the TNT Post Group in the Commission also establishes an interest in the result of the case.

The President of the CFI in *IMS Health*[41] decided that the interest in the result of the case of the three interveners was established, as NDC was the complainant in the procedure before the Commission, NDC Health was directly involved in the copyright infringement proceedings brought by IMS Health in Germany and AzyX was not merely IMS Health's only other current competitor on the relevant market, but it was also closely associated with the investigation of the Commission. In the *NFV* case[42] the CFI acknowledged the right of CEF City and CEF Holdings to intervene on the basis of Art. 37 (now 40) of the Statute, as they had lodged a complaint before the Commission and, thereafter, participated in the procedure. Furthermore, the CFI added that the outcome

[39] T-139/01, *Comafrica Dole* v. *Commission* [2002] ECR II-0799.

[40] T-53/01 R, *Poste Italiana* v. *Commission* [2001] ECR II-1479.

[41] T-184/01 R, *IMS Health Inc.* v. *Commission* [2001] ECR II-3193.

[42] T-5/00 R, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v. *Commission* [2000] ECR 4121.

of the procedure could adversely affect the interests of CEF City and CEF Holdings.

In the PVC cases[43] the Court ruled on a specific aspect of the intervener's interest in the result of the case. In all of these cases *DSM* applied to intervene in support of the applicants who sought the annulment of the judgements of the CFI denying the annulment of the Polypropylene Decision of the Commission.[44] In the mean time, the Court delivered its PVC judgement[45] on an appeal annulling a CFI judgement denying the annulment of the Polypropylene Decision. Following, the Court examined whether its PVC judgement dissolved the interest of *DSM* in the result of all the cases. The Court found that the interest of *DSM* did not die on delivery of the PVC judgement of the Court of Justice and held that the defects found by this judgement were not such as to warrant treating the decision challenged in the PVC cases as non-existent. The PVC judgement did not establish the non-existence of the Polypropylene Decision, and, therefore, it did not bring the interest of *DSM* in obtaining a finding of such non-existence to an end. The Court also asserted in these cases that the fact that the Court, by a previous order, had allowed intervention in support of the form of order sought by a party does not preclude a fresh examination of the admissibility of the intervention.

Summary

These cases highlight that the Community courts interpret the condition of an interest in the result of the case as a direct and present interest. However, they also require the interveners to prove that the contested measure in the main procedure affected them directly. Furthermore, a new element appears in the test: the intervener must establish a certain interest in the result of the case. Moreover, it is stated that an interest in the result of the case is established, if the orders sought could adversely affect the interest or the functioning of the intervener. In other cases the direct and existing interest was also established by interveners, if the administrative procedure preceding the procedure in the court was instrumented on the basis of the complaint of the intervener, and/or the

[43] T-199/92 P, *Hüls AG* v. *Commission* [1999] ECR II-4287; T-200/92 P, *ICI* v. *Commission* [1999] ECR II-4399; T-227/92 P, *Hoechst AG* v. *Commission* [1999] ECR II-4443; T-234/92 P, *Shell* v. *Commission* [1999] ECR II-4501; T-235/92 P *Montecatini* v. *Commission* [1999] ECR II-4539; T-242/92 P; T-245/92 P, *Chemie Linz* v. *Commission* [1999] ECR II-4643.

[44] Commission Decision 86/398/EEC of 23 April 1986, OJ L 230 , 18/08/1986, 1–66.

[45] C-137/92 P, *Commission* v. *BASF and Others* [1994] ECR I-2555.

intervener took part in the administrative procedure, or the intervener was closely associated with the administrative procedure. The application to intervene of a local or regional body is admissible, if their economic and social structure essentially depends on the sector affected by the contested measure. In association cases the protection of members' rights is sufficient to prove to have a leave to intervene granted.

The Concept of the Right to Effective Judicial Protection in Community Law

Procedural rights, such as the right to effective judicial protection, are central to the principle of rule of law,[46] as they ensure the fair administration of justice.[47] Community law is based on the rule of law,[48] thus it ensures that the right to effective judicial protection is observed. Moreover, it is settled case law that fundamental rights form an integral part of the general principles of Community law inspired by the constitutional traditions common to the Member States and by the international treaties on the protection of human rights signed by the Member States.[49] It follows that the right to effective judicial protection is a general principle of Community law.

The principle of effective judicial protection was explicitly established in Community law in cases *Johnston* and *Heylens*.[50] In its *UPA* judgement[51] the Court stated that the

[46] Harlow, C.: *Access to Justice as a Human Right: The European Convent and the European Union*, 188, in Alston, P.: *The EU and Human Rights*, Oxford University Press, 1999.

[47] Jacobs, F.: *The European Convention on Human Rights*. Clarendon Press, Oxford, 1996. 125.

[48] C-294/83, *Les Verts* v. *European Parliament* par.23 [1986] ECR 1339.

[49] C-29/69, *Stauder* v. *City of Ulm* [1969] ECR 419; C-11/70, *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratselle für Getreide und Futtermittel* [1970] ECR 1125; C-4/73, *Nold* v. *Commission* [1974] ECR 491; C-36/75, *Rutili* v. *Ministre de l'Interieur* [1975] ECR 1219.

[50] C-222/84, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* par. 18 [1986] ECR 1651; C-222/86, *UNECTEF* v. *Heylens* [1987] ECR 4097; see also: C-257/85, *C. Dufay* v. *European Parliament* [1987] ECR 1561; C-314/91, *Weber* v. *Parliament* [1993] ECR I-0643; C-12/95 P, *TRAMASA* v. *Commission* [1995] ECR I-0467; C-282/95 P, *Guérin Automobiles* v. *Commission* [1997] ECR I-1503; T-107/94, *Christina Kik* v. *Council* [1995] ECR I-1717; C-97/91 *Borelli* v. *Commission* [1992] ECR I-6313.

[51] C-50/00 P, *UPA* v. *Council* par. 39 [2002] ECR I-6677.

> "right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

The CFI in *Jégo-Quéré*[52] concluded that

> "access to the courts is one of the essential elements of a community based on the rule of law and is guaranteed in the legal order based on the EC Treaty (...) The Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the ECHR (...) In addition, the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Art. 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000."

It is evident from the above that the right to effective judicial protection covers the right to a fair trial (hearing) and the right to an effective remedy as mentioned in Art. 6 and 13 ECHR.[53] It is settled in ECHR law that the rite to access to a court stems from the right to a fair hearing.[54] The scope of the right to access of a court covers different sets of rules on the administration of justice[55] including the formal restrictions on initiating procedures. It follows that the provisions of Community law on the conditions of intervention before Community courts must also correspond to the right of access to justice.

[52] T-177/01, *Jégo-Quéré* v. *Commission* par. 41-42 [2002] ECR II-2365.

[53] According to *Picod* the right to a judge involves both the right to access to a judge and the right to effective protection by a judge. Picod, F.: *Le droit au juge en droit communautaire*, 147, in Rideau, J.: *Le droit au juge dans L'Union Européenne*, LGDJ, 1998.

[54] Jacobs: *The European Convention on Human Rights... op. cit.* 126.

[55] Legal aid, the need for formal authorisation to bring proceedings, immunities protecting certain groups, oppressive procedural requirements, practical and financial restrictions, the implementation of rulings; in: www.pili.org, Access to Justice in Central and Eastern Europe: International Standards on Access to Justice: Presentation of Jeremy McBride, University of Birmingham, 2003 by the Public Interest Law Initiative, Columbia University Kht, INTERIGHTS, Bulgarian Helsinki Committee and Polish Helsinki Foundation for Human Rights.

The Right of Access to a Court in ECHR Law with Respect to Formal Restrictions on Bringing Procedures

Notwithstanding the scope of Art. 6(1) ECHR, the interpretation given by the European Court of Human Rights (ECtHR) to the right of access to justice "can supply guidelines which should be followed within the framework of Community law."[56]

Art. 6(1) declares:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing..."

In the fundamental *Golder* case[57] the ECtHR ruled that the principle of the rule of law is hardly conceivable without the possibility of access to courts. It continued that it is one of the universally recognised fundamental principles of law which must be read in the light of the principle of international law forbidding the denial of justice. The ECtHR considered, however, that the right of access to a court is not an absolute right. It stated that this right was set forth in the ECHR without an exact definition, therefore there is room for limitations permitted by implications. Nevertheless, the ECtHR rejected to give a general theory of admissible limitations, which meant that the ECtHR will judge the restrictions on this right on a case-by-case basis.

In *Airey*[58] he ECtHR went further when deciding that the ECHR did not guarantee rights that are theoretical or illusory, but rights that are practical and effective. The ECtHR continued that this particularly applies to the right of access to courts, as the right to a fair trial holds a prominent place in a democratic society.

The court gave a further interpretation on the restriction of the right of access to courts in *Ashingdane*.[59] The ECtHR asserted that the right of access to courts is not an absolute right, thus it may be subject to limitations. These limitations are inherent in this right, as the nature of this right provide the states a certain margin of appreciation to regulate access to courts, which may vary in each state. Nevertheless, the ECtHR concluded that these limitations must not restrict or reduce the access to courts in such way that the essence of the right is

[56] *Nold v. Commission... op. cit.* par. 13.
[57] 4451/70, *Golder* v. *The United Kingdom*, Series A, No. 18.
[58] 6289/73, *Airey* v. *Ireland*, Series A, No. 32.
[59] 8225/78, *Ashingdane* v. *The United Kingdom*, Series A, No. 93.

violated. Moreover, the restrictions can only be upheld, if it pursues a legitimate aim and the principle of proportionality is respected in relation of the aims of the limitation and means applied.

The Right to Access to Community Courts in Community Law with Respect to Formal Restrictions on Bringing Procedures

In *Dufay*[60]a three month deadline for lodging a complaint under Art. 90(2) of the Staff Regulations was contested by the applicant on the basis of the right to a fair trial. The Court decided reflecting to Art. 6 ECHR that the right to a fair trial, which is recognised by the Community legal order, does not prohibit the setting of a time-limit for the institution of legal proceedings.

The CFI in an action for annulment launched by *Christina Kik*[61] ruled that the right to a fair trial protected by Art. 6 ECHR and recognised by the Community judicature in the Community legal order may not be applied in the case, since this right cannot prohibit the application of certain criteria regarding admissibility set for the institution of proceedings. In *Salamander*[62] the CFI decided that an action for annulment shall not be declared admissible because of a lack of adequate judicial protection, since this circumstance, even if proved, could not entitle the CFI to usurp the function of the founding authority of the Community in order to change the legal remedies and procedures established by the Treaty.

Although the *UPA* judgement[63] prejudiced its influence, it is still worth considering the *Jégo-Quéré* judgement[64] of the CFI. The CFI decided that the interpretation of individual concern–the standing condition under Art. 230(4) EC in actions for annulments launched by natural or legal persons–set by the Court in *Plaumann*[65]must be reconsidered on the basis of the right of access to courts and the right to an effective remedy.

In *UPA* the Court following a similar line of argument decided, however, that it is for the Member States to alter the current system of remedies under Art. 48 EU to ensure that the right of access to courts and the right to an

[60] *C. Dufay v. European Parliament... op. cit.* par. 10.

[61] *Christina Kik v. Council... op. cit.*

[62] T-172/92, T-175/98-177/98, *Salamander AG* v. *Parliament and Council* [2000] ECR II-2487.

[63] *UPA v. Council... op. cit.*

[64] *Jégo-Quéré v. Commission... op. cit.*

[65] C-25/62, *Plaumann* v. *Commission* [1963] ECR 95.

effective remedy is observed in the Community system of remedies. Furthermore, the Court explicitly denied to give a new interpretation to the standing condition of individual concern conforming with the right to effective judicial protection, as such an interpretation cannot have the effect of setting aside the condition set up in the Treaty, without violating the jurisdiction of Community courts.

It should be added that Advocates General in their opinions have continuously expressed that restrictions on bringing cases to the courts shall not result in a denial of justice.[66]

Art. 47 of the Charter of Fundamental Rights of the European Union provides:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Art. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law."[67]

The updated explanations relating to the text of the Charter of Fundamental Rights[68] hold that the protection of the right to an effective remedy is more extensive in Union law than in ECHR law since it guarantees this right before a court. Referring to the jurisprudence of the Court[69] the explanations point out that this right not only applies to the institutions of the Union, but of the Members States when implementing Union law. The explanations contend that while Art. 47 covers all rights guaranteed by Union law, it has not been intended to alter the system of judicial review laid down by the Treaties. In connection with the right to a fair hearing the explanations assess that Art. 47 (2) of the Charter correspond to Art. 6(1) of the ECHR. It adds, however, that its scope is not limited to the disputes recorded in the ECHR, which is the consequence of the fact that Union law is based on the principle of rule of law as stated in *Les*

[66] Among others: Opinion of Mr. Advocate General Jacobs in C-50/00 P,*UPA* v. *Council* [2002] ECR I-6681, in another context: Opinion of Mr. Advocate General Léger in C-224/01, *Köbler* v. *Austria* nyr.

[67] See also in: Draft Treaty Establishing a Constitution for Europe, Art. II-47.

[68] pg. 41, CONV 828/1/03 REV1, 18/07/2003; the text corresponds to the text in The explanations relating to the text of the Charter of Fundamental Rights of the European Union, Charte 4473/00 Convent 49, 11/20/2000.

[69] *Johnston v. Chief Constable of the Royal Ulster Constabulary... op. cit., UNECTEF v. Heylens... op. cit., Borelli v.Commission ... op. cit.*

Verts.[70] Finally, the explanations provide that except for the limitations on the scope of the right the guarantees in ECHR law apply in a similar way to the Union.

Carrying out the Access to Court Test / Conclusions

On restrictions of the right to access to justice the ECtHR developed a test which provides that the restriction can be upheld, if it does not result in a denial of justice, and, if it is supported by a proportionate legitimate interest. In Community law it is stated that the right to access to a justice may be restricted, however, it shall not constitute a denial of justice. It comes from the general principles of Community law that such restriction is subject to the principle of proportionality which is designed to resolve the conflicts between colliding legitimate interests. Furthermore, reflecting to *Nold*[71] and the Explanations of the Charter of Fundamental Rights the guidelines established in ECHR law should be followed in Community law.

It can be concluded that for scrutinising formal restrictions the Luxembourg and the Strasbourg courts can apply tests that contain very similar elements. It is evident from the above that the correspondence of the two tests is a result of conscious jurisprudence and lawmaking by the Community. Nevertheless, at this point it cannot be concluded that the tests are uniform, since the possible digressions in the application of the tests has not yet been discovered. However, it is not the task of this paper to analyse the possible functional differences, rather it wishes to examine whether the restrictions in question how and with what possible results can be brought under this basic right analysis.

Considering the restriction on the type of actions in which the intervention of any other person than the Member States and the Community institutions is permitted, its justification on the basis of the right of access to courts is highly questionable. Even tough its international public law origin is evident,[72] this provision shall not be excluded from the requirement of the fair administration of justice based on fundamental rights.

It follows from ECHR law that it is determined on a case-by-case basis whether the rules on the administration of justice are in conformity with the right to access to a court. Therefore, below it will be considered in the first

[70] *Les Verts v. European Parliament... op. cit.*

[71] *Nold v. Commission... op. cit.*

[72] Harlow, C.: *Access to Justice as a Human Right*, 193, in Alston: *The EU and Human Rights... op. cit.*

place, whether it is possible to put the rules on intervention in the Statute to a test, in which its compatibility with fundamental rights may be scrutinised.

The Statute of the Court of Justice is a protocol annexed to the Treaties at Nice, which, under Art. 311 EC, is an integral part of the Treaty establishing the European Community, if adopted by a common accord of the Member States. It is evident from Art. 230 EC and Art. 234 EC–both designed to provide jurisdiction to the Community courts to review the legality of Community acts, that the founding treaties are not covered by them, thus the test based on fundamental rights could not be executed. On the other hand, it is a paradox situation that the review of a Council decision amending the Statute is possible under the same Treaty provisions. It follows that in Community law the genuine method of reviewing the restriction established in the Statute is in the hand of the Member States as political actors defining the framework of Community law.

Under Art. 1 of the ECHR the contracting states are responsible for all acts and omissions of their domestic organs allegedly violating the ECHR regardless of whether the act or omission in question is a consequence of domestic law or the obligations to comply with international obligations.[73] In the referred case the Commission on Human Rights dismissed the application, as it was basically concerned the autonomous functioning of the Community, although based on the act of the representatives of the Member States. The problem of intervention, however, is more of a question of the legal framework, in which the Community autonomously functions, since the statute is a protocol annexed to the founding treaties adopted by a common accord of the Member States. It can be assumed that the act of the Member States creating the legal framework of the Community is related to the Member States as international actors more closely than an act of the Council, in which the Member States act on behalf of the Community. It follows that the act of the Member States adopting the Protocol of the Statue of the Court of Justice should be such act which they are responsible for under Art. 1 of the ECHR, thus it should be covered by the jurisdiction of the ECtHR.

It is established in ECHR law and in Community law that formal restrictions on access to courts may be applicable, however they may not result in a denial of justice. Such restriction can be upheld on the basis of a legitimate aim which fulfils the requirements established by the principle of proportionality. The restriction of the type of action in which natural or legal persons may intervene does not seem to establish a *déni de justice*, since the system of remedies in Community law offers other ways of judicial protection. It is relatively more difficult to bring forward a proportionate legitimate interest supporting the

[73] 13258/87, *Melcher* v. *Germany*, 64 D&R 138.

restriction. Since Community law established a complete system of remedies governed by uniform principles, a restriction based on the separation of remedies is far from justifiable. Moreover, considering the interpretation of the principle of proportionality in Community law[74] an absolute ban on the applications on intervention in certain cases does not seem to satisfy the rather chiselled approach established by Community courts.

The requirement of an interest in the result of the case is another provision restricting the access of interveners to Community courts, therefore it shall also be scrutinised under the uniform test based on fundamental rights derived from ECHR law and Community law. It is clear that it does not call forth a denial of justice, since within the complete system of remedies established in Community law other means of judicial protection are provided. A legitimate interest underpinning the restriction may also be discovered, as the effectiveness of judicial protection requires the judiciary to function focusing on the essential and relevant matters in a case. The proportionality of the restriction may, however, be questioned on certain grounds.

First, it is difficult to establish a single line of interpretation concerning the interest in the result of the case–as it is highlighted above, since the applications to intervene differ in a large extent. Furthermore, in the basic line of cases the Community courts apply various elements in their interpretation, even though the basic condition of a direct and present interest in the result of the case can easily be revealed. The scarcely appearing requirement of a certain interest in the result of the case further stiffens the conditions of admissibility. Lastly, the here and there established postulate of being directly affected by the contested measure indicates that the Community courts have the opportunity to strangulate the access of prospective interveners to courts. It follows that the suitability of the restrictive condition in question is dubious, since a single line of interpretative elements is difficult to allocate even in the main stream of cases. Moreover, the diversity of the conditions of an interest in the result of the case shall also be reconsidered in the light of the principle of legal certainty, however, it is true that in most case the courts apply the condition of a direct and present interest.

[74] Eg.: C-114/76, *Bela-Mühle* v. *Grows Farm* [1977] ECR 1211; C-44/79, *Hauer* v. *Rheinland-Pfalz* [1979] ECR 3727; C-181/84, *R.* v. *Intervention Board* [1985] ECR 2889; C-331/88, *R.* v. *Minister for Agriculture, Fisheries and Food ex parte FEDESA* [1990] ECR 4023; C-36/75, *Rutili* v. *Ministre de l'Intérieur* [1975] ECR 1219; C-33/74, *Rewe Zentrale* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649; C-41/74, *Van Duyn* v. *Home Office* [1974] ECR 1337; C-34/79, *R.* v. *Henn and Darby* [1979] ECR 3795.

In the light of the fact that in certain cases[75] it is rather facile to establish an interest in the result of the case, the overtly restrictive approach towards regional and local bodies which are required to prove that their economic and social structure essentially depends on the sector affected by the contested measure seems a bit out of context. Furthermore, considering that associations, notwithstanding their size and significance, are granted a leave to intervene in order to protect their members, it is difficult to appraise the fact that local or regional bodies are only able to intervene to protect the undertakings operating in their territory, if they are able to prove that they entirely and essentially depend on that given sector. It follows that it is worth reconsidering whether less restrictive means are disposable to decide upon the existence of an interest in the result of the case.

Lastly, it is necessary to examine whether it is possible to submit the judicial interpretation of the condition of an interest in the result of the case to the similar access to court tests established in ECHR law and in Community law. It is clear from case law that the Court of Justice considers its interpretation on a condition and the condition itself as a unit, whose legality under basic rights can only be challenged, if the condition established in a Community measure can be subject to a scrutiny.[76] Despite the fact that other opinions[77] support the detachment of the interpretation from the condition itself, therefore allowing a possible self-review of judicial interpretation, it is clear that in order to create a new line of interpretation of an interest in the result of the case, the condition itself provided in the Statute must be challenged. Furthermore, even in ECHR law it is not ascertained whether the fundamental rights based analysis of national law covers the scrutiny of judge-made law–the judicial interpretation of admissibility conditions established in positive law.[78] It follows that on this matter the above explained apply.

[75] Eg.: the administrative procedure preceding the procedure before the court was instrumented on the basis of the complaint of the intervener, the intervener took part in the administrative procedure, the intervener was closely associated with the administrative procedure.

[76] *UPA v. Council... op. cit.*

[77] *Opinion of Mr. Advocate General Jacobs in UPA... op. cit., Jégo-Quéré v. Commission... op. cit.*

[78] Hickman, Tom R.: *The "uncertain shadow": Throwing Light on the Right to a Court under Art. 6(1) ECHR*, 132, Public Law 2004 Spring.

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Re-Codification of the Civil Code? Conception for Drafting the New Civil Code

Abstract. The paper may serve as a good practical guidance for a foreign reader to the conception of the new Hungarian Civil Code. After a brief historical review, and description of the drafting process, the paper summarises the principal issues addressed in the Conception of the New Civil Code ("Conception"). These are: the proposed structure is a comprehensive code, covering all ranges of matters that are related to civil law, including commercial law, family matters, labour law, company law, intellectual property and conflict of laws issues. Then the paper describes the most important specific amendment proposals in the various fields covered by the Code: introduction of a preamble, basic principles of the civil law, rules regarding legal entities, property rights, contract law, including liability, and finally in the field of the law on succession.

Keywords: Hungarian Civil Code, civil law, commercial law, family law, labor law, company law, intellectual property, conflict of laws

Exposition

1. In Hungary, Act IV of 1959 is the first Civil Code enacted. Previously, drafts were made in the course of the 19th century: first, partial drafts were framed to regulate specific areas of civil law,[1] then proposals were submitted on the comprehensive codification of civil law.[2] The most significant of these was submitted as Bill of 1928 on Civil Law, which, albeit was not passed by Parliament as an act, has been applied in judicial practice.

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[1] Partial drafts were made during the second half of the 19th century to regulate specific areas of civil law, e.g., the draft by Pál Hoffmann concerning a general part of civil law completed in 1871 and the draft by Istvan Teleszky concerning law of succession completed in 1887.

[2] Draft of the First Hungarian General Civil Code of 1900, Committee text of 1913 (second draft), the so-called Parliament text of 1914 (third draft), and finally, the so-called Committee text of 1915 (fourth draft).

Following World War II, Parliament adopted Act IV of 1959 on the Civil Code (Ptk),[3] then, its comprehensive amendment was adopted in 1977.[4]

Since the political transformation in 1989–1990, more than 50 amendments of the Civil Code have been passed. Meanwhile, substantial changes ensued in economic and social relations, and consequently, in the area of civil relations. Therefore, in 1998, the Hungarian government decreed "the commencement of the work on the comprehensive modernisation of civil law, and in this scope, of the Civil Code with the objective of framing a modern Civil Code in view, which, as an economic constitution will qualify as the fundamental law governing civil life".[5]

As pursuant to the decision of the Hungarian government, the draft of the Conception was completed, then adopted as a moot point and submitted to extensive professional and social debate by the government.[6] The motions concerning the Conception were deliberated by the Editorial Committee and the Chief Codification Committee. The Chief Codification Committee divided the draft into two parts, i.e., the Conception that sets forth the cardinal principles of the new Civil Code and the Programme as the basis of the elaboration of the norm text. The main tendencies of the necessary amendments of the new Civil Code were summarised in a concise manner in the Conception,[7] whereas, the Programme rendered a more meticulous elaboration of conceptual problems. In 2003, the government adopted the Conception,[8] and published it in the Hungarian Official Gazette in line with the Programme. Any diversion from the Conception will require authorisation by the government, whereas departure from the Programme is subject to the decision of the Chief Codification Committee.

[3] Law Decree XI of 1960 was enacted to regulate the effectiveness and implementation of Act IV of 1959.

[4] Act IV of 1977, which was implemented as pursuant to Law Decree II of 1978.

[5] Government Decree no. 1050 of 1998 (IV. 24.) on the Codification of Civil Law as amended by Government Decree no. 1061 of 1999 (V. 28.)

[6] Government Decree no. 1009 of 2002 (I. 31.)

[7] The following authors compiled specific parts of the Conception: András Kisfaludy,: *General Rules of Liabilities Pertaining to Securities*, Tamás Lábady: *Liability for Extra-Contractual Damages and Insurance Contracts*, Ferenc Petrik: *Volume One on Persons*, András Kőrös: *Volume Second on Family Law*, Tamás Sárközy: *Volume Three on Law of things*, Lajos Vékás: *Introduction*, and, *Volume Four on Law of Obligations (with the exception of Rules Pertaining to Insurance Contracts, Delictual Liability for Damages and Liabilities Pertaining to Securities)*, and, Emília Weiss: *Volume Five on Law of Succession.*

[8] Government Decree no. 1003 of 2003 (I. 25.)

2. The Conception takes a stand on general substantial issues with respect to drafting the new Civil Code.[9] These are as follows:

No foreign *models* were adopted for framing the new Civil Code, although, instances of foreign codification, such as the Civil Code of Holland and various international achievements of legislation were taken into consideration, such as the Vienna Convention on International Sale of Goods, UNIDROIT Principles of International Commercial Contracts (1994) and Principles of European Contract Law (Volumes I–II: 1999 and Volume III: 2002). Besides relevant directives of the European Community (considering the requirements of legal harmonisation as pursuant to the European Agreement), rules of civil law currently framed under separate provisions of Hungarian law and significant principles of law established by judicial practice are also designated to be integrated into the new Civil Code.

Since the political transformation in 1990, a different *social model* has emerged that needs to be responded to. According to the Conception, the framing of the new Civil Code will conform to the image of society that evolved in the EU, to the social model of a constitutionally protected market economy shaped by welfare elements.

The new Civil Code is designated to codify civil law on *a national level* and enact the accomplishments of *legislation within the framework of a code.*

The new Civil Code *would be based on a monist principle* and would encompass civil relations of professional entities in the business world and in financial transactions and civil relations of private entities. Among other factors, this is justified by the followings: "in relevant foreign instances of codification, separate codification of contractual rules of commercial transactions may not be considered modern any longer ..., since general contract law has transformed to bear the mark of 'commercial law' during the recent 100 years". In case of the application of the monist principle, parallel regulation could be avoided and current problems of denotation could be eliminated.

Scopes of content of the future Civil Code will be defined as follows:

- *Family law* will be integrated into the new Civil Code,
- The elaboration of the new Civil Code is designated to be in accordance with the comprehensive reform of the *Labour Code.* As a consequence, norms of particular labour agreements as a separate type of agreements may be integrated into the Volume on Contract Law of the new Civil Code, and hence, special norms of labour agreements will be substantiated

[9] The document on "The Conception of the new Civil Code" is accessible on the homepage of the Ministry of Justice of the Republic of Hungary: http://www.im.hu/mainpage.

by the general rules pertaining to contracts as pursuant to the new Civil Code.

- According to the monist conception, rules of *company law* formulated under separate law would be integrated into the scope of special norms pertaining to particular legal entities under the new Civil Code. An advantage of that regulation would be that the scope of legal entities could be regulated under the new Civil Code in full breadth, the scope of general rules pertaining to legal entities could be extended, the repetition of particular rules could be avoided and the character of the norms of the new Civil Code as secondary law would become manifest. (This corresponds to foreign pattern, as well.) The Conception enumerates some instances of counter-arguments *vis-à-vis* the monist standpoint: as pursuant to such regulation, norms of civil law and public law would mingle, the unity of the Act on Business Associations (which should be repealed in case of the purported regulation under the new Civil Code) would cease, furthermore, the cogent character of company law would also encumber its incorporation into the new Civil Code. The viability of the application of the monist conception is debated in special literature and in professional circles. The Chief Codification Committee, following the deliberation on the draft of the Conception, formed the opinion that the relationship between company law and the new Civil Code will be defined following the supplementary review of the Act on Business Associations. Since the viability of the monist solution is under dispute, with all probability the dualistic approach *vis-à-vis* the Conception would be adopted pursuant to the Amendment Act on Business Associations.[10]
- The volume of rules on *industrial property rights and copyright law* is not integral to the effective Civil Code, which needs to be maintained on the following grounds: *in re* separate provisions under this branch of law set forth complex norms, they should not be extricated, furthermore, some powers are conferred as pursuant to administrative acts. Finally, the effective settlement is customary and internationally recognised.
- The Conception does not include a proposal for the re-codification of *international private law* and its manner, merely makes reference to scopes of content.

By reason of considerations of volume and content, the new Civil Code would be extended by *a further structural unit*, i.e., the "Volume". Therefore, the new Civil Code would consist of Volumes, Sections, Titles and Chapters. (The

[10] The deadline for drafting the norm text of the new Civil Code is December, 2005.

numbering of articles would be continuous, whereas, the numbering of Sections within the Volumes, of Titles within the Sections, and of Chapters within the Titles would recurrently start from the beginning.)

As pursuant to the Conception, the Civil Code will simultaneously be adopted by Parliament and take effect.

Concerning the *inner structure* of the new Civil Code, the following proposal has been made:

The objectives of the new Civil Code will be formulated in a concise manner under the Preamble, which will precede the "Volumes" and the "Introductory Provisions". The fundamental principles of the new Civil Code will be summarised under the "Introductory Provisions". The new Civil Code, accordance with the Civil Code in force or the Bill on Civil Law of 1928, will not contain a General Section. According to the preamble to the Conception, the General Part would unnecessarily complicate the structure of the law and excessively increase the significance of the rules of legal transactions, furthermore, would encumber the application of the law.

The new Civil Code is going to contain the following Volumes:
Volume One on Persons
Volume Two on Family Law
Volume Three on Law of Things
Volume Four on Law of Obligations
Volume Five on Law of Succession

The significance of the new Civil Code would be guaranteed by the stipulation of a clause, according to which exclusively a separate act could *amend* it expressly designed to do so, as opposed to the effective practice, when the Civil Code is marginally amended by acts adopted on other matters.

3. In the followings, we will outline major proposals for amendment with reference to the Programme:

Preamble: The objective of the act is not normatively based, therefore, it will be formulated under a Preamble, separately from the normative text. Besides emphasising that the Code regulates pecuniary circumstances with respect to the integration of family law, it will highlight that civil relations of entities are also regulated under the new Civil Code.

Introductory Provisions: Fundamental principles that pertain to the whole body of the new Civil Code will be formulated under the Introductory Provisions, however, separate fundamental principles may be laid down within the Volumes,

if necessary. According to the Conception, overlaps of effective fundamental principles will be eliminated and the regulation will be more focused.

The following *fundamental principles* will be upheld under the new Civil Code:

- The principles of *bona fides (good faith) and honesty* will be upheld as requirements with respect to the exercise of civil rights and fulfilment of duties,
- The principle of *nemo suam turpitudinem allegans auditur* will be upheld, since a mainly correct relevant judicial practice has been established in broad scope,
- The new Civil Code will also set forth the principle of the prohibition of the abuse of the law, however, shall not render a definition of the content of this prohibition, but transfer this power to judicial practice,
- Substitution of legally required statements by judicial decisions will qualify as significant intervention into the private autonomy of the parties concerned, therefore, this, as opposed to former practice, would only exceptionally be admissible,
- The new Civil Code will also set forth the currently effective fundamental principle that protection of rights guaranteed by law shall primarily pertain to the powers of courts.[11]

Volume One on Persons

This Volume will specify rules concerning natural persons and legal entities. According to the Conception, substantial amendments of the regulation concerning *natural persons* will not be made under this Volume.

[11] The prescription of requirements of *generally expectable behaviour* and *proper exercise of powers* as fundamental, formally recognised principles is not deemed necessary, since their content corresponds to that of the requirements of *bona fides* and *honesty*.

The principle of *the obligation to co-operate* formerly prescribed as a fundamental principle shall not be a general requirement, therefore, it shall not be set forth under the Introductory Provisions, but under law of obligations.

The principles of *the protection of the fundamental right of the person to property* and of *the right of the person to protection of the law* set forth under the effective Civil Code as fundamental principles do not need to be framed under the new Civil Code, since the protection of these rights are laid down under the Constitution and their formulation under the new Civil Code would be a mere repetition.

Provisions, primarily general provisions concerning *legal entities* and rules concerning the foundation and cessation of legal entities will require significant amendments.

According to the preamble to the Programme, the Hungarian legal system is devoid of basic directive principles pertaining to legal entities. Therefore, the new Civil Code would reasonably stipulate, on the one hand, *general rules* pertaining to legal entities, on the other hand, an entire scope of rules pertaining to the types of legal entities. The determination of general criteria would be essential, since, as expressly pursuant to the new Civil Code, any law beyond its scope could establish a legal entity exclusively on condition that the respective entity complies with the general criteria specified under the new Civil Code. In a given case, the organisational unit of the legal entity may qualify as a legal entity exclusively on grounds of its compliance with the general criteria. Under the new Civil Code, the legal entity of the volume of the property (primary capital) specified by law could be recognised on condition that its administration and representation is secured by a trustee.

A significant amendment of rules pertaining to the establishment, content–based modification and cessation of legal entities will be effected under the new Civil Code. Therefore, legal entities would acquire legal capacity not by establishment, but as pursuant to an act of constitutive force, i.e., *registration.* Furthermore, all modifications would take effect exclusively as pursuant to registration of constitutive force, whereas, the cessation of a legal entity would take effect as pursuant to cancellation from registration. Duties related to keeping the registers would be administered by an office under judicial supervision to be organised by a court.

According to the Conception, during the term between registration and establishment, a so-called *preliminary legal entity* would be operative upon the model of preliminary association.

In the scope of general rules pertaining to the *establishment* and cessation of legal entities, the new Civil Code would regulate that a legal entity may be established as pursuant to an agreement, a deed of foundation or charter (hereinafter: charter), in case the type of legal entity specified under the Civil Code or other law is applicable. Failing a provision to the contrary, the followings will be specified under the charter on a mandatory basis: designation of the founder, the name and seat of the legal entity, the objective of the foundation of the legal entity, the volume of assets designated to the legal entity, the area of economic activity of the entity, the main decision–making and managing body of the legal entity, its legal representative, the manner and extent of acceptance of responsibility for the liabilities of the legal entity. As pursuant to Directive no. 1 of the European Community on Company Law, the determination of the

area of economic activity (objective) of the legal entity under the charter will have no pertinence on the scope of the legal capacity of the legal entity.

The general rules pertaining to the *cessation* of the legal entity will be stipulated according to uniform principles as opposed to the effective Civil Code. Accordingly, cessation of legal entities would ensue in the following instances: *a)* expiration of a specified period or supervention of a specified condition, *b)* dissolution, *c)* fusion or merging, *d)* de-merger or withdrawal, *e)* transformation into another type of legal entity, *f)* liquidation, *g)* declaration of cessation by court. Elements, such as the manner of legal succession, the obligation of the legal successor to accept responsibility and related issues, cessation without a legal successor would be provided for under the new Civil Code.

Business associations that currently do not qualify as legal entities (general partnerships and limited partnerships) *will be defined as legal entities* under the new Civil Code. According to the preamble to the Programme, these, *in re* their legal substance, currently also function as legal entities and their legal capacity corresponds to that of other forms of associations. In case an organisation that does not qualify as a legal entity is conferred legal capacity by law, then such law will specify the representative and managing body of the organisation as a lawful minimum and determine conditions of the assumption of financial obligations by the organisation.

In the scope of the *protection of civil rights of entities*, the most significant proposal for amendment concerns the introduction of the institution of *remuneration for the injury of the entity*. The effective objective legal consequences of the violation of privacy would be upheld, however, the legal institution of the so-called remuneration for the injury of the entity would replace non-financial restitution. This, on the one hand, would imply indirect compensation for the violation of privacy, on the other hand, civil penalty, which would incur indemnification. Remuneration for the injury of the entity could also be adjudged in cases if the violation of privacy did not incur losses for the aggrieved party, however, considering all circumstances, indemnification for the aggrieved party would be reasonably due. On grounds of the extent of the loss and the seriousness of the breach of the law and of imputability, the adjudication of remuneration for the injury of the entity and the determination of its extent would be subject to the discretion of the court. Irrespective of or besides the adjudication of remuneration for the injury of the entity, the court could adjudge compensation for pecuniary losses as pursuant to the rules of liability for damages.

Volume Two on Family Law

According to the Conception, family law will be integrated into the new Civil Code with respect to *peculiarities of relations under family law*. In the area of family law, the legislator will not primarily conform to effective norms of the EU, but to specific provisions of the European Convention on Human Rights pertaining to family law and to adjudication by the Strasbourg Court of Human Rights pertaining to family law, and, in the scope of international treaties, primarily to the Convention on the Rights of the Child of 1989.

The Volume on Family Law would be introduced by special *fundamental principles* that are peculiar to rules of family relations or depart from rules of civil relations.

The following principles regulated under the effective Act on Family Law will be reasonably *upheld* in the new Civil Code: the principle of protection of marriage and family, the principle of guaranteeing equal rights for the spouses and in the child–parent relationship, and, finally, the principles of protection of the child and of the primacy of their interests.

The requirement of harmony between the interest of the family and of the individual, instead of the currently effective requirement of harmony between the interest of society and of the individual would be stipulated as a *new principle*. Some principles and provisions of family law framed under the Convention on the Rights of the Child will be included into the new Civil Code: for instance, that potentially the child should be brought up in his/her own family, or in case no other possibility obtains, in a family.

The *structure* of the Volume on Family Law would conform to the effective framework that consists of the following three main sections on:

1. Marriage 2. Relations 3. Guardianship.

In the scope of regulations concerning marriages, the rules of *law of matrimonial property* will be basically transformed. It can be justified by several factors, one of the most important is that these rules have been adjusted to transformed social–economic conditions to a marginal extent. Therefore, in this scope, content–based amendments and more detailed regulation will be required with special regard to the interest of the protection of the family. These will be harmonised with the broader recognition of the autonomous financial decisions of the spouse engaged in economic activity, with the requirement of the security of transactions, and particularly, with the protection of the interests of creditors.

Volume Three on Law of the Things

Instead of Right of Ownership, the title of this Volume will be Law of the Things, and therein, the following maxims will be proclaimed as *fundamental principles*:

- Rules of Law of the Things may be exclusively formulated under the Civil Code (by reason of the constraint of standard form),
- Rules of Law of the Things may not be disregarded despite the according common wish of the parties concerned,
- Peremptory prohibition of nationalisation by law, which overreaches the scope of appropriation, will be formulated as a fundamental principle,
- Appropriation under terms regulated by law will exclusively be admissible by reason of exceptional and cogent public interest and will be attached to guaranteeing full, immediate and unconditional compensation,
- Restriction of proprietary rights by reason of public interest may be effected exclusively on legal grounds and will be attached to guaranteeing full indemnification if legal conditions obtain.

The Volume on Law of the Things will specify rules pertaining to *res* and rights *in rem*.

Accordingly, the Volume on Law of the Things will specify rules pertaining to blocks of freehold flats, basic rules of land law and substantive rules of civil law pertaining to the registration of estates. According to the Chief Codification Committee, problems related to the registration of estates could be solved if the effective system was replaced by a system of administration implemented by an organisation under the direct supervision of courts. This would adequately guarantee publicity and public authenticity.

The Programme does not propose further specification of the scope of the *notion of res* under the Volume on Law of the Things, but recommends further regulation under the rules pertaining to sales agreements.

State property: As pursuant to the civil law of market economies, the property of all subjects of law is construed as private property, which also pertains to the property of the state: under civil law, the property of the state shall qualify as private property. As a main rule, the property of the state is administered by publicly financed institutions that qualify as autonomous legal entities as pursuant to the rules of budget economy set forth under the Budget Act. In case the administration of government property does not pertain to the authority of any publicly financed institution, such property is administered by the Treasury as a legal representative of the state exercising the powers of the minister responsible for government property. In case the property of the state does not

qualify as government property, but is constituted as venture capital, the state will be liable to utilise it in business associations or non-profit organisations. The scope of the venture capital of the state will be circumscribed under separate law, however, within venture capital, the circumscription of the scope of property to be maintained as long-term state property and of the property designated to be privatised and realised, i.e., transferred to private ownership is deemed to be necessary at the same time.

Exclusive and not-negotiable objects of the property of the state and of local authorities will be defined, whereas, the scope of negotiability will be reduced as pursuant to the new Civil Code. Activities pertaining to the monopoly of the state, which the state may benefit from as pursuant to concession agreements, may exclusively be prescribed by law.

Besides framing the rules of civil law pertaining to the right of ownership, the new Civil Code will set forth norms of *so-called restricted rights pertaining to another res*. In this scope, rights of use and rights of assets will be regulated under separate chapters: personal and predial servitude shall qualify as *rights of use*, whereas, lien shall qualify as *rights of assets*. As pursuant to that proposal, hypothecary law would be reintegrated into substantive law, or at least, pertinent rules under the Volume on Substantive Law and on Contract Law would be divided.

Volume Four on Law of Obligations

Structure: This Volume will consist of six Sections:

1. Section One: will set forth general rules pertaining to liabilities,
2. Section Two: will set forth general rules pertaining to contracts,
3. Section Three: will set forth rules pertaining to specific types of contracts,
4. Section Four: will set forth general rules of liabilities pertaining to securities,
5. Section Five: will set forth rules pertaining to extra-contractual liability for damages,
6. Section Six: will set forth rules pertaining to various facts of cases that establish liabilities such as accession of unjust enrichment administration without mandate, promises of reward, other itemised unilateral legal transactions and implied behaviour.

1. *General rules of liabilities* will include regulations concerning the limitation and calculation of deadlines, rules of representation in transactions, rules concerning interest and compensation, norms pertaining to the order of liquidation

of debts of the obligee, rules of multi-civic liabilities and rules pertaining to unilateral legal transactions.[12]

2. Section Two will set forth *general rules pertaining to contracts*. By way of introduction, the Conception stipulates general principles, which will be applied for the purpose of the regulation of contract law.

As pursuant to the new Civil Code, the effective system of regulations will be replaced by an *uniform regulation* pertaining to contractual relations in commercial transactions and between private entities. It may be regarded as a substantive change that the legislator, for the purpose of framing contract law, construes contracts concluded in commercial (business) transactions as a *model* to be followed, instead of traditional contractual relations between private entities.

According to the assumption of the Conception, the parties engaged in financial transactions are capable of enforcing and protecting their interests, therefore, civil law should interfere with contractual relations in the least possible degree. This both entails *recognisance of private autonomy in a broad scope* and supplanting legal possibilities of judicial intervention by the state. (This would be admissible exclusively in exceptional cases and in the interest of the so-called "weaker party" and its possible instances will be expressly defined. Such instances typically obtain in consumer legal relations, relations under labour law and transactions realised as pursuant to the application of general conditions of the conclusion of contracts.) As a traditional means of protection, nullification of prohibited, immoral and usury transactions may be resorted to as a sanction.

As pursuant to the above, the principle of *dispositivity* shall be applied in the scope of rules pertaining to contracts. Cogent rules in a broader scope shall be formulated for the purposes of the regulation of consumer contracts.

According to the Conception, the effective framework of contract law would be upheld with respect to the *inner structure* of the rules of *contract law*.

Special rules pertaining to *consumer contracts* will be specified under the new Civil Code, which mainly implies the adoption of Community Law. Certain norms of consumer contracts will be stipulated under general rules governing contract law, whereas, other norms will be stipulated under the respective type of contracts. This would merely imply further specification of the effective regulation of concepts of the consumer and of consumer contract.[13]

[12] Unilateral legal transactions could include itemised unilateral legal transactions effecting liabilities, such as norms governing promises of reward and assumption of duties for purposes of public interest.

[13] The concept of the consumer shall be construed as a natural entity concluding a contract beyond its scope of self-employment or business activity. Consumer contract shall

A *fundamental principle* of contract law will be stipulated as *the freedom of the parties to determine the content of the contract.* Furthermore, the principle of the freedom of the parties to decide on *the conclusion of the contract* will be laid down. The parties may be obliged to conclude a contract exclusively under separate law, which may stipulate such obligation in exceptional cases.

The obligation of the parties *to co-operate* will be set forth as a specific fundamental principle of contract law, which, as a general fundamental principle, will not pertain to the whole body of the new Civil Code.

In the scope of general rules of contract law, the Conception proposes the introduction of *amendments of substance* pertaining to: I. invalidity of contracts, II. indemnification.

I. Rules pertaining to *invalidity* shall be based upon new bases of principle, since the Conception introduces amendments with respect to three elements: *a)* causes of invalidity, *b)* nullity, *c)* the legal consequences of invalidity.

   a) According to the Conception, *causes of invalidity* shall be formulated in *an unified system*, whereas, so far as possible, the legal consequences of the conclusion of invalid contracts shall be attached to causes of invalidity.

   In the scope of the causes of invalidity, the invalidity of *illegal contracts, which violate law*, has posed a difficulty of construction in judicial practice for a long time. Therefore, the following textual amendment will be deemed reasonable: irrespective of other legal consequences, any contract that violates a rule of law shall be null and void provided that it is either specified under the respective rule of law, or the objective of such rule of law is expressly the prohibition of the provision of the service defined by the parties to the contract or the prohibition of other content of the contract.

   According to the Conception, the interest of the elimination of unnecessary legal impediments in business transactions requires the adoption of the principle prevailing in judicial practice that *in re invalid contracts by reason of defect of form*, unless an exception is allowed by law, the defect of form of the legal statement shall be redressed by completion.

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be construed as a contract, which has been concluded between the consumer and the entity ("trader") that concludes such contract within its scope of self-employment or business activity as pursuant to Para. d) of Article 685 of the effective Civil Code.

To ensure doctrinal completeness, *coercion* will be introduced as a further cause of invalidity.

The element of "conspicuously considerable difference in value" that obtains between *service and valuable consideration* in the moment of the conclusion of the contract would be upheld as a further cause of invalidity. As pursuant to the new Civil Code, the inclusion of certain elements in specific types of contracts, such as the element of chance, shall constitute an incontestability clause on grounds of invalidity, or, with the exception of consumer contracts, the parties upon the conclusion of specific contracts could waiver their right to impugn on grounds of invalidity.

b) *In pais reference to the invalidity of null and void contracts* will be maintained as admissible, furthermore, the rule, according to which the court deciding on the case shall not take the nullity of contracts into consideration *ex officio* without the according request of the parties concerned, will also be maintained. For further specification of these maxims, the legal principle prevailing in judicial practice, according to which exclusively a legally concerned entity with contentious legal capacity may institute action (objection) for the establishment of invalidity by court, will be formulated under the new Civil Code. The general fundamental principle of *nemo turpitudinem suam allegans auditur* will be specified not only under the Introductory Provisions, but also *in re* invalidity, with the stipulation that the entity incurring the cause of nullity in an imputable manner may not refer to the invalidity of the contract.

The distinction between null and void and voidable contracts will be upheld. The relative ineffectiveness of contracts concluded via violation of the right of the first refusal would be regulated as a new instance of ineffectiveness.

c) In the scope of *the legal consequences of invalidity*, the rule that completion may not be demanded on grounds of an invalid contract shall be formulated.

Provided that *partial completions have been effected* as pursuant to invalid contracts, the Conception introduces solutions based on new principles that depart from effective rules: the restitution of the *status quo ante* is admissible provided that the conditions preceding the conclusion of the contract *may be restituted in kind.* Based on a claim of ownership, this option is applicable in case of the provision of reversible real value services, whereas, a claim of ownership may not be made for matching payment as valuable consideration by reason of its character. A refund of payment may be ordered by court on the basis of rules pertaining to accession of unjust enrichment.

Financial discrepancies (deriving from costs, profits, damages, etc.) not settled by the restitution of the *status quo ante* shall be adjudicated on the basis of rules pertaining to possession without legal grounds, whereas, rules pertaining to accession of wealth without legal grounds shall be applied as auxiliary rules.

In a given case, conditions preceding the conclusion of the contract *may not be restituted* in kind either by reason of the character of the service, which substantiates genuine irreversibility, or by reason of annihilation, consumption, utilisation, processing or alienation of the service, etc, which substantiates subsequent irreversibility. In such cases, for the settlement of the relations of the contracting parties, the Conception stipulates the application of rules pertaining to accession of unjust enrichment. However, in favour of the party that acceded to unjust enrichment, preferential rules of loss of enrichment shall not be applied by reason of the consideration of bearing responsibility and risk.

The option that on condition the cause of invalidity of the contract may be terminated, *the contract may be pronounced to be valid by court*, will be upheld.

The *legal consequences* of invalid contracts *shall be adjudicated by courts*. As opposed to effective regulations, the Conception proposes that even *in re* nullity of contracts, courts do not make decisions *ex officio*, but exclusively at the request of the parties concerned.

Under the new Civil Code, the sanction of *condemnation in favour of the state* shall be nullified as a legal consequence of invalid contracts and accession of wealth without legal grounds, since their major cases have been eliminated from adjudication.

II. According to the Conception, on the one hand, rules pertaining to exemption of the party infringing the contract from *liability for damages* will be rendered more rigorous *(A)*, on the other hand, the scope of indemnification will be determined contrary to the effective Civil Code *(B)*.

a) Exemption of the party infringing the contract from liability for damages: In this scope, *a more inflexible principle of exemption* established in international trade will be introduced under the new Civil Code by separation of the sanction of indemnification for breach of contract from the condition of the imputability of the party infringing the contract. According to the Programme, in case of contracts concluded in commercial transactions, allocation of consequential damages as pursuant to breach of contracts implies primarily the spread of losses, instead of the repression of individual fault. Therefore, the party infringing the

contract shall not be exempted by reference to compliance with the principle of generally expectable behaviour in the given situation. Exemption would exclusively be substantiated if the party infringing the contract can prove that the damage was incurred by an unavoidable obstacle, which was not predictable in the moment of conclusion of the contract. That principle of exemption shall be applicable to the contributor of the obligee, as *well.*

b) Scopes of indemnification: It needs to be set forth as a starting point, that damages deriving from breach of contract shall be fully indemnified.

In conformity with recognised norms under international commercial law, the standard of rational predictability *as a basis of limitation of the extent of unrealised profits and consequential damages* will be introduced. This implies that the extent of indemnification shall not exceed the extent of losses that the party infringing the contract could or had to foresee in the moment of infringing the contract on the basis of facts and circumstances he could be or had to be aware of as potential consequences of the contract upon concluding the contract. The aggrieved party shall be liable to furnish evidence concerning the extent of damages foreseeable for the party infringing the contract.

Under the new Civil Code, the regulation of contractual liability for damages deriving from breach of contract would be separated from extra-contractual (delictual) liability for damages *with respect to different conditions of exemption*, whereas, under the effective Civil Code, the general rule (on grounds of imputability) pertaining to *delictual and contractual liability for damages* is formulated in a principally uniform manner and their partial elements are regulated accordingly. In the framework of the new Civil Code, it is the condition of liability with respect to exemption that will be separated. The regulation of the manner and extent of indemnification would be upheld as uniform. The norms of the manner and the extent of indemnification would be set forth within the scope of rules pertaining to delictual liability, however, the inclusion of a mere reference to these shall suffice within the rules pertaining to contractual liability.

In view of the demands posed by market competition, *restriction and exclusion of liability for breach of contracts* would be admissible with the exception of consumer contracts.

3. Subsequently to the formulation of general rules pertaining to contracts, the new Civil Code would not set forth norms of delictual liability, but *rules of specific types of contracts* and of liabilities pertaining to securities. It would subsequently stipulate terms of extra-contractual damages, and finally, other elements that establish *liabilities*.

Rules formulated under particular parts of most types of contracts call for modernisation primarily by reason of the requirements of commercial transactions, and accordingly, rules pertaining to certain types of contracts under the Civil Code do not respond to the requirements of the business world, therefore, they require modernisation, as well. Various commercial contracts are not integral to the effective Civil Code, therefore, these contracts need to be integrated into the new Civil Code. The sequence of types of agreements will be determined on grounds of their financial import, however, the *dare, facere, praestare* character of services shall also be taken into consideration.

4. General substantive rules pertaining to securities will be summarised under the new Civil Code, which will define securities in a normative manner and circumscribe their content-based criteria, furthermore, it will set forth procedural rules of legitimation, rules of the transfer of securities, of the restriction of raising objections and substantive rules of the rescission of securities. These elements will also be regulated with respect to dematerialised securities.

5. According to the Conception, rules pertaining to liability for extra-contractual damages will be divided into two parts, i.e., the general and the particular part.

The general part would establish the universally recognised framework of delictual liability, rules of law of liability with peremptory effect and pertinent sanctions (provisions concerning the manner and extent of indemnification). Increasing the rigour of the general rule pertaining to liability for extra-contractual damages is not deemed to be necessary.

According to the Conception, *the particular part* would establish the framework of special liability and indemnification and specify the respective particular *rules*.

By reason of the inconsistencies prevailing in judicial practice, the rule that incurring damages is prohibited by law will be formulated under *the general part* of the new Civil Code. Accordingly, all forms of incurring damages shall be illegal, unless a rule of law provides otherwise. By reason of *the stipulation of a general prohibition of incurring damages*, the instances of the admissibility of incurring damages and the causes that exclude unlawfulness should be expressly specified. In the scope of *the specification of causes that exclude unlawfulness*, the rule, according to which indemnification shall be due in instances of incurring damages permitted by law, will be formulated with peremptory effect. Exemption is admissible exceptionally and in *favour* of public interest exclusively as pursuant to a provision of law.

The manner and extent of indemnification: As pursuant to Para. 4 of Art. 355 of the effective Civil Code, four types of damages are distinguished: *a)* depreciation, *b)* unrealised profits, *c)* non–pecuniary damages, *d)* expenses required for the elimination or reduction of financial losses.

a) According to annotations and judicial practice, the concept of *depreciation* of the property of the aggrieved party is defined as loss as pursuant to changes incurred in *res*. This interpretation should be extended to *non–in–rem* pecuniary damages (e.g., losses proceeding from loss of rights or claims).

b) The category of *unrealised profits* contains several elements of uncertainty, therefore, its scope should be circumscribed within limitations of predictability, as that is manifest in standard judicial practice. According to the proposal, under the new Civil Code, the party incurring damages shall be exclusively accountable for unrealised profits that could be reasonably foreseen as a consequence of a given activity under normal circumstances. As a *conditio sine qua non* of the establishment of liability for damages, the aggrieved party would be liable to prove that the probability of real risk obtained.

c) Regulation of *non-pecuniary damages* is not deemed necessary under the new Civil Code, in view of the fact that the introduction of remuneration for the injury of the entity as a civil sanction of the violation of privacy is on the agenda, which would qualify as compensation for non–pecuniary damages.

d) The category of *expenses required for the elimination or reduction of financial losses* affecting the aggrieved party should be supplemented by a limitation of content developed in the course of judicial practice with the purport that exclusively reasonable and expedient expenditure and costs could be claimed as damages.

Besides upholding the principle of full indemnification, the new Civil Code should primarily provide for *the manner of pecuniary indemnification.* The options of restitution *in integrum* and indemnity in kind would be admissible as marginal manners of compensation, which may be ordered by court at the express request of the aggrieved party and if the conditions set forth by effective provisions obtain.

The particular part, within the scope of special instances, will specify rules pertaining to civil liability currently set forth under separate provisions. Among these, the following clauses are deemed to be most important:

- *Problems of liability for damages under labour law*: In case particular labour agreements are regulated in the framework of the new Civil Code, then liability for damages by the employee and the employer will also be regulated

therein, either within the scope of rules of particular labour agreements or under rules pertaining to delictual liability.

- *Liability of public officials:* Under the new Civil Code, the specification of special rules pertaining to the liability of (head) officials of *business* associations, of co-operatives and of various partnerships that obtains for the association (co-operative, partnership) will be subject to the discretion of the legislator.
- Act X of 1993 on *Product Liability* will be re-enacted under the part of the new Civil Code regulating delictual liability.
- *Absolute liability:* Subsequently to the harmonisation of different rules, rules pertaining to liability for damages incurred by the application of nuclear energy and the *provisions* on amends for damages as pursuant to Act CXVI of 1996 on Nuclear Energy will be incorporated into the new Civil Code. In case the clause on absolute liability is integrated into the new Civil Code, these provisions will introduce the part on delictual liability.
- As a fact of the case of *autonomous liability*, causal liability for damages will be established in case of *endangering, polluting or otherwise harming* the *environment* or *nature*. Thereby, rules of liability currently set forth under separate law would be defined in a unified manner under the new Civil Code with the application of the doctrine of the European Community pertaining to causality and allocation of damages. The admissibility of the institution of action by the public prosecutor in favour of public interest and condemnation in favour of the Fund for Protection of the Environment could be prescribed separately.
- *Liability for hazardous activities:* The effective rule would be upheld with the adoption of the amendment elaborated in judicial practice that in case the instrumentality of the aggrieved party can be established, upon the determination of the extent of instrumentality, the degree of risk of the operation should be evaluated.
- *Damage done by game or incurred in the course of hunting, damages caused to game:* Provisions on damage done by game or incurred in the course of hunting and on damage caused by killing game currently regulated under separate provisions will be integrated into the effective Civil Code. Under the new Civil Code, as a replacement of the liability clause for hazardous operation, the regulation of acceptance of responsibility for damage done by game would reasonably prescribe stricter liability of the party with hunting licence. The party with hunting licence would exclusively be exempted from liability on condition that the damage was incurred by the imputable fault of the aggrieved party.
- *Damages incurred by the employee and the substitute:* Under the new Civil Code, the effect of operative provisions that establish the liability of the

employer (and co-operative) for damages will be extended to all legal entities in cases when the (head) official or member (in the context of its position) incurs damages to a third party. It needs to be stipulated that if an employee, substitute or member incurs damages by deliberate criminal act or misdemeanor, s/he will (potentially jointly with the employer or the legal entity) be directly liable to the aggrieved party.

– *State Liability for damages:* Effective rules pertaining to damages incurred in the scope of exercise of administrative power will be amended according to maxims established by judicial practice. Therefore, *liability for damages incurred by the state, the local government or their institutions* shall exclusively, if damages are incurred in the scope of the exercise of public authority, i.e., of the activity or negligence of the public authority. Rules pertaining to liability for *damages incurred in the scope of exercise of judicial power* will be formulated under a separate scope of actual circumstances with respect to the regulations of the EU. Under a relevant clause, the new Civil Code should stipulate as pursuant to the effective Act on the Rules of Procedure, that the state, irrespective of imputability, will be liable for grievances incurred by the violation of the right to due process of law and to its conclusion within a reasonable period. The regulation of claims for damages by reason of unlawful arrest or detention will be reasonably provided for under this clause. In the scope of the regulation of judicial liability, the stipulation that wrong decisions in their content made in particular cases shall not substantiate liability for damages by the state will be introduced as a peremptory non-liability clause. Liability for damages incurred by the state via legislation could be established with the limitation that the state shall be liable exclusively for damages incurred by particular acts that are substantiated by statutes pronounced *ex post facto* unconstitutional.

6. Section Six: will set forth rules pertaining to various facts of cases that establish liabilities such as accession of wealth without legal grounds, administration of affairs without order, promises of reward, other itemised unilateral legal transactions and implied behaviour.

Volume Five on Law of Succession

According to the Programme, commitment to tradition and conventions have greater significance under law of succession than in other branches of civil law. According to the Conception, "the objective of drafting a new Civil Code may

not be construed as the replacement of rules responding to contemporary social–economic relations by necessarily new regulations". Accordingly, the Conception proposes the introduction of minor and no fundamental amendments in the area of the law of succession. Therefore, with minor amendments, lineal inheritance as a specific Hungarian institution and the legal share of inheritance would be upheld.

The society of Hungarian lawyers is further intrigued by both the Conception and the Programme: their maxims are analysed, assumptions are debated.[14] The elaboration of the norm text of the new Civil Code has commenced as pursuant to the decision of the government.[15]

[14] This was demonstrated as a moment in the course of professional debates by the Conference on Codification of Civil Law held at the Eötvös Loránd University of Sciences in November, 2003, which dealt with significant institutions of civil law in the context of the Conception and the Programme of the Civil Code. Reputed invited lecturers explicated their views on the following subjects: Pál Solt and János Zlinszky delivered lectures on strict liability, András Kisfaludy and Tamás Sárközy held forth on general rules pertaining to legal entities and on the powers of business associations. György Boytha lectured on non-financial indemnification and remuneration for the injury of the entity, and finally, Attila Harmathy and Lajos Vékás expounded the legal consequences of invalid contracts.

[15] Governmental Decree no. 1003 of 2003 (I. 25).

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On Some Aspects of the Roman Concept of Authority

Abstract. When scrutinizing the concept of authority, presenting the basic definition of auctoritas, the capacity of increase and augmentation, Hannah Arendt appositely quotes the relevant passage by Cicero, according to which the task of founding the state, the human community, as well as the preservation of what has already been founded, highly resembles the function of the numen, the divine operation (Cicero, De re publica 1, 7. „Neque enim est ulla res in qua propius ad deorum numen virtus accedat humana, quam civitatis aut condere novas aut conservare conditas."); and in connection with this, she states that, from this aspect, the Romans regarded religious and political activity as being almost identical. The paper will examine various aspects of the numen, one of the most important phenomena of Roman religion (I.), its etymology (II.), the institution of the triumphus, a phenomenon seeming to be relevant from this point of view (III.), then the concept of numen Augusti, incorporating these elements of the religious sphere into the legitimation of power. (IV.)

Keywords: authority, auctoritas, numen, imperium, triumphus

I. The concept of Augustus's *numen* is of utmost importance from several points of view with respect to the subsequent cult of the emperor since it is not only the late Octavianus who, as a living person, is invested with the *numen* that could be put to use in public life, his given name, Augustus, carries in itself the expression *augus*, which bears religious connotations.[1] The leader having *imperium* and *auctoritas* in the Roman conceptual sphere, represents a certain archetype; because *imperium* originally meant nothing else than *mana*, the charisma of the leader, i.e. one's capacity of implementing, of giving birth to something in other persons.[2] The expression of *numen*–especially in ancient Roman sources–is mentioned in connection with the gods, the senate, the Roman people, as well as in connection with the mind on a more abstract, philosophical level, as a superhuman force in itself which is nevertheless most frequently connected to a person of some kind; Rose defines the concept in

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[1] Wagenvoort, H.: *Roman Dynamism. Studies in Roman Literature, Culture and Religion.* Leiden, 1956. 12.

[2] Köves-Zulauf, Th.: *Bevezetés a római vallás és monda történetébe* (Introduction to the history of Roman religion and myth). Budapest, 1995. 31.

perfect accordance with the meanings occurring in these sources: *„Numen signifies a superhuman force , impersonal in itself but regularly belonging to a person (a god of some kind) or occasionally to an exceptionally important body of human beings, as the Roman senate or people."*[3] This does not seem to be especially surprising, as the senate fulfilled numerous religious functions. The religious identity and divine origin of the Quirites was widely accepted as well, and Cicero also drew a parrallel between the *aminus* and the *princeps deus* in *Somnium Scipionis*.[4] Thus, the *numen*, especially according to the dynamistic trend, connected to Wagenvoort's name, signified–to use this Polinesian expression–a kind of *mana*, a mysterious force dwelling in a thing or in a person.[5]

The *numen Augusti*, the concept of the charismatic leader, representing the deity in a special way, can be understood precisely by investigating the ambivalent relationship of Roman religion with the *epiphany*, the *numinous* experience of the divine presence; here it becomes visible that certain subsequent outcomes were already present in their germs in the most ancient Roman religion.[6] The *triumphus* is the archetypal–numinous event of the embodiment of the deity, *in concreto* Iuppiter, surrounded by numerous preventive rites. It is not by chance that pondering over the role of the *numen* in antique religion *(Antike, magische, faustische numina)*[7] Oswald Spengler mentions that the Roman cult of the emperor–which must be clearly separated from the oriental cult of the sovereign because of their different origins–is a natural consequence of Roman religion, and the role of the *triumphator* must be regarded as its precedent, as Iuppiter's *numen* was embodied in the consul holding the *triumphus* during the triumphal procession.[8] It should be noted that the Jupiterean role of the presence of the *triumphator*'s embodying the divine *numen* was, among other things, a numinous, awe-inspiring experience for the Romans, because Roman religion–unlike Greek religion–tried to avoid the divine presence, the epiphany; e.g this was the reason for the complete turning around, the *circumactio corporis* after finishing the prayer, as well as

[3] Rose, H. J.: Numen and mana. *Harward Theological Review*, 44. 1951. 109.

[4] Cicero *De re* publica 6, 15. *Homines enim sunt hac lege generati, qui tuerentur illum globum, quem in hoc templo medio vides, quae terra dicitur, iisque animus datus est ex illis sempiternis ignibus quae sidera et stellas vocatis, quae globosae et rotundae, divinis animatae mentibus, circos suos orbesque conficiunt celeritate mirabili.*

[5] Köves-Zulauf: *Bevezetés a római vallás... op. cit.* 29.

[6] *Ibid.* 177.

[7] Spengler, O.: *Der Untergang des Abendlandes*. München, 1991. 517–522.

[8] *Ibid.* 521. sq.

the well-known *fas sit vidisse*[9] formula, meaning: *„I should not be blamed for seeing it."*[10]

II. The first occurrence of the word *numen* can be found–*in concreto* in a genitival and an attributive construction belonging to a god's name–in Accius,[11] later near the genitives of the words *deus* and *divus*,[12] referring to a particular god, e.g. Ceres[13] or Iuppiter,[14] as well as in an attributive construction with the adjective *divinum*.[15] It characteristically occurs in verbal constructions near the verbs denoting ritual activities,[16] whereas in attributive constructions it appears near adjectives denoting piety, anger, reconciliability, or, on the contrary, implacability.[17] In Augustus's time the *numen* can also mean the deity himself, previously having meant only one of his properties or functions[18]–a typical example for this can be found in the *prooemium* of the *Aeneis*[19] and Servius[20] also defines it in accordance with this thought when recounting Iuno's functions in his commentary.[21] The antique grammarians also tried to explain

[9] Seneca: *Epistulae* 115, 4.

[10] Latte, K.: *Römische Religionsgeschichte*. Handbuch der Altertumswissenschaft V. 4. München, 1967. 41.

[11] 646 R. b. Non. 173, 27. *nomen et numen Iovis*; 692 R. *nomen vestrum numenque*.

[12] Cicero: *De divinatione* 1, 120. *numen dei*; 2, 63. *divum numina*; *Philippicae* 11, 28; *De finibus bonorum et malorum* 3, 64; *De natura deorum* 1, 3; 2, 95; 3, 92. *deorum immortalium numen*.

[13] Cicero: *In Verrem* 5, 107.

[14] Cicero: *Pro rege Deiotaro* 18; *Tusculanae disputationes* 2, 23.

[15] Cicero: *De natura deorum* 1, 22; *Pro Milone* 83. *numen divinum*.

[16] Cicero: *In Verrem* 2, 4, 111. *expiare*; *De divinatione* 2, 63; *De domo sua* 140; Caesar: *De bello Gallico* 6, 16, 3. *placare*; Vergilius: *Georgica* 1, 30 *colere*; Ovidius: *Tristia* 5, 3, 46. *flectere*; Horatius: *Epistulae* 17, 3; Vergilius: *Aeneis* 2, 141. *orare*; Vergilius: *Aeneis* 3, 437; Ovidius. *Tristia* 3, 8, 13. *adorare*.

[17] Vergilius: *Aeneis* 2, 141. *conscium veri*; Ovidius: *Metamorphoses* 4, 452. *implacabile*; *Corpus Inscriptionum Latinatum* VI 29944. *iratum*; Vergilius: *Aeneis* 4, 521. *memor*; 4, 382. *pium*; *Culex* 271. *placabile*; Statius: *Thebais* 10, 486. *providum*.

[18] Pfister, Fr.: Numen. In: *Paulys Real-Encyclopädie der klassischen Alterumswissenschaft* XVII. 2. 1937. 1273.

[19] Vergilius: *Aeneis* 1, 8. *quo numine laeso quidve dolens regina deum*.

[20] Servius: *Commentarius in Verg. Aen.* 1, 8. *Nam Iuno habet multa numina: est Curitis ... est Lucina ... est regina*.

[21] Pötscher, W.: 'Numen' und 'numen Augusti'. In: Pötscher, W.: *Hellas und Rom*. Hildesheim, 1988. 449.

this expression, e. g. Festus defines it as a divine nodding, and divine power,[22] Varro defines it as *imperium.*[23] These interpretations lead to the basic meaning of the word, i. e. the (assenting divine) nodding.[24] Various authors–like Pfister,[25] Wagenvoort[26] and Rose[27]–identify the expression with the *verbum 'to move'*. Interpreting a pregnant locus by Catullus,[28] Pfister also takes position vis-a-vis the orendistic, will-expressing meaning of the word *numen,*[29] which seems to be strongly corroborated not only by the expression *adnuit* in the text of Catullus, but also by other constructions with the verb **nuo,*[30] which reinforce the (personal) expression of the will, with the help of the emotionally charged gesture of the nodding.[31] Opinions also differ concerning the age of the expression *numen* itself. Pfister ranks it into the most ancient layers of religious terms,[32] Rose prefers not to take sides in this question.[33] Latte's opinion deserves special attention. On the one hand he states that the expression *numen* can be encountered neither in ancient religious texts nor in the works of Plautus, Ennius and Cato, its first occurrence in the works of Accius and Lucilius could be dated to the second half of the 2nd century BC., so he thinks it possible that it became part of the Latin language only because of the influence of Stoic philosophy, as a translation of the Greek *dynamis,*[34] on the

[22] Festus 172. *numen quasi nutus dei ac potestas.*

[23] Varro: *De lingua Latina* 7, 85. *numen dicunt esse imperium*

[24] Pötscher: *op. cit.* 450.

[25] Pfister: *op. cit.* 1289.

[26] Wagenvoort: *Roman Dynamism... op. cit.* 74.

[27] Rose, H. J.: *Ancient Roman Religion.* London, 1948. 13.

[28] Catullus: 64, 204. sqq. *Adnuit invicto caelestum numine rector, quo motu tellus atque horrida contremuerunt aequora concussitque micantia sidera mundus.*

[29] Pfister: *op. cit.* 1290. sq.

[30] *adnuere* (Pomponius: *Atellana.* 25. *saepe adnuit. invenibit saepe*; Plautus: *Asinaria* 784. *illa ... nutet, nictet, annuat*; *Bacchides* 186. *ego autem me venturum adnuo*; *Truculentus prol.* 4. *quid nunc? daturin estis an non? adnuont*; Varro: *De re rustica* 1, 2, 2. *si ita est, ut adnuis*; Ennius: *Annales* 133. V. *adnuit sese mecum decernere ferro*), *adnutare* (Naevius: *Comoediae* 1047. *alii adnutat, alii adnictat*; Plautus: *Mercator* 437. *mihi ... adnutat: addam sex minas*), *abnuere* (Plautus, *Truculentus prol.* 6. *abnuont ... adnuont*; *Mercator* 50. *abnuere negitare adeo me natum suom*), *abnutare* (Plautus: *Captivi* 611. *quid mi adnutas? tibi ego abnuto?*; Ennius: *Tragoediae* 306. V. *quid te adiri abnutas?*), *innuere* (Plautus: *Rudens* 731. *ubi ego innuere vobis*; Terentius: *Eunuchus* 735. *abiens mihi innuit*; Terentius: *Adelphoe* 171. *si innuerim*; 174. *non innueram*).

[31] Pötscher: *op. cit.* 450.

[32] Pfister: *op. cit.* 1290.

[33] Rose: *op. cit.* 1948. 114.

[34] Latte: *op. cit.* 57.

other hand he notes that it is impossible to explain why this particular word was used to translate the concept of *dynamis theou*.[35] Concerning the first part of Latte's idea, it cannot be disregarded that both Ennius's and Cato's texts are considerably incomplete, thus the lack of the word *numen* does not provide sufficient reason for drawing conclusions, Plautus's comedies cannot contain the expression becuse of their very nature, while in the religious texts the expression *numen* signifies a concept pertaining to the sphere of the religious experience rather than to the ritual.[36] In connection with Cicero's relevant locus,[37] Latte seems to forget about the important sacred functions of the *senatus*, like the ordering of the *triumphus* , the consecration of a certain plot of land to the gods and later the initiation of the emperor to the divine status. Pötcher also states that through the functions the *senatus* assumed certain competences belonging to the divine sphere.[38] When Lucretius connects the concept of the *numen* to the human mind,[39] he presumably speaks only about the familiar mechanism through which religious concepts *mutatis mutandis* gain philosophical significance.

The question concerning the *numen*'s main operational principle, which at the same time means the manifestation of the divine will, is of utmost importance. Pötscher considers the **nuere*, the manifestation of the divine will, an ancient component of Roman religion, which avoided epiphany, carefully guarded the *pax deorum*, and interpreted the slightest deviation from the order of daily routine as a sign (more precisely as a *sympthome*, according to Köves-Zulauf[40]) without attempting to draw any conclusion with regard to the age of the expression *numen*.[41] Similarities of the expression with Greek terms are striking, the word *numen* can be connected with *neyma*, the meaning of *nutus* can be connected to *neysis*, the common characteristic feature of these latter two is the dynamism inherent in them,[42] but the closest parallel can be drawn

[35] *Ibid.* 57.

[36] Pötscher: *op. cit.* 451.

[37] Cicero: *Philippicae* 3, 32. *magna vis est, magnum numen ... idem sentientis senatus.*

[38] Pötscher: *op. cit.* 452.

[39] Lucretius: *De rerum natura* 3, 144. sq. *Cetera pars animae per totum dissita corpus paret et ad numen mentis momenque movetur.* 4, 179. *in quem quaeque locum diverso numine tendunt.*

[40] Köves-Zulauf: *Bevezetés a római vallás... op. cit.* 61.

[41] Pötscher: *op. cit.* 452.

[42] Cicero: *Tusculanae disputationes* 1, 40. *terrena et humida suopte nutu et suo pondere ad partes angulos terram et in mare ferantur*; Vergilius: *Aeneis* 9, 106; 10, 115. *adnuit et totum nutu tremefecit Olympum.*

between *neyo*[43] and **nuo*, known in its constructions.[44] The concept of divine warning, consent or disapproval appearing in the form of natural phenomena can be encountered both in Greek and Roman authors.[45] However, the different *omina* cannot be strictly paralelled with the divinity expressing his will with a nod (*nutus*), because in most cases only the Romans' conviction about a certain event's being proper or not can be inferred without the possibility of establishing whether or not the given warning was connected to the will of a personal god.[46] In numerous cases it is not possible to separate the personal energy-component and the one manifesting only in the course of operation, or it is not possible to define their precise amount and proportion, these phenomena being ouside the logical sphere. At the same time certain *omina*–e.g. the *augurium* connected to the founding of Rome–were traditionally related to particular gods.[47] Presumably here belong both the local, less important divinities mainly manifesting in the form of natural phenomena, conceived as operating natural forces, and the more important ones, invested with a certain cult and precisely defined personal characteristics, almost a personality–this coincides with the concept of *Person-Bereichenheit*, the concept of the unity of person and sphere of authority which for the antique man meant the unity and the simultaneity of the material component and the divinity of the given phenomenon.[48] As Kerényi also notes: *„Apollo–and every other Greek god–is a primordial type that was recognised by the Greeks as the metaphysical form of experienced spiritual and plastically contemplated natural realities."*[49] According to the conviction of ancient Romans the lack of a precise denomination does not mean that the *augurium* would have been the work of chance, and not the manifestation of a particular (personal) will.

[43] *Ilias* 3, 337; 13, 133; 9, 223; *Odysseia* 16, 283; 18, 237.

[44] Pötscher: *op. cit.* 453.

[45] *Cf.* Nielsson, M. P.: *Geschichte der griechischen Religion I-II.* Handbuch der Altertumswissenschaft V. 2. München, 1955; Cook, A. B.: *Zeus. A Study in Ancient Religion.* Cambridge, 1914; Jakobsthal, P.: *Der Blitz in der orientalischen und griechischen Kunst. Ein formgeschichtlicher Versuch.* Berlin, 1906.

[46] Pötscher: *op. cit.* 455.

[47] Livius: 1, 6, 4. *Quoniam gemini essent nec aetatis verecundia discrimen facere posset, ut dii quorum tutelae ea loca essent auguriis legerent qui nomen novae urbi daret, qui conditam imperio regeret, Palatium Romulus, Remus Aventinum ad inaugurandum templa capiunt.*

[48] *Cf.* Pötscher, W.: Das Person-Bereichdenken. *Wiener Studien* 72. 1959. 24. sqq.; Spengler: *op. cit.* 518. sq.

[49] Kerényi, K.: Halhatatlanság és Apollon-vallás (Immortality and Apollo-religion). In: *Az örök Antigoné* (The eternal Antigone). Budapest, 2003. 157.

The concept of divinities invested with a concretely defined personality is not excluded by the fact that they are not called by a precise name, it is enough to think of the text and the ritual of *evocatio*,[50] belonging to the sphere of the *ius sacrum*, known from Macrobius,[51] which, without mentioning names, appeals to personal gods and not impersonal forces.[52] The image of Zeus, shaking the skies and the earth with a little movement of his head, as well as the image of Iuppiter can be frequently encountered.[53]

It seems to be worth returning to the two oldest occurrences of the term in the constructions *nomen et numen Iovis* and *nomen vestrum numenque* in Accius. In both cases the expression *numen* is connected with the word *nomen*. Two widely differing opinions collide here. Wagenvoort thinks that this construction might help to grasp the historic moment when the concept of the personal God comes to existence as a development of the impersonal, magical force, just as the primary expression of *numen* is later associated with the secondary term *nomen* as the result of a kind of evolution.[54] Conversely, Pötscher argues that the expressions *numen* and *nomen* are two different aspects of the same phenomenon without either of them being secondary to the other with regard to both their meaning and their chronology.[55] This view is corroborated by the analogy taken from the functions of the Roman military leader, i. e. the *ductus*, the *imperium* and the *auspicium* are concepts appearing

[50] *Cf.* Basanoff, V.: *Evocatio*. Paris, 1947.

[51] Macrobius: *Saturnalia* 3, 9, 7–8. *Si deus, si dea est, cui populus civitasque Carthaginensis est in tutela, teque maxime, ille qui urbis huius populique tutelam recepisti, precor venerorque veniamquea vobis peto ut vos populum civitatemque Carthaginensem deseratis, loca templa sacra urbemque eorum relinquatis, absque his abeatis eique populo civitati metum formidinem oblivionem iniciatis, proditique Romam ad me meosque veniatis, nostraque vobis loca templa sacra urbs acceptior probatiorque sit, mihique populoque Romano militibusque meis praepositi sitis ut sciamus intellegamusque. Si ita feceritis, voveo vobis templa ludosque facturum.*

[52] Pötscher: *op. cit.* 456. sq. *(Cf.* Vergilius, *Aeneis* 8, 347. sqq. *Iam tum religio pavidos terrebat agrestis / dira loci, iam tum silvam saxumque tremebant. / 'Hoc nemus, hunc' inquit 'frondoso vertice collem /–quis deus, incertum est–habitat deus: Arcades ipsum / credunt se vidisse Iovem, cum saepe nigrantem / aegida concuteret dextra nimbosque cieret.)*

[53] Vergilius: *Aeneis* 4, 268. sq. *ipse deum tibi me caelo demittit Olympo / regnator, caelum et terras qui numine torquet*; Horatius: *carmina* 3, 1, 5. sqq. *Regum timendorum in proprios greges / reges in ipsos imperium est Iovis / clari Giganteo triumpho / cuncta supercilio moventis.* Ovidius: *Metamorphoses* 1, 179. sqq. *Ergo ubi marmoreo superi sedere recessu, / celsior ipse loco sceptroque innixus eburno / terrificam capitis concussit terque quaterque / caesariem, cum qua terram, mare, sidera movit.*

[54] Wagenvoort: *Roman Dynamism... op. cit.* 78.

[55] Pötscher: *op. cit.* 460.

together, in juxtaposition, overlapping with one another but not altogether synonymous.[56] These concepts express different aspects of the same office and it is highly unlikely that they would be only synonyms heaped together–the *imperium* primarily signifies the effective power of the commander but is also related to the religious sphere, in the case of *auspicium* the sacred element is dominant, at the same time it carries within itself the executive competence needed for its fulfillment.[57] According to Wagenvoort, in Roman thinking, certain persons disposed of a special *mana* of their own, e. g. the *imperator*–if the origin of the word is considered–has a creative fertilising power,[58] and when, as a general, he ordered his soldiers to occupy an enemy camp, he conjured up the force necessary to carry out the order with the help of his magic words; hence it can be inferred that the imperium is nothing other than a form of transmitting a mysterious force.[59] It cannot be disregarded that according to antique views, the name is never arbitrary but it always, thus in the case of gods as well, constitutes an integral part of personality; it was not by chance that they proceeded with such caution in the precise naming of the gods or in keeping their names in secret if it was necessary.[60]

III. Payne thinks that it is not possible to understand Roman thinking without understanding the *triumphus*.[61] Although tradition knows about *triumphus* already held by Romulus, the ceremony of the *triumphus* is connected to the introduction of the cult of Iuppiter Capitolinus in the year 509 BC.[62] The last *triumphus* corresponding to all religious prescriptions were held at the end of

[56] Plautus: *Amphitruo* 196. *ductu, imperio, auspicio suo*; 192. *imperio atque auspicio eri*; 657. *eos auspicio meo atque ductu vicimus*; Livius 27, 44, 4. *sine imperio, sine auspicio*; 28, 27, 4. *qui imperium auspiciumque*; Valerius Maximus 2, 8, 2. *de imperio et auspicio*

[57] Pötscher: *op. cit.* 462.

[58] Walde, A.–Hofmann, J. B.: *Lateinisches etymologisches Wörterbuch.* Heidelberg, 1938. I. 683.

[59] Wagenvoort, H.: Wesenszüge altrömischer Religion. In: *Aufstieg und Niedergang der römischen Welt.* I. 2. Hildesheim–New York, 1972. 371. sq. *Imperium ist also eine Form der Übertragung geheimnisvoller Kraft.*

[60] *Cf.* Brelich, A.: *Die geheime Schutzgottheit von Rom.* Zürich, 1949.

[61] Payne, R.: *The Roman Triumph.* London, 1962. 10.

[62] Lemosse, M.: Les éléments techniques de l'ancient triomphe romain et le problème de son origine. In: *Aufstieg und Niedergang der römischen Welt I. 2.* Hildesheim–New York, 1972. 443.

the 3rd century AD,[63] the *triumphus* organised later–the custom well survived the fall of the empire–cannot be considered the continuation of the religious tradition.[64] Although the political importance of the *triumphus* can hardly be overestimated, and countless examples can be found for its *abusus* for profane purposes in Roman history, it must be kept in mind that the *triumphus* is originally a religious act[65]–both in the magic and the sacred sense of the word[66]–because, as it was mentioned in the introduction, in the course of this, the *numen* of the Iuppiter Capitolinus is incarnated in the *triumphator*.[67] In ancient times, the archaic *triumphus*, presumably taken over from the Etruscans, started from the Alban mountains, and according to the classic rite that had been formed through historical development, it proceeded according to the following itinerary: The procession started from the Campus Martius, got into the city through the Porta Triumphalis, there they presented the prescribed sacrifice, then headed towards the Porta Carmentalis–after the building of Circus Flaminius had been finished, the procession naturally touched it as well–originally they went across the Velabrum towards the Capitolium, later they went round the Palatinus along the Via Sacra to reach the same place.[68] In the procession, the looted treasures, the weapons seized from the enemy, the sacrificial gifts, the group of captives, among whom the captive generals, rulers and their courts were followed by the *triumphator* himself, escorted by his officers and the soldiers of his army.[69] The *triumphator* was standing on a two-wheeled, horse-drawn *quadriga*, holding an ivory sceptre with Iuppiter's bird the eagle in one hand and a laurel twig in the other, a slave standing behind him on the *quadriga* was holding a golden wreath above his head, he was wearing a laurel wreath on his head and festive clothes on his body, which

[63] Picard, Ch. G.: *Les Triompées Romains. Contribution à l'histoire de la religion et de l'art triomphal de Rome.* Paris, 1957. 428.

[64] Köves-Zulauf: *Bevezetés a római vallás... op. cit.* 154.

[65] Wissowa, G.: *Religion und Kultus der Römer.* München, 1912. 126; Livius: 28, 9, 7. *Ut et dis immortalibus haberetur honos et ipsis triumphantibus urbem inire liceret.* 45, 39, 10. *Dis quoque enim, non solum hominibus debetur triumphus.*

[66] Köves-Zulauf: *Bevezetés a római vallás... op. cit.* 156.

[67] Wissowa: *op. cit.* 127.; Taeger, F.: *Charisma. Studien zur Geschichte des antiken Herrscherkultes II.* Stuttgart, 1960. 13; Picard: *op. cit.* 139.

[68] Altheim, F.: *Römische Religionsgeschichte.* Leipzig, 1932. II. 24. sq.

[69] *Cf.* Ehlers, W.: Triumphus. In*: Paulys Real-Encyclopädie der klassischen Alterumswissenschaft* XIII. 493. sqq.

he put down when he reached the Capitolium[70] and he sacrificed a white bull to Iuppiter there.[71]

The characterisics likening the general to Iuppiter, more precisely incarnating Iuppiter in him were the following: the *triumphator*'s face was painted vermilion,[72] the colour of the face of the Iuppiter Capitolinus's clay statue. The red painting on the face did not only serve his identification with Iuppiter, but it also symbolised blood thus investing the general with the magic power dwelling in blood,[73] his clothes did not merely resemble the clothes of Iuppiter's statue but they were identical, as they took off the statue's clothes (this on the one hand meant the *toga palmata*, on the other hand the *toga picta* decorated with golden stars that was worn over it) to dress the *triumphator* in them.[74] The *triumphator* was driving a *quadriga* like the one standing on the top of the temple of the Capitolium, where the above mentioned statue of Iuppiter was standing too.[75] Many scholars, like Fowler[76] and Deubner[77] attempted to deny that the *triumphator* represented Iuppiter and he was regarded as being Iuppiter for that period, but they could not shake the identifying view, counting as *communis opinio* in the literature on the subject.[78] It is true that it is hard to interpret the duplicity according to which the *triumphator* who–by virtue of the above identification–is none other than Iuppiter during this period, is heading towards Iuppiter's Temple on his *quadriga* in order to present sacrifice to the god there, thus Iuppiter's presence is somehow redoubled for this period. However, it must be taken into account that the contradiction that is rationally percieved in the *triumphus* but not disturbing the experience on the religious level cannot be reconciled according to the rules of linear logic,[79] it must also be observed that the divine character of the *triumphator* was gradually waning in the course of the ceremony until it completely ceased when he put down his wreath and his clothes at the statue.[80] (The sacrifice

[70] Plinius: *Naturalis historia* 15, 133; Silius: *Punica* 15, 118. sqq.

[71] Servius: *Commentarius in Verg. Georg.* 2, 146; Ehlers: *op. cit.* 493. sqq; Wissowa: *op. cit.* 126. *sq;* Köves-Zulauf: *Bevezetés a római vallás... op. cit.* 156.

[72] Plinius: *Naturalis historia* 33, 111; Servius: *Commentarius in Verg. ecl.* 6, 22. 10, 27.

[73] Köves-Zulauf: *Bevezetés a római vallás... op. cit.* 156.

[74] Livius: 10, 7, 10; Suetonius: *Augustus* 94; Iuvenalis: *Saturae* 10, 38.

[75] Dionysius Halicarnassensis 9, 71, 4; Ovidius: *Epistuae ex Ponto* 2, 1, 58.

[76] Fowler, W. W.: *Iuppiter and the Triumphator.* Classical Review 30. 1916. 153. sqq.

[77] Deubner, L.: Die Tracht des römischen Triumphators. *Hermes* 69. 1934. 316. sqq.

[78] About the controversial theses *cf.* Köves-Zulauf, Th.: *Reden und Schweigen. Römische Religion bei Plinius Maior.* München, 1972. 136.

[79] Payne: *op. cit.* 57. sq.

[80] Köves-Zulauf: *Reden und Schweigen. op. cit.* 136.

presented on the Capitolium was followed by the *ludi magni*, which probably constituted an integral part of the *triumphus*; this seems to be corroborated by the fact that though the independent *ludi magni* separated from the *triumphus* itself appeared only later, the *magistratus* organising the games still appeared in the clothes resembling those of the *triumphator*, the date of the games were connected to the founding ceremony of the Capitolian Temple celebrated on the 13th of September.[81])

At the same time, the special position aquired by the *triumphator* through his temporary deification was carrying numerous dangers. The rational core of these dangers was the envy manifested towards the *triumphator* which embodied in the *malocchio* from the magical aspect, and in the ire of Nemesis and Fortuna from the religious aspect, against which they tried to defend the *triumphator* with the help of various preventive means well-known from antique magic, e. g. amulets put round his neck, bells fastened onto the *quadriga* that were meant to keep demons away, obscene accessories,[82] as well as by singing satirical songs in order to belittle the glory of the triumphant general, thus diminishing the danger of divine envy.[83]

However, more important than all these is the rite according to which the slave holding a golden wreath above the *triumphator*'s head was shouting into his ears reminding him of his being human, as it is mentioned in a locus of *Naturalis Historia* by Plinius Maior.[84] Köves-Zulauf thoroughly examined both the Plinian and the parallel loci[85]–with special attention to the *hoti antrópoi eisin* in Arrianos's text and the *Hominem te memento!* phrases in Tertullianus's and Hieronymus's works–therefore we took over the *recipere* version in the Plinian text recommended by him instead of the *respicere* version, proposed by Ernout.[86] A particular mixture can be traced in Fortuna's character: the

[81] Altheim: *op. cit.* II. 25.

[82] Köves-Zulauf: *Reden und Schweigen. op. cit.* 160.

[83] Suetonius: *Divus Iulius* 51.

[84] Plinius: *Naturalis historia* 28, 39. ... *illos religione (muta) tutatur et Fascinus, imperatorum quoque, non solum infantium, custos, qui deus inter sacra Romana a Vestalibus colitur, et currus triumphantium, sub his pendens, defendit medicus invidiae, iubetque eosdem recipere similis medicina linguae, et sit exorata a tergo Fortuna gloriae carnifex.*

[85] Arrianus: *Epicteti dissertationes* 3, 24, 85; Tertullianus: *Apologia*, 33, 4; Hieronymus: *Epistulae* 39, 2, 8; Isidorus: *Origines* 18, 2, 6; Zonaras 7, 21, 9; Tzetzes: *Epsiulae* 97, 86; *Historiarum variarum chiliades* 13, 51–53.

[86] Ernout, A.–Beaujeu, J.–Saint-Denis, E. de–Pépin, R.–André, J.–Bonniec, H. Le–Gaullet de Santerre, H.: *Pline l'Ancient, Histoire Naturelle*. Paris, 1947; Köves-Zulauf: *Reden und Schweigen. op. cit.* 123. sqq.

Romans regarded Fortuna as being an aspect of Nemesis[87] thus she entered the Roman pantheon as the enemy of human intemperance and conceit; in this function she is rightly conferred the *appositio* of *carnifex gloriae*–thus being not only the enemy but the executioner of glory–which *mutatis mutandis* should be taken not only for Fortuna but also for the *servus publicus*, i.e. the *triumphator*–in order to defend him from *hybris* and in order to diminish his glory the way the satirical songs were meant to do–containing some kind of concealed threat as well. The godess's place in Plinius's text is exactly where the other sources localise the *servus publicus,* this also alludes to their symbolic identifiability, as well as to Envy watching from his back, ready to pounce on him.[88] It is a question whether Fortuna and Nemesis had any concrete function in the liturgy of the *triumphus*, or the Plinian locus has got into the text as an element of the author's personal style of composition and message. Although there is no knowledge of any cultic prayer or ritual act addressed to Fortuna in the course of the triumphus, fear of the power of Fortuna and Nemesis probably occurred in the thoughts of the the *triumphator,*[89] as certain references seem to prove this. Plinius's wording testifies to the fact that perceiving Fortuna's power not only on the real but also on the religious level was at least not strange from the atmosphere of the *triumphus.*[90] The restraining, moderative character of the *recipere* could be taken *stricto sensu* for the speed of the *quadriga*, i. e. the triumphator should proceed more slowly in his carriage (which–taking into account the ceremonial clothes, the sceptre and the laurel stick– was probably not driven by himself[91]) because in this way it could have moved away too much from his soldiers, making them rightly feel offended, as the *triumphus* was meant to recognise not only the *triumphator's* merits but their merits as well;[92] at the same time, considering the magical religious atmosphere of the *triumphus*, it could carry a more abstract, spiritual meaning, fitting into the line of the rites of prevention. It can be legitimately asked what is the substantial difference between the textual variant *recipe* and that of *respice*. It is perhaps not necessary to treat more amply the literary historical and textual arguments proposed by Köves-Zulauf, which make his

[87] *Corpus Inscriptionum Latinarum* III. 1125. *Deae Nemesi sive Fortunae*; Historia Augusta, *Maxim. et Balb.* 8, 6. *Nemesis id est vis quaedam Fortunae.*

[88] Köves-Zulauf: *Reden und Schweigen. op. cit.* 131. sqq.

[89] Livius: 5, 21, 15. sk; Plutarchus: *Camillus* 5. 7. 12; Livius: 45, 40, 6-9; 45, 41, 8. sqq.

[90] Wagenvoort: *Roman Dynamism .. op. cit.* 69.; Köves-Zulauf: *Reden und Schweigen. op. cit.* 132.

[91] Ehlers: *op. cit.* 507.

[92] Livius: 26, 21, 4; 39, 7, 3; 45, 36, 5; 45, 37, 3; 45, 41, 3; 45, 43, 8.

version more plausible, it seems more important to give an overview of his conclusions drawn from the immanent structure of the *triumphus*.[93]

The inadequacy of looking back is substantiated by other sources as well,[94] emphasizing the rigid, statue-like posture of the *triumphator* modelling Iuppiter Capitolinus, meant to evoke the feeling of *tremendum maiestatis*, which completely harmonizes with the description of the Persian ruler's posture, probably influencing the formation of the rite of the *triumphus* relatively early.[95] It is possible to ponder on the fact that the prohibition of looking back is well-known from mythology in cases when a given person is standing at the limit, the meeting point of two spheres, one negative, harmful, demonic,[96] from the past, the other positive, fulfilling, pointing to the future. The story of Deucalion throwing stones behind his back is an example of the threat of the demonic sphere,[97] or the ceremony of the magic digging out of the plant,[98] looking back appears as the threat of losing the mission-fulfilling, positive future in numerous texts from both the Old and New Testaments.[99] The equally strong presence of the two spheres is exemplified by the story of Orpheus looking back[100] and by the story of Lot's wife.[101] Several circumstances prohibiting looking back meet in the ceremony of the *triumphus*: The *triumphator* is preparing to perform a religious act, the sacrifice dedicated to Iuppiter Capitolinus, in the most important moment of his life, he is returning from the scene of his triumph to the most sacred place of his motherland, in his back the power of Nemesis, the harmful force of the *malocchio* is watching.[102] At the same time the prohibition of looking back seems to be corroborated by the circumstance that the triumphator, who will take off the divine insignia when reaching the sanctuary of Iuppiter Capitolinus, thus ending his temporary identification with the deity, would

[93] Köves-Zulauf: *Reden und Schweigen. op. cit.* 137. sqq.

[94] Ammiamus Marcellinus: 16, 10, 9–10. *...talem se tamquam immobilem ostendens. Nam ... velut collo munito rectam aciem luminum tendens nec dextra vultum nec laeva flectebat tamquam figmentum hominis.*

[95] Payne: *op. cit.* 14; 202. sqq.

[96] Servius: *Commentarius in Verg. ecl.* 8, 102. *Nec respexeris: nolunt enim se videri numina.*

[97] Ovidius: *Metamorphoses* 1, 397. sqq.

[98] Plinius: *Naturalis historia* 24, 176.

[99] *Reges* 1, 19, 19–21; *Lucas* 9, 62.

[100] Ovidius: *Metamorphoses* 10, 56. sqq.

[101] *Genesis* 19, 17. 26.

[102] Köves-Zulauf: *Reden und Schweigen. op. cit.* 144. sq.; Köves-Zulauf: *Bevezetés a római vallás... op. cit.* 167. sq.

hinder his own rehumanisation aimed at in fact by the entire ceremony, thus provoking Nemesis even more.

IV. First let us take a brief overview–following mainly Taeger[103] and Pötscher[104]–of the literature of the *numen Augusti* problem. Toutain, somewhat simplifying the question, regards Augustus's *numen* and person as being basically the same, substantiating his views by stating that–especially for the provincial usage–the conceptual separation is too nuanced, almost hair-splitting.[105] In his opinion he seems to forget the characteristic Roman religious tendency prone to atomizing and separation, which instead of synthetizing, connected clearly separable divine forces, so-called *Sondergottheiten* to numerous phenomena of everyday life, like the different phases of the life of corn.[106] Pippidi identifies the concepts of *numen Augusti* and *genius Augusti* with each other,[107] his view being challenged by Taeger, who, highlighting the fundamental differences between the cult of the *numen* and that of the *genius* categorically rejects the attempt at identifying *numen Augusti* and *genius Augusti*.[108] In his opinion this cult was dedicated to Augustus's *numen*, i.e. the numinuous force present in the emperor as Augustus, to obtain a general cultic figure, not one connected to some particular function,[109] the *numen* being a concept less strictly cultic than the *genius*, rather connected to experiencing of a given phenomenon as a religious experience.[110] With regard to the problem of *genius* and *numen* Fishwick states that the *numen Augusti* phrase was frequently used instead of the construction *genius Augusti* but this does not mean at all that the term *numen* would have meant the same as the term *genius*.[111] According to Latte the genius is the life-giving, personal creative power that dwels in man, never becoming abstract;[112] this, naturally does not mean that a given god, a human,

[103] Taeger: *op. cit.* 145. sqq.

[104] Pötscher: *op. cit.* 471–483.

[105] Toutain, J.: *Les cultes paiens dans l'Empire romain.* Paris, 1907. 53. *Pour nous, le culte du numen impérial équivaut pleinement au culte de l'empereur vivant.*

[106] Latte: *op. cit.* 50. sqq.; Pötscher: *op. cit.* 472.

[107] Pippidi, D. M.: Le 'Numen Augusti'. Observations sur une forme occidentale du culte impériale. *Revue des Études Latines* 9. 1931. 83. sqq.; 106. sqq.

[108] Taeger: *op. cit.* 145.

[109] *Ibid.* 146.

[110] *Ibid.* 379.

[111] Fishwick, D.: Genius and Numen. *Harward Theological Review* 62. 1969. 358. sqq. (Quoted by Pötscher: *op. cit.* 473. sq.)

[112] Latte: *op. cit.* 103.

or a corporation could not have possessed *numen* on the one hand and *genius* on the other in Roman thinking.[113] The *numen* is rather a given momentary operation, a (divine) manifestation, involving a kind of extra energy.[114] The divinity possesses *genius*, though it is not itself *genius*, at the same time, it possesses *numen* and–especially according to the Augustan and the subsequent terminology–is itself *numen*. This, however, does not solve the *numen Augusti*–*genius Augusti* problem, because the term *numen genii* would be possible *de iure*, but it does not *de facto* appear in textual tradition, on the contrary, the construction *genius numinis* is somewhat problematic, especially with respect to the living *princeps*, considering the fact that–at least the emperors of the Augustan age–were not regarded *stricto sensu*, i.e. religiously revered gods in their lifetime.[115]

Thus the emperor possessing numinousity, remained human throughout his life, even on the highest level of his exaltation, although, as it will be demonstrated, a human representing divine substance.[116] In Roman thinking, the entry to the pantheon of certain abstract notions (e. g. Concordia, Pax, Salus) might have served as an analogy with the *consecratio* following the emperor's death.[117] The veneration of the living and the deceased emperor are two more or less clearly separable mechanisms, because the deceased emperor became *de iure* god by the act of *consecratio*,[118] hence he was entitled to the *divus* attributum–which, though it contained a kind of distinction between the eternally venerated gods and the people who became, or were declared divine after their death, as it is pointed out by Servius,[119] this distinction was bearing grammatical rather than cultic relevance.[120] The *numen* attributed to the ruler–because it is an independent concept–cannot be considered identical with the ruler's *genius* although, considering its origins, it incorporates some of its aspects.[121] At the same time, to a certain extent, it can be related to the hellenistic, *eyergetes* image of the ruler, which can be regarded as being one of

[113] Pfister: *op. cit.* 1286.

[114] Porphyrio: *Commentarius in Hor. Carm.* 1, 35, 2. *Praesentia dicuntur numina deorum, quae se potentiamque suam manifeste tendunt*

[115] Pötscher: *op. cit.* 475.

[116] Taeger: *op. cit.* 467.

[117] *Ibid.* 242.

[118] Wissowa: *op. cit.* 243. sqq.

[119] Servius: *Commentarius in Verg. Aen.* 5, 45. *Quamquam sit discretio, ut deos perpetuos dicamus, divos ex hominibus factos, quasi qui diem obierint; unde divos etiam imperatores vocamus.*

[120] Pötscher: *op. cit.* 479.

[121] Latte: *op. cit.* 103.

the sources of the Roman cult of the emperor. Nevertheless, the most important point remains that mentioning the *numen* of the ruler they invariably meant a special supernatural force and reality and if,–as Cicero mentions it as well[122]– the unified, consenting Senate can possess *numen*, than the living princeps can possess *numen* as well. The fact that it possesses *numen*, a numinous force, does not necessarily mean–at the same time not so much by virtue of the *consecratio* but rather the as a result of the unconscious associations evoked by the rites surrounding his person–that he would become a *numen*, i.e. a divinity. By the fact that the *numen Augusti* was cultically venerated already during the life of the *princeps*, it was not primarily Augustus's person that partook of religious hommage, but the numinous, manaistic force, the *numen praesens*, manifested for his subjects through his person.[123] At the same time, establishing the precise borderline causes difficulty because although it is true that Augustus did not become *divus* in his lifetime, he accepted the title *Divi filius* after Caesar, who became *Divus Iulius* in the year 42 BC.[124] It is in perfect accordance with the above that Augustus was first given the right to wear the wreath of the *triumphator* during all his public appearances,[125] then, in the year 19 he obtained the privilege to wear the vestments of the *triumphator* in addition to the wreath, on the first day of each year,[126] thus he could appear among his subjects as the image of Iuppiter Optimus Maximus of the Capitolium. According to Suetonius, the future greatness of the later Augustus was predicted to his father by a dyonisian augury in a dream when he saw his son invested with the ornaments of Iuppiter Optimus Maximus.[127] (It is worth noting that representing Augustus as Iuppiter was part of the private cult, but Servius knows of a statue of Augustus which represented the ruler in complete Appolonian vestments.[128])

Thus it can be legitimately inferred that religious and dynamistic ideas played a role in Octavianus's becoming Augustus in the year 27 BC., because preceding him this *epiteton* had not been used for persons but only for sanctified things and cultic accessories, the word *augus*[129] originally meaning nothing else than *the one that has been augmented.*[130] The construction *augustum augurium* first

[122] Cicero: *Philippicae* 3, 32. *magna vis est, magnum numen ... idem sentientis senatus.*
[123] Pötscher: *op. cit.* 482.
[124] Altheim: *op. cit.* III. 56.
[125] Dio Cassius: 51, 20, 1.
[126] *Ibid.* 53, 26, 5.
[127] Suetonius: *Augustus* 94, 5. sq.; *Cf.* Altheim: *op. cit.* III. 58. sqq.
[128] Altheim: *op. cit.* III. 63; Servius: *Commentarius in Verg. ecl.* 4, 10.
[129] Walde–Hofmann: *op. cit.* I. 83.
[130] Wagenvoort: Wesenszüge altrömischer Religion. *op. cit.* 367.

occurs in the *Annales* by Ennius,[131] on the textile made by Athene, described in Ovidius's *Metamorphoses*, twelve Olympian gods can be seen who are sitting on their thrones with *augusta gravitate*, i.e. in human form but with an authority in their personality that exceeds human measure.[132] This expression can be encountered twice in connection with Hercules, who is recognised by Euander in Livius becuse of his supernatural character, his emanation, *habitum formanque,*[133] and who appears in a corresponding shape with the occasion of his rising to heaven in Ovidius as well.[134] The poet explains the expression in accordance with the dynamistic connotations: *"Sancta vocant augusta patres, augusta vocantur templa sacerdotum rite dicata manu. Huius et augurium dependet origine verbi et quodcumque sua Iuppiter auget ope."*[135] This denomination thus immanently carries within itself the substance standing beyond the human sphere, growing into the divine sphere, and, though this is not being defined each time the word is uttered,[136] it exerts its influence going deeper and originating deeper than any definition by means of unconscious associations, it is not by chance that in order to illustrate this Altheim quotes Vitruvius's address to Augustus: *divina tua mens et numen, imperator Caesar.*[137] A reference to the same creative act can be found in Suetonius when he says that the glory of permanent fame, the gift of the immortal gods will be received by those who increased the power of the Roman people from the smallest to the greatest measure.[138] Thus the word *augustus* derives from the verb *augere*, and is cognate with the term *augurium*, synonymous with *sanctus*, and even more with the expression *sacer,*[139] which receives its character from the sanctification performed by the *sacerdos* (see also *sacer-dare*).[140] However, the sanctification could be carried out only by a person, the *augur*, who had the numinous ability, *the auctoritas* to increase the *mana.*[141]

[131] Ennius: *Annales* 502 V.

[132] Ovidius: *Metamorphoses* 6, 72. sq.

[133] Livius: 1, 7, 9. ... *aliquamtum ampliorem augustioremque humana.*

[134] Ovidius: *Metamorphoses* 9, 269. *maior ... videri ... et augusta fieri gravitate verendus.*

[135] Ovidius: *Fasti* 1, 609. sqq.

[136] Dio Cassius: 53, 16, 8.

[137] Altheim: *op. cit.* III. 61.

[138] Suetonius: *Augustus* 31, 5. *Proximum a dis immortalibus honorem memoriae ductum praestitit, qui imperium populi Romani ex minimo maximum reddidissent.*

[139] Cicero: *De natura deorum* 2, 62. 79; Statius: *Thebais* 10, 757; Macrobius *Saturnalia* 1, 20, 7.

[140] Suetonius: *Augustus* 71. *loca quoque religiosa et in quibus augurato quid consecratur augusta dicuntur.*

[141] Wagenvoort: *Roman Dynamism... op. cit.* 12. sq.

Considering the Roman concept of *religio* one must place great emphasis on the experience of numinousity to reflect its special relationships, as C. G. Jung (based on Otto Rudolf's views[142]) defines religion as a dynamic (i.e. full of *dynamos*–see also the identifiability of the concept of *numen* with the Greek *dynamos*) existence or influence affecting the human subject from the outside, getting possesion over him.[143] The main characteristic of the archetype can be found precisely in its numinousity because the archetypal situations and images generate an emotional and temperal overcharge, thus eliciting the feeling of *tremendum maiestatis* from the conscience. Jung defines the origin and gist of the *mana* as the archetype being present in the collective unconscious, which appears as a person possessing power and authority, e. g. the hero and the godman:[144] It is in complete harmony with this that the operation of the *numinosum* seizes and dominates the human subject, the subject being rather the victim of this operation than its originator, thus it is independent of the subject's will.[145]

It is worth taking a quick glance at how the concept of *imperium* is related to the concept of *numen*, and the concept of *auctoritas* augmenting and expressing the capacity of numinousity by its creative function even on the level of historical reality. It could be seen that the religious and military leader (both functions being fulfilled in the beginning by the *rex* in Rome) posesses *mana*–as he activates the archetype of the divine leader and that of the hero on the level of the collective unconscious.[146] His *mana* enables him to increase the fertility of the land, as it can be seen from ethnological examples. According to this in Wagenvoort's interpretation *imperare* originally did not mean anything else but to call to life, to fertilise, as the general–who ordered (*imperabat*) his soldiers to attack an enemy camp–conjured up, created the force necessary to carry out the mission with the help of his magic words, thus he draws the conclusion that the *imperium* is nothing else than the ability of creating and transmitting a mysterious power.[147] Köves-Zulauf mentions as a specificity of

[142] Otto, R.: *Das Heilige*. Breslau, 1917.

[143] Jung, C. G.: *Psychologie und Religion*. München, 1997. 10. sq.

[144] Jung, C. G.: *Die Beziechungen zwischen dem Ich und dem Unbewußten*. München, 1997. 113. 118. sq.

[145] Jung: *Psychologie... op. cit.* 11.

[146] Wagenvoort: Wesenszüge altrömischer Religion. *op. cit.* 371.

[147] Wagenvoort: *op. cit.* 371. sq. *Sehen wir richtig, so bedeutete das Zeitwort imperare ('befehlen', 'herrschen') ursprünglich 'zum Leben erwecken', 'befruchten'; der Feldherr, der seinen Soldaten befahl (imperabat), ein feindliches Lager zu berennen, erzeugte in ihnen durch sein magisches Wort die Kraft zur Erfüllung seines Auftrages. Imperium ist also eine Form der Übertragung geheimnisvoller Kraft.*

this: *„the particular interest of the issue, not to be discussed in great detail here, is that parere (to bear) is a typically feminine word, wheras imperium was exclusively possessed by men."*[148]

Without endeavouring to thoroughy explain this phenomenon let proceed again from C. G. Jung's definition of the *Mana-Persönlichkeit*, according to which it is nothing else than the archetype of the power-possessing man figure dwelling in the collective unconscious which dominates the conscious personality and takes over the autonomuos power and value of the *anima*, and later, the identification with this figure creates the idea of possessing the *mana* of the *anima*.[149] By this, although the consciuous did not prevail over the unconscious, it integrated the power of its representative, the *anima* to such an extent that the possibilty of a more direct connection between the *ego* and the unconscious was created, through which the *ego* aquired the identification with its ideal which exercises higher power, the one posessing the power of the *mana*, the *außergewöhnlich Wirkungsvoll*, thus becoming a *mana*-personality.[150] Thus one becomes a leader capable of evoking the archetype of the possessor of power, one who has the ability in the strictest sense of the word to create, to bear–this ability is designated by the typically feminine word *imperium*–certain ideas of power in others by virtue of his harmonious relationship with the *anima*. (The leader living in disharmony with the *anima* also evokes the archetype of the manaistic personality, in his subjects, but precisely due to this disharmony, by which the power of the *anima* prevails over him, he becomes destructive, he cannot appropriate the *imperium* that is creative–this creativity being also shown by the word's etymology.)

Augustus achieved the stability of his legitimation by the superior handling of the associational points connected to the *auctoritas*, the *imperium* and the *numen*, with the help of transferring the formation called–to use Max Weber's formula–charismatic legitimation into the construction called traditional legitimation. The *numen Augusti* compositum organically fits into the Roman religious system, as on the one hand it evokes in the subjects the concept of the *numen*, the divine presence and dynamistic operational mode, on the other hand it evokes the *augus*, the numinous experience of the charismatic leader, possessing the augmenting, creative ability, the *mana*. Köves-Zulauf's characterisation constitutes a convenient parallel, giving a synthesis of the Roman religion's relationship with language: *„Therefore, Roman religion is the religion of*

[148] Köves-Zulauf: *Bevezetés a római vallás... op. cit.* 31.
[149] Jung: *Die Beziechungen zwischen... op. cit.* 113.
[150] *Ibid.* 114. sqq.

discipline, of repression, of anxiety, not of eliberated relief, as the Greek ... From here ensues the neurotic relationship of Roman religion with speech."[151] As it could be seen it is not only the Romans' relationship with speech that is relatively neurotic, but also their general relationship with the numinous experiences of religion, as their relationship with the above analysed archetypal phenomena is basically negative, refusing. This should not necessarily be the case as *„the archetype is in itself neither positive nor negative but a morally neutral numen that becomes good or bad only as a result of its collision with the conscience."*[152] It is precisely this neurosis inherent in Roman religion, constituting its most basic part that is used by the reigning power–so as to ensure its unquestionability–with the elevation of the concept of authority to numinous regions, generating the feeling of *tremendum maiestatis.*

[151] Köves-Zulauf: *Bevezetés a római vallás... op. cit.* 249.

[152] Jung, C. G.: *Pszichológia és költészet (Psychologie und Dichtung).* Budapest, 2003. 100.

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A Short Review of the History of the Hungarian Privatization

Abstract. This article is intended to give a short synopsis on the history of the Hungarian privatization, which has not been fully finished yet, but the most important aims however have been accomplished. As this issue is rather a complex one, having also legal and economic nature, one cannot avoid providing a short historical introduction from legal and economic aspects. Therefore the author also outlines the most significant elements of the changes in the system of the Hungarian ownership at the beginning of the 1990s, which can be featured as the transaction from planned economy into market-economy.

After the introduction the author describes the most important steps of the Hungarian privatization, which can be summed up as follows: *(i)* stage of spontaneous privatization (1985–1989); *(ii)* stage of state-controlled privatization (1990); *(iii)* stage of state-"directed" privatization (1990–1991); *(iv)* stage of privatization under the SPA/-programmes (1991–1992); *(v)* stage of self-privatization (1992–1995); *(vi)* the "third" regulation of privatization, strategic privatization (1995–).

The author also pays attention to the analysis of the relevant legal rules, which are or used to be in effect regulating privatization. The author also highlights that the law of Hungarian privatization cannot be thoroughly studied without taking into consideration the economic goals and economic characteristics of Hungary, as well.

Keywords: law and economy, Hungarian law, company law, law of privatization, history of privatization.

I.

The present study is intended to provide a brief summary of the history of privatization in Hungary, without pretending to be exhaustive in several respects. One of the primary reasons lies in space limitations, for a historically rather prolonged process of over 15 years, abound in complicated economic, legal and political interrelationships, cannot be described on a few pages except in no more than scanty outlines.[1] Privatization in Hungary has not yet been

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[1] For a rather detailed exposition of the process privatization in Hungary between 1989 and 1997, see in particular Mihályi, P.: *A magyar privatizáció krónikája, 1989–1997*

completed entirely even today, although there is no doubt that a very important stage thereof has been closed. As was pointed out by Tamás Sárközy, private ownership had encompassed about 85% of the national wealth by the turn of the millennium.[2] At the time, the completion or conclusion of privatization can be seen as a question of current politics when the present study is being written. This complexity of problems has practically been on the agenda ever since the coalition government of Socialists and Free Democrats was formed in 2002, and it has received even greater emphasis since the change in Prime Ministers early in the fall of 2004, which involved another shift in government in accordance with the rules governing the Hungarian constitutional organization of the State. This will be treated in a later section of my study.

In consideration of what I have set out above I can not but seek to outline the most essential aspects of privatization in Hungary and to sum up the main provisions of the relevant legislative enactments. From this it follows, furthermore that the present study will not be concerned with certain economic consequences of privatization. Although it is true that certain economic effects of privatization have long been felt, some of the longer-term economic implications should be expected to come into the open in times ahead.[3]

A statement to this effect may even be made *nolente-volente* in respect to the subsystem of law. The dumping of economic regulations in the early 1990s obviously reflected the impact of the period as well as of the circumstances in which the relevant legislative provisions were adopted. The upshot of all this made itself felt at the level of legislation or legal practice in the space of a few years. In some questions or concrete legal cases, however, such as litigations connected with privatization, the legislative provisions adopted at the time continue to have significant effects and may even today exert a fundamental influence on certain legal relations between subjects at law of economic life.

(A Chronicle of Privatization in Hungary, 1989–1997), Budapest, 1998. For a history of privatization in Hungary up to 1993 in English, see in particular Frydman, E.–Rapaczynski, A.–Earle, J. S. et alii: *The Privatization Process in Central Europe*, vol. I. Budapest–London–New York, 1993. 95–145.

[2] Sárközy, T.: *A magyar tulajdoni rendszer átalakulása és a privatizáció hazai szabályozása* (The Transformation of the Hungarian Property Regime and the Hungarian Regulation of Privatization). In: Török, G. (ed.): *A tulajdonjogi rendszer változásai a XX. század végére* (Changes in the Property Regime by the End of the 20th Century). Budapest, 2001. 70.

[3] For a summary of some macroeconomic questions of privatization, see Simon, A.: A privatizálási stratégiák makroökonómiája (The Macroeconomics of Privatization Strategies). *Közgazdasági Szemle*, Nr. 9 of 1992. Also see Clarke, T. –Piteles, C. (ed.): *The Political Economy of Privatization*. London–New York, 1994.

The history of privatization in Hungary so far can be periodized from several aspects. Perhaps the possibility of a periodization in a historical perspective is not yet at hand, because the necessary long-term view does not yet exist for objective reasons. At any rate, privatization in Hungary can be divided into the following periods, it being understood that the different periods are well characterized by the main legislative provisions adopted in the particular periods, notably

1. stage of spontaneous privatization (1985–1989);
2. stage of state-controlled privatization (1990);
3. stage of state-"directed" privatization (1990–1991);
4. stage of privatization under the SPA (Short for State Property Agency (Hungarian ÁVÜ, short for Állami Vagyonügynökség)-programmes (1991–1992);
5. stage of self-privatization (1992–1995);
6. the "third" regulation of privatization, strategic privatization (1995–).

Evidently, other periodizations of privatization are equally possible, and, as it has been indicated, the researcher of a later period will also be able to discover other relevant momentous stages of privatization. However, before I examine the different stages of privatization through an interpretation of the relevant legislative provisions, it appears appropriate to discuss the causes underlying privatization and to point up the basic conditions thereof.

II.

As it is known, the turn of 1948 made Hungary a part of the so-called eastern or people's democratic bloc. Apart from the rather short-lived Council Republic of 1919, there was introduced in this country a form of government practically without any tradition. As it was stated in the Constitution of 1949, Hungary became a People's Republic, which survived down to the proclamation of the Republic in 1989. The people's democratic form of government followed the Soviet-type political system and was based on a single-party State. For the present consideration, it means above all that the State's unity as owner and public power was consummated, which is to say that national property meant state property in the first place. Emphasis is deserved in this respect by original Art. 4 of the Constitution (Act XX of 1949), reading as follows:

> "Art. 4. (1) In the Hungarian People's Republic the bulk of the means of production is owned as public property by the state, by public bodies or by

cooperative organizations. Means of production may also be privately owned.

(2) In the Hungarian People's Republic the force directing the national economy is the state power of the people. The working people gradually dislodge the capitalist elements and consistently build up a socialist system of the economy."

A relevant provision concerning property relations is also contained in Art. 6, which reads as follows:

"Art. 6. The mineral resources, the forests the waters, the natural sources of power, the mines, the large industrial enterprise, the means of communication such as railways, road, water and air transports, the banks, the postal, telegraph and telephone services, the wireless, the state-sponsored agricultural enterprises such as state farms, machine stations, irrigation works and the like are the property of the state and of public bodies as trustees for the whole people. All foreign and all wholesale trade is carried on by state enterprises, all other trade is under state supervision."

At the same time the Constitution recognized property acquired by labour (para. 1 of Art. 8), but Art. 8 (2) provided that private enterprise and private property must not prejudice the public interest. From this it appears plastically that private property merely receives, in point of fact, subsidiary recognition and that, contrary to the centuries-old development traceable to Roman law,[4] the economic and social order of the one-time People's Republic reflected an effort to grant a privileged status to public or state property.[5] Recognition of property acquired by labour also implies the necessity of examining the origin of property. Nor is it accidental that the socialist legal order often contrasts personal property with private property, a concept embracing things capable of ownership by private persons.[6]

[4] As it is known, Roman law was basically grounded on private property, and this statement can be deemed to be true even if one considers that, at the time of its emergence, Roman property cannot naturally be identified with the property concept of modern times. See in particular Diósdi, GY.: *Ownership in Ancient and Preclassical Roman Law*. Budapest, 1970.

[5] For an analysis of the socialist constitution, see in particular Bihari, O.: *A szocialista államszervezet alkotmányos modelljei* (Constitutional Models of the Socialist State Organization). Budapest, 1983.

[6] The concept of personal property emerged for the first time in Art. 10 of the Soviet Constitution of 1936.

This property regime is basically noticeable in the Civil Code (Act IV of 1959) as amended several times. The category of the law of things is relegated to the background under the regime covered by the Civil Code.[7] Property in socialism is postulated as a relationship between people rather than between people and things. This is likewise revealed by the structure of the Civil Code, in which the law of persons is followed, as the third part, by the law of property rather than the law of things. It should be stressed that the same arrangement prevailed in the other socialist countries, as well. In Bulgaria, for instance, the Property Act of 1951 (Zakon za sobstvenosta) contained similar regulations, while similar principles were formulated by the Czechoslovak Civil Code of 1964 (Obcansky Zákoník).[8] This solution is, to some extent, contrary to the regime governed by the Pandectist codes in the narrower sense; under it, the rights in rem play a fundamental role as rights of a person in his own things or in things of others.[9]

In conjunction with this it is necessary to refer to the fact that commercial law or some parts thereof (company law, law of securities, law of competition, etc.) practically ceased to be applied. The Commercial Code (Act XXXVII of 1875) formally remained in effect and retained a certain role until the adoption of the new Act on the Law of Associations, as will be discussed at a later stage. Of course, non-application of the legislative provisions relating to commerce

[7] The Civil Code borrowed the concept of personal property from the Soviet Constitution. Original Articles 92 and 93 of the Civil Code provide the following:

"Art. 92. (1) Goods directly serving or promoting the satisfaction of citizens' personal needs (family homes, furnishings and articles for personal use, etc.) are personal property.

(2) Assets belonging to household plots, serving the purpose of auxiliary farming are also personal property.

(3) The law may determine the size of dwelling-houses that can be personal property.
Art. 93. The owner may make free use of his personal property for the satisfaction of his personal needs."

Although the Civil Code id Hungary's first code of private law, mention is deserved by the fact that the Draft Private Law of 1928, which did not come into force, commanded much attention on the part of courts. See in particular Hamza, G.: *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján* (The Development of European Private Law. The Emergence of Modern Private-Law Systems on the Basis of Roman-Law Traditions). Budapest, 2002. 176–177.

[8] See Hamza, G.: *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung in Deutschland, Österreich, der Schweiz und Ungarn.* Budapest, 2002. 184 and 227.

[9] See in particular Lent, F.–Schwar, K. H.: *Sachenrecht. Ein Studienbuch.* München, 1976. 3–5.

greatly hindered the process of legislation on economic matters at the beginning of the 1990s.

It stands to reasons that the Socialist state organization based on public property intended to create the economic possibilities for that property regime. It should be stressed that this was done in some measure on the basis of the principle of *filius ante patrem*, since nationalizations had partially started as far back as 1945. On 17 March 1945 there was issued a Government Decree on the land reform. On 6 December 1945 a decision of the National Assembly took coal mines and electricity works into public ownership. In terms of figures this means that before 1945 private property had a share of about 60% in the sphere of production, whereas in 1988 the share of state property was about 92,9%, thanks, among others, to the nationalizations effected in the 1940s and the 1950s.[10]

A role in shaping the structure of industry was played, along with nationalizations, by the fact that during the said period, in the late 1940s and the early 1950s, the State itself formed numerous large enterprises, which were held by the State. According to the contemporary legislative enactments, the founder of a state enterprise was the competent sectoral ministry, and the foundation document of the foundation document of the state enterprise was also signed by the sectoral minister himself. This period saw the foundation of several enterprises, which are still operating, are not naturally state-owned any more, but were later transformed or privatized.[11] The contemporary structure of the state enterprise was, of course, a true reflection of the prevalent economic conceptions, under which Hungary was to become a big power in heavy industry. Even if that did not come to pass, it may be said that the large enterprise structure became a determinant element of the Hungarian economy, or the people's economy as it was called at the time.

The Hungarian agriculture was collectivized, also on the Soviet model, practically as the result of forcible entry into cooperative farms. Politics thought cooperative land ownership to be temporary, on the understanding that the final goal was to be complete nationalization, the adequate form of which was the state farm. The law of cooperatives, their structure and the transformations in the

[10] Mezey, B. (ed.): *Magyar jogtörténet* (History of Hungarian Law), Budapest, 1996. 198.

[11] To give an example in the field of the building industry, the public buildings construction company was such an enterprise in overground construction. After the systemic change it became a public buildings construction corp. and today it is known as European Construction Corp.

wake of the systemic change will not be discussed in the present study, as they are not closely related to our topic.[12]

The system of economic direction was based on plan instructions, which is to say that one can speak of a planned economy which–now a commonplace–had no particular regard for the needs and challenges of the market. It may nevertheless be said that certain forms of privatization, the so-called spontaneous privatization, had emerged as early as the 1980s. However, one should go back to 1968, the year of the introduction of the new economic mechanism, for an explanation. Without giving a detailed analysis of that mechanism here and now, I cannot fail to emphasize that the new economic mechanism went munch further than the command economy did to make allowance for profit orientation, enterprise autonomy and market coordination.[13] Although the 1970s witnessed a certain degree of recession after the introduction of the economic mechanism, the larger measure of enterprise autonomy can be presumed to have contributed to the creation of possibilities for future privatization.

It is Decree No. 28/1972. (IV. 3.) of the Minister of Finance and Act VI of 1977 that can be said to have shown the first signs of enterprise autonomy in the domain of law. The Decree of the Minister of Finance was concerned with economic associations operating with foreign participation and allowed western enterprises to establish associations as a kind of joint venture with Hungarian enterprises on Hungarian territory. The suitable legal form was represented, mutatis mutandis, by the limited liability company and the joint stock company[14] as covered the Commercial Code of 1875 referred to above. On the other hand, Act VI of 1977 dealt with enterprises. While in its original version that Act provided for the sectoral direction of state enterprises and laid emphasis on supervision by the founding organization, it regulated in detail the responsibilities of the directors of state enterprises and the participation of workers in direction. Art. 27 (3) of the Enterprises Act contained an extremely important provision on enterprise assets:

[12] A concise overview of the Hungarian law of cooperatives is provided by Mrs. Domé, GY.: A szövetkezetek jogi szabályozásának múltja, jelene és jövője (The Past, Present and Future of the Legal Regulation of Cooperatives). *Veres-emlékkönyv* (Essays Presented to Veres), 1999. 79–93.

[13] For a summary see Frydman, R.–Rapaczynski, A.–Earle, J. S. et alii; *op. cit.* 95–96. For some legal questions of the new economic mechanism, see Fesztl, N.–Tamás, L.: Az új gazdasági mechanizmus polgári jogi vonatkozásainak néhány problémája (Some Problems concerning the Civil-Law Aspects of the New Economic Mechanism). *Studia Iuridica Auctoritate Universitatis Pécs Publicata* 54 (1969), 3–36.

[14] See Sárközy, T.: *A magyar tulajdoni rendszer... op. cit.* 75.

> "Art. 27. (3) The enterprise shall be responsible for its obligations with the assets entrusted to and managed by it."

The creation of a certain degree of financial independence is to be interpreted in close relationship with the provisions of Act III of 1974 on Foreign Trade, which stated this:

> "Art. 13. In the interest of building its foreign market organization an enterprise entitled to engage in foreign trade may, within the limitations established by law, appoint delegates abroad, employ a foreign natural or legal person as commercial representative, set up a representation, a branch or an office, found an enterprise or obtain enterprise interests abroad."

As it can be seen, this Act allowed state enterprises to acquire a right of its own to carry on foreign trade and, in given cases, to operate a representation abroad. In addition to implying numerous career opportunities, the permission to engage in foreign trade not only involved participation in economic activities abroad, but also contributed significantly to the development of enterprise autonomy, which can therefore be seen as a precondition for future privatization as well.[15]

III.

By the early 1980s Hungary had witnessed the emergence of a special economic order, owing to a considerable degree of national indebtedness at one extreme and, at the other, to the rise of what Tamás Bauer called neither a planned nor a market economy, as was also embodied in numerous legislative provisions.

On the one hand–at the level of small undertakings–this was manifested in the adaptation of the civil-law society, as known to the Civil Code, to economic activity, a dogmatically not too fortunate solution, for the civil-law society was not basically destined to serve economic purposes. This form of civil-law society clearly reminds us more of the limited partnership or the general partnership, which can be regarded as the traditional partnerships

[15] For a summary of legal regulations on foreign trade, see Vattay, GY. (ed.): *A külkereskedelmi tevékenység jogi kézikönyve* (A Legal Handbook of Foreign Trade Activities). Budapest, 1991. For a summary of enterprise law of that time, see Sárközy, T.: *A szocialista vállalatelmélet jogtudományi alapjaihoz* (To the Juridical Foundations of the Socialist Enterprise Theory). Budapest, 1981.

covered by commercial law. It is to be mentioned that, from 1978 onwards, artisans–three of them at the most–had been permitted to form general partnerships, but no scope was left for cooperation between other forms of association (e.g. silent partnership). Clearly enough, all this was far from confirming to the basic constitutional principle of economic undertaking.

On the other hand, introduced by Law-Decree No. 15 of 1981, the business partnership represented a special form of economic cooperation. It was allowed to consist of not more than 30 members or employees, but it could be considered to be a genuine form of small undertaking.[16] A great number of business partnerships had been formed until the adoption of the first Act on economic associations, and it was only the second Act on economic associations (Act CXLIV of 1997) which required the business partnership or the business partnership operating with the liability of a legal entity to be transformed into a general partnership within two years from the entry into force of the Act, while entitling it to be transformed into some other economic association, too.[17]

The contemporary legislation of the greatest importance to the large enterprise structure was Law Decree No. 23 of 1984. which introduced a significant reform[18] by allowing establishment of the self-governing enterprise with an enterprise council and the workers' general meeting, these organs being even competent to appoint the director, who also had a considerable say in the composition of the said bodies, so that this arrangement led to a notable interaction of the posts involved, that is to say that a momentum for a kind of symbiosis between them was generated by the law itself. One might as well say with some simplification that the enterprise council performed several such functions as were referred to the competence of the highest organ in the case of an economic association.[19]

[16] On its entry into force the old Associations Act included provisions on the business partnership, while repealing Law-Decree No. 11 of 1985.

[17] Art. 300 (3) of Act CXLIV of 1997 on Economic Associations contains the following provision: "By modifying its contract of association within two years from the entry into force of this Act. the business partnership or the business partnership operating with the liability of a legal entity may continue to operate as a general partnership, or the business partnership shall be transformed into another economic association. If it fails to do so, the Registry Court shall declare it to be defunct." Also see Lenkovics, B.: *A szocialista vállalkozási formák polgári jogi kérdései* (Civil-Law Questions of the Socialist Forms of Undertaking). Budapest, 1983.

[18] The full title of the Law-Decree is law-Degree No. 23 of 1984 instructing economic organizations to engage in specific economic activities.

[19] For example, Art. 8, para. 1 (a), of the Decree enforcing the Enterprise Act provides that the enterprise council is entitled to aspect the balance sheet of the enterprise, which is

From the foregoing one may draw the conclusion that, owing precisely to the aforementioned structural elements and reforms, the Hungarian economy was not prepared for privatization, for an economic transformation, in as small a measure as the other people's democratic states of the eastern bloc were. As against the Balkan people's democratic countries or the Soviet Union, for instance, it was Poland and one-time Czechoslovakia that could be regarded as such "*socialist reformer countries*" (Tamás Sárközy).[20]

As compared with Western European or American privatizations, privatization in Hungary certainly exhibits a specific feature in that there was a need here not only for privatization, but, on the one hand, for the appropriate transformation of the enterprises to be privatized and, on the other, for a simultaneous settlement of economic issues by high-level legislation, notably for a fundamental economic legislation as well.[21] Relying on a graphic description by Tamás Sárközy, one can detect a significant difference between efforts to privatize the shares of British Petrol by, e.g., introducing them in a stock exchange or in a market with an otherwise significant purchasing power, or to subject to privatization, for example, a State Hair-Dressing Enterprise in a society that is not based on the primacy of private property and hence not markedly rich as regards its broad segments.

Although one should pay heed to the thesis-like statement that privatization is to be construed as termination of state ownership in favour of non-state owners (namely that privatization involves a change on owners),[22] adoption of the first institutionalized measures called for a legislative enactment on associations. The first Associations Act (Act VI of 1988 on Economic Associations, the old Associations Act) created the institutional frameworks necessary for effecting the otherwise spontaneous privatizations not controlled by the State.[23]

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typically a responsibility or right that, in the case of an economic association, must be conferred on the highest organ.

[20] For a summary of privatization in Central and Eastern Europe, see Sándor, I.: *Privatizáció Közép- és Kelet-Európában* (Privatization in Central and Eastern Europe), in: Czuczai, J.: *A magyar privatizáció alulnézetből* (Privatization in Hungary from Bottom-View), Budapest, 1994. 177–236.

[21] For privatization in Western Europe, see in particular Sándor, I.: *Privatizáció Nyugat- és Kelet Európában* (Privatization in Western and Eastern Europe), in: Török, G. (ed.): *A tulajdoni rendszer változásai... op. cit.* 46–70.

[22] See Sárközy, T.: *A privatizáció joga Magyarországon (1989–1993)* [The Law of Privatization in Hungary (1989–1993)]. Budapest, 1993. 48.

[23] It may be mentioned as a point of interest that the Commercial Code (Act XXXVII of 1875)–with the exception of its provisions on commercial bonds and warehouse transactions–was repealed by the old Associations Act.

The old Associations Act–just as Act CXLIV of 1997 on Economic Associations, which succeeded it–rests on a dualist concept, meaning that the forms of economic association are regulated by legislative provision in a manner different from regulation by the Civil Code, or the Code of Private Law.[24] What the old Associations Act sought to establish was a system differing from that created by the former socialist legislation in a socialist state organization then still existing.[25] The changing needs of the economy and, not least, the requirements of the changed international political environment

> "... made a case for an enterprise system resting on the following pillars: the freedom of economic undertaking and of association; economic units based on a shareholders' system, notably associations, cooperatives, individual undertakings and firms, and other units (e.g. state enterprises, non-profit companies, subject to duly differentiated rules)."[26] (quoted from Ferenc Mádl)

At the same time, the first version of the old Associations Act imposed some additional restrictions. For example, a natural person was not entitled to form a one-man joint stock company, or associations in exclusively private ownership were allowed to employ not more than 500 workers. Of course, it became relatively quickly possible for these restrictions to be sidestepped by founding several one-man limited liability companies, each employing 500 workers separately. Foreign investors were similarly accorded appropriate possibilities, coming to find themselves in the same position as Hungarian entrepreneurs. It is to be noted that for only one year up to 1 January 1990, namely after the entry into force of the old Associations Act, the joint permission of the Minister of Finance and the Minister of Trade was required for an economic association to possess foreign property in excess of 50%.[27]

[24] On the question of the monist and dualist concepts, see in particular Vékás, L.: *Az új Polgári Törvénykönyv elméleti előkérdései* (Theorical Preliminary Questions of the New Civil Code). Budapest, 2001. 38–74.

[25] The old Associations Act came into force on 1 January 1989, when Hungary was characterized by the one-party system and the form of government was the people's republic. As mentioned earlier, the Republic was proclaimed on 23 October 1989.

[26] See Mádl, F.: *Állam és gazdaság. Forradalom a jog útjain a Közép- és Kelet-európai országokban* (State and Economy. Revolution Treading the Paths of Law in the Central and Easten European Countries). Budapest, 1997. 52.

[27] Art. 8. (1) of the old Associations Act stated the following: "The joint permission of the Minister of Finance and the Minister of Trade shall be required for the foundation of an economic association mostly or entirely in foreign ownership, for transformation into such association, and for acquisition of a majority share by foreigners, such permission to include

It should be stressed that in 1988 a separate Act (Act XXIV of 1988) was passed on foreign investments in Hungary. The Act sought to promote international economic cooperation and to encourage inflows to Hungary of foreign working capital. It is still in effect and contains highly relevant provisions in respect of, e.g., companies in customs-free zones.

In view of the foregoing it can be stated that the old Associations Act had created the particular institutional frameworks required for the switch to a market economy, since it was familiar with the most fundamental forms of association, such as general partnership, limited partnership, merger, joint venture, limited liability company, and joint stock company.[28] (It should be underlined that, unlike the German law of association, the Hungarian law of association is unfamiliar with the concept of "partnership limited by shares".) Of course, the old Associations Act was not by itself sufficient to adequately regulate all economic legal relations as there was a need for legislation on the money market, registry procedure and bankruptcy as well. All of the related norms had to be elaborated within a rather short period of time, considering the need for a relatively rapid regulation appropriate to the specific requirements of the economy, and, owing to the nature of the socialist economic order, the said legislative provisions had previously been absent from the Hungarian legal system.[29]

Act XIII of 1989 on the transformation of economic organizations and economic associations (Transformation Act) was the first legislative enactment more closely related to privatization. On the one hand, it allowed transformation of the formed small undertakings (e.g. business partnership) into economic associations and, on the other, it left room for large enterprises to be transformed into an economic association, chiefly joint stock company or limited liability company. It could not yet be regarded as an *ex asse* privatisation Act, since it did not ordain privatisation of state property, which has proved to be an essential element of privatisation, but created a kind of possibility for privatization. At the same time it was particular useful to spontaneous privatization, which

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a permit of the foreign exchange authority. The permission shall be deemed to be granted if the application was not rejected within 90 days of its submission."

[28] See Gábor, F. A.: The Quest for Transformation to a Market Economy: Privatization and Foreign Investment in Hungary. *Vanderbilt Journal of Transnational Law*, 24 (1991), 269–303.

[29] In connection with bankruptcy proceedings, currently governed by Act XLIX of 1991, it should be noted that Law-Decree No. 11 of 1986 on the Liquidation Procedure contains elements of bankruptcy law for the most part, but exhibits peculiar features in several aspects. That enactment was amended on a comprehensive scale by Law-Decree No. 26 of 1988. See Miskolczi Bodnár, P.–Török, G.: *A magyar csődjog alapjai* (The Foundations of the Hungarian Law of Bankruptcy). Budapest, 20002. 85–90.

means above all privatization not controlled by the State and preceding state-controlled privatization. The main beneficiaries (not within the meaning of positive law) of such privatization were the chief executives of certain state enterprises, who relied on the aforesaid legal frameworks (i.e. the old Associations Act and the Transformation Act) for having a state enterprise or some more valuable parts thereof (e.g. immovables, means of production) transferred from state to private ownership. All this was naturally coupled with numerous abuses and disproportions. It is not by chance that in 1990 the question of spontaneous privatization came into the focus of internal political life, with consideration to be given both to its advantages (spontaneous termination of state ownership) and to its disadvantages (possible bargaining away of state property). All these considerations called for a halt to spontaneous privatization and for its replacement with state-controlled privatization.

IV.

Before reviewing the positive-law rules of privatization it is appropriate to list, using Tamás Sárközy's terminology, the three methods of privatization by legal transactions, i.e. by reliance on other than peremptory rules of law:

(a) privatization by sale of state property;
(b) privatization by partial transfer of state property to associations;
(c) privatization by complete transformation of state enterprises into economic associations.[30]

a) This method was, in point of fact, already applied in part by way of spontaneous privatization. The question of how the problems of value and proportion manifested itself is a different point. This method is also known to institutionalised privatization, but sale above a certain value limit is subject to notification.

b) Partial transfer of state property to associations virtually means that a state enterprise and another person jointly establish a new economic entity, whose initial assets are contributed in part by the other person and in part by the enterprise. In this case the enterprise secures non-cash contribution, i.e. physical assets, while the other partner makes a financial contribution. Thereby a part of the enterprise property (means of production, immovables, etc.) becomes the property of the new enterprise, while the enterprise acquires in its place a business share or shares, depending on the form of association. This is called privatization by contribution. Clearly, it is equally possible for the

[30] See Sárközy: *A privatizáció joga... op. cit.* 53.

enterprise to eventually provide a know-how as a contribution. In this kind of privatization the other partner was very often a foreigner making the financial contribution, whereby a joint venture was actually set up. It is easy to see why this form of privatization was of particular advantage to the foreign partner, as in this way the foreign partner was able to become a member of a completely new economic association, behind which there stood a state enterprise as owner. Hence he did not have to face any of the many problems likely to arise in purchase of an old firm (e.g. long-standing litigation, other debts, obligations), and the need for an *audit* of the *due diligence* type was also eliminated. At the same time, cases were rather frequent in which the former state enterprise transferred a considerable part of its employees to the new economic association. It was very salutary to do so, for, on the one hand, the trade unions did not protest against that avenue of privatization, while, on the other hand, the other partner could be sure that the new association had a pool of suitable professional personnel at the time of starting business. This allows the conclusion that through such arrangement the foreign partner not only participated in privatization, but practically purchased a market, since he was able–with a new association possessing in a given case a team of tried and tested professionals and appropriate means of production–to participate in the Hungarian market and eventually even to quickly occupy a decisive position on the market.[31] That phenomenon might also naturally lead to a depletion of the state enterprise or actually duplicate the enterprise, since the state enterprise and the new association established with the assistance of the other partner were in a position to operate concurrently.[32]

c) This procedure can be considered in effect, as the first step to privatization, for, normally, it had not yet led to a full privatization of the state enterprise, but did, upon transformation, enable an external entrepreneur or investor to acquire part of the enterprise's shares or business share. An important provision on this point is contained in Art. 19 of the Transformation Act, reading:

> "Art. 19. (1) Transformation of a state enterprise operating under the general management of the enterprise council and the workers' general meeting (delegates' meeting) shall be conditional on the requirement for the amount of the stated (initial) capital of the future economic association to exceed by at least 20% or by one million forints the amount of the enterprise assets as shown in the balance sheet and for the external entrepreneurs to obtain a

[31] It is a different matter that eventual acquisition of the market in this way could also pose problems related to the law of competition

[32] See Sárközy: *A privatizáció joga... op. cit.* 60.

share in the association to the amount of the surplus assets, such surplus to be charged against the stated (initial) capital.

(2) The business share (shares) of the economic association formed upon transformation of a state enterprise shall, in proportion of the share to the stated (initial) capital, pass into the ownership of the external entrepreneurs mentioned on para. (1).

(3) Transformation of a state enterprise operating under supervision by state administration, other state economic organization, an enterprise of a legal person and the external entrepreneurs obtaining a share in the association."

Upon transformation, the newly established economic association is obviously general successor in title to the enterprise transformed. Thus, in the case of self-governing enterprises, external entrepreneurs are entitled, subject to specified financial conditions, to obtain a share in the association to the extent of surplus assets. This is the case of privatization by increase of capital, the core and substance of which lies in the requirement for the enterprise transformed to automatically obtain larger capital as the result of privatization. As it is stated in Art. 19. (3) above, if a state enterprise is under supervision by state administration, namely it is not a self-governing enterprise, transformation is permissible without the participation of an external entrepreneur. In such a case the enterprise, now obviously operating in the form of association, remained in state ownership, a step practically preparatory to privatization. The possibility was naturally there for numerous borderline cases to arise. During the period under discussion it was possible, for instance, for a state enterprise to continue operating with the structure of a state enterprise, but to be entered in the trade register and to receive a register number. This was of importance chiefly in the case of enterprises engaged in considerable foreign trade, for the foreign partner, when making an international contract, expected that the state enterprise should also have such parameters, including a trade register number, as an economic association had.

It should be emphasized that the aforementioned Transformation Act contained an important provision also in respect of the local self-government authorities then councils). Art. 21. (1) reads as follows:

"The business share (shares) equal to 20% of the enterprise assets as shown in the balance sheet, falling to the enterprise out of the stated (initial) capital of the economic association formed upon transformation of a state enterprise operating under the general management of the enterprise council and the workers' general meeting (delegates' meeting), shall be due to the

> state property management agency, while the business share (shares) equal to the value of the inner-city land as shown in the balance sheet of the enterprise in the process of transformation shall be due to the local council of competence by the locus of such land. No exception from this provision on land may be made in the agreement mentioned in Art. 17. (3)."

As is expressed in the above provision, the shares (business share) equal to the value of the inner-city land as shown in the balance sheet of the enterprise in the process of transformation are due to the local council of competence by the locus of the land, that is, to the actual predecessor in title of the local self-government authority, the implication being that the enterprise property was virtually deemed to be the property of the people, so the councils predicated the expectation that the land used by the state enterprise should pertain to the competent council. For that matter, this is one of the explanations why the local self-government authorities, too, became owners as a result of the privatization of numerous large enterprises.[33]

It should be noted that there had been formulated several other conceptions in connection with privatization. Among them it was the idea of property voucher or note, or of people's share, which would have served to involve large segments of the population in privatization by way of quasi gratuitous grant. Though not large segments of the population, the workers' collectives were indeed enabled to participate in privatization by means of the so-called workers' shares,[34] a special arrangement on the American model being the Employee Part-Owner Programme.[35]

Also, a special method of privatization was the use of compensation vouchers, which, dogmatically, was reprivatization in the first place, as it was intended to enable one-time owners to regain their proprietary status.[36]

[33] The present study does not discuss questions concerning privatization of the property of self-govnerment authorities. On this topic see in particular Török, G.: *Az önkormányzatokat a belterületi földek után megillető járandóságok kiadásával kapcsolatosan felmerült jogviták* (Legal Disputes about Allocations Due to Self-Government Authorities for Inner-City Land), in: Török, G. (ed.): *A tulajdoni rendszer változásai... op. cit.* 111–157.

[34] The rules on workers' shares were laid down in Art. 244. of the old Associations Act. It is to be mentioned that the new Associations Act uses the concept not only of workers' share (Art. 187), but also of workers' business share (Arts. 145-146), thereby leaving

[35] See in particular Act XLIV of 1992 on the Employee Part-Owner Programme. That Programme was intended to ensure workers' ownership chiefly on the model of the American ESOP.

[36] The present study is not concerned with a description of compensation processes. On the constitutionality of compensation, see Sajó, A.: *A részleges kárpótlási törvény által fel-*

V.

The first step toward institutionalised privatization can be said to have been taken by Act VII of 1990 on the State Property Agency (SPA) and on the Management and Utilization of the Property Pertaining to It. The SPA functioned as a budget-dependent organ, its basic purpose being to separate the functions of the State as owner and public power. Its primary responsibility was to manage the state property pertaining to it.[37] It was directed by an 11 member Board of Directors, while operative management was entrusted to the managing director. The decisions of the Board of Directors were binding on the managing director.

In my view, the goals of setting up the SPA are excellently summed up by the Handbook of Privatization, which was published in 1993. The Handbook summarized the activities of the Agency and served as a practical guide to investors intending to participate in privatization:

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vetett alkotmányossági kérdések (Constitutional Issues Raised by the Partial Compensation Act). Állam és Jogtudomány, No. 1–4 of 1992. 190–209. For a concise summary in English of the compensation processes, see Koppányi, Sz.: *Summary of the Most Important Issues of the Hungarian Nationalisation of the Industry after World War II, and of the Compensation after the Transformation of Regime, with Particular Respect to Foreign Ownership*. Collega. No. I of 2002. 17–24.

[37] Act VII of 1990 defined the concept of property pertaining to SPA in the following wording:

"Art. 7. By virtue of this Act there shall belong to the State Property Agency,

a) out of the assets of state enterprises and other economic organizations transformed into economic associations under the Transformation Act,

aa) any business share and any share that did not pass into the ownership of external entrepreneurs, in the case of enterprises, trusts and other state economic organizations that operated under supervision by state administration;

ab) business shares (shares) equal to 20% of the state assets as show in the balance sheet, falling to such essets out of the stated (initial) capital: the portion determined by agreement (Art. 17. /3/ of the Transformation Act); and the business shares (shares)–not affecting the right of sale–which the economic association may retain for the purpose of sale under Art. 23. (1) of the Transformation Act. In the case of state enterprises that operated under the general management of the enterprise council and the workers' general meeting (delegates' meeting);

b)the property which, operating in economic associations not subject to subpara. (a), was owned by the State prior to the entry into force of the Transformation Act and is still owned by the State at the date of entry into force of this Act;

c)the assets remaining in state ownership after the liquidation of state economic organizations and any such state property as is transferred to the SPA by separate statute or decision of Parliament."

"The declared goals of setting up the SPA were
- to separate the functions of the State as owner and public power;
- to create appropriate tools and organizational frameworks for the implementation of the property reform;
- to estimate the market value of state property;
- to strengthen the position of the State as owner with a view to protecting state property and consistently implementing the State's privatization policy;
- to ensure control over the process of spontaneous privatization in keeping with the short- and long-term interests of society;
- to devise the most suitable forms of operating state assets;
- to facilitate the operation of state property on the basis of capital interest and the selection of suitable owners;
- to promote implementation of the economic strategy, including reduction of the state debt."[38]

The Act laid down the rules of property management and tenders. An outstanding role in the latter question was played by firms specialized in privatization, which participated in the process of tendering jointly with representatives of SPA and the given enterprise subject to privatization. The specialized firms sought to make use of foreign experience on the one hand and to realize their own ideas on the other. Adaptation to Hungary of foreign schemes of privatization met difficulties for the reasons set out above, while the specialized firms had little domestic experience. There were found several special solutions even under this scheme of arrangement. Thus, there were cases, in which the specialized firms themselves wanted to obtain a share in the property of privatised companies, but such plans were not supported by the SPA Board of Directors.

Under the terms of Act LXXIV of 1990 (Minor Privatization Act), which was adopted in the fall of 1990 on privatising the property of state enterprises engaged in retail trade, public catering and consumer service, the process of privatization affecting the related businesses had run its course by the end of 1994. In several cases the Act allowed the former operators of businesses covered by the Act to privatise the business units operated by them.

Privatization was taking place under the Spa programmes during 1991. An obvious effect on privatization was exerted by the legislation on compensation (Act XXV of 1991 on partial compensation, with a view to settlement of

[38] See Mrs. Ferencz, Földváry K. (ed.): *Privatizációs kézikönyv az Állami Vagyonügynökség tevékenységéről* (Handbook of Privatization on the Activities of the State Property Agency). Budapest, 1993. 13–14.

property relations, for damage unjustly caused to citizens' property) and by the Concessions Act (Act XVI of 1991 on the privatization of use). A significant influence on privatization was similarly borne nolente-volente by Act XLIX of 1990 regulating liquidation, bankruptcy proceedings and final settlement, as sizable state property passed into private ownership during the liquidation of state enterprises.

The year 1992 was of paramount importance to legislation on privatization, as Act LIII of 1992 on the management and utilization of entrepreneurial property permanently remaining in state ownership, Act LIV of 1992 on the sale, utilization and protection of property temporarily remaining in state ownership, and Act XV of 1992 amending the legislative enactments on the entrepreneurial property of the State were passed in that year.

Act LIII of 1992 determined the enterprises that were to remain permanently in state ownership. Government Decree No. 126/1972. (VII. 28.) on economic organizations permanently remaining, wholly or in part, in state ownership under authority of the Act specified the range of economic organizations within the said category.[39] Act LIII of 1992 founded the State Property Management Corp. (ÁV RT) to manage the property permanently remaining in state ownership. The ÁV RT. was a one-man, state-owned joint stock company, which, unless otherwise provided by law, was subject to the rules of the old Associations Act. It was directed by the Board. Its task was to transform enterprises permanently remaining in state ownership into economic associations and to exercise proprietary rights (a kind of property management). Chapter V of the Act laid down detailed rules for the transformation of state enterprises.

Act LIV of 1992 governs the utilization of property temporarily remaining in state ownership. Its scope of application can most easily be defined on the basis of Art. 2, which contains a negative definition:

"Art. 2. This Act shall not apply to

a) property subject to Act LIII of 1992 on the management and utilization of entrepreneurial property permanently remaining in state ownership;

b) those of treasury assets whose utilization for purposes of undertaking is excluded by separate statute;

c) those assets–covered by Act XXXIII of 1991 on transfer of certain state-owned assets to the ownership of self-government authorities–which

[39] I mention by way of example that at the time the Decree was adopted the Hungarian Oil Industry Corp. (MOL), IKARUS Vehicle Manufacturing Corp. and the like belonged to this category of organizations. For that matter, the size of state property was likewise determined by the Decree.

will become the property of self-government authorities after completion of the procedure by the property transfer committee;

d) the property of the Hungarian National Bank, the State Development Institute, and the Centre of Banking Institutions."

As it can be seen, the treasury property remained outside the scope of property capable of privatization. The property temporarily remaining in state ownership was still amenable to management by SPA. The Act laid down the rules for the transformation of enterprises into economic associations. The highest decision-making organ of SPA was the 11-member Board of Directors, and operative management was entrusted to the managing director. The proprietary rights in respect of property covered by the Act were exercised by SPA, its function being to carry out privatization.

The related enactments may summarily be called Status Acts, and it should be stressed that those of the state enterprises which were not terminated by final settlement or liquidation were required by the Act to be transformed into joint stock companies or limited liability companies within three years, while the companies permanently remaining in state ownership were managed by the national holding, the ÁV Rt. as a "giant with feet of clay" (Péter Mihályi).[40]

However, this legislative package did not fully clarify the relationship between ÁVÜ (SPA) and ÁV Rt. The latter branched out the former, while the abovementioned Privatization Acts contained no provisions on e.g., transfer of property between the two organizations.

In 1994 there was a change of government in Hungary; the first, right-wing coalition formed after the systemic change was replaced by a socialist-liberal coalition, with the Hungarian Socialist Party as its leading party and with the Alliance of Free Democrats as its second member. The Government pursued the definite goal of ending the parallel operation of ÁV Rt. and ÁVÜ as well as of creating a set of legal conditions for the privatization of large public utility companies and commercial banks. Legislative preparatory work for the implementation of these goals began right after the government had been formed. Consultations and preparations, not free from political disputes, finally resulted in the adoption of Act XXXIX of 1995on the sale of entrepreneurial property in state ownership, which is still in effect (Privatization Act).

The Privatization Act set up the State Privatization and Property Management Corp. (ÁPV Rt.) to carry out privatization and disbanded ÁVÜ and ÁV Rt. Its Art. 9 provides that ÁV Rt. must be renamed ÁPV Rt. as from the entry force

[40] For an evaluation see in particular Mihályi: *A magyar privatizáció... op. cit.* 163–194.

of the Act, while Art. 10 dissolved ÁVÜ and conveyed its rights and obligations to ÁPV Rt. under the rules of universal legal succession. ÁPV Rt. is a one-man joint stock company possessing registered and not negotiable shares. (Subject to the exceptions made by the Act, ÁPV Rt. is governed by the provisions of the Associations Act as basic underlying rules.) It is owned by the State. Its foundation document was approved by the Government on 17 June 1995. Its collegiate management is entrusted to the Board of Directors composed of 9 to 11 members, while its operative management is the responsibility of the general manager.

The Privatization Act lays down detailed rules for privatization and regulates various techniques of privatization. Along with the traditional methods of privatization, the Act is familiar with preferential privatization techniques, which are the following:

- instalment sale;
- sale with reservation of ownership (privatization leasing);
- buyout by senior executives and employees;
- facilities for acquisition of property by employees;
- start-up credit;
- Employee Part-Owner Programme.

As it is also indicated by the designations, the privatization leasing is not the classical leasing, but sale with reservation of ownership, which is, for that matter, rather common in business transactions.[41]

Of course, the Privatization Act is similarly aware of the concept of permanent state ownership. As regards temporary utilization of property incapable of privatization at the time of the adoption of the Act, there is a possibility open to making three types of contract for property management, notably

- contract of agency to preserve the value and substance of property;
- contract for work, labour and materials to achieve specified returns (dividend, acquisition of interest);
- portfolio contract, including the right of alienation and the obligation to achieve a specified increment of property.[42]

The Annex to the Privatization Act identifies the associations operating with a share in the property of companies in permanent state ownership, indicating

[41] On privatization leasing see in particular Novotni, Z.: *Technika vagy jogügylet? Gondolatok az un. privatizációs lízing koncepcióról* (Technique or Legal Transaction? Thoughts about the So-Called Concept of Privatization Leasing). Magyar Jog, No. 4 of 1993. 220–224.

[42] See Articles 62–69 of the Privatization Act.

the proportion of state property and the minister or organ exercising the rights of state membership (shareholder's rights).

VI.

It may be stated in summary that one cannot disregard either the legal and economic issues or the political aspects of privatization. Since the summer of 2002 power in Hungary was been again held by a socialist-liberal government coalition, and completion of privatization is practically a question of current politics. All this is evidenced, furthermore, by the fact that on 5 December 2004 a referendum was held at the initiative of the Workers' Party and with effective support from the opposition. One of the questions put to the vote was an eventual halt to the privatization of hospitals.[43] The referendum was unsuccessful, because neither question received identical answers from at least 25% of citizens entitled to vote. The turnout amounted to over 3 million voters representing 37.5% of all citizens having the right of vote. It should be stressed that the votes were only a few ten thousand short to oblige Parliament (a specificity of referendum) to adopt a decision prohibitive of privatization in public health.

From the foregoing it follows that the full and definitive conclusion of privatization and presumably the dissolution or transformation of the instructions of privatization are still some time away, albeit it is equally unquestionable that certain strategic measures of privatization in Hungary have already been implemented. I trust that this study of mine has succeeded in outlining the history thus far of privatization in Hungary, describing the background to and the reasons for privatization, and highlighting the major wellsprings of related efforts that will help to draw some conclusions–with due attention also paid to certain international experiences–concerning the determinant tendencies for future action as well.

[43] The other question submitted to the referendum–the dual citizenship of Hungarians living beyond the borders–is irrelevant to the present topic.

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TAMÁS NÓTÁRI*

Professor Gábor Hamza's Inaugural Lecture at the Hungarian Academy of Sciences

On the 6th of October 2004 in the main lecture hall of the Hungarian Academy of *Sciences* the inaugural lecture was delivered by Chair Professor Gábor Hamza, Head of Department of Roman Law at the University „Loránd Eötvös" Budapest, corresponding member of Hungarian Academy of Sciences, on „The Classification (*divisio*) into „Branches" of Modern Legal Systems (Orders) and Roman Law Traditions".

The session was opened by Ádám Török, Chairman of the Section of Economics and Legal Science of the Hungarian Academy of Sciences. The Chairman presented the professional career of Professor Hamza. He draw the attention of the distinguished *audience* to Professor Hamza's achievements in the domain of Roman law, history of law and comparative law. Professor Török also pointed out Gábor Hamza's exceptional contribution to the legal science both as an author and editor, acknowledging also his achievements in fostering the international relations in his capacity as member of a number of international scholarly societies.

Professor Hamza started his inaugural lecture with emphasizing the contemporary significance of Roman law traditions. He pointed out that the idea of classification (*divisio*) of the Roman legal system (legal order) originated in ancient Greek philosophical thinking. He also emphasized that the classification i.e. partition (*divisio*) of *ius civile* is in no relation with the present day classification of the legal order into various branches of law, in particular in the civil law jurisdictions. The notion of the *ius civile*, comprising originally the entire legal order of the Roman State, had multiple meanings, since the *ius civile* regulated all areas of the legal order of the Roman State and of legal relations arising between its citizens (*cives Romani*). In the later period of the Roman *res publica*, along with the *ius civile* appeared, interpreted as a counterpart of it, the *ius praetorium (ius honorarium)*.

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Professor Hamza referred to Cicero who already considered the equal ranking of the *ius civile* and the *ius praetorium*. In the classical period of Roman law the *ius civile* merged with the *ius praetorium*. This merger i.e. the lenghty process of fading away of the distinction was due in particular to the fact that the *ius praetorium* lost its role as a vehicle of the renewel of the legal order. Since then *ius civile* has become a synonym of *ius privatum* including law of persons, family law, real rights, law of obligations and law of successions as opposed to the *ius publicum* consisting „*in sacris, in sacerdotibus, in magistratibus*" (D. 1, 1, 1, 2 – Ulpianus). On the basis of this distinction between *ius publicum* and *ius privatum*, it is obvious that this *divisio* has significance exclusively from the point of view of the *iurisprudentia*. This is due to the fact that this *divisio* is more a classification than a *definitio*.

Professor Hamza pointed out that the notion of the Roman *ius privatum* was not identical with the notion of the private law (*droit privé, diritto privato, derecho civil, Privatrecht, etc.*) of the contemporary legal orders. The same is holding true for the notion of the Roman *ius publicum* in relation to the notion of the public law (*droit public, diritto pubblico, derecho publico, öffentliches Recht, etc.*) of the contemporary legal orders. This difference is due to the fact that the Roman notions of the *ius privatum* and the *ius publicum* originated in totally different social and economic circumstances. Gábor Hamza drew attention to the fact that this divisio was not merely a theoretical one but reflected adequately Roman reality. He mentioned in this regard, as an example, the acquisition of property. In the case the State acquires property, the method of acquiring ownership differs from the modes of acquiring property in the relationship between citizens (*cives Romani*). The State does not need to use as a mode of acquiring ownership either the *mancipatio* or *traditio*. In contradistinction to the Roman legal order (*ius civium Romanorum* or *ius Romanum*) in contemporary legal orders the State can be subject of private law related relations. He emphasized that in ancient Rome the *ius privatum* did not regulate State related relations. He pointed out that only certain *delicta* were part of the Roman criminal law as an autonomous „branch of law", since the *delicta privata* (for instance theft [*furtum*]) constituted part of private law. The *crimina* (*delicta publica*, for instance *parricidium* and *perduellio*) belonged to the *ius publicum*. This was in contradistinction to the prevailing view, according to which modern criminal law is part of public law. This view, however, can not be regarded as a generally held one, because in the French doctrine criminal law (*droit criminel*) belongs to the sphere of private law (*droit privé*).

Gábor Hamza mentioned that for the Roman jurisconsults the *divisio* of the legal system into branches was merely a form of scientific classification without any practical significance. The distinction made by Ulpianus is by no means

of theoretical nature. He emphasized again that this *divisio* is rather a form of general classification rooted in the Greek philosophical thinking. He placed particular emphasis on analysing the famous dispute between the two outstanding Glossators, Placentinus and Azo Portius, taking place in the second half of the 12th century. According to Placentinus († 1192) who first clearly separated the legal system into *ius privatum* and *ius publicum*, considered these two „branches of law" as *duae res* i. e. real existing things. Azo heavily opposed this idea, developed by Placentinus, insisting on the necessity of keeping the unity (*unitas iuris*) of the legal order. Since he was convinced about the necessity of the unity of the legal order, he rejected the *„diversitas rerum vel personarum"*, pointing out that the separation of the *ius publicum* from the *ius privatum* could exclusively assume the function of orienting lawyers.

In the next part of his presentation, Professor Hamza drew the attention to the structure of the *Codex Iustinianus* emphasizing that the last three books (*Tres libri*) of this Code contained exclusively public law related *edicta* i.e. *constitutiones* of the Roman emperors. Of particular significance from the viewpoint of the development of the public law is the subsequent interest towards the *Tres libri* both by the Glossators and Commentators. Andrea Bonello da Barletta (c 1190–1273), the highly-reputed follower of the Bologna School, Professor of the University of Naples (the first State university) founded by emperor Frederic II in 1224 made the first comments on the *Tres libri*. His comments regarding their nature were on halfway between *glossa* and *summa*. He also mentioned the *Glossa* of Marino da Caramanico written between 1270 and 1278 patterned after the *Glossa ordinaria* of Accursius, in which Marino da Caramanico is dealing with the *Tres libri*.mmmmm Gábor Hamza pointed out that Bartolus de Saxoferrato (1313/14–1357) also commented in a number of his *tractatus* (for instance in the *Tractatus repraesaliarum, Tractatus de tyrannia, Tractatus de regimine civitatis, Tractatus de statutis*) public law related matters. Bartolus commented all parts of the *Corpus Iuris Civilis* including a number of questions relating to public law. In those treatieses (*tractatus*) the outstanding Commentator dealt with such extremely important matters as the relation between State (*imperium*) and ecclesiastical power (*sacerdotium*).

Gábor Hamza emphasized in the following part of his presentation that the non-existant *divisio* into „branches" of the legal order in ancient Rome did not constitute a hindrance of the development of the *ius publicum*. The author also emphasized that, in particular in Germany, the representatives of the public law (*öffentliches Recht*) availed themselves of the concepts and terminology of the *ius privatum* (*Privatrecht*). This is holding true also for the outstanding specialists of the *öffentliches Recht*, pertaining to the Pandectist legal science

during the XIXth century. It deserves mentioning that Paul Laband and Georg Jellinek were equally versed in both private and public law.

Most representatives of the public law science in Germany in the XIXth century, for example Georg Jellinek, were familiar also with the private law. This explains why they so often approached the institutions of public law from the viewpoint of private law, using private law concepts and terminology.

Dealing with the English jurisprudence, Gábor Hamza first noted that Sir Thomas Erskine Holland considered private law as „the only typically perfect law" in his work *Elements of Jurisprudence* published in 1880. Referring to Frederic William Maitland, he cited the following passage of the English author: „Our whole constitutional law seems at times to be but an appendix to the law of real property", taken from Maitland's *Constitutional History of England*, published posthumously in 1908. This phrase is caracteristic of what outstanding significance English authors attributed to real property, refusing the idea of the *divisio* of the legal order into branches. Mentioning deserves the idea of Sir John Salmond, the highly-reputed New-Zealand lawyer. His view relating to the *divisio* of the legal order was similar to that of Ulpianus, since he also regarded public law (*ius publicum*) consisting *„in sacris, in sacerdotibus, in magistratibus"*. Salmond furthermore, like Ulpian's view, did not attribute any practical importance to the *divisio* into „branches" of the legal order.

In the French legal doctrine Léon Duguit, following Ulpian's concept, underlined in his work *Traité de droit constitutionnel* the relative nature of the *divisio* of the legal system into public (*droit public*) and private law (*droit privé*), emphasizing that the idea lying behind this *divisio* served exclusively the purpose of classification. Referring to a number of examples, the lecturer proved that the Roman Law did not know the separation between public and private law as it is believed today. He pointed out, in compliance with the idea of Azo, the danger of this separation. The division is hardly able to provide any contribution to the adequate interpretation and the development of law, since it contains i.e. invokes the danger of the disintegration of the legal system.

Dealing with the reflection of the *divisio* into „branches" of the legal order in the field of legal education, he emphasized that legal education both in middle ages and modern times was based on the sources (*fontes*) of law, rather than on the „branches" of the legal system. He mentioned in this regard the Faculty of Law of the University of Halle, founded by the Prussian State as a *Reformuniversität* in 1694. In Halle the four Chairs (professorships) were based on the *fontes iuris* (*Decretalis, Codex, Pandectae, Iustitutiones*).

At the end of the session Ádám Török solemnly presented the diploma of corresponding membership of the Hungarian Academy of Sciences to Professor Gábor Hamza.

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BOOK REVIEW

László Blutman: **EU-jog a tárgyalóteremben. Az Előzetes döntéshozatal** [EU Law in the Court Room. The Preliminary Reference Procedure]. Budapest, KJK-Kerszöv, 2003. pp. 506.

This very first monograph on a special institutional question follows some twenty years after the first monograph on European Community Law was published in Hungary.[1]

Blutman's book has arrived at just the right moment, subsequent to the recent accession of Hungary to the European Union. The situation now is such that Hungarian judges can (and sometimes must) make preliminary reference to the European Court of Justice requesting its interpretation and decision concerning the validity of acts of Community institutions. When deciding cases before them, they are now obliged to follow the judgement of the European Court. This procedural relationship, which is the only one between the courts of the Member States and the Court of Justice, is of great importance in terms of principles, but likewise forms part of the every day practical activities of the judiciary. The rules of procedure themselves demand interpretation, and from numerous aspects this has already taken place. Any major study in the field must offer simultaneously a theoretical approach and a guide for practitioners. This dual objective requires an author to position himself so as to the present different points of view. The theoretical approach requires complexity and details, whereas the practitioner often prefers simplification, with the focus on knowledge that is applicable in every day life. Another feature of duality stems from the fact that the procedure comprises part of the Community legal system and at the same time the legal order and practice of the Member States, though the roles it plays in them are far from being the same. In the Community legal order, the preliminary reference procedure serves the uniform application of Community law, while the national courts are embedded in the national legal system and must decide on the litigation before them. Moreover, such a book has to describe, analyse and interpret a system that is undergoing constant transformation.

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[1] Mádl, F.: *Az Európai Gazdasági Közösség joga* (The European Community Law). Budapest, 1974.

It might appear extremely difficult to meet all these requirements, but in the even of success the result will be a work of great value both in theory and in practice. Is this the case with Blutman's book? Yes. The reasons are not too difficult to discover. Two highly appreciated studies on the topic by practising lawyers[2] will have served as starting points for the author in his own research, focused on the case law of the Court of Justice. His deep analysis of the related case law is exemplary for authors worldwide and in itself a very important scientific contribution. The reports of the 2002 Helsinki conference dedicated to the preliminary ruling procedure must have furnished additional raw material for a comparative perspective.[3]

Blutman has a particularly strong aptitude for systematic analysis and explanation. His method, greatly demanding in terms of intellectual energy, offers much help to the practitioner. At the same time, it leads to a large number of new findings and furnishes an abundance of ideas for theorists of law or sociologists of law to develop. On the other hand, the reader sometimes has the feeling that the system overrides the story and that the huge amount of knowledge would have deserved more courageous consequences.

In the following, the contents of different chapters will be considered.

The first chapter is an introduction, in a very narrow sense of the term, which makes the book useful even for readers who are not familiar with the law of the European Union. It may be presumed that mainly judges will be the readers. (This means that points of particular importance for litigants and their lawyers occupy only second place.) The sources of law, the main legal principles involved in the judicial application of law, and a concise presentation of the Community judicial system provide an adequate basis for further studies.

Chapter 2. Under the title "General questions of the preliminary ruling procedure", the book affords good selection of international public law and national laws that exhibit some similarity with Art. 234. procedure, what the book is really about.[4] This presentation is very interesting; however, as these

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[2] Anderson, D. W. K.–Demetriou, M.: *References to the European Court.* London, 2002; Dauses, M. A.: *Das Vorabentscheidungsverfahren nach Articel EG-Vertrag.* München, 2 nd edition, 1995. Translated into Hungarian in 2000.

[3] Colloque à Helsinki: "Le renvoi préjudiciel à la Cour de justice des Communautés européennes, 20 et 21 mai 2002."

[4] As Blutman himself states, Art. 234 reflects the very essence of the book. The text of the Art. reads as follows:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

– the interpretation of this Treaty;

– the validity and interpretation of acts of the institutions of the Community and of the ECB;

procedure are not naturally interrelated, the only benefit is that we become aware of the non-uniqueness of the European Community procedure.

It further becomes clear that Art. 234. is far from the only EU-law rule under which this kind of procedure can be initiated. While these provisions by no means have any particular theoretical or practical importance, the reader soon senses that things are not always as simple as they first might appear. The real question of the first chapter concerns the conditions of the admissibility and the competence of the Court to answer questions. The author agues that there is a difference between the two, but the practical relevance of this finding remains extremely limited, because the Court itself does not seem to differentiate in its jurisprudence.

The reader is also given the basic meanings of the terms such as rule of law, interpretation, control of validity, the court or tribunal of a member State, necessity and the procedure before the national court, as well as the effect of the preliminary ruling.

Chapter 3. The detailed analysis begins here. The very well-structured presentation proves that legal acts which can be interpreted or placed under the control of legality are much broader than might be conceived after a first reading of Art. 2324, relating to the Treaty and the legally binding acts of the Community institutions and the European Central Bank (the regulations, the directives and the decisions). According to the case law of the European Court of Justice, not only the different types of international treaties, but also the national rules referring to the text of the Community law and the non-binding acts (recommendations) of the Community institutions are open to scrutiny or interpretation under this procedure.

Chapter 4. In chapter, the author considers the "behaviour" of the European Court of Justice from various aspects: when answering questions on compatibility between Community law and national law; the demarcation between interpretation and application; the difference between interpretation and fact-finding; and the different techniques of interpretation.

The Court does not have formal jurisdiction under Art. 234. to answer questions on the compatibility of Community law and national law. However, it

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– the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a member State, against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

furnishes a "useful answer" that allows the national court to be able to solve problems of this nature appropriately. While Art. 234. is perfectly clear in this respect, the problem of interpretation (the competence of the European Court of Justice) versus application (the national court is empowered) arises with some frequency in the jurisprudence of the European Court of Justice. Blutman suggests a typology of the attitude of the Court in this field: The European Court of Justice reaches a final conclusion in the case (application); makes general statements, but statements which allow only one solution; and the general statements form the basis of the application of the facts of the particular case before the national court (interpretation).

As concerns interpretation, the question of the methods of interpretation applied by the Court arises quite naturally. How is the answer to the question arrived at? Here the author does not enumerate the classical methods of interpretation as is so often done in the literature. He suggests that these methods are sometimes meaningless: the procedure whereby the Court chooses between them remains unclear, and it would therefore be more useful to consider the "points of orientation". He proposes a number of points, such as the text of the norm, the objective of the norm, the spirit of the rule, the system and construction of the rule which contains the norm to be interpreted, the will of the law maker, the preamble of the norm, the founding treaties, and the previous judgements of the Court.

Nevertheless, after this stimulating exercise, the reader is provided with all the "classics": textual, historical and systemic interpretations. Surely the comparative law method (with special regard to the laws of the Member States) would have deserved mention.[5]

Finally, this chapter analyses the principles of interpretation, from which the *sui generis* meaning of the Community legal terms and the consequences of the multilingual nature of the Community law require special attention.

In the preliminary ruling procedure, primarily the national court produces the facts of the case. However, the Court of Justice is also allowed to gather facts, and the parties and persons contributing observations may also acquaint the Court with new facts. Despite this, it seems that all such facts may only complement those produced by the national court, even when the question of their well-foundedness arises.

Chapter 5. This chapter offers a very detailed description of the limits of the review of the validity in this procedure, with an account of how the question of

[5] For recent literature, see: Lenaerts, K.: Interlocking Legal Orders in the European Union and Comparative Law. *International and Comparative Law Quarterly*, vol. 52, 2003, 873–906.

validity is raised before the national courts, and the related problem of the interim measures.

In a comparison of the similar jurisdictions of the Court under Arts. 230. (review of the legality) and 234, a consideration of the aspect of the principle of effective judicial protection of the private parties would have been useful. In the view of the Court of First Instance, Advocate General Jacobs and a number of legal writers, the European Court of Justice offers a very narrow interpretation of (potential) private applicants. The Court justifies its position by stating that there is an indirect route via Art. 234. to question the validity of a normative Community measure, referring a preliminary question to the European Court of Justice. This argument is not entirely free of problems. (In the present state of national laws, this way is open only when there is a national act whose breaching will to cause an individual be brought to the national court. In the absence of such an act, or the willingness of the national judge to refer the question to the European Court of Justice, this mechanism can not provide a solution.) In the light of the recent case law of the European Court of Justice, the difference between the two can hardly be attributed to the normative or individual nature of the act in question.

The presentation of the legal basis of the invalidity would perhaps have been better placed under the basic characteristics of the legal instrument in general.

Chapter 6. What does "the court or tribunal of a Member State" mean under Art. 234? Belonging to a Member State is not always self-understandable. The Court has admitted questions from a court in a non-EU member country, because the Community law forms an integral part of the law of the territory in question. The Benelux Court has also been accepted. As concerns the notion "court" itself, the Court of Justice has created a relatively complicated situation. On the one hand, it has put forward a system of criteria to be fulfilled by a body serving a court or tribunal for Art. 234. On the other hand, these criteria are not particularly clear, and the Court itself does not seem very rigorous in applying its own test.

The first attempt to establish the test was made in the Vaassen case,[6] whereas legal writings (and sometimes the Court itself) tend to cite the Dorsch Consult[7] as leading case,[8] though this is formulated in rather general terms, and obviously strives for a quasi-complete catalogue of the criteria. Accordingly,

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[6] 61/65, G. Vaassen-Göbbels v. Management of the Beamtenfonds voor het Mijnbedrijf [1966] ECR 261.

[7] C-54/96, Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH [1997] ECR I-4961.

[8] See Anderson–Demetriou: *op. cit.* 32., Craig-de Burca: *EU Law.* Oxford, 2003. 436.

consequent adherence to the "Vaassen criteria" in Blutman's text is somewhat disturbing.[9]

A meticulous analysis of the related case law is somewhat counter-productive here: the final conclusion may readily be reached that each of the criteria may be neglected by the Court, so that overall there are no true criteria. Against this background, we can be very happy with the systematic overview of the Hungarian legal system clarifying the position of the different bodies, and their eligibility or not to refer preliminary questions to the European Court of Justice.

Chapter 7. The question of admissibility. The Treaty stipulates that the Court is not allowed to answer any question put before it, even though this may be related to the interpretation or the validity of Community law. Blutman suggests that it is convenient to distinguish the condition stated in the Treaty (the answer must be "necessary" for the judgment to be given) and the conditions forged in the case law of the Court (the question must not be a general or hypothetical one, it must be related to the case before the court, the dispute must be genuine, and the procedure in the course of which the question was raised has not ended).

As concerns the usefulness of the answer, the case law reveals that the Court denies an answer only when the necessity can not be adequately identified because of deficiencies in facts or legal basis, or if it is proven that the answer is manifestly not necessary for a judgement to be given. (It is regrettable that this part is not illustrated with concrete examples, such a deficiency commonly arises when preliminary questions are formulated by "absolute beginners".) The dispute is not a genuine one when the parties create a legal relation in order to start a litigation procedure. In general, the Court does not consider whether the litigation is genuine. This is only a matter of concern for it if there are signs suggesting that it is faced with apparent litigation.

If the materials of the case do not afford sufficient evidences concerning the necessity of the preliminary ruling, the referring court must produce adequate information and justification. At this point, Blutman follows the evolution of the case law.

The hypothetical question arises when the question is based on facts which do not feature in the particular case.

Once again, for "beginners" it would have been useful to recall that the Court will refuse to provide an answer if the question relates to a national measure not related to Community law.

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[9] On this point, we disagree with Blutman and consider that the reasoning of the Act is more appropriate. Blutman L.: Az eljárási törvények újabb módosítása és az uniós jog (The Recent Amendment of the Procedural Acts and EU Law). *Európai Jog*, 2003. 5. 18–19.

Chapters 8 and 9. The right to refer and the obligation to refer.

Under the title "Right to refer, the book treats a number of questions of practical importance for Hungarians, and particularly the courts.

Chapter 10. The reference from a procedural point of view.

For practitioners, this may be the most valuable chapter of the book. The comparative analysis and the precise interpretation of the Hungarian rules in force are also of interest for theoreticians.

The criticism concerning the Hungarian rules on appeal against the order to refer or against the refusal to refer appear highly convincing. This is likewise so with the exclusion of appeal in the one-tier procedures. At the end of such a procedure, the first court adjudicating on the matter is at the same time the final court to decide; hence if the law excludes the right to appeal against the order denying the reference for a preliminary ruling, the possibility of a judicial review of the fulfilment of the obligation to refer will be excluded.

Chapters 11 and 12. The legal effect of the preliminary ruling.

At this point, Blutman is in open debate with the reasoning of Act XXX of 2000, which lays down that the preliminary rulings have an *erga omnes* effect. This statement certainly necessitates some precision. The case law of the European Court of Justice clearly demonstrates that only one point is certain: the preliminary ruling is obligatory for the referring court. The *erga omnes* effect in the event of rulings on validity also seems to be accepted. The rulings on questions of interpretation have the necessary authority for the national courts in the Community to refer to them. In cases of doubt or disagreement , however, the national court is obliged to make reference to the European Court of Justice. As far as the temporal effect is concerned, in both situations the *ex tunc* effect is the general rule. The rules governing the limitation of the *ex tunc* effect are also established. The legal certainty and the extremely severe financial consequences make the Court willing to limit the retroactive effect of its rulings. It is extremely important that the Court does not include persons who have introduced an action in order to assert their rights.

A number of annexes are attached to the main text. Annexes 2 (Note for guidance on references by national courts for preliminary rulings), 3 (The preliminary ruling procedure before the European Court of Justice) and 4 (a specimen Order for Reference) should be particularly useful for practising lawyers. As far as the table of cases is concerned, it would have been helpful to supplement the numerical index with an alphabetical one. The reader may also have welcomed a complete bibliography at the end.

Ernő Várnay

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ATTILA RÁCZ*

Remodelling the System of Legal Protection in Hungary

Abstract. The study presents how the system of legal protection since the turn of the 1980s and 1990s, as a consequence of the changed international, political and economic circumstances, has been transformed in Hungary according to the requirements of a modern constitutional state. Giving information on the relevant historical-legal antecedents in Hungary, the then arising practical exigencies and different recently applied models in Western democracies, taken as starting points during the elaboration of the reform, the pros and cons of the latters, the study analyses the solutions introduced at the time of the change of the political-economic regime, their later developments, as well as the present-day system of legal protection in Hungary, making mentions of problems, too, which arise in some respects even nowadays. Taking all these into account, a comprehensive information is given in the study on the establishment of the Parliamentary Commissioners for Civic Rights and of the Constitutional Court in Hungary, on the prosecutor's (procurator's) offices and courts of justice, focusing on the relating constitutional principles, their organisation, competences, guarantees of independence and staff problems alike.

Keywords: administration of justice, Constitution, Constitutional Court, judges, judicial independence, judicial organisation, national round-table negotiations, National Council of Justice, ombudsman, Parliamentary Commissioner for Civic Rights, prosecutor's (procurator's) offices

Introduction

Since the turn of the 1980s and 1990s, the transformation of the system of legal protection according to the requirements of the constitutional state has featured as a distinguished goal of the reform of the state establishment, primarily following the declaration made at the Party Conference of the Hungarian Socialist Labour Party (MSZMP) on the necessity of the review of the Constitution in search for an answer to the conditions of the increasingly critical economic situation that generated social discontent, to the restricted democratic rights and freedoms and to the Soviet "perestroika" more favourable to Hungarian state sovereignty. Thereby, not only research that kept the modernisation of state establishment in view for several years gathered impetus, but the preparation of drafting the new Constitution commenced in an institutional framework, as

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well, particularly as pursuant to the MT Resolution 2022/1988 (HT. 7) passed in August by the Council of Ministers.[1] That work encompassed all areas of constitutional regulation, in which the reform of the framework and functioning of legal protection was inevitably highlighted. In fact, simultaneously with drafting the Constitution, the establishment of a new organ of legal protection, i.e. of the Constitutional Court was anticipated under the Amendment of the Constitution of 1989 adopted on 10th January, 1989 on the grounds of the position taken by the Party Conference. Furthermore, the problem of the overall framework of legal protection was also dealt with under government documents framed during the preparation of the Constitution that drew on its interim results. Thus the option of instituting the spokesman for civic rights (ombudsman) in the framework of legal protection was first proposed in an official form in the document issued by the Ministry of Justice on 30th November, 1988 titled "Conception of the Regulation of the New Constitution of the Hungarian People's Republic". The draft titled "The Principles of the Regulation of the Constitution of Hungary" was prepared by the Ministry of Justice on 30th January, 1989 and the respective Resolution was adopted by Parliament on 9th March, furthermore, instead of the Draft Act on the Constitution, which was not framed for political reasons, the scope of the "qualified" transition was also delineated by the Draft Act amending the Constitution elaborated by the Ministry of Justice on 29th May, 1989 and tabled by the Government on the motion of the Political Committee of the Hungarian Socialist Labour Party (MSZMP) amongst opposition endeavours that gained ground.

The prerequisites of the actual political-economic transformation directed up to that time by the "state party" were created on 10th June, 1989, when an agreement concerning the commencement of substantial political negotiations was concluded by the MSZMP, various social organisations and movements and the Opposition Round–Table. In this process, at the National Round–Table Negotiations a trilateral consensus was reached concerning the fundamental issues put on the agenda of the discussions on the systems of political, economic and social institutions. According to the agreement concluded on 21st June, the consensus concerned also areas of the framework of legal protection,

[1] See, especially, the introductory essay of Géza Kilényi for *Egy alkotmány-előkészítés dokumentumai* (The Documents of Drafting the Constitution). *Kísérlet Magyarország új Alkotmányának megalkotására, 1988–1990* (Efforts at Drafting the New Constitution of Hungary, 1988–1990). Kilényi G. (ed.). Research Center for Political Sciences, Budapest, 1991. See further, Holló, A.: *Az államjogtól a jogállamig* (From State Law to a State Based on the Rule of Law). Published by the Foundation Promoting Political Culture, Budapest, 1993.

for instance, the topical formulae of the Amendment of the Constitution and issues related to the Constitutional Court.

Following from the above, the adoption of the new Constitution was temporarily removed from the agenda and the Government also withdrew the bills with the content covered in the course of the trilateral negotiations. The Parliament in its Session of 27th June did not put the discussion of the Draft Act amending the Constitution of 29th May or of the Draft Act on the Constitutional Court on its agenda. With regard to the documents on the Amendment of the Constitution and on the Constitutional Court mentioned above, the common standpoint was formulated primarily at an expert level in work committees in fierce discussions often motivated by political concerns and interests.[2] Standpoints which according to the closing Agreement of 18th September of the National Round–Table Negotiations held between 13th June and 18th September, 1989, were realized in draft bills as well. Under the political agreement, the Government recognised these as its own proposals and subsequently to not so much content-based as formal modifications, submitted to Parliament.[3] After a short debate, the supreme Hungarian representative body passed them with minor amendments in October, 1989.

The "constitutional revolution" had not been completed as pursuant to the comprehensive Amendment of the Constitution under Act XXXI of 1989. First of all, the adoption of Acts to implement the Amendment of the Constitution was still necessary, which was accomplished in 1989 and within 3–4 years following 1990 as a result of the work of democratically elected parliaments. Subsequently, however, further reformulation, readjustment and development of several constitutional institutions were even at that time imperative by reason of the inevitable improvisation, inaccuracy and non-availability of practical experience implicated in the urgency of the Amendment of the Constitution and of law-making as well as the rapidly changing social–political conditions. Despite relevant attempts and owing to the non-agreement between parliamentary parties, Hungary has failed to frame a new Constitution, whereas our constitutional framework has been completely reorganised and reinforced. According to the requirements of a constitutional state based on the rule of law, the framework of legal protection has also been transformed. In the course of the

[2] See, Halmai, G.: Az 1949-es alkotmány jogállamosítása (The Reformulation of the Constitution according to the Rule of Law). In: Bozóki, A.–Elbert, M. et al. (eds.): *A rendszerváltás forgatókönyve. Kerekasztal-tárgyalások 1989-ben* (The Dramaturgy of the Political Transformation. Round–Table Negotiations in 1989). Vol. 7. *Alkotmányos forradalom* (Constitutional Revolution). Essays. Új Mandátum Publisher, Budapest, 2000. 180. and following.

[3] See, Holló: *op. cit.*, 109.

political transformation, two new bodies of legal protection have been established, too, namely, the institution of the ombudsman and the Constitutional Court. Owing to the changes, the framework of legal protection today bears comparison in all its dimensions even at an international level. This holds true despite the fact that the reasonableness of several solutions, either sustained throughout the political transformation or newly adopted, has been challenged up to now. In the followings, we shall explore what the above exactly imply with respect to the institutions of the ombudsman, the prosecution, the judiciary and the Constitutional Court, which belong to the constitutional framework of legal protection.

The Establishment of the Institution of the Ombudsman (Parliamentary Commissioner) in Hungary

The Institution of the Parliamentary Commissioner originates in Scandinavia and looks back on a past of two centuries. According to the Swedish model, it gained ground in other Scandinavian countries primarily following the 2nd World War and in several Western European countries (e.g., in England, France, Austria, Spain) following the 1960s and 1970s. Moreover, we can assert that the introduction of the institution of the Parliamentary Commissioner was put on the agenda on other continents and has been spreading all over the world.

Basically, two factors account for the apparent prevalence of the institution of the Parliamentary Commissioner. Primarily, it is considered to be an appropriate form of the extension of parliamentary control over the executive power, but its establishment has also created an additional guarantee for the protection of citizens' rights.

The traditional forms of function of the parliament are not appropriate for the control of the legality of particular procedures of applying the law by authorities. Albeit the representatives place great emphasis on the settlement of the complaints of their constituents, even if the settlement of individual and group complaints distracts them from performing their "express" representative duties. Therefore, as a result of the delegation of power to promote to solve individual and group grievances to the Parliamentary Commissioner, not only the supervisory power of Parliament will be construed as more comprehensive, but representatives will also be exempted from the task of attending to the complaints of their constituents.

The establishment of the institution of the Parliamentary Commissioner is further justified by the consequent extension of guarantees for increased

protection of the rights and lawful interests of citizens, even if independent judicial review of the legality of administrative decisions is available in every case. Nevertheless, the instrument of judicial remedy is perforce incomplete. Generally, courts cannot secure remedy if the officials of the respective authority resort to offensive abuse, fail to make a decision within the prescribed or reasonable period, do not institute proceedings in an arbitrary manner within their discretionary powers, perchance take arbitrary measures or decisions. In case of such abuses, if the procedure is otherwise lawful, courts do barely have the power to proceed, since the authority resorts to arbitrary measures only within the scope of law. For instance, the law allows that the authority in a given group of cases made either an affirmative or a negative decision within its discretionary powers, and on these grounds it may grant the request of one party and dismiss that of the other without a recognisable reason. Similar inconsistencies may appear in the system of remedies not only in administrative, but also in judicial, prosecuting or other procedures by authorities or *quasi* authorities. In such cases, with regard to judicial independence, except for court proceedings, intervention by the Parliamentary Commissioner (in certain cases by commissioners attached to other organs, such as, e.g., the Head of State or bodies of local self-government), being independent of the organs of applying the law is deemed to be a supplement and an effective instrument of the increased protection of civil rights and lawful interests.

At the turn of the 1980s and 1990s, the establishment of the institution of the Parliamentary Commissioner was necessitated by similar reasons in Hungary, as well. The document issued on 30th November, 1988 by the Ministry of Justice with the title "Conception of the Regulation of the New Constitution of the Hungarian People's Republic", based on foreign examples and Hungarian research, referred to the necessity of the establishment of the institution ("spokesman for civic rights"), in case the competence of the prosecution (independent of the executive power, i.e. the administration) to exercise full legality supervision would be substantially transformed (narrowed) or abolished. Consequently, a largely similar scope of duties could be delegated to the power of the ombudsman. This conception was reaffirmed under the Resolution of Parliament adopted on 9th March 1989 on the Principles of the Regulation of the Constitution of Hungary.

The Draft Act of 29th May, 1989 amending the Constitution did not set forth the establishment of the institution of the Parliamentary Commissioner. However, the establishment of the institution was highlighted again at the National Round–Table Negotiations that commenced in June, whereas at that time it was not directly attached to the transformation of the scope of power of the prosecution. Finally, according to the agreement, the Constitution should

stipulate an authorisation for the establishment of the institution of a general ombudsman and of special parliamentary commissioners at a later date. Such independent institutions could be, e.g., the Parliamentary Commissioners for Data Protection, Environmental Protection and for Protection of Minorities, who would proceed in matters concerning national minorities.[4]

According to the Round–Table Agreement, the comprehensive Amendment of the Constitution of 1989 provided for the establishment of the institution of the "Parliamentary Commissioner for Civic Rights". Accordingly, the Parliamentary Commissioner for Civic Rights shall be responsible for the investigation or initiating the investigation of cases involving irregularities related to constitutional rights he has become aware of and initiating general or specific measures for their redress. Proceedings by the ombudsman may be initiated by any citizen in the cases specified by law. The Parliamentary Commissioner shall be elected by Parliament based on the proposal of the President of the Republic. The Parliament may also elect special commissioners for the protection of specific constitutional rights. The Parliamentary Commissioners shall submit an annual report on their activities to Parliament. The detailed rules concerning Parliamentary Commissioners shall be set forth under an Act of constitutional force. Later, Act XL of 1990 amended the constitutional provisions by specifying the institution of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities as responsible for investigating or initiating the investigation of cases involving irregularities related to the rights of national or ethnic minorities he has become aware of and initiating general or specific measures for their redress. According to this amendment, in a remarkable way, the competence of the Parliamentary Commissioner would have been exercised by a body consisting of one representative of each national and ethnic minority, who were to be proposed on the motions of national and ethnic minority organisations by the President of the Republic and elected by Parliament. This solution was primarily promoted so that national and ethnic minority rights could be enforced, since the autonomous representation of national and ethnic minorities had not been granted in Parliament and according to the reasoning of the draft amendment, the authority of the Parliamentary Commissioner to protect minorities may even be considerably broader and more efficient than those of the MPs. Later, however, as pursuant to Act LXXIII of 1994 amending the Constitution, the

[4] See: Bozóki, A.–Elbert, M. et al. (eds.): *A rendszerváltás forgatókönyve. Kerekasztal-tárgyalások 1989-ben* (The Dramaturgy of the Political Transformation. Round–Table Negotiations in 1989). Vol. 6. *Documents*. Ed., introduction and notes by Kalmár, M.–Révész, B. Új Mandátum Publisher, Budapest, 2000. 618.

amendment above providing for the establishment of the *quasi* "representative" body designated to protect national and ethnic minority rights was repealed. Subsequently, the person of Commissioner to protect minorities too, shall be elected with a qualified majority vote by Parliament on the proposal of the President of the Republic as pursuant to the Amendment of 1990. Besides, since the Act with constitutional force as a special type of Acts ceased to exist in 1990, the detailed rules concerning Parliamentary Commissioners was to be specified under a qualified majority Act of Parliament. Accordingly, this was accomplished on the adoption of Act LIX of 1993 on the Parliamentary Commissioner for Civic Rights, which was supplemented by Act LXXVII of 1993 on the Rights of National and Ethnic Minorities, furthermore, by Act LXIII of 1992 on Personal Data Protection and Publicity of Data of Public Interest with respect to the still acting Commissioner for the Rights of National and Ethnic Minorities as well as Commissioner for Data Protection; the Commissioner for Data Protection having even special powers exceptionally as an authority. Following their election in 1995 for a term of 6 years, the Parliamentary Commissioners, who may be once re-elected, started their work. The considerations of the supporters of the introduction of the institution have been justified by the fact that the independent parliamentary commissioners subjected exclusively to the Constitution and other law have proceeded in their offices to common content. The favourable judgement of their operation manifests itself in the recurrent claim for the establishment of further offices of special commissioners, too, in favour of more efficient protection of constitutional rights drifting into the focus of general attention.

According to the Constitution and Act LIX of 1993, the Parliamentary Commissioner for Civic Rights shall be competent to exercise its supervisory or controlling power in all cases, if, in consequence of the proceedings of any authority or an organ performing public service or its decision made (measure taken) and/or of the omission of measures a person's constitutional (fundamental or "human") rights have been injured or if its direct threat obtains, provided that the person concerned has exhausted the available administrative legal remedies (except for the judicial review of an administrative decision as pursuant to a later amendment) or provided that no legal remedy has been secured. With regard to determining the scope of competence of the Commissioner, the following aspects are, however remarkable:

– Concerning its application, Article 29 of the original text of the Act specified the scope of organs that qualify as authority and are subject to the authority of the Commissioner. Later, however, the Constitutional Court stated in its Decision of 7/2001 (III. 14.) that in some aspects the definition was vague, since it was not unambiguous, which organs the supervisory power of the

Commissioner exactly encompassed. This contradicts the principle of legal security that grounds a state based on the rule of law. In view of that, several points of the definition were annulled by reason of unconstitutionality, which called for a more accurate regulation of Article 29 under Act XC of 2001, according to which an authority, that the competence of the Commissioner pertains to, is an organ performing public administration, an organ exercising its competence of public administrative character, the armed forces, the policing organs, the national security service, the investigating authority including the public prosecutor's office performing prosecution investigation, local self-governments and national or ethnic minority self-governments, a public body operating on the basis of obligatory membership, a notary public, the county court bailiff and the independent court bailiff. Nevertheless, in respect to the application of the Act, the Parliament, the President of the Republic, the Constitutional Court, the State Audit Office, the court, the Office of the Public Prosecutor, except for the prosecuting authority that accomplishes prosecution investigation, shall not qualify as authority.

– The power of supervision of the Parliamentary Commissioner for Civic Rights encompasses only the activities or omissions of authorities and organs performing public service concerning the exercise of constitutional rights. It shall not encompass the entire activity of the supervised organs, such as the case in respect of, e.g., public administration in some countries. Its supervision necessarily pertains, first of all, to the operation of public administration, so far as it interacts with a great number of citizens on a daily basis. Nevertheless, we may assert that its basic agency is the protection of fundamental rights, rather than the external supervision of the executive power or of public administration.

– The Commissioner is responsible for the elimination or the prevention of the injury of fundamental constitutional rights. As a consequence, it supervises mainly the lawfulness of the operation of different organs. In its scope of constitutional authority, however, it is entitled to intervene in any case of irregularities concerning the enforcement of constitutional rights he has cognisance of even if it does not directly infringe any legal rule. Consequently, it may examine, and according to the established practice it has done so, whether the authority within its discretionary powers had proceeded in a consistent manner and in good faith. In its procedure, the authority may not pursue any objective other than it has powers and competence for; it may proceed on an objective and impartial basis with respect to the relevant circumstances in the case concerned. It shall make a decision adequate for the peculiarities of the case within a reasonable period even if this period is shorter than the period

specified by law. Human dignity shall at all times be respected in the course of the proceedings by the authority.[5]

The institution of the Parliamentary Commissioner for Civic Rights is related to Parliament. Nevertheless, it is not expressly an organ of Parliament exercising supervision or control, at least not in the sense as it is in several countries (e.g., England and France), where, according to the rule, the investigation of the complaints of citizens may be initiated by their representative or senator in Parliament. In Hungary, those concerned may directly initiate proceedings by the Commissioner in cases subject to its scope of supervision, who shall examine the filed petition and proceed to investigate the case on a mandatory basis unless the irregularity mentioned in the petition, according to the judgement of the ombudsman, is of small importance. Otherwise, the Parliamentary Commissioner is entitled to proceed in order to reveal and terminate any irregularity concerning constitutional rights *ex officio* on any or without notification, too.

As in other countries, the Parliamentary Commissioner does not have, as a rule, powers to redress the revealed irregularity. According to the nature of the irregularity, he may, for instance, resort to the following "soft" measures that can by no means be considered insignificant by reason of the great publicity his activity entails: initiate that the organ incurring the irregularity terminated it, or recommend redress of the irregularity to the supervisory authority. The Parliamentary Commissioner may initiate that the competent public prosecutor lodged a prosecutor's protest. If in the course of proceedings, the Commissioner forms a grounded suspicion of perpetration of a disciplinary or petty offence, he may, whereas if he forms that of a criminal offence, he shall initiate the corresponding process. He may initiate that the Constitutional Court instituted proceedings. So that the irregularity shall be avoided in the future, the Commissioner may recommend that the organ authorised to make law or norms amends, repeals or frames a legal rule or any normative legal instrument. Eventually, the Commissioner shall notify the Parliament of the revealed irregularity or request its investigation in his annual report, or, if the irregularity is extraordinarily massive, in the interim period.

[5] See, e.g., Report of the Parliamentary Commissioner for Civic Rights and its General Deputy on their activity in the period of 1st January–31st December, 1998 submitted to Parliament. In: *Hungarian Official Gazette*, II./79/1999. 18.

The Organisation and Functions of the Prosecution's (Procurator's) Offices

Following the bourgeois transformation, the system of prosecution on the European continent was in general established as subordinated to the executive power (Government, Minister of Justice), and, according to the French model, it was strictly centralised and performed duties almost exclusively related to criminal procedures (accusation, public prosecution at court) so that the uniformity of prosecution could be ensured. Such prosecution was established in Hungary following 1871, as well. Lately, in view of the requirement of impartial criminal investigation, issues such as guaranteeing the independence of prosecution, loosening its attachment to the executive and constraining the directive power of the superior authority in the centralised system have all been stressed. Nevertheless, the system of prosecution is still generally a levelled, hierarchical structure attached to the executive power. Apart from duties related to the prosecution, it secondarily or exceptionally attends to civil procedural or administrative duties. The scope of duties of the prosecution does not include, in principle, the supervision of the legality of public administration. In several countries, similar duties are performed by the institution of the Parliamentary Commissioner, which is independent of the executive power.

Following 1917, in Russia or the Soviet Union the system of prosecution established, with respect to its organisation and functions, was different from the solutions adopted in Western Europe. After 1936, the strictly centralised prosecution was separated from public administration and it was organised not as a member state, but as a federal organisation dependent exclusively on the supreme federal organ of representation. This principally promoted centralisation, which was instrumental to the uniform enforcement of federal law on the whole territory of the federation. This organisational construction was also substantiated by the fact that the prosecution was constituted as not only responsible for criminal and partly civil procedures, but also for the so-called general supervision of legality, so, accordingly, it supervised both the lawful operation of state, social and economic organs and the legality of the activities of citizens. Nevertheless, the prosecution controlled principally the lawful functioning of public administration. Therefore, the consequential assurance of the effectiveness of Acts and other law required that this duty was performed not by an organ related to, but by one that was independent of public administration. This solution, which guaranteed the "external" supervision of administration, could, in principle, also provide some protection for citizens seeking legal remedy against abuses by administrative authorities, particularly in an era when any

instrument of the judicial contest of administrative decisions was virtually completely revoked.

Following 1945, the system of the prosecution in Eastern–European countries was transformed according to the Soviet model. As pursuant to the Constitution of 1949, a centralised, hierarchical and independent prosecution system was established in Hungary after 1953, as well, which was subordinated exclusively to the supreme organ of representation. Besides, the scope of duties of the prosecution included the tasks connected with criminal procedures (the supervision of legality of investigations, accusation and prosecution in court proceedings, the supervision of legality of the implementation of penal measures), as well as partly tasks connected with civil procedures, furthermore, the prosecution's office was specifically responsible for the general supervision of the observance of the law. No substantial change was effected later in the legal status of prosecution, although, owing to partial amendments in the meantime, the scope of the general supervision of legality was restricted. After 1972, the responsibilities of the prosecution ceased to include the supervision of the legality of economic activities, and after 1990, owing to the introduction of new methods of supervision, the supervision of local self-governments (councils). However, as pursuant to the currently effective Act V of 1972 (and its Amendments) on Prosecution, the supervision of legality exercised by the prosecution shall pertain even today to legal rules, other norms, general regulations and individual decisions applying the law of organs of state administration under the level of Government. Furthermore, it pertains to decisions of non-judicial organs settling legal disputes, to decisions of business and other organisations concerning relations of employment and those of membership in co-operatives, as well as their measures with general effect issued when enabled by law. In this scope, omission also shall be subject to supervisory procedures *ex officio* or upon notification. In case of infringement of law, redress by the public prosecutor is not admissible (except in cases of petty offences), however, he may initiate that the competent organisation terminated or prevented the infringement of the law. In case of the availability of legal conditions, e.g., the prosecutor may lodge a protest with the organisation that infringed the law or with its superior organ (organ that performs legality supervision on behalf of the state). Furthermore, the prosecutor may lodge a complaint with the director of the organisation so that the illegal practice or the infringement of the law in the form of omission was terminated, or in case the risk of future infringement of the law obtains, he may lodge an admonition in the interest of its prevention, etc.

With respect to its organisational structure and functions, the prosecution has not changed fundamentally since the "socialist" transformation, in spite

of the fact that its possibility and claim has been asserted and recurrently highlighted since the years of 1988–1989. Based on research, this, as an alternative, was formulated under the document titled "Conception of the Regulation of the New Constitution of the Hungarian People's Republic" of 30th November, 1988 and under the Resolution of Parliament adopted on 9th March, 1989 on the Principles of the Regulation of the Constitution of Hungary. However, the conceptions concerning transformation were not recognised either by the Draft Act of 29th May, 1989 amending the Constitution or by the agreement concluded at the National Round–Table Negotiations,[6] and, as a consequence, were not adopted under the comprehensive Amendment of the Constitution of 1989, either. However, with reference to conceptual–professional considerations, the demand for such a transformation recurrently manifested itself in the endeavours of successive Governments after the free elections in 1990. According to the more or less prevalent models adopted in Western Europe, the motive of these endeavours was to integrate the prosecution into the organisational structure of the executive power and to subordinate it to the supervision and authority of the Minister of Justice in Hungary, as well. This could promote that the Government contributes to framing policy concerning penal law not only by the submission of bills, but by drawing on the powers of the prosecution. This is possible all the more because the extension and the establishment of other "external" safeguards for the legality of administration (quasi general introduction of administrative jurisdiction, introduction of the institution of the ombudsman) supersede the so-called general legality supervision by the prosecution that would substantiate the sustenance of the prosecution as independent of the executive power. The realisation of these endeavours, which requires an Amendment of the Constitution, has, however, so far been met by the resistance of the successive oppositions that feared the excessive strengthening of the Government, although, forceful conceptual and professional reservations have also had bearing on such a turn of events. It has been raised, e.g., that in case of the adoption of that solution, the penal proceedings preceding the judicial phase, except for some measures, would not be subject to "independent", external control, it would be completely subordinated to the executive power which, without the introduction of adequate "counterbalances", would threaten the assurance of the legality of criminal procedures. Therefore, following the model adopted in other countries, the institution of the investigating judge and in a relatively

[6] Bozóki, A.–Elbert, M. et al. (eds.): *A rendszerváltás forgatókönyve. Kerekasztal-tárgyalások 1989-ben* (The Dramaturgy of the Political Transformation. Round–Table Negotiations in 1989). Vol. 6. *op. cit.*, 100. and following.

wide scope that of subsidiary private accusation should be introduced. Furthermore, the consideration has been raised that the extension or establishment of various safeguards of legality promoting the "external" supervision of administration may not fully substitute the "general" supervision of legality exercised by the prosecution that substantiates the independent system of prosecution. It cannot be replaced by the extension of administrative jurisdiction, since it is inadmissible in cases specified by law, and, we cannot disregard the option that an organ independent of the administration may initiate legality proceedings *ex officio*, since no party will take action if the decision infringes the law in his favour. The supervision exercised by the prosecution cannot be fully replaced by the powers of the Parliamentary Commissioner for Civic Rights, either, since the Commissioner may intervene exclusively by reason of the injury of constitutional rights, not by reason of the unlawful operation of state administration in general. Therefore, if the prosecution was subordinated to the Minister of Justice by terminating its power of the general supervision of legality, similarly to the solutions adopted in other countries, the Parliamentary Commissioner for Civic Rights should be authorised to perform the legality supervision of the "entire" state administration, in the scope of which he could safeguard the enforcement of constitutional rights, too.

The Reorganisation of Jurisdiction

Based on previous research, the conception issued by the Ministry of Justice on 30th November, 1988 related to drafting the new Constitution of the Hungarian People's Republic, already referred to all aspects that had great significance with respect to the development of jurisdiction in the course of political transformation. The core issues of reform endeavours thenceforth and following the adoption of the Resolution of Parliament of 9th March, 1989 on the Principles of the Regulation of the Constitution of Hungary were the following: more consistent assurance of the constitutional principle of the judicial administration of justice, reinforcement of the unity of judicial organisation, enforcement of democratic jurisdiction with respect to realities, furthermore, universal establishment of guarantees for judicial independence. These endeavours were barely asserted under the Draft Act of 29th May, 1989 amending the Constitution, however, quite obviously, they were highlighted again at the National Round–Table Negotiations in relation to the constitutional regulation of the state establishment, so far as the restriction of the powers of special courts and the extension of guarantees for judicial independence was concerned. However, the actual reform commenced only subsequently to the comprehensive

Amendment of the Constitution of 1989 and was accomplished later, via the adoption of further amendments and Acts implementing the Constitution.

The Declaration of the Rights of Man and of the Citizen of 1789 in France proclaimed that any society in which guarantees for rights and the separation of powers are not secured does not have a Constitution. The first European Constitutional Charter of 1791 (of France) that adopted the Declaration as its integral part set forth that judicial power pertains to the judges. Whereas, the requirement of the separation of powers in further French and Western European constitutional development evolved into the requirement of the division and counterbalance of powers, this hardly affected the constitutional requirement that jurisdiction should be exercised by courts. Furthermore, the principle was also set forth under the constitutions of European socialist countries, although, together with the conception of the unity of state power. They could not disregard the general requirement that jurisdiction must pertain to the power of the courts, since it is exclusively the particular organisation and procedures of courts circumscribed by guarantees, which ensures that the administration of justice shall be exercised in a lawful and impartial manner. Both the original text of the Constitution of 1949 and the effective Constitution of Hungary set forth the principle of the judicial administration of justice, too.

We cannot fail to mention that the monopoly of courts to administer justice has never and nowhere prevailed with full consequence. For practical purposes, (e.g., expeditiousness, economising, knowledge of facts and locality, relieving courts) other organs have also attended to administering justice. Such a situation developed in Hungary, too. Nevertheless, so that the constitutional principle of the judicial administration of justice could be more consistently enforced, Economic Adjudicatory Commissions were dissolved in 1972 (their competence was taken over by ordinary courts) and, in the course of political transformation, the competence of non-judicial organs administering justice was more overtly restricted. The so-called social administration of justice (social court's adjudication) was declared unconstitutional in 1991, then, the work of Labour and Co-operative Adjudicatory Commissions was also terminated in 1992. However, even recently similar *quasi* judicial organs have also been operating, such as the Public Procurement Adjudicatory Commission to adjudge unlawful or disputed cases pertaining to public procurement. Administrative organs shall proceed in certain scopes of actions, primarily in procedures initiated by reason of petty offences. Arbitration shall be admitted in economic legal disputes and other scopes of cases recognised by law, etc. Thus despite the restriction of the competence of jurisdiction of non–judicial organs, e.g. in Hungary, we still can't posit as a fact in practice the exclusive judicial monopoly of jurisdiction. Although, we admit exceptions that are unproble-

matic with regard to their narrow scope and guarantees, we can assert that the Constitution does not contain even today either reference to their admission or stipulate limitations on the authorisation of non-judicial organs to administer justice, furthermore, it does not specify a main rule concerning the admissibility of the judicial review of the decisions of these organs.

The requirement of equality before the law implies the enforcement of equality before jurisdiction. This postulates that the cases of subjects of law, i.e., legal entities and natural persons shall be adjudicated by the same organs, and that provisions of law shall be rendered uniform interpretation by the organs of jurisdiction. In the judicial organisation that is safeguarded by the establishment of a unified system of courts. Consequently, in different constitutional systems all cases pertaining to courts shall be adjudicated, in principle, by courts of the same type and organisation, and all courts shall be linked on the grounds of powers of appeal–review and through the guarantees of the uniform interpretation and application of law.

Following the bourgeois transformation, the functioning of extraordinary courts, and special courts which establish privileges or manifest discrimination and are organised on the basis of social, national–ethnic or religious distinctions, have always been inadmissible on consolidated constitutional grounds. In Hungary, such courts had not obtained in the period preceding the political transformation, either, whereas, similarly to other countries, specialised courts, such as Labour Courts and Military Tribunals had operated in a narrow scope in specific proceedings. However, in favour of the reinforcement of the unity of judicial organisation, the conception issued by the Ministry of Justice on 30th November, 1988 related to drafting the Constitution took the sustenance of Military Tribunals into consideration, then the Resolution of Parliament adopted on 9th March, 1989 on the Principles of the Regulation of the Constitution promised both the dissolution of Labour Courts and narrowing the scope of competence of Military Tribunals. At the National Round–Table Negotiations, the Opposition Round–Table maintained that Military Tribunals could function exclusively for the state of defence. In the transition period, the urgent dissolution of Military Tribunals and Prosecution is inevitable with respect to guarantees.[7] Finally, in the course of the political transformation, Labour Courts have been operative until recently, whereas for times of peace, Military Tribunals were dissolved as pursuant to Act LVI of 1991 amending Act IV of 1972 on the Courts, and since that time military justice has been administered by the military panels operating at the appointed County Courts or the Metropolitan Court in Budapest and at the High Court in Budapest.

[7] *Ibid.* 99. and following.

Despite the functioning of Labour Courts established in counties and Budapest, the organisation of courts may be deemed to be unified. Judicial competence is concentrated at ordinary courts with general scope of jurisdiction. Generally, the courts that may proceed to administer justice are the Local Courts, County Courts or the Metropolitan Court of Budapest, the High Courts–three of which were established on 1st January, 2003, supplemented by two further ones on 1st July, 2004 as pursuant to Act LIX of 1997 amending the Constitution proposed under the Resolution of Parliament of 9th March, 1989 on the Principles of the Regulation of the Constitution of Hungary–and the Supreme Court. The judicial system is headed by the Supreme Court that shall assure the uniformity of administration of justice by the courts.

Since the adoption of constitutional charters, safeguarding the democracy of jurisdiction has featured as a distinct constitutional endeavour, which, in times of epochal revolutionary changes, necessitated the election of judges for definite terms, moreover, the involvement of lay assessors into jurisdiction. Whereas, in periods of political consolidation, the reasonableness of the observance of such democratic principles for themselves would usually be challenged and the meticulous enforcement and application of democratically adopted law deemed to be the major standard of democratic jurisdiction. Therefore, the system of the filling up the posts of judges must comply with the requirement of judicial independence and competence. The involvement of lay–assessors was also challenged on the grounds of its being in different cases a mere formality from the outset.

In several countries, based on the considerations above, the appointment of judges for an indefinite period has been instituted as opposed to the election of judges for a definite period, even if the election of judges is known even nowadays in a certain scope, e.g., in some member states of the U.S. and also in Switzerland. In Hungary, the system of the election of judges as pursuant to the original text of the Constitution of 1949, the exercise of which by the organs of representation was prescribed under its implementing rules, was never enforced, since the offices of judges used to be filled by way of appointment in a broad scope for a long time. As a matter of fact, the institution of the election of judges was stipulated under the Amendment of the Constitution of 1972, so that the judges were elected by the Presidential Council of the People's Republic, composed of 21 MPs, for an indefinite period. In the course of the political transformation, the comprehensive Amendment of the Constitution of 1989 dissolved the Presidential Council functioning as a collective Head of State and its role was taken over by the one-man Head of State. Thence, the system of the appointment of judges for an indefinite period after a three years' probationary period has positively prevailed. The President of the Republic is

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authorised to appoint the judges. Unarguably, their appointment for an indefinite period creates better conditions for the enforcement of judicial independence. It is also beyond doubt that in case sufficient guarantees are provided, the appointment system as opposed to the contingency of election facilitates the selection of judges with adequate training. The way of selection to various major offices of the judiciary sometimes may be different, e.g., according to a more recent provision, the President of the Supreme Court is elected by Parliament for a period of 6 years.

So far as people's participation is concerned, the formerly general participation of people's–assessors in adjudication on the first instance was confined to a narrower scope in Hungary as well as other countries after the 1960s. According to experience, the involvement of lay–judges incurred substantial expenses, whereas it barely promoted more meticulous adjudication. On account of their low performance, the involvement of lay–judges was mere formality, since the expectation that "practical experience" and the expertise of lay–judges could support adjudication, except for certain groups of cases, was rather chimerical. On the contrary, it was the selection of the unfit that prevailed in the system of the selection of lay–judges, i.e., not the most suitable persons were selected, but those, whose absence from the workplace caused the least disturbance. Even in such a case mustering the required number of lay–judges would be a recurrent problem by reason of disinclination to participate. These factors led to the solution that beyond labour adjudication the involvement of lay–judges was restricted to those (groups of) cases in which the participation of expert lay–judges could in fact promote reaching a more technical and considerate decision, furthermore, lay assessors could counteract the faults entailed by routine in the scope of judicial discretion, particularly in serious penal cases. Because according to sociological surveys, the attention of the professional judge in the panel is focused primarily on the act of the perpetrator, whereas that of lay–judges concentrates on the person of the perpetrator. These facts influenced the Conception issued by the Ministry of Justice 30th November, 1988 in the course of drafting the Constitution and the Resolution of Parliament on the Principles of the Regulation of the Constitution of Hungary, too, both of which proposed that the new Constitution confined the involvement of non-professional judges in jurisdiction exclusively to those cases specified by law. However, it was only later that the "reversal" of the constitutional rule pertaining to adjudication by lay–judges or "reducing" the institution in view of reality was provided for under Act LIX of 1997 amending the Constitution. As it is known, according to the former text of the Constitution, courts administered justice through panels consisting of professional judges and lay–assessors, even if Acts could provide for exceptions. According to the effective Constitution,

"Non-professional judges shall also participate in judicature in the cases and in the manner prescribed by law." This provision theoretically also facilitated the institutionalisation of jury trials, which, however, devoid of a compelling legacy, would amount to hardly any sense in Hungary, primarily because jury trials undermine the constraints imposed by the law of evidence, furthermore, this solution, by way of making an artificial distinction between decisions on matters of fact and on legal questions would in fact transfer the responsibility to lay–judges of making autonomous decisions on questions, too, which in fact require significant legal expertise, such as the qualification of the act in penal cases.

Guaranteeing judicial independence is a fundamental constitutional principle of the judicial system. Following Anglo-Saxon antecedents, its legal bases were established by the first modern constitutional charters, which instituted guarantees primarily to prevent the removal of judges from office. Later, the general rule according to which "judges are independent and subjected only to the law" has been adopted by constitutions mainly according to the model of the (German) Constitution of Weimar of 1919. Following 1936, this rule for propagandistic reasons was introduced into European socialist constitutions, among others into the Hungarian Constitution of 1949, as well. Nevertheless, this principle as a rule was not enforced until the 1960s and 1970s by reason of frequent intervention into the work of the judiciary, in spite of the fact that several legal guarantees existed for safeguarding judicial independence. Subsequently, external political influence on judicial administration of justice slackened, nevertheless, it became obvious that the democratic transformation of social–political conditions and the extension of legal guarantees for judicial independence were necessary for the elimination of legal–political encumbrances of enforcement of judicial independence. In fact, the democratic changes taking place in 1989–1990 and the transformation of the system of structural and personal legal guarantees of judicial independence established universal grounds, which facilitated that the judge endowed with human and professional dignity accomplished his/her duty in an independent, impartial and unprejudiced manner.

In democratic political systems, in which the exertion of influence upon the work of the judiciary is deemed inadmissible, the enforcement of judicial independence is safeguarded by a comprehensive system of structural and personal legal guarantees. Structural legal guarantees have been instituted so that accessibility of adjudicating judges can be precluded via the establishment of the relationship of courts with organs that supervise adjudication, guarantee the unity of law, administer courts or perform other duties. Legal guarantees related to the person of the judge facilitates that the judge, so far as his/her personal existence (career) as a judge is concerned, does not have to fear adverse

consequences, if he fails to recognise unlawful intervening attempts, that he/she shall not be exposed to unwelcome harassment, and that he/she can avert situations of incompatibility that may affect his/her work. With respect to these factors, following the political transformation in Hungary, several far-reaching changes have taken place. In the followings, we shall outline those we deem to be most important:

– The issue whether MPs in Parliament could address questions to the President of the Supreme Court concerning all matters pertaining to his scope of competence was already a subject of dispute at the National Round–Table Negotiations.[8] With respect to judicial independence, this option was eliminated as pursuant to the comprehensive Amendment of the Constitution in 1989.

– In view of the text of the Draft Amendment of the Constitution of 29th May, 1989, the standpoint according to which the President of the Supreme Court shall not be accountable to report on the work of the Supreme Court to Parliament was formulated at the National Round–Table Negotiations. That took effect as pursuant to the comprehensive Amendment of the Constitution in 1989.

– The document issued by the Ministry of Justice on 30th November, 1988 on the Conception of the Regulation of the New Constitution of the Hungarian People's Republic was the first one to propose in an official form that the system of the judicial administration, by way of the reinforcement of the competence of autonomous judicial bodies or setting up new ones, should be reconstituted so that its functioning (guaranteeing the material and personnel conditions of the administration of justice) could not be an instrument of intervention into issues of content in the administration of justice. The significance of judicial self-government and, for instance, the necessity of the establishment of the National Judiciary Council was emphasised also under the Resolution of Parliament of 9th March, 1989 on the Principles of the Regulation of the Constitution of Hungary. The comprehensive Amendment of the Constitution of 1989 disregarded that issue, however, the systematic establishment of the self-government of courts commenced as pursuant to the Amendments of Act IV of 1972 on the Courts in the course of the legislation of the 1990s. The competence of the Minister of Justice to supervise the general functioning of courts was terminated under Act XLII of 1989, whereas Act LXVII of 1991 legalised the operation not only of the Plenary Session of the Supreme Court, Divisions of the Supreme Court and county-metropolitan courts, but of new bodies of judicial self-governments (county–metropolitan judiciary conferences, county–metropolitan councils of judges elected by the judges out of the judges

[8] *Ibid.* 87. and following.

and the National Judiciary Council), too, which had a major role in formulating the decisions concerning the administration of courts. However, it was Act LIX of 1997 amending the Constitution that entailed a complete "breakthrough" concerning the administration of courts, according to which the central administration of courts shall be exercised by the National Council of Justice as the successor of the National Judiciary Council. As pursuant to Act LXVI of 1997 on the Organisation and Administration of Courts that replaced Act of IV of 1972, it's chaired by the President of the Supreme Court and its members are: 9 judges (elected for a term of six years by the delegate conference of the judges), the Minister of Justice, the Attorney General (Prosecutor General), the Chairman of the Hungarian Bar Association, and two MPs appointed by the Budgetary and Financial as well as Constitutional and Justice Committees in Parliament. Its decisions are reached by majority vote. Simultaneously, the authorisation of the Ministry of Justice to administer courts was terminated in an unequalled manner among European states, which led to the full autonomy of courts in the scope of administration. This solution obviously promoted the prevention of potential exertion of external pressure on judicial administration of justice, even if it could accommodate several irregularities, since this way, among others, the scope of responsibility of the Government did not pertain to the keeping in operation of courts, the management of problems related to finances, infrastructure and staffing any longer. With regard to the fact also that according to the Amendment as pursuant to Act XLVI of 2002, the Government shall table to the Parliament the proposal for the annual budget of the courts framed by the National Council of Justice without modifications.

– In the course of constitutional changes, the reinforcement of personal guarantees for judicial independence was of necessity also highlighted. The Conception of the Ministry of Justice issued on 30th November, 1988 emphasised, e.g., that the Constitution had to stipulate that the judges could be exempted, suspended, transferred from office or discharged with pension against their will exclusively upon the proposal of the competent judicial self-government body, on the grounds stipulated by the respective law. That was the starting point for the Resolution of Parliament adopted on 9th March, 1989 on the Principles of the Regulation of the Constitution of Hungary, too. Eventually, that was substantiated by the respective provision of the Constitution reformulated under the comprehensive Amendment of the Constitution of 1989 that stipulated "Judges may only be removed from office on the grounds and in accordance with the procedures specified by law." Then, at the beginning of the 1990s, the Amendments of Act of 1972 on the Courts introduced a more and more meticulous reformulation of the grounds and the procedure in view of judicial independence, however, it developed into a system of guarantees

"devoid of defects" as pursuant to Act LXVI of 1997 on the Organisation and Administration of Courts and to Act LXVII of 1997 on the Legal Status and Remuneration of Judges and their further amendments. The latter enumerated the possible grounds for the exemption of judges, among others such as those on account of which the judges may be exempted from office even against their will. These reasons may be recognised without reservations, are generally circumscribed objectively and determined without the possibility of discretion (e.g. grounds for exemption may be that the judge has reached the retirement age of 70). In such cases, a proposal for the exemption of a judge shall be tabled by the National Council of Justice to the President of the Republic for taking decision after it has received the opinion of competent bodies of judicial self-government. However, it is remarkable that in case the reason for exemption is circumscribed by law with "vague" legal concepts that substantiate discretion, the proposal for exemption may be drafted on condition that prior guarantees have been exhausted. Namely, if the judge has become permanently incompetent for the fulfilment of his office, the President of the County (Metropolitan) Court, of the High Court or of the Supreme Court shall demand in writing that the judge resigned from his office. In case the judge fails to comply, in a medical case his state of health shall be examined, in case a professional ground obtains, an anticipatory evaluation of his work shall be ordained. In a case of the establishment of professional incompetence judicial review is admissible. It is only afterwards that the National Council of Justice, considering the opinion of the competent body of judicial self-government, too, may submit the proposal for the exemption of the judge from office.

The Establishment of the Constitutional Court

The necessity of guaranteeing the protection of the Constitution has been on the agenda since the adoption of the first modern constitutional charters. What has been assigned special significance was to ensure the prevention or elimination of the breach of the Constitution with respect to law-making, since the application of unconstitutional legal rules may lead to massive breaches of the Constitution.

In the course of development, in several countries various organisations or mechanisms were institutionalised to ensure the exercise of a *prior* and a *posterior* norm control, so that the constitutionality of law could be guaranteed. Among the solutions adopted with respect to a *posterior* norm control, the most efficient were those, which, for instance, endeavoured to promote the review of unconstitutional legal rules, not via the framework of law-making, but via impartial, independent organs, the courts.

It is remarkable that in modern legal systems, the system of judicial concrete norm control has been established since the *Marbury v. Madison* Decision of the U.S. Federal Supreme Court in 1803, according to which all courts have the power to examine the constitutionality of the relevant statute in a particular case and if it is found unconstitutional, it shall not be applied in that case. Such cases then usually reach supreme courts via appeals, thus the final judgement concerning the applicability of the law is made either by the Supreme Court of the member state, or in cases pertaining to the federal Constitution, by the Federal Supreme Court. This court shall not make a decision on the annulment or repeal of any law with a general effect, however, a peculiarity of the American legal system is that any legal rule that is found unconstitutional with respect to a case shall become dead letter. Unless the Constitution is amended or the court modifies its standpoint, it may not be applied by courts any longer. In U.S. law, the principle of "stare decisis" is generally recognised, which means that it is mandatory for lower courts to adopt the precedent established by a higher court. Throughout the development of law on the European continent, e.g., in Hungary during the period between 1869 and 1949, there were opportunities for reviewing the constitutionality or lawfulness mainly of decrees in the process of application of the law by courts, as well. However, devoid of the direct binding force of precedents, the system of judicial concrete norm control manifest in setting aside the application of unconstitutional legal rules proved to be hardly applicable without the injury of the uniform application of the law and legal security. For the consequential assurance of the constitutionality and lawfulness of legal rules, such a solution was needed that facilitated that organs independent of any other organs, i.e. courts could make decisions on the annulment or repeal of unconstitutional legal rules abstractly with general binding force.

Disregarding the fact that in some countries ordinary courts (e.g. in a certain scope in Switzerland) or administrative courts (e.g., in France with respect to decrees) have been authorised to exercise abstract norm control, in the Post-2nd World War decades, more and more countries followed the model of the Constitution of Austria of 1920, so far as independent constitutional courts have been authorised to perform that duty, because the judicial review of legislation was considered a function of law-making, rather than of jurisdiction. Ordinary and administrative judges have competence for jurisdiction and "implementation" of law. In continental Europe assigning judges the task of lawmaking (at least "negative" lawmaking), which is an indisputably political task, would have contradicted their professional training, way of thinking and all prevalent traditions. Featuring the courts that administer justice as politically involved bodies would not have been a propitious choice with respect to public

opinion. The requirement of the division of state powers could also have affected the establishment of independent constitutional courts in the sense that constitutional judicature should not result in the concentration of powers at courts administering justice. Besides, in several countries the expectation to set up a new, higher and distinguished body also substantiated the establishment of a separate constitutional court, which in the field of the control of the government may be authorised not only to review the constitutionality of legal rules, but also to perform other tasks, such as holding high-ranking state officials responsible (so-called "state judicature"), and pronouncing judgement in case of conflicts between supreme state bodies, state units in federal states, etc.

The Hungarian constitutional system established in 1949, similarly to other socialist countries, did not institute the possibility of judicial review of Acts and other legal rules. It was particularly the competence of judicial organs to decide on the constitutionality of Acts that was deemed inadmissible. This conception was theoretically based on the principle of authorisation the supreme body of state-power and representation of the people for the exercise of all powers, i.e., if an extra-parliamentary body had the competence to decide on the constitutionality of various Acts of Parliament, this body would overreach the competence of the Parliament and violate the principle of the sovereignty of Parliament. However, there were practical reservations also concerning constitutional jurisdiction, first and foremost, that its establishment could become "an impeder of revolutionary legislation". As a consequence, the legislative organs within the scope of their law-making power could decide on the annulment or amendment of law deemed to be unconstitutional or unlawful. Neither did the comprehensively amended Constitution of 1972 change that situation, which, for instance, specifically stipulated that Parliament and the Presidential Council are responsible for guaranteeing the observance of the Constitution. Nevertheless, the law-making bodies (or their supervisory bodies) did not exercise *de facto* norm control, apart from some exceptions concerning local council law–making, although, its urgency became more and more apparent, firstly, in view of the volume of the effective and constantly amended legal materials of 10–20 thousand pages requireing to correct at least inevitable faults of regulation techniques and secondly, of meeting demands concerning constitutionality certainly asserted after 1980. This conveyed the idea that for the professional promotion of the work of law–making bodies competent to exercise norm control, a so-called Council of Constitutional Law attached to the Parliament should be established that was not competent to terminate unconstitutionality, however, it could initiate that law-making bodies with competence reviewed a legal rule or a normative legal directive in case their unconstitutionality was established. In its own scope of competence,

it could only stay the implementation of unconstitutional provisions of a legal rule or of the directive with the exception of Acts, law–decrees and general norms of interpretation binding courts set forth by the Supreme Court. This body set up as pursuant to Act II of 1983 amending the Constitution and to its implementing Act I of 1984 consisted of 11–17 members, who were mostly MPs and other public figures [generally experts of (constitutional) law] and were elected by Parliament for one parliamentary term. In case of the establishment of unconstitutionality, it could proceed on its own initiative or on that of authorised state bodies, state officials, among them MPs, supreme national organs of social organizations, national organs representing interests of state economic organizations and organs of co-operatives. The direct initiation of the procedures by those, who had positive claims or were positively interested in the review of the constitutionality of legal rules, was not allowed. However, besides these limitations on competence and procedure, what accounted for the fact that the Council of Constitutional Law could barely perform its mission, was primarily the mistrust of the leading political and state organs, which were "offended" by reason of the control exercised over their law-making activity, which restrained the actual operation of the Council of Constitutional Law. Throughout its five–year operation with eleven board sessions, the Council put issues of constitutionality on its agenda ten times and unconstitutionality was established on merely five occasions.[9] Thus, by the second half of the 1980s, it became manifest that the amplified review system of the constitutionality and lawfulness of legal rules still based on the decision-making power of legislative bodies was barely working and the system of norm control was quite inoperative without providing guarantees for independent proceedings. Which explains why in the midst of highly variable political circumstances the Constitution as amended by Act I of 1989 referred to the establishment of a Constitutional Court authorised to annul unconstitutional legal rules and normative legal directives with the exception of Acts.

In the course of drafting the new Constitution, the document issued by the Ministry of Justice on 30th November, 1988, the Resolution of Parliament adopted on 9th March, 1989 as well as the Draft Act of 29th May, 1989 amending the Constitution all took into account that a Constitutional Court will be part of the new constitutional system. In case unconstitutionality is established by the Constitutional Court, it shall have the power to suspend the enforcement of Acts until an opposing qualified majority decision is reached by Parliament, furthermore, to annul legal rules of lower rank. The question, however, whether citizens should be allowed to initiate proceedings by the

[9] *See*, Holló: *op. cit.*, 15. and following.

Constitutional Court, and if so, in which cases, has been left open. Reasonably, these were the issues concerning the Constitutional Court in the new constitutional system, on which the various standpoints most powerfully clashed at the National Round–Table Negotiations following the withdrawal of the Draft Acts amending the Constitution and on the Constitutional Court in June. The Opposition Round–Table consistently maintained that the Constitutional Court should have the power to annul unconstitutional Acts also and that any citizen could initiate proceedings for the review of legal norms with the potential introduction of filtering mechanisms.[10] Basically, this conception was affirmed subsequently both under the comprehensive Amendment of the Constitution of 1989 and under Act XXXII of 1989 on the Constitutional Court implementing the Constitution. As pursuant to these Acts, the Constitutional Court could start its work on 1st January, 1990.

The Constitutional Court, as pursuant to Act LXXIV of 1994 amending the Constitution, consists of 11 Judges. The Judges of the Constitutional Court, who may be once re-elected, shall be elected for a term of 9 years by Parliament with a qualified majority vote of the MPs. The members of the Constitutional Court are independent and their decisions shall be made exclusively in compliance with the Constitution and other law. In cases specified by law, they proceed at plenary sessions or in three-member boards.

The Constitutional Court exercises a *prior* and a *posterior* norm control and also proceeds in public law disputes as pursuant to the Constitution or other law. For instance:

– The Constitutional Court shall implement review of Acts adopted by Parliament prior to promulgation upon the motion of the President of the Republic; the Procedural Rules of Parliament upon the motion of Parliament; the unconstitutionality of international agreements before their conclusion upon the motion of Parliament, the President of the Republic or the Government. (Until the Amendment of 1998, it also had the power to review the constitutionality of bills on the motion of Parliament, of its standing committee, or of fifty MPs.)

– The classical powers of the Constitutional Court include a *posterior* review of the unconstitutionality of legal rules and norms for state direction other than legal rules. Uniquely among European countries, the Hungarian Constitutional Court shall be authorised to do so on the petition of anybody without being personally concerned. The circumscription of this form of petition, which anybody is entitled to resort to, by the introduction of "filtering mechanisms"

[10] Bozóki, A.–Elbert, M. et al. (eds.): *A rendszerváltás forgatókönyve. Kerekasztal-tárgyalások 1989-ben* (The Dramaturgy of the Political Transformation. Round–Table Negotiations in 1989). Vol. 6. *op. cit.*, 169. and following.

has been recurrently proposed, however, it is obvious that the petitions of citizens seeking redress by reason of injury via unconstitutional legal norms may not be precluded by the introduction of such mechanisms. As a matter of law, as a result of a *posterior* norm control, the Constitutional Court could fully or partly annul the unconstitutional norm (Acts included). Norm shall generally lose its validity on the day of publication of the decision on its annulment, however, the Constitutional Court may stipulate its annulment or inapplicability in a specific case on a different date, so far as that is substantiated by the interest of security of law or of the particularly important interest of the party who initiates the proceedings. The Constitutional Court shall always provide for the review of criminal procedures concluded with a final decision based on the application of an unconstitutional norm, in case the convict has not been exempted from adverse consequences, and if from the annulment of the provision applied in the proceedings resulted either in the reduction or dispensing with the penalty or the measure, or in immunity from or limitation of liability.

– The Constitutional Court shall examine *ex officio* or on the motion of state organs specified by law, officials in high public offices or any MP, whether any legal rule or norm for state direction other than a legal rule contradicts an international agreement promulgated by a Hungarian legal rule.

– The Constitutional Court shall consider constitutional complaints, which those concerned are entitled to file in by reason of the injury of their constitutionally guaranteed rights on condition that the injury of their rights was incurred by the application of an unconstitutional legal rule and that they have already exploited all available instruments of legal remedy or they are not granted other instruments of redress. In such cases, the Constitutional Court shall annul the applied unconstitutional legal rule or its provision. If it simultaneously establishes the inapplicability of the legal rule in a particular case, there is an opportunity for remedy in the particular case that substantiates constitutional complaint so that the competent judicial or administrative organ which proceeds may not apply the unconstitutional norm when considering the case of available extraordinary remedy.

– If the Constitutional Court *ex officio* or on any motion establishes that the law–making body has failed to fulfil its duty of law-making deriving from legislative authorisation and that has incurred unconstitutionality on the grounds of omission, it shall summon the body to perform its duty by determining the deadline.

– The Constitutional Court as a "court of competence" – apart from courts – shall make decisions concerning conflicts of competence arising between state organs, between local self-governments and state organs, furthermore, between local self-governments.

– The Constitutional Court, on the motion of state organs and officials in high public offices prescribed by law, shall officially interpret the provisions of the Constitution abstractly.

– The Constitutional Court may proceed in further scopes of power specified under the Constitution and other Acts, for instance, if certain conditions stipulated under the Constitution obtain, it shall make a decision concerning the impeachment of the President of the Republic.

In a summary, we may assume that during the political transformation the trustworthy legal prerequisites of protection of the Constitution and of review of unconstitutional law have been formulated in Hungary via the establishment of the Constitutional Court and the meticulous definition of its structure and competence. Moreover, the new democratic political system did not impose again actual restrictions on the fulfilment of duties of the Constitutional Court set forth under the Constitution and other law, despite the professional–political disputes concerning its work. That is also manifested by the fact that in recent years, according to the figures of 2002, the Constitutional Court, in compliance with its main duty, annulled several legal norms, among them 139 Statutes and statutory provisions deemed as unconstitutional.[11] These account for the fact that the development of constitutional law has reached a new phase, in Hungary, too, where the provisions of the Constitution have been transformed from "constitutional common decencies" into real, legally sanctioned rules of conduct.

[11] *Az Alkotmánybíróság által alkotmánysértőnek minősített törvények, illetve törvényi rendelkezések (Statutes and Statutory Provisions Declared as Unconstitutional by the Constitutional Court)*. Xeroxed Manuscript, Legal Department of the Office of Parliament, 4th July, 2002. 20.

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Legal Traditions?

In Search for Families and Cultures of Law

Abstract. Since the waning of the world concept offered by classical physics, law is seen as embodied less by material objects any longer than in a specific way of thinking. Consequently, the normativist perspective of legal positivism is also getting replaced by the comprehension of law in context of culture and tradition. In its own context, any of the terms of 'system', 'family' or 'culture' can be applied independently from each other but it is to be noted that 'tradition' is at the same time both a part and a given path of culture. In legal thought, concrete and generalising (abstract) ways of thinking are equally recoursed to, just as types which search for a solution either in the case's terms in its entirety or in the exclusive bounds of the given normative conceptual framework. It is only Western law that has become differentiated out of the rest, when individualism advanced and thinking in term of subjective rights grew into a dominant pattern, contrasted to our primitive (albeit surviving) approach to law which also expects, in addition to external conformity, the realisation of the law's internal ethos based on own initiative. English law, however, has revealed its face only gradually, as it has factual decisions made through an only-processually-arranged laic (jury) process while it has bound the declaration of what the law is to such facts of the cases among which no logical relationship can be established. In Civil Law, the treatment of adjudication as argumentation, and in Common Law, as practical reasoning, led the judicial process into a sphere only smoothly controllable by logic. Jewish and Islamic laws accept contradictory arguments from the outset. As to Indian and Far-Eastern cultures, they reject even the underlying question to be raised. This way, in legal problem-solving the assessment of the merits of the case and the recourse to a reductive procedure can complement one another on the basis of some compromise. Institutionalisation itself is, as it channels the legal problem-solving to given paths, a function of a previously formed idea of order, of a given mentality. Our legal theorising today is built mostly separatedly either on the classification and interpretation of facts or on the re-conventionalisation of the philosophical generalisation of concepts, with little interaction between the two types of approaches and research attitudes. Therefore, in order to encourage debate and commensurability, it is important that notions of law, at least tacitly assumed to substantiate their choices of subject, are clarified.

Keywords: families of law, legal cultures and traditions, understanding of law and judicial mind compared, Civil Law and Common Law, Jewish law and Islamic law, chtonic laws, Asian laws

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The epoch of the ingeniously simple conception of the universe, offered by classical physics, seems to have been waning for long. For our reality can be pictured from *Newton* to almost today as consisting of sets of particles, bound together to an endless interconnection by the chain of causality or quasi-causality. Albeit this image had been temporarily shaken by thermodynamics a century ago, a kind of its replica, broken down to elementary particles this time, re-emerged as restored again, with material aggregates re-organised at a molecular or atomic level. Well, until we could believe in material entities and their given interrelations as suggested by a naturalistic human approach to basic things, we had also an easy job in law. We could perceive rules with a mechanism destined for their enforcement in it, which in our intellectuality could be integrated into an all-comprehensive causality as an independent active force.

By today, our reference points taken for granted so far as secure have been shattered. Consequently, law is no longer for us what it used to be. Its supposed solidity has disappeared and started to slip out of our hands like sand. It is no mere chance that topical subjects for professional interest and research of the type "law and..." have started to appear a few decades ago (first linked to such obvious blocks as "society" and "economy", and then, as "logic", becoming more sophisticated by linkage to "language", and arriving finally at "culture", "patterns of thought" and "communication"), to such an extent that nowadays interest and research sometimes seem to take exactly opposite a direction. We no longer study the environment around law in order to explore it more completely (through more contexts of it). Instead, we focus our examination on the latter, that is, on the "and..." elements, hoping to acquire more profound knowledge perhaps also about law if we start out from them. This is how the living culture (fomenting also its corresponding ideal of order) is getting into our primary sphere of vision as the factor conditioning the law (instead of the reified view of mere rules); and the very thought of a rigidly formal, conceptual application, reduced to some merely mechanical logicism, is on the way of being replaced by the very idea of human problem-solving, pondering in a responsible way and eventually aiming at an optimum and disciplined balancing among mostly contradictory interests and values, through channelling the entire process to given paths.

All this has not left the chances of comparison unaffected either. It could indeed even strengthen its historical dimension, just because forms of thought apparently obsolete, or made esoteric and often forgotten, could in result of this become current again, supporting kinds of search for a way out.

(1 Comparative Law and the Comparative Study of Legal Traditions) By transcending the limits legal positivism has set for itself, the law's internal

self-description is replaced by a description within an external (socio-historical or sociological or cultural anthropological) framework. Confronted today, on the threshold of the new millennium, with the recurrent job of rewriting textbooks inspired by the pattern of René David's classic *Les grands systèmes de Droit contemporains*, one is faced with a dual choice: either to accept David's loosened positivism by overviewing various legal families or to take a wider socio-historical framework as a starting point. According to trends having evolved so far, opting for the second alternative offers again two paths to choose from: either grounding one's approach by the underlying *culture*, as the law's natural medium, or, by unfolding the roots of various (legal) cultures, one starts investigation through (legal) *traditions* themselves.

Summarising the valuable results of several decades devoted to comparative study in a novel global synthesis, H. Patrick Glenn, lecturing on comparative Civil Law and Common Law at McGill University in Montreal, undertook the task of surveying and philosophising upon the various traditions having survived and still living in our diversified legal world.* In fact, he mapped out the typifiable legal civilisations alive today in some co-existence with one another. On completion of a largely comprehensive analysis, his expressed purpose was to consider the strength of traditions underlying legal arrangements as parts of the intellectual treasure and social experience of mankind, their ability for change, renewal and association with other traditions, on the one hand, and the sustainability of their diversity, the synergy of traditions formed by different sorts of logic in both their development and functioning, on the other.

The *opus*, awarded the Grand Prix of the International Academy of Comparative Law in 1998, captivatingly rich in ideas with countless enlightening discourses and conceptual developments relating to partial issues as well (not only processing the abundance of literature as well as data on law, development of ideas, diversity of cultures, etc., but also elaborating them analytically), also offers a uniquely fascinating piece of reading. The reader may find a most integrative presentation of the kinds of law and legal thinking in the overview of the Chthonic, Talmudic, Civil Law, Islamic, Common Law, Hindu, and Asian legal traditions. All this is done in a way worthy indeed of its subject, essayistically and impressively, at the same time in a charmingly philosophical engagement, so that the reader rejoices to encounter the finest virtues of English legal historical writing, showing not merely the law's irreducible cultural historical embeddedness but also the collective impact of intellectual

* Glenn, H. P.: *Legal Traditions of the World: Sustainable Diversity in Law*. Oxford–New York, 2000.

and moral traditions in the doctrinal and practical, belief-laden and values-focussed problem solving.

At the same time, the suspicion may arise that it is primarily in the author's essayism and his challenging way of opening stimulating new vistas that the old positivistic description of legal families expands to the treatment of legal traditions. His developments are, no doubt, integrated into one unified view. Starting from the analysis of tradition as such, taken as the originary source of inspiration and framework of imagination, the book introduces traditions underlying the various arrangements of law as case studies (worth of a monographic consideration in themselves), to arrive at a thorough pondering upon the commensurability and sustainability of diversity. The venture is novel on the whole but without the force convincing that he has actually surpassed the culturally grounded historico-comparative ideal at work behind the style of positivistic description linked already to René David's one-time endeavour. The introductory and concluding chapters assess the force of traditions with powerful accents. However, his intention of drawing a panorama presenting all the diversity of legal arrangements in our present world as derived from identified legal traditions does not reveal characteristics of traditions that could not be traced back to what we commonly call legal families. All in all, his *captatio benevolentiae* interest in identifying legal cultures as traditions and categorising the diversity of legal arrangements as differing traditions may hold the promise of a truly remarkable innovation, albeit the question of how and in what respect, why and with what results he innovates is not answered. More precisely, the job is tacitly left to the drawing of the evolutionary map of the diversification of legal development, which will however keep silence even in the (more implied than manifest) criticism of the category of 'legal family'. Moreover, also the issue whether or not legal tradition is a synonym of legal culture and how they are related is left unanswered.

(2 'System', 'Family', 'Culture', and 'Tradition' in the Classification of Law)
After all, what conceptualisations do we recourse to when we speak about the world's legal systems in general and their various groupings in particular?[1]

[1] It is indicative of the general uncertainty about methodological foundations that when the classifying characterisation of phenomena is at stake, taken as unfolding from a given substance and perceivable in varying forms, of social constructions gradually conceptualised as mutually related members of the same entity, growing from the millennium-long co-existence and mutual impact of in-themselves merely historical accidentalities, it may be considered as a new realisation–as, e.g., in Husa, J.: Legal Families and Research

The distinction of *'system of law'* and *'legal system'* spread over (in English-language literature, first of all) after the emphatic separation of positivistic and sociologistic approaches. 'System of law' seems to refer rather to the normative stuff seen in its mutual correlations (mostly as a textual aggregate, or at least as derivable from the textuality, of positivations, regulations and official expectations), while 'legal system' is to focus on the functioning (actually assessed as a usually coerced) whole. (It is to be noted that expressed in common terms, this does not imply other theoretical message than the conceptual duality of 'law in books' and 'law in action', once proposed by American pragmatic legal sociology.[2]) Due to the notion of system, both 'system of law' and 'legal system' do differ from 'law' [or *'droit'* or *'Recht'*, but not 'a law' or 'the law'] in that law as a whole in one organised unity is emphasised by them. Or, they are certainly not used to describe either optional fragments or partial manifestations of the law. However, the categorial distinction between these possessive and attributive expressions has not become widespread beyond English professional usage. (In Hungarian, *'jogi rendszer'* [standing for 'legal system'] sounds quite artificial and is therefore less used than *'jogrendszer'* ['system of law'] and *'jog'* ['law'] itself, taken almost as synonyms.) This may be the reason why both (as 'les grands systèmes de droit', and 'the major legal systems') can appear as a most widespread generic sense, without telling in the textbooks themselves anything more about the specific motive of why opting for the one or the other expression as the right title.

The term *'legal family'* [*'Rechtskreis'*] has fortuitously become integrated into our scholarly language,[3] as it suggests a kind of resemblance and relatedness (albeit not specified in detail), which is mainly (but not exclusively) based on common origins. It is no mere chance that 'legal family' is neutral descriptive a notion, assuming no special dynamism or activity about its subject. This arose as a key word in the movement of comparative law, searching for an intermediary classifying category between the individual (domestic) arrangements and their total aggregate in the mapping out of the world's laws (once formed in history or still extant). Therefore, in itself it suggests hardly anything more than the term 'family resemblances' do in linguistic philosophical

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in Comparative Law. *Global Jurist Advances*, vol. I. 2001/3. 4–that, at the most, a proposition of a *Weber*ian ideal type can be achieved at all.

[2] Pound, R.: Law in Books and Law in Action. *American Law Review*, vol. 44. 1910/1.

[3] E.g., Kötz, H.: Abschied von der Rechtskreislehre? *Zeitschrift für Europäisches Privatrecht*, vol. 6. 1998. 493–505.

analysis:[4] certain similarities factually common to varied entities, inter-related in one way or another. Accordingly, 'legal family' is a category of law in so far as specific distinguishing features [*differentia specifica*], suitable for classification [*classificatio*] amongst various legal orders, are to be emphasised.[5]

In contrast, the term *'legal cultures'* [*'cultures juridiques'*, *'Rechtskulturen'*] stands for an operative and creative contribution, through social activity rooted in underlying social culture, to express how people experience legal phenomenon, conceived as a kind of objectified potentiality, how and into what they form it through their co-operation, how and in what way they conceptualise it, and in what spirit, frame and purpose they make it the subject of theoretical representation and operation. At the beginning, it was sociological interest that brought the conceivability of such an interest into jurisprudential thought. As the first step, sociological jurisprudence described the entire process by concluding to 'law in action' as discerned from 'law in books',[6] then jurisprudential analysis revealed the "enchantment" and "transformation" between the end-poles, to characterise law as a factor and medium of exerting influence from the point of view of its operation mechanism, i.e., its specific make-up and way of functioning, that is, as expressed figuratively, its "thinking" and "logic".[7] Accordingly, in an exclusively descriptive sense, confined to the value-free factuality of sociology, it can carry any general or particular (e.g., professional) ideology and conceptual culture (presuppositions, sensitivity, diversity), as well as determination, skills and professional socialisation within its "world outlook". Thus, dedicated to the mere description of underlying conditions, conceptually it lacks any developmental or derivational perspective, excludes comparison and evaluation, as much as even eventual regression or

[4] Cf., e.g., Bambrough, R.: Universals and Family Resemblances. *Proceedings of the Aristotelian Society*, vol. LXI. 1961. 207–222.

[5] For more in details, cf. Varga, Cs.: *Theatrum legale mundi* avagy a jogrendszerek osztályozása [Theatrum legale mundi, or the classification of legal systems]. In: Szilágyi, I. H.–Paksy, M. (eds.): *Liber Amicorum: Studia Z. Péteri dedicata (Studies in Comparative Law, Theory of State and Legal Philosophy)*. Budapest, 2005. 219–244.

[6] The definition by Van Hoecke, M. and Warrington, M.: Legal Cultures and Legal Paradigms: Towards a New Model for Comparative Law. *The International and Comparative Law Quarterly*, vol. 47. 1998. 498 is quite insufficient, because characterising law as culture merely by reference to the social practice by the legal community is stuck at the conceptualisation of *Roscoe Pound.*

[7] In one of its first formulations, "cognitive structure" in Legrand, P.: European Systems are not Converging. *The International and Comparative Law Quarterly*, vol. 45. 1996. 52–81, especially at 60, and in his subsequent works, more and more definitely taking it as an entire established "mentality".

degeneration. As opposed to such a *sociological* sense, its *cultural anthropological* understanding stems from the idea of some common social origin; and by gradually (historically and professionally, i.e., in a *Luhmann*ian sense, differentiatingly) narrowing this–taking legal culture as a general mode of thinking, underlying world-view, motivation and purposefulness, as well as skills–, it arrives at a given (state of) professional culture. At the same time, this sense presupposes a certain amount of dynamism with the mechanism of effects in mutual relations in reverse directions. On the other hand, the part always remaining the component of a broader whole, legal culture too is inevitably embedded in the general social culture, being formed in interaction with it. On the other, the parts and the integrating whole are themselves the momentary issue of a complex total movement with varying potentialities of evolutionary derivation and connection, and, as such, can be evaluated in the light of their originally decisive qualities as showing, as the case may be, even degeneration and defection. There is a feature common to them all, namely, that 'legal culture' addresses not so much law but the social intellectuality underlying (as a usual expectation towards) law, in the spirit of which legal phenomena at any time happen to emerge and get used in both theory and practice. Or, 'culture' builds a bridge between man's desanthropomorphising objectivations and his increasingly socialising ideology, taking the former back within the realm of the specifically human.[8]

'Legal tradition' as a concept can be interpreted exclusively within legal culture.[9] Tradition is the awareness of an earlier inherent pattern of culture, taken as the source of and inspiration to community identification, with the

[8] For its contrasted understandings, cf., from Varga, Cs.: [Comment to The Notion of Legal Culture.] In: Feest, J.–Blankenburg, E. (eds.): *Changing Legal Cultures.* Oñati, 1997. 207–217. [Oñati Pre-publications–2.–reprinted as Comparative Legal Cultures: Attempts at Conceptualization. *Acta Juridica Hungarica*, vol. 38. 1997/1–2. 53–63.] as well as Összehasonlító jogi kultúrák? [Comparative legal cultures?]. *Jogtudományi Közlöny*, vol. LVI. 2001/10. 409–416, both reflecting upon the disciplinary choice raised by the differing paths of Varga, Cs. (ed.): *Comparative Legal Cultures.* Aldershot, Hong Kong, Singapore, Sydney and New York, 1992. [The International Library of Essays in Law & Legal Theory: Legal Cultures 1.] and Gessner, V.–Hoeland, A.–Varga, Cs. (eds.): *European Legal Cultures.* Aldershot, Brookfield (Vanderbuilt), Singapore and Sydney, 1996. [Tempus Textbook Series on European Law and European Legal Cultures I.], respectively.

[9] At a conceptual level, this was already pointed out by Merryman, J. H.: *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America.* Stanford, 1969. 2, where he states that legal traditions correlate legal systems to the cultures whose partial expressions they are, and place the notion itself into a cultural perspective.

demand for continuity as an encouraging or justifying power. Thus, 'legal tradition' itself is relational a concept, the issue of a specific relation. For tradition as such is neither a piece nor an aspect of the past. Moreover, in itself it is not longing for external or internal certainty, nor a search for confirmation or showing a way out. It is just the encounter of the two sides involved, notably the selection of a segment of the past or the qualification of a feature attributed to it, in order that the present, viewed from a future's perspective, can be linked to the past as worthy of continuation, because of the latter's inherent values. By the way, exactly in the manner of a fact that can only be »established«,[10] tradition can only be referred to, providing that we need and thereby we can also realise its extended impact and axiological continuity. Accordingly, there is not much use proclaiming that, for example, "chthonic societies did not function in terms of culture. They functioned in terms of tradition."[11] For in addition to logical inclusion, the two poles represent conjunctivity in reciprocity, which simply excludes any disjunctivity. Or, in a more sophisticated formulation, all we can claim is that indeed, in some societies there has been (or was) a culture of cultivating tradition, while in others–perhaps–something else is (or was) practised.

Consequently, the bare fact that the comparatist undertakes the thorough investigation into the *Legal Traditions of the World* scarcely means anything more or else than–correctly–identifying, as a feature rather typical exactly of law, a special adherence to past patterns (in a way sometimes reified up to the extreme, through erecting wholly artificial–artefactual–formalisms and automatisms, at times guaranteed by expressly alienating mechanisms). And the very circumstance that implementing culture exactly this way we are "failing to identify any particular factors that can be seen to be making a difference"[12] may only imply that the notions of culture and tradition present law in the medium and perspective of the consciousness of man's social action.

Well, in such broad outlines, the culture of the observance of traditions is an uninterrupted creative process, in the course of which the recognition of human necessity will select, with a force normative to the entire community, from the store (dead in itself) of lessons drawn from the past.[13] And this tells

[10] Cf. Varga, Cs.: *Theory of the Judicial Process: The Establishment of Facts.* Budapest, 1995.

[11] Glenn: *op. cit.*, 66.

[12] Cotterrell, R.: The Concept of Legal Culture. In: Nelken, D. (ed.): *Comparing Legal Cultures.* Singapore–Sydney, 1997. 20.

[13] "Things [...] do not speak [...] so a particular receptivity is called for in learning of the past from its capture in things." Glenn: *op. cit.*, 7.–"Tradition is never acquired, it is

us about the roots of thinking rather than about its eventual outcome, as in point of principle it does embrace the factors breeding change in continuity too.[14] Or, tradition is not a passive medium but the social construction of man (in constant building as his second nature), in which he contextualises his uninterrupted creative presence on the terrain of his self-identity within the boundaries of his self-discipline in the dual pressure of continuance and change.[15] For exactly this reason, it serves as the final basis for any comparison and judgement. Therefore no further foundation is required. Whatever shall be regarded as a criterion, its acceptance can only be ensured by the culture of tradition.[16]

(3 Different Traditions, Differing Ways of Thinking) The survey in question has offered a more comprehensive picture of various legal families and their underlying legal cultures owing to the fact that the author himself has been primarily interested in the exploration of the ways of thinking operating the legal arrangements concerned. How does the power of tradition manifest itself in those various legal cultures?

In *chthonic* regimes, the priority of collective interest over the individual one with emphasis upon consensus (instead of enforcement) had developed a

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always being acquired." Wieseltier, L.: *Kaddish.* New York, 1998. 259.–"Law is essentially a tradition, that is to say something which has come down to us from the past". Simpson, A. W. B.: *Invitation to Law.* Oxford, 1988. 23.–"Traditions are not self-created; they are consciously chosen [...]. We tend, therefore, to choose that which suits our present needs". Thapar, R.: Tradition. In: Thapar, R.: *Cultural Transaction and Early India: Tradition and Patronage.* Delhi, 1994. 23.

[14] It is "procreative of change" {Friedrich, C. J.: *Tradition and Authority.* New York–Washington–London, 1972. 39. [Key Concepts in Political Science.]}, as "legal tradition is not conservative in principle" {Atias, Chr.: Présence de la tradition juridique. *Revue de la recherche juridique*, vol. 22. 1997. 387.}

[15] It is no mere chance therefore to describe it as retroprojection, because in tradition "we choose what we say determines us and we present ourselves as heirs of those we have made our ancestors". Muñoz, L.: The Rationality of Tradition. *Archiv für Rechts- und Sozialphilosophie*, vol. 67. 1981. 197 et seq., quote on 203. Consequently, in it "The past is mobilized to invent a future" Tourraine, A.: *Pourrons-nous vivre ensemble? Égaux et différents.* Paris, 1997. 49.–This explains its proximity to *social self-identity.* For according to the classical outline of sociology, "above all it is the idea that it has of itself" which is constitutive of society [Durkheim, É.: *The Elementary Forms of the Religious Life.* London, 1915. 422.], which, in present-day view, is mostly rooted in connections suitable to comparison. Glenn: *op. cit.*, 31–33.

[16] "There is no view from nowhere, no possibility of judgment from without a tradition, in reliance on ultimate, non-traditional criteria." Glenn: *op. cit.*, 43.

pattern of thought that operates in concrete terms bound to situations.[17] It is not to be used as a weapon by anyone,[18] all the less since the chief's "power" is hardly more than his ability of encountering consensus, if only because his "power" can only be asserted until successful in fulfilling this very job.

In contrast, legal arrangements with similarly early roots but inspired by *divine revelation* face the dilemma of how to bridge the gap between the historically unique and closed source of the law and its use extended over changing challenges of a number of millennia and civilisations. Therefore their basic issue is whether or not their "gate is closed",[19] that is, whether there are techniques available to allow some degree of openness, loosening and re-consideration, in order to comply with the new challenges. This is why the question emerges: what role can logic, if at all, play in this? Whether or not, can the concreteness of various cases (as opposed to abstraction, characteristic of any theoretical reasoning) appear in it? Does it offer any room for human hesitation, pondering upon the merits of the underlying situation, as well as for the clash of opinions and for the moment of responsive decision, normatively projected from the personal stand taken by the judge as the master of the case? And, to begin at the beginning, may any idea of a personified creator-divinity (legislator in law) become exclusive in such laws, whose will is to be explored and executed as the only source of the law?

On the European continent, this very pattern of legal thought, drawing on divine inspiration in origins, conceived of law as a contractual form (following the openly postulated philosophico-political concept of social contract, presuming the tacit establishment of a political connection), that is, as the expression of

[17] Glenn: *op. cit.*, 67, note 43. Cf. Ong, W.: *Orality and Literacy: The Technologizing of the World.* London–New York, 1982. 51–52.

[18] M'Baye, K.: African Conception of Law. In: Zweigert, K.–Drobnig, U. (eds.): *International Encyclopedia of Comparative Law.* Vol. II. Tübingen–The Hague–Paris, 1975. 138–139.

[19] "The Talmud was never completed"–writes Steinsaltz, A.: *The Essential Talmud.* New York, 1976. 47.–, for what was ever put down in it covers both the past and the entirety of future. Or, "Of course every interpretation that ever will be was known at Sinai, was intended by God". Holz, B. W. (ed.): *Back to the Sources: Reading the Classic Jewish Texts.* New York, 1984. 15.–For a similar presupposition by Islamic law, cf., e.g., Hallaq, W. B.: Was the Gate of Ijtihad Closed? *International Journal of Middle East Studies*, vol. 16. 1984. 3–41, what is expressly confirmed by *Rahman v. Begum* (1995) 15 BLD 34 in Bangladesh (Glenn: *op. cit.*, 187, note 157.).–Hindu legal thought does not even raise the issue as it relies on the all-comprehensive cultural practice of the community, experiencing a continuity, instead of mere abstractions and barely human formalisations. Glenn: *op. cit.*, 270.

someone's will, derived (or logically concluding) from an official source, from the Roman Empire to modern exegesis. For, on the one hand, there are cultures implementing logicism (based on the axiomatic ideal of *mos geometricus*), as, for instance, the Civil law. On the other hand, there are cultures precautious of logic, otherwise speaking, of processing textual representations of the law as theoretical propositions in an epistemological context, as premises to conclusions to be drawn with logical necessity. In cultures with religious traditions and advances in logification as a scientific ideal in the background (e.g., Jewish and Islamic ones), the field of logic may turn to be a less emphatically relevant sphere of legal thought, not to let a thoroughly human definition with logically justifiable generalisations through individual applications replace the originary divine determination. As we can strive for exploring divine intentions at the most, without being entitled to close them back into a categorial certainty, the solution of moral and legal issues remains necessarily a human dilemma in such cultures, by far not excluding the equally defendable conceivability of differing opinions. In secular cultures, in which law is either conceived of as part of the natural world order (e.g., in the Far East) or taken as the value-centred harmonisation of justifiable human reactions (as e.g., in the Common Law), the emphasis is not on a complete and gaplessly comprehensive foresight but on the optimum solution of conflicting situations in everyday life. It is precisely in the gift of human casual problem solving that they experience the mystery of order, the presumption of human righteousness as well as the trust placed in that careful examination of past instances (taken as a closed set or assessing their actuality in the light of the historical particularity of the past challenges) may indeed contribute to the shaping of the future, without predetermining and anticipating, by way of past patterns, its present and coming course and incidentalities.

These are different cultures of thought, sometimes–in addition to underlying traditions–with no specific religious, geographical or meteorological conditions, levels of development or organisations of production (etc.) in the background to explain their actual differences. At the same time, as to their out-put, the respective outcomes may prove to be largely commensurable or (as in Civil Law and Common Law contrasted) even similar, while both the normatively frameworking in-put and the set of operations taking place in the black box of the specifically juridical elaboration of the case–complying with the official expectations accepted in the given culture (as asserted by the prevailing ideology of the legal profession)–may differ from one another, bearing witness to diverging routes.

How is all this possible? And what is it that takes actually place in law, irrespective of any appearance and alleged formal definition? How are then our

expectations towards unambiguity, safety, foreseeability and also calculability fulfilled? Or, putting it exaggeratedly, on the last resort is it law at all that works under the name of the law, through the agents of law? Or, perhaps, do we merely relieve the arbitrary moment of our irreducibly final power to reach a decision to some tolerably viable measure through various mediations (called 'law' in all-covering social institutionalisation), by channelling it upon definite paths and routes?

(4 Different Expectations, Differing Institutionalisations in Law) Well, what turns out about all this in the examination of various legal traditions?

First of all, the burden to be borne by the legal set-up is different in differing civilisations. Where law is part of the community life, it serves for the benefit of the community. Where it is integrated into the salvation history cementing a whole society together, it is not even featured as distinctive. Therefore the debates, formalisations, divisions to "rites" in law are hardly purporting anything more than the ones in theology or moral philosophy. Otherwise speaking, the law is not differentiated: what it demands is demanded by the overall normativity, and that what fulfils it is not simply *outer* conformity (exhausted by the mere restraint from infringements) but a genuine human incentive implementing its spirit, prompted by *inner* initiative. At the beginning, this was the feature of all regimes of law, never questioned in chthonic and Asian laws, and continued in Hindu, Jewish and Islamic laws up to the present day,[20] with only Civil Law and, then, Common Law, breaking away from it in historical time, reviving the common Roman tradition differently. Remarkably, all along this break correlates with the spread of the individualistic view of society and, at a later time, with the growingly fetishising and assertive deduction of rights out of the body of the law–which, it is to be noted, will appear in English law by the 20th century for the first time.[21]

Classical *Jewish* jurisdiction is from the outset built on the parties reconciling themselves to the decision to be made, as declared in advance. This is why no

[20] In Sanskrit, there is no word for 'law', and what the so-called Laws of Manu concern is only the smaller part of Hindu life to be formed from inner ethical motivation [*a'tma tushti*].–In Jewish law, *halakhah* [do not act outside the law] is necessarily complemented by the expectation of *aggadah* [to act inside the law].–In Islam, acts recognised as compulsory, rewarded, indifferent, disapproved and forbidden are distinguished from the outset. Glenn: *op. cit.*, 26, 96 and 185–186.

[21] Lawson, F. H.: »Das subjektive Recht« in the English Law of Torts. In: Lawson, F. H.: *Selected Essays*. Vol. I. Amsterdam–New York, 1977. 176 et seq., especially on 179–182, as well as Samuel, G.: »Le droit subjectif« and English Law. *Cambridge Law Journal*, vol. 46. 1987. 264 et seq., especially on 267–286.

doctrine of legal force has developed, as the parties, if discontented, may as well go to the court again. At the same time, the decision is addressed only to them, so no decision is published or collected. As a result, neither law-reporting nor precedential reference to earlier decisions is known in it. This way, judicial reasoning is mostly fully adjusted to the conflicting situation, to the very facts of the case.[22]

In *Islamic* law, a specific culture of chain-references were to develop in order to give the Prophet's historically finite manifestations a force providing orientation under changing conditions and jurisdictions.[23] Although the Muslims have had a highly developed logic in philosophical and scientific reconstruction, they could only recognise such canons of judicial argumentation which were to prevent the law from further extension through human generalisation, a danger that under the plain pretext of logical generalisation would be diverting from the Prophet's divine revelation, obviously not permissible with respect to the Divine Word.[24]

As to the roots of *Continental law*–"*siamo tutti Bartolisti*",[25] or, on the final account, we are all committed to refining and continuously adapting one single idea (organised as a school) from the almost unlimited depth of the store of techniques and potentialities developed by the Romans–, it is of utmost interest to realise that, as the author writes, "For centuries, those who wrote the glosses on Roman law seemed more Talmudic than civilian. They were more interested in questions [*quaestiones*] than answers; more interested in accumulating opinions than choosing among them; more interested in debate than action." For "Questions are more important than answers (which may change); under-

[22] Glenn: *op. cit.*, 92–93, as well as Jackson, B.: Jewish Law or Jewish Laws? *Jewish Law Annual*, vol. 8. 1988. 25.

[23] Let us quote a typical chains of *hadith*: "According to *Bukhari* (chapter 30, tradition 26) »*Abdan* related to us [saying]: *Hisham* related to us saying: *Ibn Sirin* related to us from *Abu Huraria* from the Prophet [...] that he said [...]«." Doi, A. R. I.: *Shari'ah: The Islamic Law*. London, 1984. 24 et seq.

[24] Opposing even analogical reasoning, seen as leading to more general rules and categories which would allow subsequent deduction or subsumption, this being an objectionable "expression of human initiative". Weiss, B.: *The Spirit of Islamic Law*. Athens–London, 1998. 67–68. Cf. also Makdisi, J.: Formal Rationality in Islamic Law and the Common Law. *Cleveland State Law Review*, vol. 34. 1985–1986. 97 et seq.

[25] Rattigan, W.: Bartolus. In: MacDonell, J.–and Manson, E. (eds.) *Great Jurists of the World*. London, 1913. 45.

standing is more important than coherence; social contact is more important than precision".[26]

However, it is exactly in this circle, the medium of practice-bound rationalising confrontation with distinctively legal problems, that a culture rooted in the recognition that "The Form is the Message"[27] had once arisen, having spread over the European continent and then also among those Southern American (and, to some extent, even Far Eastern) cultures which in modern times became affected by the impact of Latin and German-language civilisations. And the centuries of polishing work by the same glossators and their successors would form–out of the inherent lack of any idea of systemicity and even of conceptualisation in Roman law[28]–a strictly conceptual system, with notions in fact empty but indispensable for their technical class function, like the principle of equality, which ordains what is considered "similar" to what is taken as "similar", however, without providing for the actual or legal criteria of "similarity" (while if the law had provided for it, the provision itself would obviously–conceptually–render the principle pointless and perfectly redundant).[29]

It is typical that where the law is identified with the observance of Divine commandments (as in Jewish and Islamic law) or serves as the casual declaration of what the law is (as in Anglo-Saxonic law), there is no appeal.[30] Or, the *Anglo-Saxon* law transmits the ancient uses of Roman tradition to the British Isles: a jury instead of lay *iudex*, judge instead of an instructing *praetor*, a writ instead of *edictum* allowing a procedure; moreover, Inns next to a church, just as *madhahib* near the mosque. Everything is but a procedure: writ construed as an artificially erected pigeon house with holes providing an action form which does allow a certain type of proceedings to be commenced. This is to say that each and every issue in law had once been expected to fit into any one of the (all in all) 50 writs around 1250 and about 75 writs around 1850 (until their abolition in 1932), and exclusively in terms of the selected writ.[31] *No remedy, no wrong*: legal quality, that is, qualification of an action in terms of the law

[26] Glenn: *op. cit.*, 123 and 128. It must have been this approach shared in many ways about which English legal history wrote that "What the judgment was, nobody knew and nobody cared". Plucknett, T. F. T.: *Early English Legal Literature.* Cambridge, 1958. 104.

[27] Daube, D.: *Ancient Jewish Law: Three Inaugural Lectures.* Leiden, 1981.

[28] Cock Arango, A.: El Derecho Romano se formo a base de realidades objetivas no por teorias o sistemas. In: *Studi in onore di Vincenzo Arangio-Ruiz.* Napoli, 1953. In particular 31.

[29] Westen, P.: The Empty Idea of Equality. *Harvard Law Review*, vol. 95. 1982. 537.

[30] Cf. Glenn: *op. cit.*, 92.

[31] Maitland, F. W.: *The Forms of Action at Common Law.* Cambridge, 1954. 5.

can at all be done only provided that a proceeding is available to elaborate it in the closed store of writs codified previously. Thus, substantive law does not even appear;[32] the decision will be made by the laic jury; and the judge–with his "artificiall reason"[33] (embodied by the law's professionally developed doctrine)–is only authorised to examine whether or not all this complies with the action form. So, law is confined to procedure to such an extent that even basic terms like formalism, casuistry and logic will gain additional meaning in classical English law. On the one hand, "In the common law, no one knew what law the jury applied, yet the jury functioned in a highly formal setting." On the other, "The process was necessarily casuistic, since it disposed of cases, but cases did not make law and cases were therefore not in conflict." Or, the actual decision will necessarily remain outside the law, and its merits, treated as mere factuality, outside logic. This is why Common Law has been "floating" up to the present day,[34] in the verbal culture of which even questions whether a 'rule' of decision is predisposed and if yes, whether a 'norm' can be formed out of the 'rule', have never been clarified.[35]

(5 Different "Rationalities", Differing "Logics") If and in so far as we accept that rationality itself is by far not more than one of the many traditions,[36] moreover, that it is a "mistake [...] to suppose that there is or must be a single

[32] For "whatever substantive law existed was hidden by it, »secreted« in its »interstices«"–writes H. S. Maine in his *Dissertations on Early Law and Custom (Lectures delivered at Oxford).* London, 1883. 389.

[33] "Equity and Lawes, an artificiall Reason and Will" in Hobbes, Th.: *Leviathan...* London, 1651. The Introduction [www://oll.Libertyfund.org/Texts/Hobbes/].

[34] It is only the jury's decision to have a legal force without, however, affecting the law or rendering it unchangeable. Glenn: *op. cit.*, for the quotations, 60, note 17, and 235 and 233, as well as, for the note above, 219.

[35] Cf., from Varga, Cs.: Kodifikáció az ezredforduló perspektívájában [Utószó a második kiadáshoz]. In: Varga, Cs.: *A kodifikáció mint társadalmi-történelmi jelenség.* 2nd amended, enlarged ed. [of *Codification as a Socio-historical Phenomenon.* Budapest, 1991.] Budapest, 2002. 379–403, in particular at 390–391. {available also as a Codification à l'aube de troisième millénaire. In: Wachsmann, P. et al. (dir.): *Mélanges Paul Amselek.* Bruxelles, 2005. 779–800.} and, in theoretical outlines, Szabály és/vagy norma; avagy a jog fogalmiasíthatósága és logizálhatósága. In: Szabó, M. (ed.): *Regula iuris: Szabály és/vagy norma a jogelméletben.* Miskolc, 2004. 23–30. [Prudentia Iuris 22.] {forthcoming as Rule and/or Norm, or the Conceptualisability and Logifiability of Law. In: Schweighofer, E.–Liebwald, D.–Angeneder, S.–Menzel, Th. (eds.): *Effizienz von e-Lösungen in Staat und Gesellschaft: Aktuelle Fragen der Rechtsinformatik. Stuttgart, 2005.*}.

[36] Popper, K.: Toward a Rational Theory of Tradition. In: Popper, K.: *Conjectures and Refutations.* 3rd ed. London, 1969.

(best or highest) perspective from which to assess ideal rationality"[37] and therefore, in the end, we also have to admit that "different types of logic and semantics may be appropriate in different contexts and for different theories",[38] then we have–based upon the normative foundations of the order in question and the terms we are bound by–either to presume its regulatory *completeness* (assuming the informality of the decision taken after the consideration of the case, weighing, balancing and pondering upon its merits, by recognising its unrepeatable complexity), or to resort to a *reductive procedure* (in the expectation of safety in law and of the guaranteed repetition of the complexity of its cases). The former counts with the undiscernible and unclosed variety of sources and approaches (with varying aspects and methodologies, normative criteria and types of argumentation taken in the judicial assessment), while the latter pre-selects from all them–by officially codifying and thereby also closing–that what it can then derive, as a logical inference, therefrom in its axiomatism, as necessarily concluding from its premises. Reductive procedure presupposes a deductive logic which, if failed in practice, may pass over just into its opposite, namely, its stochastic, statistical or perhaps probability-based substitution by some fuzzy logic at the most. In case of the presumption of completeness, logic (taken in its mathematical ideality) will either be simply considered non-applicable or take on polyvalent forms, uninterpretable from an axiomatic point of view as operating with more than two values, thereby transcending the dichotomy of true and false, lawful and unlawful, by wedging in intermediate values that induce logical uncertainty).

In addition, it is to be noted that classifying judicial argumentation onto the domain of "practical reasoning" has turned out to be a master model for ousting adjudication in law from the notional sphere of "application" (with the underlying idea of logical "deduction") in present-day *Anglo–American* theoretical reconstruction which, just like the theory of "argumentation" proposed by *Chaïm Perelman* in *Continental* law some decades ago, puts the whole process in a logically uninterpretable range.[39]

[37] Dennett, D. C.: *Darwin's Dangerous Idea: Evolution and the Meanings of Life.* New York, 1995. 502–505.

[38] Pearce, D.: *Roads to Commensurability.* Dordrecht, 1987. 9.

[39] *"Practical reasoning* [...] is a reasoning in transition. It aims to establish, not that some position is correct absolutely, but rather that some position is superior to some other. It is concerned, covertly or openly, implicitly or explicitly, with comparative propositions"–writes Taylor, C.: *Sources of the Self: The Making of the Modern Identity.* Cambridge (Mass.), 1989. 72. It is defined by Jonsen, A.–Toulmin, S.: *The Abuse of Casuistry: A History of Moral Reasoning.* Berkeley–Los Angeles–London, 1988. 341. as follows:

How do then such alternative solutions appear in the various ancient regimes of law?

For example in *Jewish* law, the simultaneous recognition of diverging (and, ultimately, contradictory) standpoints with the exclusion of any systemicity exhausts the entire culture of the practice of reasoning to such an extent that the *Talmud* itself would appear as if "many texts and many authors [...] spoke [...] all at once" still with opacity. "It's just in there somewhere." Apparent self-reproach may even describe it as "a terribly frustrating book [...:] everything is fascinating [..., but ...] nothing can be trusted".[40] Accordingly, "preference for a concrete rather than an abstract terminology" permeates it, with 'contract' lacking general features of a type[41] and categories used in figurative sense rather than as a conceptual class delimitation. As if the forgotten wisdom were embodied therein: axiomatic thought with no reference to reality, with its self offered as its exclusive subject, and without any validity whatever beyond it.[42]

In *Islamic* law, the 'doctrine of diversity' [*ikhtilaf*] comes to the forefront, with the acceptance of *hadith* which may recognise both parts of a logical contradiction as simultaneous Divine inspiration, since "Difference of opinion [...] is a sign of the bounty of God."[43]

Finally, in *Hindu* law, "no precise definition", deduction or inclination for systematisation can be found either. For if everything and everyone shares in *Brahman* as the creator of the world, then commonness within the everlastingly given totality cannot be segmented simply by segregation, moreover, not even the appearance of any accomplished change could be more than sheer illusion.[44]

All in all, ancient cultures (involving the Far-East) presuppose polyvalent logics in human matters, which can therefore regard any differentiation, extreme

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"Practical reasoning in ethics is not a matter of drawing formal deductions from invariable axioms, but of exercising judgment–that is, weighing considerations against one another".

[40] Glenn: *op. cit.*, 98. The last quotation by Goldenberg, R.: Talmud. In: *Back to the Sources*, *op. cit.*, 157.

[41] Elon, M.: Contract. In: Elon, M. (ed.): *Principles of Jewish Law.* Jerusalem, 1975. 247.

[42] "[T]he great advantage of employing such models, as opposed to abstract concepts, lies, *inter alia*, in the ability constantly to supervise the validity of methods of demonstration [...]. [A]bstract thought [...] cannot be defined except by use of similarly abstract terms, we can never know whether they constitute a departure from the subject or are still relevant." Steinsaltz: *The Essential Talmud*, *op. cit.*, 147.

[43] Glenn: *op. cit.*, 325.

[44] Diwan, P.: *Modern Hindu Law: Codified and Uncodified.* Allahabad, 1958. 1.

formulation, polarisation or discreteness in either objects or ideas exclusively as an artificial outcome of human intervention.

(6 Mentality in Foundation of the Law) The change of emphasis in comparative interest is obviously striking here as most of the data, explanations and contemplations, abundant in this excellent overview, are focussed on ways of thought rather than on institutions. Or, *mentalities* are at play within this context which, staring in wonder at (by experiencing) the world, also provide institutional answers in responding to challenges for survival. Well, institutionalisation is already half a way to formalisation. Final consummation is provided by the axiomatism in codification–be it of posited law or of doctrine (taken as a mentally structured representation behind it)–, when law is projected as a systemic aggregate of logically arranged abstract conceptualities. In a systemic perspective, not even institution as such can any longer be conceived of as a casual or routinised product of practical problem-solving: as an abstract formula, it is at the same time the mentally concretised representation of further conceptual abstractions. Well, comparative law in its classical understanding was the product of exactly such a scheme, born to pin the various purely logified conceptual abstracts of law to its map with the requirements of taxonomy, formed originally for the classification of nature in natural history.[45]

In sum, all the issues we have discussed within the conspectus of *Legal Traditions of the World* are focussed indeed on the human dilemma of practical problem-solving within the various cultures of order, in the interest of societal survival. This is at work in the way of raising issues in respect to the *ordo*, in reacting to them, in the search for conceivability and appropriate technique for this, in institution-building through standing practice and planning, in inventing and operating instruments, willy-nilly breaking away from the historical idea expressed in law yet desirably remaining within its circle of ethos–to such an extent that we could even say with some exaggeration that this is the motor, and everything else is just a cloud of dust...

Of course, we know that civilisatory development produces divides, structures and differentiations in formalisation, with a success to launch also mechanisms with an effect dehumanising to such a depth that we may well feel even our creative thinking to have become mostly reactive in so far as merely filling the frameworks set by established forms.

Considering ourselves and the gardens we cultivate, it is to be seen that preserving, collecting and publishing of judicial decisions, utilising and referring

[45] Firstly applied to real (living) objects in nature by Linne [Linnæus], C. von: *Systema naturae.* [1735.] London, 1956.

to arguments suitable to found them in an authoritative way, setting up an official expectation toward the justices to decide on (with administration of justice becoming a freely accessible state service) and making it available that a repeated consideration of the case will be done in appeal–all these are relatively new and particular developments, characteristic mostly of Western culture. The achievement of legal doctrine, abstracting general claims for the individual out of the body of laws, from which a general status can arise through ordaining civic rights [*'subjektive Rechte'*] to given circles of persons, is also a product of modern Western world. The English legal culture is just about to get started assimilating (more or less and controversially) to Continental culture in logifying law, by at least understanding the Continental requirement to identify conceptualities in law that can be referred to as a source and carrier of the law, upon the basis of which the reduction (i.e., separate homogenisation, taken as deduction in justification) of the judgement in law to formal operation(s) is conceivable at all. Or, we can see that although *Descartes'* and *Leibniz'* utopia of formal rationalisation may have generated movements and efforts, it could lead neither to all-comprehensive development nor to the elimination of other traditions based upon non-formal rationalisation with the exclusion of contradictions. As a conclusion, we can scarcely tell more: our problems may strike us as new, most of them are nevertheless still old-rooted ones.

Therewith we have arrived back to man who humanises his existence by creating culture as a second nature for and around him, to which he draws strength from his tradition. This includes, among others, a search for the source of law through its refined deep structure, the awareness of which and the best possible preservation of the diversity of its civilisatory forms is a never ending task for us, indispensable for any orientation in general and for substantiating decisions to be taken at historical crossroads in particular.

(7 Question Marks in the Definition of Subject for Theoretical Research in Law) Comparative historical inquiries usually approach potential subjects of their analyses with certain experience in the background and open for receiving new ideas, and suggest classification schemes in result of their investigations only–e.g., for answering the question of what (and in what sense) can (or is worthwhile, founded, or reasonable in an analytical framework, or self-enforcing enough, to) be regarded as law in a given cultural anthropological situation or in official proceedings. However, in a quite artificial theory-building (based upon an approach to law it is to propose for introduction), given concepts are assumed (hypostasised or presumed) which then are treated as an axiomatic basis–i.e., as accepted without empirical evidence–throughout the entire theoretical construction.

We know that some weaker or stronger normativity prevails in our language usage and, especially in conceptual thinking, we reconstruct and thereby also construct what we only wanted to cognise from close-by. Yet, there does seem to be a difference between the results of an *analysis aimed at drawing comparative-historical experiences,* on the one hand, and of a merely *conceptual analysis*, confined to rationalising conventionalisations according to certain pre-set ideas (dogmas or prejudices), on the other. This is especially manifest both in the separation of these two attitudes and their results, usually excluding the chance of any mutual interaction, and in the similarly differing ways of how a critical stand can work (or usually works) in them. For the former surveys, evaluates and groups *facts* by listing data of field studies or by referring to a wealth of literature. In contrast, the latter arrives, practically with no reference to sources, from certain philosophical generalisations at other (further) *philosophical generalisations*. Any factual argument or evidence on behalf of the former runs off the latter from the outset as ephemeral (exceptional and negligible) or as irrelevant. All the former can have is some influence on the public opinion, forming the dominant paradigm in the long run as organised into an overall effect; as the latter mostly gives voice to or reflects upon this (or, sometimes, proposes a theory aimed at replacing–by changing–it). The internal debates of the former are usually arranged to dispute upon *facts and their possible interpretations* (e.g., what criteria are likely to result in sensible outcomes in separation of the law's variety in systems, cultures and traditions). In contrast, the latter–approaching, as much as it can, the *axiomatic* ideal–either proposes an amendment to, or version of, the prevailing system, or rejects it, from a position (of another system) outside (and negating) the system in question (e.g., the one-time ideological criticism between socialist and non-socialist ("bourgeois" or "reformist") legal theories mutually negating each other, or present-day so-called deconstructionism, unmasking–either in the spirit of a radical hermeneutics with anarchic extremism or by some (feminist, white, etc.) division, aiming at historical rehabilitation–thousand-year-old arrangements as guises of mere routine or sophisticated oppression.

Present-day globalising tendencies are probably of an uneven effect in various fields. Anyway, despite several attempts at mediation, these two attitudes seem to further strengthen themselves, and–curiously enough–samples of theoretical construction, aimed at merely conceptual (re)conventionalisation, can today transform into independent forces wandering all around: perhaps once drawn from English analytical tradition and subsequently organised into an American political philosophical conceptual construction, they may now arrive in continental Europe as a theoretical explanatory framework. Within their new frame, they certainly gain a new domain of meanings, because their contextual

presupposition has in the meantime changed, from an English pre-understanding that identifies law as a casual declarability of what rules are at play, into a Civil Law conception, taking law as a system of norms, with utmost conceptualisation in logical generalisation.

The path of scholarship is obviously free. However, in order to be able to assess the applicability and commensurability of its various trends and claims, it is still important to raise awareness of their tacitly received foundations in their underlying legal conception.

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The Characteristic Features of Investigation under the Act on Criminal Procedure in Hungary

Abstract. The present study purports to introduce, elucidate and examine reform ideas and institutions pertaining to criminal investigation in the purview of Act XIX of 1998 on Criminal Procedure, which came into force in Hungary on 1 July, 2003 through the explication of the regulation of the different phases and moments of the completion of the investigation and its closure. Besides clearly introducing the general objectives and scope of investigations, as well as the rights and obligations of the concerned parties, the study focuses on the prescribed procedural obligations of the authorities at each stage of the investigation as pursuant to Act XIX of 1998, with reference to the changes incurred in view of the former regulation. After meticulously highlighting the intention of the lawmaker implied by the effected changes and evaluating these, thereby also providing a basis for international comparison, it concludes that the basic objectives of the new, "reform" criminal procedures law included the shift of emphasis from the phase of the investigation to that of the judicial proceedings. The possibility of the achievement of this objective will be tested by the future practice of law applying organs.

Keywords: completion of the criminal investigation, investigative authority, forensic science, prosecutor, defence, accused, suspect, exploration, well-founded suspicion, interrogation, arraignment

Following several revisions, Act XIX of 1998 on Criminal Procedure (hereinafter: ACP), which includes reform ideas and institutions, came into force in Hungary on 1 July, 2003. The amendments also affected the completion of the investigation, which the present study purports to introduce, elucidate and examine.

Conduct (Completion) of the Investigation

On the Conduct (Completion) of the Investigation in General

It is predominantly forensic science that deals with the completion of the investigation. The successful exploration of criminal offences depends primarily on the applied criminal technique and tactics, whereas ACP promotes thorough

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and expeditious exploration essentially through framework rules, which provide for the basic requirements, the methods and temporal scope of the investigation, for the attendance of those concerned and of official witnesses, as well as for safeguarding its order. Furthermore, these framework rules pertain significantly to two major official acts (measures or decisions) taken in the course of the investigation, i.e., to the announcement of well-founded suspicion concurrently with the interrogation of the accused, and to the suspension of the investigation.

A meritorious explication of the completion of the investigation would equal a brief summary of criminalistics. This has already been accomplished by the author and his colleagues in the criminalistic studies textbook compiled within the framework of the Pécs Criminalistic Workshop.[11]

Essentially, the law of criminal procedure provides merely framework rules, therefore, the successful completion of the investigation hinges predominantly on professional, i.e., criminalistic training and disposition. The process of revelation, which includes disclosure and justification, cannot be formulated in legal norms, compliance with which could automatically guarantee the effectiveness of investigation.

Investigations are intellectual and practical activities involving specific data and versions conducted in order that past events can be adequately revealed. Within their scope

- primarily interrogations of witnesses and the suspect are carried out,
- in case of so-called crimes with scenes inspections of the scenes, in case of crimes not connected to scenes house-searches are deemed most significant,
- the role of experts specified in different branches of (mostly natural) sciences and professional knowledge is growing most rapidly. Their involvement secures that traditional exploration and investigation is expanded by the possibility of multidisciplinary decoding and application of information,
- the most intricate area is the so-called secret collection and obtainment of information, as well as the effective use of its results,
- the most timely problem is the elaboration and reinforcement of integrated criminal investigation, which is also effective against organised crime.

Whether investigations have basic principles is an interesting question. Investigation is part of the criminal procedure, therefore, the general principles

[1] Tremmel, F.–Fenyvesi, Cs.–Herke, Cs.: *Kriminalisztika Tankönyv és Atlasz* (Criminalistics Textbook and Atlas), Budapest–Pécs, 2005.

of the ACP are essentially and eventually normative in the course of the investigation, whereas, contradiction and publicity, i.e., verbalism or directness, which we consider important, however, was not specified under the act, can prevail rather fragmentarily. At the same time, the requirements of expeditiousness and meticulousness, as well as of flexibility have been emphasised.

In the course of completion of the investigation, the criminal offence and the person of the perpetrator shall be disclosed, moreover, the means of evidence shall be specified and secured. The facts of the case shall be explored to such an extent that the prosecutor can decide whether to arraign (Para. 2 of Section 164). We must supplement this by stating that in our view, the interest of the exploration of the real facts of the case, which, according to the principle of material defence, also includes extenuating facts and mitigating circumstances (Para. 1 of Section 28), requires that all legal and expedient measures are taken without delay, therefore, the investigation can also be conducted with respect to a misdemeanour related to the criminal offence. Thus, the breadth of exploration shall be adequate for making a decision on arraignment, that is, it has to substantiate a decision on arraignment and further decisions made by the prosecutor. According to the intention of the lawmaker, the main task of the investigation is not the obtainment and collection of lawful evidence, but assuring that the authority entitled to make a public arraignment is adequately informed concerning whether an arraignment can be made in the given case. In this context, the dominus litis legal standing of the prosecutor is undoubtedly reinforced by the fact that Paragraph 2 of Section 28 of ACP positively provides that "the prosecutor conducts or has an investigation conducted in order to establish whether the conditions of the arraignment obtain".

Thus, according to the conception of the ACP, the nature and function of the investigation is mainly exploratory. Investigations should be expeditious and in accord with exploration, the basic task of the investigative authority, primarily the police. Therefore, the act promotes the centuries-long "commonplace" of criminology, that successful exploration has a crime-preventive effect. Consecutively, following the expeditious exploration, the prosecutor can prove the facts of the indictment in a contradictory environment at an independent, impartial court that regards due process of law and all the basic principles. Thereby, the shift of emphasis to the phase of judicial proceedings as the substantial scene of holding one criminally responsible, which is expedient in a state under the rule of law, is realised.

Unfortunately, the practical experience so far does not reflect this tendency. A definite indication of this is that neither the volume of investigation by the investigative authority, nor the rather impressive number of investigators has

decreased. Furthermore, the number of prosecutors, who can be considered crucial figures of the reform, has not increased, either.

The completion of the investigation, however, involves not a sheer obtainment of evidence, but a more comprehensive and complex collection of data, since evidence itself frequently needs to be found, almost "discovered". Furthermore, the investigative authority shall take the procedural steps and the related coercive measures necessary for holding the perpetrators responsible.

As pursuant to Section 178 of ACP, following the commencement of the investigation, "other data-collection activities" by the investigative authority may include "sounding" in a criminalistic sense, which implies disclosure, registration and collection of data with penal and forensic relevance. To accomplish this, the authority can use data management bases as resources (e.g., road traffic, real estate registration, criminal records, records of the co-ordination centre against organised crime, criminal records and records of the co-ordination centre against organised crime), may "infiltrate" these according to the method of "screening" investigation developed by forensic science. The authority may request documents and data from any entity, therefore, it may apply to state, civil, business and self-government organs, foundations and public bodies. Furthermore, it may request an investigation and damage adjustment from the party entitled, may inspect the scene, may consult an expert counsellor and check the data obtained. With the help of the photos obtained, it may select a person or an object, as well as request information about the person or object represented and may carry out secret collection of information that is not subject to the permission of the court. With the prosecutor's permission, the authority may even involve a cover investigator as pursuant to Paragraph 2 of Section 178, and may request data that cannot be denied (if the nature of the case substantiates that, but not in general) from the tax authorities, media bodies, medical institutions, from bodies managing data that qualify as banking secrets, securities secrets, counter secrets and other business secrets as well as from the prosecution and penal data centres as pursuant to Paragraphs 2–3 of Section 178/A. If the prosecutor intends to use the result of the foregoing data collection activity of the investigative authority as evidence, then the report about this as documentary evidence shall be attached to the documents of the investigation.

Besides the above, the prosecutor and the investigative authority, concurrently with taking the minutes, may consult an expert counsellor during the specific investigative steps, if special expert knowledge is necessary for finding, obtainment, collection or registration of the means of evidence or for the provision of information. The polygraph, the psycho-physiological means or method of interrogation well-known in criminalistics has been specified as

special expertise, if it is used with respect to the accused (Paras. 1–2 of Section 182).

In our view, the legal formulation of sounding constitutes a great step forward in the legal application of the latest achievements of modern criminalistics, criminal technique and tactics and in the effective combination of the operative and the open, lawful investigative activity in general.

The completion of the investigation, which involves a multi-level series of tasks, is not boundless, it has temporal constraints. The investigation shall be conducted within the shortest possible time from the time it was ordered and shall be concluded within two months. If the complexity of the case or some insurmountable obstacle makes it necessary, the deadline of the investigation can be extended

- by the head of the local prosecutor's office by two months,
- by the county prosecutor for as long as one year from its commencement,
- by the public prosecutor beyond one year.

Guarantees are provided against the unreasonable prolongation of the case, that is, the decision on the extension of the term of the investigation shall be mailed to the accused and the defence counsel, who may resort to legal remedy against it. We note here that according to the general rules, the decision on the extension should also be mailed to the aggrieved party, since it contains provisions regarding him, as well.

However, if the investigation is conducted against a particular person, the extension, including the term of the continuation of the investigation, may encompass at most two years from the announcement of incrimination (Para. 2 of Section 176). This temporal constraint indeed urges the investigative authority: the lawmaker endeavoured to limit the prolongation of procedures and of accusation by powerfully pressing the investigative authority. Certain law applying organs consider the above regulation in contradiction with the statutes of limitations, since according to their assumption, thus, holding responsible on the merits might fail in connection with certain criminal offences, especially in case of protracted investigations requiring especially complex, wide-scale examination. According to our view, this needs to be surmounted by criminal-tactical means, namely, the investigative authority will decide on the time of the announcement of incrimination, in case of people who are not in detention. In other words, the multitude of evidence needs to be collected in advance and the well-founded suspicion will be announced afterwards. In case of the accused in detention, charges shall be announced within 24 hours due to detention, primarily to preliminary arrest, therefore, it is a legal requirement to proceed in an anticipatory manner. That is, more energy, attention and apparatus need to be devoted to these cases.

When the prosecutor conducts an investigation, the deadline of the investigation can be extended

- by the head of the prosecutor's office by two months,
- by the superior prosecutor by one year from the date it was ordered (Para. 3 of Section 176).

The supervision of the investigative authority, which works independently, is supported by the institution of the so-called prosecutor's stepped-up supervision (hereinafter: PSS), which is exercised by the prosecutor, if

- the factual or legal judgement of the case, or proving that a criminal offence obtains is complex,
- he has experienced a significant violation of the law, default, or a circumstance threatening the success of the investigation in the course of the investigation,
- six months have passed since the coercive measures limiting the personal freedom of the suspect were ordered,
- one year has passed since the commencement of the investigation against a particular person (Para. 2 of Section 176),
- the investigation is conducted by reason of a criminal offence that is punishable with imprisonment of over ten years,
- the court has pronounced a witness in the case especially protected,
- the court has given permission that a cover investigator is employed in the case,
- he deems it necessary for whatever other reason [Points a-h of Section 37 of Public Prosecutor's Directive No. 11/2003 (hereinafter: PPD)].

Within the framework of the PSS announced to the investigative authority in writing, the prosecutor examines the documents requested for submission, gives instructions with deadlines for the execution of investigative activities, defines the scope of the investigation, specifies the evidence to be obtained with deadlines, the demonstration procedures and the investigative activities to be conducted, gives directions with respect to the conclusion of the investigation, if the facts have already been disclosed in a manner that is suitable for the decision of the case on the merits (Section 38 of PPD No. 11/2003).

Safeguarding order is also necessary for the completion of the investigation. For this purpose, the investigative authority

- may remove those from the scene, whose presence impedes the procedure,
- may impose a disciplinary penalty on anyone disturbing the order of the procedure,
- may obligate anyone to stay on the scene of the investigation so as to promote the investigation and may impose a disciplinary penalty on anyone who violates this obligation (Para. 3 of Section 185).

The ACP guarantees a specifically limited publicity as an exception in the course of the completion of the investigation on the one hand for those concerned, on the other hand by the potential involvement of official witnesses.

As pursuant to Sections 184–186, attendance of the specific investigative activities by those concerned is permitted. Accordingly, the defence (counsel) (as well as by or in lieu of him, the candidate) can be present

- at the interrogation of the suspect defended by him,
- at the confrontation held with the participation of the suspect defended by him (as a special form of interrogation),
- at the interrogation of the witness motioned by the defence counsel or the suspect defended by him, where he may ask questions directly of the person interrogated at the end of the interrogation.

However, exercising this right may not impede the interrogation of the suspect or the witness.

The issue of the admissibility of the attendance of the interrogation of the witness by the defence counsel has led to heated debates in the special literature of the last ten years. According to Ákos Borai, the regulation with general effect pertaining to all witnesses (characteristic of the 90s) significantly decreases and threatens the effectiveness of criminal investigation, since it guarantees too extensive scope of rights for the defence counsel in the preparatory phase. The author of the present study reinforced this by adding that it is an unparallelled solution even by international standards, since for instance in France, a country with considerable background in criminal procedures law, the attendance of the first interrogation of the suspect by defence counsels (but not the interrogation of witnesses) has been permitted since 1st January, 2001. That is not required either by the European Court of Human Rights from the member states, or by the Hungarian Constitutional Court. According to Mihály Tóth, the lawmaker did not endeavour that either, however, the admissibility of the defence counsel's presence during the interrogation was interpolated and introduced into the former regulation during the debate of the bill. The arguments of the other side, mainly of practising lawyers, have been that this entitlement can be deduced from the necessity of balance, and at the same time it promotes the work of the investigative authorities, since it admits direct questions and motions on the part of the defence, thus works against the prolongation of the procedure.

The lawmaker has chosen an in-between solution: the defence counsel can be present only at the interrogation of witnesses motioned by the defence. This shall be connected to a real act, that is, in case of a witness not interrogated yet, the motion must be admitted regardless of by whom, when and how the witness was summoned previously. We cannot identify with the view that

attaches primacy to the preliminary measure of the authority, such as the issuance or mailing of a writ of summons, since this cannot be checked given the deficiencies of official registration and the possibility of the issuance of short-notice writs of summons and would substantiate continuous disputes and legal remedies for the subjects of the defence, which does not serve the interest of fair criminal procedures.

Another factor that might substantiate disputes is how precise and customised the motion should be. Our view is criminalistically grounded in this issue, as well: if the person can be identified without being named specifically, e.g., the bookkeeper of the limited liability company, then this shall be a valid motion for the interrogation of the witness, which establishes the defence's entitlement to participation during the interrogation of the witness.

Based on incorrect interpretation of the law, there emerged a view in practice that the defence counsel cannot be present at a confrontation, where a witness not proposed by him is "posed opposed to" the defendant. This contradicts the basic principle of defence, since confrontation is a special form of interrogation, at which the defendant is entitled to his defence counsel and his presence shall be guaranteed by all means in a state under the rule of law. This is also substantiated by Paragraph 3 of Section 184 of ACP, which permits that the suspect in custody meets his defence counsel before his interrogation.

Not only the defence counsel, but the aggrieved party and the accused are also permitted to attend

- the interrogation of experts,
- the inspection of the crime scene,
- the attempt at demonstration,
- the introduction for recognition,
- the inspection of the scene in a criminalistic sense, which the act defines as interrogation on the scene.

The notification of the listed concerned parties may be neglected, if the delay would entail risks. Otherwise, those present at the investigative activities may make comments, put forward motions and ask questions of the experts.

What qualifies as an entitlement on one side is an obligation on the other side, therefore, the investigative authority shall notify those, who are entitled to attend, which in certain cases might be a rather high number of persons. Since in cases with several defence counsels only the so-called head defence counsel shall be notified, the situation has become somewhat simpler.

The investigative activity may also be attended by a person completing his professional practice as a full-time undergraduate student at the faculty of legal sciences of any university, provided that it is permitted by the prosecutor and the investigative authority and that the suspect, the witness or the aggrieved

party present have given their written consent (Para. 5 of Section 184). With regard to the equality of university degrees, limiting attendance to full-time undergraduate law students is unreasonable, since getting acquainted with the procedures has the same significance for postgraduate and distance-learning students. A conciliatory solution for that is, and we emphasise that in other cases, as well, that even though the main rule for the attendance of investigative activities is that besides the prosecutor, a member of the investigative authority and the recorder only those can be present, whose presence is permitted by law, the secondary or auxiliary rule is that it is the official conducting the investigative activity that decides who may be present apart from those who are obligated or entitled to. The decision of the official is not unlawful, if besides complying with the regulation of attendance, he allows the participation of other persons expressly for investigative or criminal-tactical purpose, and if thereby he does not jeopardise the efficiency of the procedure. Such persons may be a teacher, a psychologist or a defence counsel, etc.

The interrogation of a foreign citizen as an accused or witness may be attended by the consular officer of the respective state, who, with the exception of the case of *periculum in mora*, shall be notified in the beginning and subsequently, if he requests that. In a similar way, as pursuant to a provision promulgated under the act, a member of the authority of the respective foreign state shall be notified of any procedure conducted *vis-a-vis* a foreign citizen as suspect or of any criminal offence committed to the *gravamen* of a foreigh citizen. The provision that a member of the investigative authority of a foreign country may be present at an investigative activity as pursuant to a separate statute or international agreement, also refers to the internationalisation of criminal investigation. We also add that according to our view, this provision is applicable not just to the authorities of states, but to interstate authorities, e.g., the Interpol, Europol, as well (Paras. 5–6–8 of Section 184).

The right to attendance is closely related to the right to view documents, since the attendants who were present (and those who could be present by law) can view the documents drawn up in their presence. Besides, the suspect, the defence counsel and the aggrieved party may view the expert opinion and, if that does not infringe the interest of the investigation, other documents, as well.

According to the defence counsels' general experience, apart from a few cases related to road traffic, there has been practically no case in practice, when viewing the documents by the defence "would not have infringed the interest of the investigation", in other words, the officials of the investigative authority do not risk handing over even the not ominous documents for viewing. Consideration on the merits in this area hardly obtains, if it does, that is by all means a sign of high professional standards.

The right to view documents, thus indirectly the right to attendance is related to the right to copying documents, as the accused and the defence counsel are entitled to receive copies of the documents they can view according to the requirements of data protection. Unfortunately, the effective legal regulation seems unconstitutional according to the detailed arguments of the author of the present essay,[2] since as pursuant to separate legal regulation [Joint IM–BM–PM Decree No. 10/2003 (V. 6.)] the copies to be provided for the defence are subject to a duty fee equivalent to 100 HUF/page to be paid in the form of fee stamps. This violates the constitutional regulation of defence and the principle of the presumption of innocence, furthermore, unreasonably encumbers the preparation of the defence and efficient pleading that meets European standards. This regulation is unlawful, even if exemption from payment of charges in the criminal procedure (obtainment of copies of documents free of charge) is possible similarly to the exemption in the civil procedure, since this affects only a very limited circle, i.e. homeless accused and accused with a per capita income below the prevailing widow's pension, which was equivalent to 22,800 HUF in 2004, whereas the requirement of efficient defence prevails in the case of every accused. As a recent and correct achievement, the reimbursement of the duty fee by the state has been admitted in case of the acquitted accused since 1 July, 2003 as pursuant to a separate legal regulation [Joint IM–BM–PM Decree No. 26/2003 (VII. 1.)]

A further problem is that, unfortunately, the court cannot proceed *ex officio*, only at the respective request of the defence, although it can decide on the acquittal of the accused without the motion of the defence.

According to the framework rule under Section 183, the investigative authority designates an official witness at

- the inspection of the scene,
- the attempt at demonstration,
- the introduction for recognition and in four further cases, namely,
- seizure,
- house-search,
- body-search,
- the introduction of the minutes taken at the interrogation of an illiterate person

[2] The author submitted a motion of complaint to the Constitutional Court by reason of the unconstitutionality of the liability to pay fees for copies, however, the motion has not been dealt with yet. See further details, Fenyvesi, Cs.: *A védőügyvéd* (The Defence Lawyer). Budapest–Pécs, 2002. 106, 199.

either *ex officio* or upon the motion of the accused, the defence counsel or of the person concerned with the inspection of the scene, or of the person affected by the seizure, house-search or body search, or of the illiterate person, unless there is an insurmountable obstacle.

The cases listed above are essentially unrepeatable procedural activities, therefore, the involvement and presence of official witnesses attending voluntarily (nobody can be forced to co-operate) has a warranting significance. The task of the official witness is to certify the conduct and result of the investigative activity, at which he was present. Therefore, the official witness shall be informed about his rights and obligations before the investigative activity commences: he may make comments about the investigative activity, which shall be included in the minutes. Those who are concerned with the procedure or are unable to apprehend and certify what they sense, or those who are officials of the investigative authority or do not undertake to co-operate may not be official witnesses. Other members or employees of the authority can only act as official witnesses, if there is an insurmountable obstacle to designating another person.

The ACP does not exclude the possibility of engaging official witnesses at other investigative activities. In our opinion, the decisive reason for the involvement of official witnesses in further cases may also be the unrepeatable character of (irreversibility) of the investigative activity, such as the interrogation of a dying aggrieved party, setting a trap or interrogation on the scene. An amendment adopted in 1999 annulled the solution, which proved rather bureaucratic in practice, according to which two official witnesses had to be engaged *ex officio* in the above mentioned cases. The present situation is exactly the opposite, since the involvement of official witnesses is obligatory only at the initiative or request of the parties listed, and even then, of only one witness. Obviously, there are no obstacles to designating two or more official witnesses, if the conditions above prevail, for instance, if the house-search is held in a real-estate with several rooms or several flats.

The Announcement of Well-founded Suspicion and the Interrogation of the Suspect

The announcement of well-founded suspicion is quite a significant stage in the completion of the investigation, since up to this moment the investigation has been conducted by reason of an act (in rem), but from this stage against a particular person (in personam), as well. From this moment, the legal standing of the accused is established, etc.

As we have mentioned with reference to the two-year period, significant tactical alternatives obtain in the timing of the announcement of the well-founded suspicion. We need to avoid by all means that it takes place too early or too late. In the former case, the accused can influence the direction of the investigation easier (can even take it to an impasse or drag it out for two years without substantial investigative results), whereas in the latter case, the danger increases that several investigative activities prove superfluous, since the accused either confesses or defends himself along a completely different version from the presumed one, etc. Further tactical alternatives are the scheduling of the announcement of the well-founded suspicion of several criminal offences and allowing that time lapses between the announcement of suspicion and the detailed interrogation.

Beyond the general regulation, the specific rules pertaining to the announcement of well-founded suspicion and to the interrogation of the accused are specified under Sections 179 and 180 of ACP:

Para 1. of Section 179: If, on the basis of the data obtained, a specific person can be well-foundedly suspected of the commission of a criminal offence, the prosecutor or, unless the prosecutor directs otherwise, the investigative authority shall interrogate the suspect as pursuant to Sections 117–118. The suspect in custody shall be interrogated within 24 hours. The deadline shall be calculated from the moment the suspect was brought before the investigative authority.

Para. 2: At the commencement of the interrogation, the suspect shall be informed about the substance of the incrimination with reference to the pertinent regulations.

Para. 3: The suspect shall be warned that he may choose a defence counsel or request that a defence counsel be appointed. If the participation of a defence counsel in the procedure is obligatory, the attention of the suspect shall be called to the fact that if he does not authorise a defence counsel within three days, the prosecutor or the investigative authority will appoint one. If the suspect declares that he does not intend to authorise a defence counsel, the prosecutor or the investigative authority will appoint one promptly.

Para. 1 of Section 180: No question that implies the answer or includes a fact not yet proven or implies a promise incompatible with the law shall be asked of the accused.

Para. 2: Without the consent of the suspect, the testimony may not be examined by means of a polygraph.

The following questions arise in connection with the quoted sections:

a) What does the announcement of the well-founded suspicion have to contain?
b) What does it not have to contain and what must it not contain?
c) What does the suspect have to be warned about and how?
d) From when and until when may or must the suspect be interrogated?
e) How is the testimony recorded?

ad *a)* The announcement of suspicion shall contain the most significant elements of the historical facts of the case and behaviour imputed to the accused (place, time, aggrieved party, method of commission) and its classification under the Penal Code of Hungary.

ad *b)* It does not have to contain either the legal facts of the case or the minor details of the historical facts of the case, since these may have special relevance from an interrogation-tactical aspect, and absolutely no reference to evidence has to be made. Well-founded suspicion can obtain without lawful evidence at disposal and it is exactly the concealment of missing or already obtained evidence that may have further interrogation-tactical potential.

ad *c)* Not only the Miranda-warning included under Paragraph 2 of Section 117 is obligatory, but the instruction about the choice of the defence counsel and the right of objection (legal remedy), as well. These warnings and the suspect's statements shall be included in the minutes, while the Miranda-warning shall be signed by the suspect separately in the course of the investigation. The suspect does not have to be warned separately that he is not obligated to tell the truth. Furthermore, it would be completely incorrect to warn him that he has the right to lie.

If the investigative authority wishes to use a polygraph as a means of interrogation, then the accused shall make an according statement included in the minutes. Without his consent, the testimony may not be examined by means of a polygraph.

ad *d)* The earliest the suspect at large may be interrogated is right subsequently to the announcement of the well-founded suspicion, and the latest before the announcement of the conclusion of the investigation. Only the suspect in custody shall be interrogated within 24 hours.

ad *e)* The testimony of the suspect (accused) shall be recorded in a report or the minutes. The report shall be signed by the proceeding official of the authority, whereas every page of the minutes shall be signed by the suspect (and the witness). If the suspect declines to sign, this circumstance as well as the indication of its reason shall be recorded in the minutes.

Even though framing the testimony of the suspect in a report is permitted under Section 168 of ACP to expedite exploration, in our view, this is not an

auspicious solution apart from exceptional cases. Inclusion of the testimony in the minutes is more expedient, reassuring and definitely advisable from a criminal-tactical viewpoint.

Neither the minutes, nor the report or the actual interrogation may involve a question asked of the accused that

– implies the answer,
– includes the statement of a fact not yet proven,
– implies a promise that is incompatible with the law.

In the first case, unjustifiable influence by the authority would not lead to a voluntary, personal testimony of the accused, whereas in the third one, a certain testimony or statement is expected from the accused in return for favours (e.g., the termination of confinement or mitigation of the circumstances of confinement, more favourable judgement of the act, etc.), therefore, both can be positively rejected. Our standpoint is not this positive in the second case, which represents a form of tactical "bluff", instances of which are enumerated and supported by criminalistic literature in great numbers. It is difficult to set the borderline of the legality of tactical bluff, which was attempted under the ACP. In practice, legality may be supervised to a certain extent by precisely including the investigator's questions in the minutes. If, subsequently, the question is classified as inadmissible, then the answer to it shall be regarded as unlawful evidence, and the same pertains to the other two groups of questions, as well.

These prohibitions are valid for the interrogation of witnesses, as well, in that case even the questions that imply "guidance" are precluded under Section 181. This regulation suggests that in the case of the accused, guidance is admissible, whereas in the case of the witness, it is not. We cannot identify with this conclusion, since influencing, guiding, hinting and promising questions are not admissible in either case.

The Closure of the Investigation
Decisions Made upon the Closure of the Investigation

As we have expounded with respect to the preliminaries of the conduct (completion) of the investigation before its commencement, when a memorandum on the refusal of the denunciation or on ordering the investigation is drawn up, in a similar way, essentially two types of decisions on the merits can be made after the completion of the investigation as its closure, namely, on the one hand a negative decision on the merits that terminates the investigation, on the

other hand a positive decision on the merits that concludes the investigation (proposal for arraignment).

The reasons and methods of decisions on the termination of the investigation are mostly the same as those of the decisions on the refusal of the denunciation, therefore, we are going to summarise the important points by focusing on the differences. However, we'll have to deal with the introduction of the documents and the conclusion of the investigation in detail.

If we examine the text of the ACP from a decision-centred viewpoint, we'll find that the refusal of the denunciation at the commencement of the investigation is dealt with in detail, whereas the order of the investigation only in brief. As opposed, in connection with closing the investigation, the rules concerning termination have been summarised in a comparatively shorter manner, while the conclusion of the investigation has been rendered quite a detailed specification.

Termination of the Investigation

According to *Paragraph 1 of Section 190*, the prosecutor may terminate the investigation with a decision

a) if the act is not a criminal offence,
b) if the commission of a criminal offence cannot be established on the basis of the data of the investigation and no result can be expected from the continuation of the procedure,
c) if it was not the suspect that committed the criminal offence or, if on the basis of the data of the investigation it cannot be established that the criminal offence was committed by the suspect,
d) if a reason that excludes culpability can be established with the exception, if the issuance of an order of compulsory therapy seems necessary,
e) due to the death of the suspect, limitation or pardon,
f) for other reason that abolishes culpability prescribed by law,
g) in the event of the absence of a request for prosecution, postulate or denunciation, and these cannot be attached,
h) if the act has been finally adjudged including the case under Section 6 of the Penal Code,
i) if two years have passed since the commencement of the investigation against a particular person (Para. 2 of Section 176).

Besides an almost complete coincidence with the grounds for the refusal of denunciation under Sections 174–175, the difference at the locutions that imply a so-called deficit of evidence is manifest. As pursuant to ACP, the

refusal of denunciation is substantiated by the absence of a criminal offence and of suspicion, whereas in the event of the termination of the investigation quite a significant differentiation is made with respect to the grounds. On the one hand, a new element in connection with the absence of a criminal offence is that according to the result of the investigation, it is not the suspect that committed the criminal offence. In that case, mostly a "relative" decision on the termination of the investigation is made, since it is only the investigation *vis-a-vis* the accused that is terminated, whereas the investigation in the basic case is continued and may be concluded.

On the other hand, unlike the case of the absence of suspicion, which upon the refusal of the denunciation may pertain to the criminal offence, not to the person of the perpetrator, in the event of the termination of the investigation the absence of evidence and its three instances, types may be substantively established. All three instances mean primarily that there is no evidence or there is little evidence to establish that

- *a criminal offence has been committed, or even if the commission of the criminal offence has been proven,*
- *who it was committed by, or if the well-founded suspicion has been announced,*
- *it was committed by the suspect.*

With the increase in criminality (in the last ten years 450–600 thousand criminal offences have been reported annually), the number of decisions terminating the investigation has reached a figure of several hundred thousands in Hungary (a proportion of 60–70 p.c.), as well. Most of these cases are terminated on grounds specified in the second instance. In these cases with an unknown perpetrator the phrase that the investigation has reached an "impasse" is adequate.

We must call the attention to the fact that the prosecutor, as the person directing the investigation, has a general entitlement to terminate the investigation, whereas in simpler cases, the investigative authority exceptionally also has this entitlement as pursuant to Paragraph 2 of Section 190:

The investigative authority has an entitlement to terminate the investigation in cases defined under Points a), e), g) and h) of Paragraph 1 as well as if culpability is excluded by incompetent age [Point a) of Section 22 of the Penal Code]. The decision that terminates the investigation shall be forwarded promptly to the prosecutor by the investigative authority.

The termination of the investigation does not hinder that the investigative authority continues the procedure is the same case. Therefore, these negative investigative decisions on the merits are not final, whereas the ACP attaches

some binding force to the termination of the investigation, since it provides that the continuation of the procedure is admissible on the following grounds:

Para. 2 of Section 191: The continuation of the procedure can be ordered by the prosecutor, and if the investigation was terminated by the prosecutor, by the head prosecutor. If the suspect was reprimanded according to Section 71 of the Penal Code, the decision terminating the investigation shall be annulled by the prosecutor or the head prosecutor.

Para. 3: If no complaint was made against the termination of the investigation, or the head prosecutor did not order that the investigation be continued, subsequently this can be ordered only by the court against the person that the investigation had been terminated before.

Para. 4: If the court has turned down the motion for the continuation of the investigation, the submission of a repeated motion for the continuation of the investigation on unchanged grounds is inadmissible.

Para. 5: With the exception of the cases under Paragraph 5 of Section 82, the investigation or its continuation may be ordered by the competent prosecutor in the case of those against whom the denunciation was refused as pursuant to Paragraph 1 of Section 175, or the investigation was terminated as pursuant to Paragraph 1 of Section 192.

In the event of the continuation of the procedure following the termination of the investigation, the investigative deadlines shall be valid again mostly by disregarding the decision on termination. For the continuation of the procedure, the annulment of the decision on the termination of the investigation is only necessary in cases, when the investigation was terminated with the reprimand of the accused. The reason for this is that the decision that terminates the investigation with a reprimand states that the accused has committed a criminal offence and such decisions may have further consequences under labour law and civil law. Furthermore, we must note that the investigative judge is implied by the judge that orders the continuation of the investigation.

The most common reason for termination is the absence of evidence specified under Point c), but the investigation can be continued unconditionally, in case new evidence emerges. Therefore, in practice, the majority of decisions on the termination of the investigation are implicit decisions suspending the investigation (since the investigation is "terminated" until new evidence emerges).

The general rules of the termination of the investigation also prescribe that the criminal expenses are defrayed by the state, whereas the suspect is obligated to bear costs that are incurred by his default (Para. 3 of Section 191).

The accused, the defence counsel, the aggrieved party, the denunciator and the party that submitted a request for prosecution shall be informed simultane-

ously about the decision. These parties are entitled to legal remedy. If the superior authority adjudging the complaint of the aggrieved party dismisses it, the aggrieved party may proceed as a secondary accuser at court.

A special form of the termination of the investigation is the so-called termination combined with an "investigative bargain" and the one with a cover investigator. The ACP contains several pertinent provisions under Section 192:

Para. 1: In case a well-founded suspicion of the commission of a criminal offence obtains, the prosecutor or the investigative authority with the prosecutor's permission may terminate the investigation, if the person who can be suspected of the commission of the criminal offence with well-founded reason co-operates by contributing to the proving of the case or another criminal case to such an extent that the interest of national security or criminal investigation related to co-operation is more significant than the one related to the necessity of the enforcement of criminal law by the state.

Para. 2: In case a well-founded suspicion of the commission of a criminal offence obtains, the prosecutor shall terminate the investigation with a decision, if the cover investigator, who can be suspected of the commission of a criminal offence with well-founded reason (Para. 2 of Section 178), has committed the offence during the accomplishment of his official task in the interest of the criminal investigation, and the interest of the criminal investigation is more significant than the one related to the necessity of the enforcement of criminal law by the state.

Para. 3: The investigation may not be terminated as pursuant to Paragraphs 1–2, if the person defined under Paragraph 1 or the cover investigator can be suspected with well-founded reason of the commission of a criminal offence involving the wilful taking of another person's life.

Para. 4: In case the investigation is terminated as pursuant to Paragraphs 1–2, Paragraphs 3–5 of Section 175 shall be applied accordingly. In this instance, the termination of the investigation shall not hinder the subsequent continuation of the procedure in the same case (Section 191).

As the quoted law manifests, the lawmaker considered these two unique cases of opportunism very carefully. In the former case, the proceeding authority essentially concludes a specific agreement with the perpetrator, as a result of which due punishment is not enforced by the state, whereas in the latter one, a member of the authority, while concealing his identity and goal, commits a criminal offence in view of the higher interest of criminal investigation and thus shall be exempt from criminal liability. The careful consideration by the lawmaker encompassed both the organisational safeguards (e.g., a bargain is admissible on condition that the prosecutor appointed by the public prosecutor has guaranteed a preliminary approval), and the rightful interest of the

aggrieved party (i.e., compensation, etc.), and last but not least, aspects of data protection and confidentiality (requisites of an incomplete decision, etc.).

We consider the regulation on the one hand a fault of drafting, since the mechanical repetition of ten or so lines of the text would be a fault in itself (pleonasm, cf. Paras. 1–2 of Section 175 and Paras. 1–2 of Section 191), on the other hand, in our view, the imperative investigative activities should be carried out with respect to all criminal offences. By reason of this or of the completion of procedural activities that include the registration or securing of evidence and traces already at disposal, in this context only the termination of the investigation already commenced is applicable, whereas the refusal of the denunciation is not.

The Conclusion of the Investigation

In a narrower sense, the conclusion of the investigation is in effect not a formal decision, just a verbal statement registered in the minutes or in a written notification about the fact of the conclusion of the investigation. In a broader sense, however, the conclusion of the investigation, that is, the positive closure of the investigation is an investigative phase constituted by several moments, such as notification about the introduction of documents, the introduction of documents with motions and interim decisions, forwarding the documents of the investigation to the prosecutor.

The investigative situation is similar to that of the announcement of well-founded suspicion, when no separate, formal decision on the declaration as suspect (accused) is made, either, but it is only the occurrence of this as a verbal statement that shall be recorded in the minutes of the interrogation. That is, in both cases informal, verbal statements are made, however, the announcement of the well-founded suspicion is usually followed by other moments (detailed interrogation, etc.), whereas the announcement of the conclusion is usually preceded by other moments (introduction of documents, supplementation of the investigation, etc.).

Section 193 contains the following provisions concerning the introduction of the documents of the investigation:

Para. 1: Following the completion of the investigation, the prosecutor or, unless the prosecutor directs otherwise, the investigative authority shall hand over the bound documents of the investigation to the accused and the defence counsel in a room designated for this purpose. The suspect and the defence counsel shall be facilitated to get acquainted with all the documents (except for the classified material) that substantiate the potential arraignment.

Para. 2: The suspect and the defence counsel shall be notified of the deadline of the introduction of documents and the suspect in custody shall be brought forward by the deadline at his request. The suspect and the defence counsel may propose that the investigation be supplemented, can make other motions and comments, and may request copies of the documents. The suspect shall be warned about this entitlement.

Para. 3: The motion of the suspect or the defence counsel shall be adjudged by the prosecutor or the investigative authority.

Para. 4: The suspect and the defence counsel shall be entitled to view the documents under Para. 1 following the deadline of the introduction of documents, as well.

Para. 5: If the procedural activity under Paragraph 1 was completed by the investigative authority, the documents shall be forwarded to the prosecutor within 15 days following its occurrence.

Para. 6: Following the completion of the procedural activity under Paragraph 1, the aggrieved party shall be notified that he can view the documents of the investigation and exercise other rights he is entitled to in the course of the investigation.

This procedural activity does not involve the presentation of the materials of the investigation by the authority, since the authority shall not present their contents, but shall hand them over and let the party entitled to get acquainted with the documents view them. In other words, it is not the presentation, but the introduction of the documents that takes places, and as we have seen, the quoted section of the ACP secures quite a broad scope of rights for the subjects of the defence. At the same time, the subjects of the defence are not obligated to exercise these rights, since at a subsequent stage, in the judicial proceedings they will be entitled to unlimited exercise of rights of attendance, viewing documents, making motions, etc. Therefore, it is reasonable to exclude the request for certification in connection with the default of notification about the introduction of the documents. Upon the introduction of documents, the bound original documents shall be handed over for study by the suspect and the defence counsel, which they can do under supervision and they shall not be impeded in doing so. Attention must be paid that the suspect does not modify or falsify the text of the documents, that he does not destroy or damage documents or means of evidence during the introduction. He shall be warned about that. The suspect and the defence counsel may take notes. The notes containing data that constitute state or service secrets are to be handled in a closed, separate envelope beside the documents.

The motions about the supplementation of the investigation must usually be adjudged instantly and detailed minutes shall be taken about the introduction of the documents. As Section 194 of ACP provides,

(1) According to Paragraph 1 of Section 193, the minutes of the handing over of the documents of the investigation shall include

a) the list of the documents handed over to the suspect and the defence counsel, the time of the commencement and the end of the introduction,

b) the motions and remarks of the suspect and the defence counsel,

c) if the suspect or the defence counsel does not exercise their right guaranteed under Paragraph 1 of Section 193, then this fact.

As the quoted section manifests, in the event a motion is made for the supplementation of the investigation, the procedure can take two directions: if the authority admits the motion (even following an objection), then a repeated introduction of the documents will take place related to the supplemented materials of the investigation. If, however, the motion has been turned down and that as a measure (without a decision) has been included in the minutes, the conclusion of the investigation shall be announced immediately. If an objection has been put forward against the measure turning down the motion, then upon its dismissing decision it shall be mailed to the prosecutor.

As a closing moment of the introduction of documents, the conclusion of the investigation shall be announced in a verbal form and recorded in the minutes. Upon this announcement, the criminal offence that according to the data of the investigation the suspect committed shall be named with reference to the pertinent section of the Penal Code.

If, however, the defence does not attend the introduction of the documents at all, instead of taking the minutes, this circumstance shall be registered in the documents. At the same time, the suspect and the defence counsel shall be notified about the conclusion of the investigation, as well as the documents shall be forwarded to the prosecutor with a motion for arraignment within 15 days of the conclusion of the investigation.

Therefore, no formal decision shall be made on the announcement of the conclusion of the investigation. As a unique measure that is reflected in the minutes of the introduction of documents or in the separate written notification in case of the complete default by the defence. The motion for arraignment does not imply a formal decision, either, as it includes merely reference to the forwarding of documents and the proposal itself, without the summary of the case.

The deficiencies of former regulations pertaining to the aggrieved party are remedied by the provision that gives opportunity for the aggrieved party (at

short-notice even in the case of the institution of proceedings) to view documents (after the defence has already viewed them, that is, within the specified mailing deadline of 15 days) and exercise his rights. The authority shall notify both the aggrieved party and the defence about its place and time. Non-appearance shall not hinder continuation, however, further written notification or information will not be mailed afterwards.

The aggrieved party may exercise his rights *via* his legal representative or, in the event of his death, the party proceeding as his heir shall be entitled to view documents. The surviving spouse of the deceased aggrieved party merely under this title or the person authorised by the spouse shall not be entitled to proceed so, since they do not have *locus standi* (Court Decisions No. 416/2001 and 483/2000).

Closing Ideas in Lieu of a Summary

The basic objectives of the new, "reform" criminal procedures law included the shift of emphasis from the phase of the investigation to that of the judicial proceedings. In view of that, the lawmaker endeavoured to render the investigation more flexible and expeditious, whereas did not waive thoroughness and the comprehensive requirements of exploration. It is difficult to satisfy this "double bind"[3] in the shadow of the increasing and ingravescent criminality. In the following years, law applying organs and their practice will decide, whether the lawmaker's intention has proved effective and whether practice can follow theory.

[3] On the "double bind", see further, Fenyvesi, Cs.–Herke, Cs.–Tremmel, F.: *Új magyar büntetőeljárás* (The New Hungarian Criminal Procedure). Pécs, 2004. 398.

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The Legality of Humanitarian Intervention under Traditional International Law

Abstract. The necessity and usefulness of a thorough examination of the legality of humanitarian intervention under traditional international law is obvious. Following the analysis of customary law, the teachings of contemporary international lawyers, the relevant treaty stipulations, the doctrine of *bellum iustum*, the general principles of international law, and the *ius ad bellum* one may come to realize that a definitive conclusion on the issue simply cannot be derived, as both *pro* and *contra* views are verifiable, but neither is absolutely correct.

Keywords: history of international law, humanitarian intervention

I.

In order to be able to examine the topic set down in the title, a definition of humanitarian intervention valid for the period of traditional international law–that is to say, the era between the 17th century[1] and the adoption of the Charter of the United Nations (UN) in 1945–has to be constructed. Since such definition does not stand, and has never stood at disposal in positive international law, it has to be assembled with taking into account the contemporary body of opinion concerning humanitarian intervention, with special regard to the common or at least repeatedly emerging elements of various descriptions. It may be observed that the opening remark speaks of a definition "valid for the period of traditional international law". It is because I am deeply convinced that

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[1] "International Law as a law between Sovereign and equal States based on the common consent of these States is a product of modern Christian civilisation, and may be said to be hardly four hundred years old." Oppenheim, L.: *International Law: A Treatise*. Vol. 1, London–New York–Bombay, 1905. 44.

humanitarian intervention cannot be *accurately* described by one single definition with respect to both the traditional and the current era of public international law.[2] This is attributable to a number of factors. For instance the legal environment surrounding intervention on grounds of humanity was substantially altered following the adoption of the UN Charter, as a consequence of which it–being a forceful measure–almost entirely left the domain of the principle of non-intervention and entered that of the prohibition of the use of force. Furthermore, the legal terminology meant to describe it has also changed, not to mention a number of modifications in the very content of the phrase, such as the widening of the group of potential subjects of intervention with certain international organizations, or the broadening of its possible grounds with the fundamental guarantees of international humanitarian law applicable to armed conflicts not of an international character.

Having considered the relevant literature of those days,[3] the definition of intervention on grounds of humanity applicable to the pre-Charter period can be formulated as follows: humanitarian intervention was a dictatorial interference involving the use of force, but not qualifying as war, carried out as a last resort and free from selfish motives by one or more civilized states against another state in absence of the consent or request thereof, with a view to coerce it to cease the grave and widespread violations of fundamental freedoms and human rights of its own nationals.

A few supplementary remarks are nevertheless necessary to shed more light on the special features of humanitarian intervention, and to make the content of the definition perfectly clear. First of all, the use of force for humanitarian purposes was generally considered a last resort, which could be utilized only after all other, non-violent measures had failed. Other requirements or obligations, however, did not really emerge *vis-à-vis* the intervening states. Thus the norms of the law of war restricting the right of belligerents to freely choose the means and methods of warfare reached a level of development on which one can perceive them as a substantial constraining factor only after 1899, near the end of the period under consideration. Let us not forget either that these norms governed situations of *de iure* war,[4] but–as it will be thoroughly dis-

[2] The creation of a definition of humanitarian intervention embracing both major periods of international law is, of course, not impossible. I am merely saying that it would inevitably be either inaccurate, or too vague.

[3] It would be excessive to enumerate here all of the sources consulted. Nevertheless, they can be found in the footnotes below. See especially *infra*, notes 12–13, 16.

[4] Cf. Convention with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, Article 2; Convention for the Adaptation to Maritime Warfare of the

cussed later on–intervention was a category distinct from war. In relation to the means and methods of forceful measures short of war only the inherently limited nature of these actions, some arguably surviving remnants of the natural doctrine of just war as well as rationality and expediency could pose actual boundaries.

Notwithstanding the fact that some of the authors of the period adopted this method,[5] I do not see any reason for the independent treatment of intervention on grounds of humanity and intervention on grounds of religion, provided that the latter was not carried out as a manifestation of religious intolerance, but to suppress religious persecution. Even though these two kinds of intervention should not be discussed separately, they were not totally identical either, that is to say, the scope of humanitarian intervention must not be restricted to the enforcement of the freedom of religion. The relationship between them was a relation of a part (intervention on grounds of religion) to a whole (humanitarian intervention), as the blatant denial of the freedom of religion regularly brought along a violation of other human rights, as well.

It may be observed that the definition above speaks of "civilized states" as the sole subjects of international law having been able to carry out a humanitarian intervention in the past. Despite that the distinction of civilized and uncivilized nations appeared fairly seldom in the relevant works,[6] I consider the inclusion of this condition well founded for three reasons. Firstly, the "civilized-semi-civilized-uncivilized" partition was an axiomatic principle of traditional international law that academics may not necessarily have wished to reaffirm repeatedly. Secondly, the genuine subjects of international law were civilized states, so its rules could not have granted a right of intervention to semi-civilized or uncivilized nations. Thirdly, the attribute "civilized" is used exclusively in connection with states carrying out the intervention; *a contrario* a target state could have belonged to any of these three categories. It would be

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Principles of the Geneva Convention of August 22, 1864, The Hague, 29 July 1899, Article 11; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906, Article 24; Convention Relative to the Opening of Hostilities, The Hague, 18 October 1907, Article 3.

[5] See e.g. Bonfils, H.: *Manuel de droit international public.* 7th edition (P. Fauchille ed.), Paris, 1914. 203; Phillimore, R. J.: *Commentaries upon International Law.* 3rd edition, Vol. 1, London, 1879. 618.

[6] See e.g. Martens, F. F.: *Völkerrecht. Das internationale Recht der civilisierten Nationen.* (C. Bergbohm ed.) Vol. 1, Berlin, 1883. 301–302; Werner, R.: *A természetjog, vagy bölcseleti jogtudomány kézikönyve. Összehasonlító tekintettel a tételes jog intézkedéseire* [Manual of Natural Law, or of Philosophical Legal Science. With Comparative Regard to Measures of Positive Law]. Vol. 2, Pest, 1869. 338.

a mistake to restrict the circle of target states to the group of semi-civilized and uncivilized countries, since the theoretical possibility of a humanitarian intervention against a civilized state was equally present although such action was almost certainly not carried out in practice. (Civilized states usually resorted to "humanitarian representations" in their relations with one another.) In addition, international lawyers of the period would not have devoted so much attention to the question of the legality of humanitarian intervention if it had been applicable only against semi-civilized or uncivilized nations, which could not fully enjoy the protection afforded by international law, particularly the principle of non-intervention.

It may be noticed that the definition contains nothing regarding issue of legality, because I believe that the classification of an intervention as humanitarian did not automatically bring about its lawfulness. In other words, humanitarian intervention was not a legal title of absolute value. The following sections are meant to elaborate on this particular issue.

II.

Customary law was undoubtedly the dominant source of public international law in the pre-Charter period. It is therefore obvious that the legality of past humanitarian interventions has to be examined in the framework of contemporaneous customary law in the first place. As commonly known, this source of international law is composed of two segments. The objective element of customary law is state practice (*consuetudo/desuetudo*, *diuturnitas*, *usus*),[7] in addition to the subjective element, the so-called *opinio iuris sive necessitatis*.[8]

[7] "State practice means any act or statement by a State from which views about customary law can be inferred; it includes physical acts, claims, declarations *in abstracto* [...], national laws, national judgments and omissions." Akehurst, M.: Custom as a Source of International Law. *British Yearbook of International Law* 47 (1974–1975), 53. Several authors, however, challenge the practical importance of *in abstracto* declarations. Cf. e.g. Thirlway, H. W. A.: *International Customary Law and Codification*. Leiden, 1972, 58.

[8] For an examination of traditional international law, one obviously needs the "traditional" concept of *opinio iuris*: "Traditionally, *opinio juris* was discussed not from the point of view of law-creation but from that of law-application. Its primary function was to draw a distinction between legally binding customary norms, on the one hand, and other social norms, particularly moral norms and comity, on the other, in the process of ascertaining and applying international law. The traditional interpretation of *opinio juris* was also developed under the strong influence of various natural law theories according to which practice does not create legal obligations but simply reflects the already existing

One can speak of an existing norm of customary law exclusively in case of a parallel coexistence of these two segments, both with respect to the past and the present. Consequently, a proof of relevant practice is not at all equivalent to an evidence of customary law. If a right of humanitarian intervention had ever been a part of customary law, a sufficient state practice as well as the adjacent *opinio iuris* can and should be revealed.

The state practice appears to be provable, although it may well be subject to debate how many of the most frequently cited instances qualified as a genuine humanitarian intervention. (This is to a great extent due to the absence of consensus on the notion of humanitarian intervention.) Diplomatic representations in connection with the actual recourses to force further render the existence of relevant state practice possible, since the *usus* is established not only by physical actions but also by other conducts. It cannot be denied, however, that the 19th century state practice comprised of a handful of instances, and even less can be said about the first half of the 20th century. Instances of humanitarian intervention during the 19th century were carried out almost exclusively by the European Great Powers against the Ottoman Empire–the sole, yet rather questionable, exception being the action of the United States in Cuba in 1898.[9] There is therefore a great deal of subjectivity in determining if this seemingly sporadic practice suffices as *usus*. On the other hand, the international community of states was extremely small at that time, thus one may find that, in fact, a relatively large number of its members participated in these interventions. As for concerns relating to the alleged infrequency of

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ones. In the framework of this approach, *opinio juris* was defined as a feeling or belief that practice corresponds to an already existing legal obligation." Danilenko, G.: *Law-Making in the International Community.* Dordrecht–Boston–London, 1993. 99. The International Court of Justice perceived *opinio iuris* in a similar manner in the Case concerning the North Sea Continental Shelf. See North Sea Continental Shelf (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands), Judgement of 20 February 1969, I.C.J. Reports 1969, para. 77, at 44.

[9] The most frequently mentioned occurrences are the following: Greece (1827–1830), Syria (1860–1861), Bosnia and Herzegovina, and Bulgaria (1877–1878), Cuba (1898), Macedonia (1912–1913). The Cuban action was perhaps the only humanitarian intervention, if seen as such, which was carried out by one civilized state against another. Admittedly, Article VII of the 1856 Peace Treaty of Paris permitted the Sublime Porte "to participate in the advantages of the Public Law and System (Concert) of Europe", but the practical significance of this solemn declaration proved even at that time rather negligible. Cf. e.g. Phillimore: *op. cit.*, 635. This list, however, can be considerably extended, if one includes non-violent interventions, as well. See e.g. Grewe, W. G.: *Epocher der Völkerrechtsgeschichte.* 2nd edition, Baden-Baden, 1988. 577–579; Stowell, E. C.: *Intervention in International Law.* Washington D.C., 1921. 63–277.

actions, they might be considerably resolved with referral to an opinion, according to which "[t]he number of States taking part in a practice is much more important than the number of separate acts of which the practice is composed, or the time over which it is spread".[10] For that reason, it is not impossible that an adequate state practice of humanitarian intervention existed–the real question is whether or not international law permitted it.

The question of *opinio iuris*–although not resulting in a direct and coherent debate–set scholars of international law against one another even in the period under deliberation. Certain statements of politicians, which might serve as an evidence of legal belief, could provide a guideline for the determination whether a state perceived its action as an exercise of a right, but it would be unwise to draw conclusions of universal validity solely from such pronouncements. I am convinced that the analysis of the legal literature of that time "as subsidiary means for the determination of rules of law" is perhaps the most expedient method. The technique to be applied for this purpose is relatively simple, and is basically the same as the one adopted earlier for the construction of the definition of humanitarian intervention. In case the overwhelming majority of eminent authorities of "civilized nations", who were most probably in knowledge of state practice and *opinio iuris*, supported a right of intervention on grounds of humanity, then we have reason to believe that this category was indeed in line with the norms of customary international law, and *vice versa*. The summary of opinions derived from the most influential works on international law leads, however, to a somewhat astonishing result: teachings of international lawyers do not give a definitive answer to the question. It can be observed that nearly as many outstanding figures considered humanitarian intervention lawful as those who expressly rejected it; not to mention the significant group of authors, who–due to the cautiousness or vagueness of their opinions–stood somewhere between the two extremes.[11]

Within the framework of a brief enumeration, one may mention, *inter alia*, the following international lawyers–including, for the sake of interest, a few representatives of Hungarian legal doctrine–among those who considered humanitarian intervention lawful: Johann C. Bluntschli, Edwin M. Borchard, László Buza, Carlos Calvo, Charles G. Fenwick, István Kiss, Fjodor F. Martens,

[10] Akehurst: *op. cit.*, 14.

[11] For an opposing statement, according to which "a majority of writers accepted the idea of a lawful humanitarian intervention", and only a "substantial minority of scholars" rejected this view (although its legality under customary law is still debatable), see Beyerlin, U.: Humanitarian Intervention, in Bernhardt, R. (ed.): *Encyclopedia of Public International Law*. Vol. 3, New York–London, 1982. 212.

Antoine Rougier, Ellery C. Stowell, Pál Tassy, László Vincze Weninger, Rudolf Werner, John Westlake, Henry Wheaton and Theodore Woolsey.[12] Naturally, all of them defined the notion of humanitarian intervention in a more or less divergent manner. Nevertheless, I believe that it does not deprive their consensus of its value, because in spite of the differences, the basic conception remained the same. The lawfulness of humanitarian intervention was clearly ruled out, for instance, by István Apáthy, Henry Bonfils, János Csarada, August W. Heffter, Albert Irk, Franz von Liszt, Karl Melczer, Paul L. E. Pradier-Fodéré, Leo Strisower, Karl Strupp and Gyula Thegze.[13] Manouchehr Ganji also added the famous philosopher, Immanuel Kant to this group,[14] but

[12] See Bluntschli, J. C.: *Das moderne Völkerrecht der civilisierten Staaten als Rechtbuch dargestellt.* Nördlingen, 1868. 268; Borchard, E. M.: *The Diplomatic Protection of Citizens Abroad.* New York, 1922. 14; Buza, L.: *Szabadság és beavatkozás a nemzetközi jogban* [Freedom and Intervention in International Law] Szeged, 1936. 5; Calvo, C.: *Le droit international théorique et pratique, précédé d'un exposé historique des progrès de la science du droit des gens.* 4th edition, Vol. 1, Paris–Berlin, 1887. 302–303; Fenwick, C. G.: *International Law.* London, 1924. 154; Kiss, I.: *Európai nemzetközi jog* [European International Law]. Eger, 1876. 94–95; Martens: *op. cit.*, 301–302; Rougier, A.: La théorie de l'intervention humanité. *Revue Générale de Droit International Public* 17 (1910), 472; Stowell: *Intervention in International Law*, 53; Tassy, P.: *Az európai nemzetközi jog vezérfonala* [The Guiding Principle of European International Law]. Kecskemét, 1887. 46; Weninger, L. V.: *Az új nemzetközi jog* [The New International Law]. Budapest, 1927. 101 (although he might be inserted in the third group, as well); Werner: *op. cit.* 338; Westlake, J.: *International Law.* 2nd edition, Vol. 1, Cambridge, 1910. 319–320; Wheaton, H.: *Elements of International Law.* 8th edition (R. H. Dana ed.), London–Boston, 1866. 113; Woolsey, T. D.: *Introduction to the Study of International Law, Designed as an Aid in Teaching, and in Historical Studies.* Boston–Cambridge, 1860. 91.

[13] See Apáthy, I.: *Tételes európai nemzetközi jog* [Positive European International Law]. Budapest, 1878. 112; Bonfils: *op. cit.*, 203, 205; Csarada, J.: *A tételes nemzetközi jog rendszere* [The System of Positive International Law]. Budapest, 1901. 179; Heffter, A. W.: *Das europäische Völkerrecht der Gegenwart.* 3rd edition, Berlin, 1855. 92; Irk, A.: *Bevezetés az új nemzetközi jogba* [Introduction to New International Law]. 2nd edition, 1929. 111; Liszt, F., von: *Das Völkerrecht systematisch dargestellt.* 7th edition, Berlin, 1911. 66; Melczer, K.: *Grundzüge des Völkerrechts.* Wien–Leipzig, 1922. 35–36; Pradier-Fodéré, P. L. E.: *Traité de droit international public européen & américain.* Vol. 1, Paris, 1887. 632; Strisower, L.: *Der Krieg und die Völkerrechtsordnung.* Wien, 1919. 121–122, 125.; Strupp, K.: *Éléments du droit international public universel, européen et américain.* 2nd edition, Paris, 1930. 124; Thegze, Gy.: *Nemzetközi jog* [International Law] Debrecen, 1930. 205.

[14] Cf. Ganji, M.: *International Protection of Human Rights.* Genève–Paris, 1962. 41. Cf. furthermore Kant, I.: *Zum ewigen Frieden: Ein philosophischer Entwurf.* Königsberg, 1796. 11–12.

to tell the truth, John Stuart Mill can likewise be included, although some of his thoughts approximated the interventionist approach.[15] For various reasons, views expressed by the following authors can be inserted in neither of the categories above: William E. Hall, Thomas J. Lawrence, Lassa Oppenheim, Pitman B. Potter, Robert J. Phillimore and Percy H. Winfield.[16]

For the previously applied method of revealing the 19th century *opinio iuris* regarding humanitarian intervention has led to a controversial outcome, one might make an alternative attempt to derive legality from the natural doctrine of *bellum iustum*, because the phrase "*iustum*" had referred not only to a war having been just, but also to the fact that it had been in conformity with the "necessary law of nature". The phenomenon qualified today as a grave and widespread violation of human rights was once, under the doctrine of just war, one of the just causes of war. It appeared in works of such classics as Francisco de Vitoria, Francisco Suárez, Alberico Gentili and Hugo Grotius.[17] We may reasonably believe that–parallel to the development of the "voluntary law of nations"–this *iusta causa* seceded from the gradually eclipsing natural doctrine of *bellum iustum* and ultimately gained independence within positive international law as intervention on grounds of humanity. Based upon this assumption, it may be concluded that the lawfulness of humanitarian intervention under customary international law was a result of the outlasting of one of the segments of just war. This train of thoughts seems *prima facie* plausible. However, it should not be overlooked that approximately at the turn of the 18th and 19th centuries, simultaneously to a presumed recognition of such

[15] Cf. Mill, J. S.: A Few Words on Non-Intervention, in Mill, J. S. (ed.): *Dissertations and Discussions, Political, Phylosophical, and Historical.* Vol. 3, London, 1867. 172–173, 176.

[16] See Hall, W. E.: *A Treatise on International Law.* 8th edition (A. P. Higgins ed.), Oxford, 1924. 342; Lawrence, T. J.: *The Principles of International Law.* 3rd edition, Boston, 1905. 120-121; Oppenheim: *op. cit.*, 186-187; Potter, P. B.: L'intervention en droit international moderne. *Recueil des Cours* 32 (1930-II), 652–653; Phillimore: *op. cit.*, 560, 623, 638; Winfield, P. H.: The Grounds of Intervention in International Law, *British Yearbook of International Law* (1924), 161–162.

[17] See Gentili, A.: *De iure belli libri tres* [Three Books on the Law of War] (J. C. Rolfe transl.), Vol. 2, Oxford–London, 1933. I. XXIII. 186, at 115, I. XXV. 198, at 122; Grotius, H.: *A háború és a béke jogáról* [On the Law of War and Peace]. Vol. 2, Budapest, 1999. II. XXV. VIII. 4, at 159; Suárez, F.: De triplici virtute theologica, fide, spe et charitate [A Work on the Three Theological Virtues: Faith, Hope and Charity], in Williams, G. L.–Brown, A.–Waldron, J. (prep.)–Davis, H. (rev.): *Selections from Three Works of Francisco Suárez.* Vol. 2, Oxford–London, 1944. XIII. IV. 3, at 817; Vitoria, F., de: De Indis recenter inventis [On the Indians Lately Discovered] (J. P. Bate transl.), in Scott, J. B.: *The Spanish Origin of International Law.* Vol. 1, Oxford–London, 1934. III. 13, 15, at xliii–xliv.

actions by positive law, the principle of non-intervention emerged as a cornerstone of international law. In light of this, the survival of legality of a just war for altruistic purposes in the form of a right of humanitarian intervention appears extremely dubious.[18]

The principle of non-intervention could not affect the outlasting lawfulness of humanitarian intervention only if the latter possessed the quality of a right of intervention, in other words, if it was an exception to the major rule of prohibiting nature. The list of these rights of intervention can be drawn up on the basis of the legal literature of the period, whereas state practice offers only but a few certain and helpful pieces of information in this regard. Acceptable rights of intervention, however, differed from author to author, not to mention those scholars who automatically denied the very existence thereof.[19] To sum up, in order to derive a customary right of humanitarian intervention from the survival of the above-mentioned element of *bellum iustum*, it has to be proven primarily that the prohibition of intervention–one of the most fundamental norms of the post-Westphalia world order–did not affect this continuity. To facilitate that, the fairly controversial coexisting legal literature has to be consulted, with the intention of illustrating whether or not the indispensable *opinio iuris* was present concerning the actual existence of this particular right of intervention. In other words, one inevitably has to face our starting, yet definitely unanswerable question at the end of an analysis focusing on the survival of *bellum iustum*, as well.

It is inappropriate to restrict the scope of examination to customary law, and to the *communis opinio doctorum*. A limited number of international treaties providing for a state party to respect specific human rights–mainly the freedom of religion–of its own subjects might also be of interest. Merely upon the basis of state practice it may appear that in case of a violation of these human rights by the obliged state, the other parties enjoyed some sort of a right of intervention, sometimes even a right of armed intervention, the principal function of which was to enforce the fulfilment of obligations undertaken in the treaty.[20] This right of armed intervention seemingly manifested itself as a

[18] The restrained tone of Emeric de Vattel, for example, reflects this uncertainty. Cf. Vattel, E., de: *Le droit de gens ou principes de la loi naturelle. Appliqués à la conduite et aux affaires des nations et souverains* [Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns]. (C. G. Fenwick transl.), Vol. 3, Washington D. C., 1916. Introd. 22–23, at 8, II. IV. 54–55, at 131.

[19] Cf. Martens: *op. cit.*, 299.

[20] The most important treaty stipulations with regard to the relevant 19th century state practice were perhaps the following: Treaty of Peace and Friendship between Turkey and Russia, Kutchuk-Kainardji, 21 July 1774, Articles VII–VIII, XIV, XVI–XVIII; Peace

sanction or a treaty guarantee, and was a particularly "popular" and often invoked ground in the practical implementation of instruments envisaging a free exercise of religion for Christian minorities living under the rule of the Sublime Porte. Unquestionable is the fact that states parties to such agreements indeed intervened militarily on some occasions, but the humanitarian nature and legality of their action did not follow automatically. Especially not in light of the fact that the treaties incorporating human rights provisions did not contain explicit clauses for a right of *armed* intervention, should a breach of the instrument occur. Notwithstanding, I consider the problem worthy of thorough deliberation, chiefly in view of Manouchehr Ganji's well-known theory on the common features of past humanitarian interventions, which directly linked these actions to treaty stipulations containing the obligation to respect the freedom of religion.[21]

Traditional international law recognized several rights of intervention in connection with international treaties. The first group of these rights–formulated *in abstracto* or for a specific event–originated directly from the text of a treaty, thus any action in invocation thereof was to be seen as a lawful exception to the principle of non-intervention, due to the consensual nature of the agreement.[22] Nevertheless, the majority of authors discussed these *expressis verbis* stipulated rights of intervention either in the context of the restoration of a sovereign, a government or of constitutional order, or–in more general terms–emphasized only the requirement of consent by the target state. With such special content, this set of rights is obviously inadequate for the demonstration of the lawfulness of intervention on grounds of humanity. This is, however, not the sole argument to hamper the successful continuation of the examination. Any right of intervention provided for in a treaty carries with itself an inherent contradiction. The essence of intervention–including humanitarian intervention–is coercion, whereas the most important feature of a treaty, at least in this regard, is consensus: an intervention based upon a treaty provision is, therefore, a paradox.

Treaty between Great Britain, France, the Ottoman Empire, Sardinia, and Russia, Paris, 30 March 1856, Articles VIII–IX; Treaty between Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey, Berlin, 13 July 1878, Articles XXIII, LXI–LXII.

[21] See Ganji: *op. cit.*, 37.

[22] See e.g. Apáthy: *op. cit.*, 109; Buza: *Szabadság és beavatkozás a nemzetközi jogban. op. cit.* 2; Bluntschli: *op. cit.*, 267; Csarada: *op. cit.*, 178; Lawrence: *op. cit.*, 118; Liszt: *op. cit.*, 66; Oppenheim: *op. cit.*, 184; Strisower: *op. cit.*, 114; Strupp, K.: *Theorie und Praxis des Völkerrechts. Ein Grundriß zum akademischen Gebrauch und zum Selbststudium.* Berlin, 1925. 29. For a critical evaluation, see Stowell: *Intervention in International Law*, 438–446.

A further right of intervention relating to international treaties served as a sanction beyond the texts of treaties, but likewise served the fulfilment of violated treaty obligations. As Oppenheim stated:

> "Thus, thirdly, if a State which is restricted by an international treaty in its internal independence or its territorial or personal supremacy, does not comply with the restrictions concerned, the other party or parties have a right to intervene."[23]

Disturbing as it may sound, most of the contemporaneous experts did not even mention this right of intervention: perhaps they deemed its existence self-evident, or examined it under a different heading, for instance that of reprisal. The quotation above does not offer a definitive answer as to the relationship between the right at issue and the category of reprisal. It seems that Oppenheim simply treated a reprisal applicable in the wake of a breach of a treaty as a separate right of intervention. If this assumption is correct, it may be concluded that an intervention sanctioning a violation of a treaty obligation to respect human rights was almost certainly lawful; in addition, it could be classified simultaneously as humanitarian intervention. It has to be kept in mind, however, that the international legality of the resort to force in this particular case was a result of an accidental overlapping of the normally distinct categories of humanitarian intervention and armed reprisal, but not a clear evidence of the lawfulness of the former under customary law.

This statement begs the explanation why humanitarian intervention could not be equalized with armed reprisal and categorized as a permissible measure under traditional international law. Since a reprisal presupposes a violation of a norm of international law, one must first answer the question, whether or not such violation occurred, if a state trod the fundamental rights of its nationals under foot during the period concerned. In order to be able to answer this question, a brief preliminary examination of a standard legal relation in the field of human rights has to be carried out, which mainly focuses on the following problem: Towards whom did states undertake the obligation to respect human rights already in existence? Towards their nationals only (*per se* obligation), or–besides them–towards other states, as well (*inter se* obligation)?[24] In the

[23] Oppenheim: *op. cit.*, 183. See also Phillimore: *op. cit.*, 568.

[24] According to András Bragyova, the undertaking of human rights obligations establishes a *per se* obligation, not an *inter se* one, because "the state obliges itself towards itself". (Translation mine.) He further adds that the lack of a substantive international right or obligation does not rule out the existence of certain procedural rights or obligations on

latter case, a violation of human rights inevitably would have injured not only the individuals but also the other states; consequently each and every humanitarian intervention would have been an armed reprisal. This is, as the conditional voice suggests, a less tenable assertion. It seems more defendable that in absence of an express stipulation, other states did not receive any rights from the undertaking of an obligation to respect human rights. Therefore, a violation of these rights could not have injured subjects other than the individuals–in other words: an intervention on grounds of humanity in favour of them could not be characterized as a reprisal. There is only one exception imaginable to this major rule. If states concluded a treaty in which they established an *inter se* human rights obligation–that is to say, they undertook the observance of human rights towards one another, as well–, the atrocities injured both the individuals and the other parties. Should the treaties previously mentioned be seen as such instruments, any breach of them produced an unintentional overlapping of humanitarian intervention and armed reprisal. The correctness of this allegation is also supported by the fact that human rights were within the domestic jurisdiction of states during the pre-Charter era, and became of international concern solely by insertion into international agreements.

Given the extreme, sometimes even chaotic diversity of the pre-Charter science of international law, it is not surprising that there was a third position, as well. According to this view, the treaties referred to above directly provided for a right of intervention for other parties even in absence of specific stipulations and independently from customary law, should a breach take place. As Percy H. Winfield wrote:

> "The provision for a future intervention is either express or, more commonly, implied, and in either case must take effect as the secondary or sanctioning right necessary to secure the maintenance of the rights and duties conferred or imposed by the treaty."[25]

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the side of other states, in case of a violation of these rights. See Bragyova, A.: Alapozhatók-e az emberi jogok a nemzetközi jogra? [Can Human Rights Be Based upon International Law?], *Állam- és Jogtudomány* 32 (1990), 100–101, 103–104.

[25] Winfield: *op. cit.*, 158. Winfield mentioned, among others, Articles LXI and LXII of the 1878 Treaty of Berlin, although none of these stipulations provided for a right of armed intervention. On the contrary, Article LXI only contained the verb "superintend", whereas Article LXII merely recognized a right of Powers to "official protection" by diplomatic or consular agents. Evidently, none of these guarantees can be identified as a right of armed intervention. It is true that diplomatic protection often took a violent form during the 19th century, but its beneficiaries were the nationals of the intervening state. The group of

Furthermore, Winfield believed that if an intervention was "not otherwise righteous", then an agreement to carry it out could neither be considered to be in conformity with international law, similarly to the provisions of municipal law.[26] (The phrase "not otherwise righteous" was presumably a referral to customary law.) Disregarding the previous conclusions, one therefore has to examine a further hypothesis in which a treaty could incorporate a right of intervention even in an *implicit* manner.

I feel it necessary to state at the very beginning that–at least in my opinion–even the starting point suffers from serious legal and logical defects; beyond the fact that the concept of a right of intervention originating from a treaty, *per se*, appears to be a paradox. The recognition of "implicit" or "inherent" treaty provisions in general (irrespective of the subsequent theory of inherent powers in the law of international organizations) is based upon the blurring of boundaries between customary and treaty law. Had the parties really wished to secure this "sanctioning right", they most likely would have done it explicitly. If states did not include such possibility, it was because they either did not want to provide for it, or it was superfluous to do so, as it had been present and applicable under customary law anyway. It is a scarcely acceptable submission that, even though a treaty stipulates nothing in this regard, a right of intervention exists, moreover, it stems from the document itself.

Should one nevertheless adopt the idea of a right of humanitarian intervention emerging somehow from a treaty, there are two ways to derive its lawfulness under customary law. On the one hand, it might be possible that the provisions of relevant treaties merely reflected coexisting customary law. On the other hand, it cannot be ruled out either that it was the norm of customary law, which came into existence as a result of treaty provisions. The latter presumption is as reasonable as the first one, given that the majority of international agreements being discussed was concluded between the Great Powers of that time–influential states, whose actual interventions might have had an immense impact on the evolution of customary law. The thought of a treaty provision to become a norm of customary law is widely accepted even nowadays (although it cannot be presumed in general):

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individuals entitled to protection by diplomatic or consular agents under Article LXII of the Treaty of Berlin, however, encompassed all natural persons–irrespective of their nationality–on the territory of the Ottoman Empire.

[26] See *ibid.*, 159. For a different view, see Strisower: *op. cit.*, 114–115.

> "Just as a series of bilateral treaties concluded over a period of time by various States, all consistently adopting the same solution to the same problem of the relationships between them, may give rise to a new rule of customary international law, so the general ratification of a treaty laying down general rules to govern the future relationships of States in a given field has a similar effect."[27]

Humphrey Waldock, however, added an important remark, according to which the norms created this way "acquired their authority as general rules of international law... from the State practice, not from the treaties themselves".[28] This pattern of establishment of customary law is not always unambiguous and possible. The Permanent Court of International Justice, for example, referred to it in the case of the S. S. Lotus: "Finally, as regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law..."[29] Both of the theoretical ways mentioned above seem rational, but–and my concluding observation in this connection is as follows–they necessarily turn out to be of no use, as none of them by-passes the problem of customary law, particularly the difficulties concerning the demonstration of *opinio iuris*.

For the sake of completeness, it should also be examined whether or not humanitarian intervention had ever belonged to the "general principles of international law recognized by civilized nations",[30] and was thus a lawful measure. Firstly, it has to be noted that several problems emerge in relation to this task owing to the actual character of general principles of law not being unequivocal. Do they originate from the common principles of domestic law, or are they special principles of international nature meant to fill the gaps in international law? It can also be a subject of debate whether these principles of law represent surviving segments of natural law, or their content has to be sought for and

[27] Thirlway: *op. cit.*, 59. See also Brownlie, I.: *Principles of Public International Law.* 6th edition, Oxford, 2003. 12–13; International Law Association: Report of the Sixty-Ninth Conference. London, 2000. 753–765.

[28] Waldock, C. H. M.: General Course on Public International Law. *Recueil des Cours* 106 (1962-II), 41.

[29] The S.S. Lotus (France v. Turkey), Judgement No. 9, 7 September 1927, in Hudson, M. O. (ed.): *World Court Reports. A Collection of the Judgements, Orders and Opinions of the Permanent Court of International Justice.* Reprint of the edition of 1935, Vol. 2, Buffalo, 2000. 41–42.

[30] For a detailed analysis of this topic, see Herczegh, G.: *General Principles of Law and the International Legal Order.* Budapest, 1969.

interpreted only in the framework of positive law. Not to mention the question pertaining to the identity of those actors empowered or bound by the general principles of law: is it the states generally, or the courts that apply them? (It needs to be underlined that in the period under deliberation the recognition of a general principle of law by "civilized nations" was an essential condition, not an anachronistic phrase, as it is held to be nowadays.)

Supposing that the general principles of international law directly empower or bind states–and they did so in the past, as well–it has to be examined first, if there was a gap in law concerning the problem of humanitarian intervention, which could have left room for an invocation of these principles.[31] In my view, the result can only be a negative one: the fact that an indisputable conclusion can be drawn neither from treaty law, nor from customary law is not equal to the existence of a gap in law.

It is fair to say that, according to the dominant position in the science of international law, a referral to the general principles of law is in fact an application of certain domestic legal principles by way of analogy on the international level. Bearing this circumstance in mind, and recalling that 19th century European and American legal literature in essence adopted a positivist approach, one can readily derive that the general principles of international law could hardly ever serve as a basis for the lawfulness of interventions on grounds of humanity. Naturally, an adequately backed up judgement could be made only after a thorough study of domestic laws of one-time civilized nations; nevertheless I strongly doubt that there have ever been common, well-established legal principles in the legal systems of the countries concerned which could provide a proper ground for even a distant analogy. Since this task goes far beyond the scope of the present study, we should confine ourselves to the application of indirect arguments.

The best imaginable theoretical combination for the lawfulness of humanitarian intervention would be the one according to which the general principles of law are and were specific international principles with a content taken from natural law. Thus, the principles of natural law, including the requirement of

[31] The following opinion is worth recalling at this point: "Es gibt ferner auch negatives Völkergewohnheitsrecht. Negatives Völkergewohnheitsrecht entsteht, wenn die übereinstimmende, von Rechtsüberzeugung getragene Staatenpraxis davon ausgeht, daß ein bestimmter abstrakter Rechtssatz des Völkergewohnheitsrechts nicht besteht. Ein solcher Rechtssatz des Völkergewohnheitsrechts hat insbesondere die Funktion, den Rückgriff auf die Analogie, auf allgemeine Rechtsgrundsätze und sonstige subsidiäre Rechtsquellen des Völkerrechts auszuschließen." Bleckmann, A.: Zur Feststellung und Auslegung von Völkergewohnheitsrecht. *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht* 37 (1977), 511.

justice, invoked by authors in the 17th and 18th centuries could have been applied to legalize humanitarian intervention. The positivist literature, however, did not support this assumption, and therefore it is futile to deal with it in detail. Such ideas have never been common in past and present legal literature, which also undermines the applicability of the general principles of law in this case. In the knowledge of heated debates regarding the lawfulness of humanitarian intervention, any truly applicable general principle is most likely to have received much more attention by international lawyers.

Finally, it is advisable to take a look at the so-called *ius ad bellum*, that is to say, the "sacred" right to resort to war. *Ius ad bellum* was one of the most fundamental attributes of state sovereignty in the pre-Charter era, providing a right for states to engage in war for nearly any reason.[32] Nonetheless, this is an oversimplified formulation of the true meaning of *ius ad bellum*. In reality, this right was subject to a number of limitations: for instance, it was to be exercised always as a last resort and required an appropriate *casus belli*–be that genuine or alleged. The catalogue of causes of war was extremely subjective, but it typically embraced the right of self-preservation, which on the other hand, usually included the category of intervention. Let us not forget that in this period the latter involved interventions carried out by force of arms, as well, which could barely be distinguished from a war at first sight. For this reason, one may easily come to the conclusion that humanitarian intervention, being an exercise of *ius ad bellum*, was lawful. This statement, however, hardly corresponds to the truth. As commonly known, war and intervention were actually two distinct and independently treated categories, even though they occasionally overlapped in literature.[33] Intervention, including its armed manifestation, was dealt with under the rubric of the law of peace and was seen as a measure short of war, unlike war, which was discussed within a different framework and was defined as follows:

[32] "War, as a means of law-making and law-enforcement, is therefore a necessary institution of current international law." Buza, L.: *Háború és nemzetközi jog* [War and International Law]. 1943. 3. (Translation mine.) "The recognition of war as an international legal relation, however, does not at all depend on its legality or illegality. The group of persons that chooses it as means is determining the legality or illegality of war. (This is the most interesting feature of self-help.)" Weninger: *op. cit.*, 298. (Italics omitted. Translation mine.)

[33] The following remark by Lawrence clearly illustrates both the reason for this overlapping and the two categories being separate from one another: „Further, the cause which justifies intervention must be important enough to justify war." Lawrence: *op. cit.*, 118.

> "Der Krieg als Erscheinung des internationalen Lebens, ist ein Zustand, der von Seite mehrerer einander gegenüberstehender Staaten darauf gerichtet ist, daß jede Partei die andere durch allgemeinen wechselseitigen Eingriff in ihre Güter behufs Durchsetzung eines gewissen Zweckes überwinde. [...] Der Zweck des Krieges ist gewiß nicht in den Kriegsakten beschlossen. Aber der eigentümliche, rechtliche Gegensatz des Krieges gegenüber dem Friedenszustande, dem Zustande ohne Krieg, liegt in den Kriegsakten, in dem dem Kriegszustande entsprechenden Verhalten, darin, daß solche Akte vorgenommen werden, um den Zweck des Krieges zu erreichen."[34]

War was therefore a peculiar "state", or in other words, a special legal relation, in the framework of which each belligerent as well as the neutral states acquired certain rights and duties.[35] War was neither an objective category, nor synonymous with the use of force. It could be established exclusively with a special intent (*animus belligerendi*), therefore the existence of a *de iure* war was dependent on a subjective decision of the belligerents.[36] This will was as a rule reflected in the declaration of a state of war, and it could not be deduced simply from objective circumstances reminiscent of war, such as the application of armed force by states against one another, the widescale loss of human life, or significant damage to property. Consequently, several forceful measures not requiring such intent–for example armed reprisal, embargo, pacific blockade, self-defence, and armed intervention–could not be properly classified as war.[37] Furthermore, under *ius ad bellum*, the waging of war was entirely lawful (moreover, war occasionally appeared as an extra-legal phenomenon in some of the treatises), whereas intervention, irrespective of a few exceptions known as rights of intervention, was generally prohibited. Finally, war was comprehensive and unlimited with regard to both its goals and its means, whereas intervention was more of a limited nature in all respects. As a result, the lawfulness of intervention on grounds of humanity cannot be drawn from the *ius ad bellum*.

[34] Strisower: *op. cit.*, 4–5.

[35] Cf. Liszt: *op. cit.*, 282.

[36] Cf. Meng, W.: War, in Bernhardt, R. (ed.): *Encyclopedia of Public International Law*. Vol. 4, New York–London, 1982. 284.

[37] Cf. Westlake, J.: *International Law*. Vol. 2, Cambridge, 1907. 2. See also Farer, T. J.: Law and War, in Black, C. E.–Falk, R. A. (eds.): *The Future of International Legal Order*. Vol. 3, Princeton, 1971. 15, 23–24; Strisower: *op. cit.*, 6–7.

III.

The legality of past humanitarian interventions has to be examined in the context of the principle of non-intervention rather than under the heading of war. This statement brings us to yet another field worthy of examination: the lawfulness of humanitarian intervention in the light of international treaties concluded during the first half of the 20th century adversely affecting the previous legality of war, namely the Covenant of the League of Nations, the Pact of Locarno and the Kellogg-Briand Pact.

The overwhelming majority of articles in the Covenant of the League of Nations contain the word "war". There is no particular reason to believe that the content of this *terminus technicus* fundamentally changed during the years of World War I in a way that it came to encompass hostile measures short of war, including armed intervention. Arguing *a maiori ad minus*, one might claim that the gradual outlawing of war had an impact on the lesser category of intervention, which thus became totally illegal. However, the relationship between war and intervention was not a relation of a whole to a part, since they were, as it has already been noted, separate categories.

The principle of efficiency may also seem to strengthen the idea of a comprehensive ban on the use of force: it might be argued that the interpretation of "war" in the Covenant in accordance with its strict legal sense would have hampered the most important aim of the League, namely "to promote international co-operation and to achieve international peace and security".[38] The rightness of this opinion is being contested by two circumstances. Firstly, "war" has always been a technical term that must be interpreted and applied in observance of this nature, regardless to the international instrument in which it appears. Secondly, as Hersch Lauterpacht mentioned, the early draft of the Covenant had originally contained the word "force", but it was subsequently replaced by "war" in the final version of the text.[39] This change, unless it was motivated by stylistic considerations, presumably veils the effort of states to preserve a substantial segment of their freedom of action by resorting to an expression bearing a much more restricted meaning.

[38] Covenant of the League of Nations, preamble. For the text of Covenant, see Treaty of Peace between the Allied and Associated Powers and Germany, Versailles, 28 June 1919, Part I, in Grenville, J. A. S.–Wasserstein, B. (eds.): *The Major International Treaties of the Twentieth Century. A History and Guide with Texts.* Vol. 1, London–New York, 2001. 100–105.

[39] See Lauterpacht, H.: "Resort to War" and the Interpretation of the Covenant During the Manchurian Dispute. *American Journal of International Law* 28 (1934), 49.

The provisions of the Covenant concerning war apparently had divergent interpretations even in those days: many were convinced that the effects of the partial renunciation of war comprised all forms of the use of force. Interestingly enough, some organs of the League also adopted this position,[40] although the states themselves were clearly hesitant to construe "war" in a broad sense.[41] Lauterpacht maintained that this phrase could be interpreted in three ways: broadly, to include "all measures of armed force"; narrowly, as a description of a state of war; and in line with a "specific meaning", positioned somewhere between the two extremes. He further stated that:

> "Resort to war" may be deduced constructively from the recourse to armed force, but it is not synonymous with the use of armed force. [...] It merely means that the Covenant does not indiscriminately and automatically render illegal all acts of armed force. But it means also that it *authorizes* the finding and treatment as illegal of such acts of force as members of the League may wish to treat as such, having regard to the nature of the case, to general political considerations, and to their attitude toward the idea of collective enforcement of peace."[42]

This renowned expert of international law seemingly did not think that the Covenant outlawed all forms of the use of force: due to its vague wording, the determination and sanctioning of war was basically dependent on the actual political will of states. Article 10 of the Covenant was the sole provision, which arguably reflected an intention to prohibit every forceful measure:

> "The Members of the League undertake to respect and preserve as against *external aggression* the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of

[40] For instance, the Assembly of the League adopted a resolution in its sixth session in 1925, which stated that all aggressive wars were and remained prohibited. Since this resolution was not a formal amendment to the Covenant, its significance was merely of moral and political nature. Cf. Wehberg, H.: *Die Völkerbundsatzung.* 3rd edition, Berlin, 1929. 95. Furthermore, in August 1921, the International Blockade Committee of the Assembly interpreted the expression "resort to war" in the Covenant as "undertaking of armed action". See Stone, J.: *Aggression and World Order. A Critique of United Nations Theories of Aggression.* London, 1958. 29.

[41] On the related debate, see Lauterpacht: *op. cit.*, 47–51.

[42] *Ibid.*, 58–59.

any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled."[43]

Humanitarian intervention, *prima facie*, appears to fit in the notion of an "external aggression" against the "existing political independence" of a state, even though a violation of "territorial integrity" is incompatible with the humanitarian nature thereof. (Noteworthy is the fact that the expressions "territorial integrity" and "existing political independence" stood in a conjunctive relation (and), not in a disjunctive one (or) as in Article 2, paragraph 4, of the UN Charter. It may allow an interpretation, according to which Article 10 was applicable only in case of an aggression against both the political independence and the territorial integrity of a member, which would obviously shove humanitarian intervention out of the scope of the provision.) A generally recognized and legally binding definition of aggression did not come into being in the period between the two World Wars. Drafts as well as bi- or multilateral treaties were nevertheless adopted containing elements of the notion of aggression, according to which all forms of armed intervention was to be seen as an act of aggression. Among these instruments a draft prepared by the Soviet Union in 1933 was of outstanding importance, which, in spite of its subsequent failure, served as a basis for several bilateral agreements.[44] This draft overtly renounced acts of aggression, including the use of force in cases of "alleged maladministration", "possible danger to life or property of foreign residents", "revolutionary or counter-revolutionary movements, civil war, disorders or strikes", and as "religious or anti-religious measures".[45]

If the term "external aggression" bore a similar meaning in the context of the Covenant, then interventions on grounds of humanity were presumably unlawful, although Article 10 did not state it explicitly. However, this reasoning is extremely speculative, as the drafts and treaties referred to above were concluded well after the entry into force of the Covenant, and carried the

[43] Covenant of the League of Nations, Article 10. (Emphasis added.)

[44] In the period between 1926 and 1937, the Soviet Union concluded a series of treaties on non-aggression in order to prevent its isolation. For instance, the Soviet-Finnish agreement provided as follows: "Any act of violence attacking the integrity and inviolability of the territory or the political independence of the other High Contracting Party shall be regarded as an act of aggression, even if it is committed without declaration of war and avoids warlike manifestations." Treaty of Non-Aggression between the Soviet Union and Finland, Helsinki, 21 January 1932, Article I, paragraph 2. For an English translation of the document, see Grenville–Wasserstein: *op. cit.*, 191–192.

[45] See Stone: *op. cit.*, 34–36.

marks of the ensuing development of international law.[46] Furthermore, judging from its wording, Article 10 probably laid down only a general rule–in addition to the creation of an obligation of collective defence–, leaving the details to be elaborated on by other articles of the Covenant dealing with collective security. Finally, as Hans Wehberg pointed out, each member state had a right to determine "nach bestem Wissen und Gewissen",[47] whether or not an external aggression existed.

The Covenant did not offer a definitive solution to the legality of humanitarian intervention, even if one–groundlessly–perceives such actions as a segment of the category of war. Although it declared war or a threat of war "a matter of concern to the whole League", the mechanism meant to avert war was reserved exclusively for inter-state disputes "likely to lead to a rupture". If such controversy occurred, members of the organization were obliged to "submit the matter either to arbitration or judicial settlement or to enquiry by the Council", with a possibility in the latter case of a referral of the dispute to the Assembly of the League.[48] Without going into a detailed introduction of the procedure of dispute settlement, one may raise the embarrassing question: Could there be any dispute–in the traditional meaning of this technical term–in the course of events leading to a humanitarian intervention? The answer seems to be negative. The question of human rights as well as the treatment of nationals–with only but a handful of exceptions elevated to the international level by international treaties, such as the protection of minorities or the abolition of slavery–was to be found in the domain of exclusive domestic jurisdiction of states.[49] Demands were naturally formulated by the intervening

[46] There existed, however, treaties of non-aggression that significantly deferred from the Soviet draft. See e.g. Anti-War Treaty of Nonaggression and Conciliation, Rio de Janeiro, 10 October 1933, preamble, Articles I–II. The content of "war of aggression" was not detailed in the treaty, but–in the light of a contextual interpretation of Articles I and II–it was closely linked to, although not equalized with, the violent settlement of territorial questions. For an English translation of the text, see Anti-War, Nonaggression and Conciliation, Treaty between the United States of America and Other American Republics. U.S. Treaty Series, No. 906. 14–18.

[47] Wehberg: *op. cit.*, 75.

[48] For the process of dispute settlement, see Covenant of the League of Nations, Articles 11–16.

[49] In support of this view, suffice it to recall the *Bernheim* case, in which the organs of the League adopted the position of the German *Reichsregierung* concerning the Nuremberg Race Laws being within its domestic jurisdiction. See Ermacora, F.: Article 2(7), in Simma, B. (ed.): *The Charter of the United Nations: A Commentary.* Oxford, 1995. 141.

states calling for a respect of human rights prior to the use of force, but–as a result of the above-mentioned status of fundamental rights–these representations could be classified as "soft" interventions rather than disputes. It is also remarkable that the concept of dispute never really became manifest in the relevant literature.

This conclusion will only be partially altered if it is held that a dispute "likely to lead to a rupture" could indeed take place prior to an intervention concerning the respect for human rights, and could have been submitted for settlement to arbitration, to judicial settlement, or to enquiry by the Council. Due to the obligation to respect the exclusive domestic jurisdiction of states, it is doubtful that the Council could have actually dealt with the matter:

> "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."[50]

It was for the Council to determine what formed part of domestic jurisdiction, but it was not required to examine this issue *ex officio*, therefore any invocation of domestic jurisdiction took the form of an objection on the side of the state concerned. The basis of such decision by the Council was whether international law had a norm prescribing a state to perform a particular behaviour under given circumstances.[51] What is more, the Covenant set a considerably strict condition for the application of the clause cited, as the matter must have been "solely" within the domestic jurisdiction, not "essentially" as under Article 2, paragraph 7, of the UN Charter.[52]

Resorting to the dispute settlement mechanism envisaged by the Covenant did not guarantee the actual prevention of war. States merely undertook the obligation of averting war in certain cases, so there remained a number of opportunities to wage war lawfully. The most evident reservation of *ius ad bellum* was incorporated in Article 15, paragraph 7, of the Covenant:

[50] Covenant of the League of Nations, Article 15, paragraph 8. For a similar conclusion, see Murphy, S. D.: *Humanitarian Intervention. The United Nations in an Evolving World Order.* Philadelphia, 1996. 59.

[51] Cf. Buza, L.: *A nemzetközi jog tankönyve* [A Textbook of International Law] Budapest, 1935. 98.

[52] Cf. Korowitz, M. S.: Some Present Aspects of Sovereignty in International Law. *Recueil des Cours* 102 (1961-I), 66–67.

> "If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice."[53]

This was, however, not the only gap in the system of collective security.[54] A recourse to war was legal in the following cases, as well: if a dispute was solely within the domestic jurisdiction of states; if the arbitration or the judicial settlement was not concluded within a reasonable time, or the Council failed to present its report within six months after the submission of the dispute; if either of the parties to the dispute did not comply with the award by the arbitrators, the judicial decision or the report of the Council, and the three-month cooling-off period expired; and–although it was not mentioned expressly in the Covenant–in exercise of the customary right of self-defence.[55] In addition, the Covenant sought to avert war only between members of the League. If non-members were also involved in a debate, they must have been "invited to accept the obligations of Membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just".[56]

The utmost one can state with certainty regarding the relationship of the Covenant and humanitarian intervention is that such actions were, or rather would have been, unconditionally of interest to the League of Nations:

> "It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends."[57]

[53] Covenant of the League of Nations, Article 15, paragraph 7.

[54] The 1924 Geneva Protocol was meant to fill these gaps, thereby making the renunciation of war complete. The effort, however, resulted in failure owing to resistance by the United Kingdom and several other states. See e.g. Faluhelyi, F.: *A párizsi Kellogg-paktum és annak jelentősége* [The Kellogg-Pact of Paris and Its Significance]. Kaposvár, 1929. 5; Harris, H. W.: *The League of Nations.* London, 1929. 29; Wehberg, H.: *Grundprobleme des Völkerbundes.* Berlin–Friedenau, 1926. 46–56.

[55] See e.g. Dinstein, Y.: *War, Aggression and Self-Defence.* 3rd edition, Cambridge, 2001. 76–77.

[56] Covenant of the League of Nations, Article 17.

[57] *Ibid.*, Article 11, paragraph 2.

The Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain, and Italy–Annex A to the Pact of Locarno–is typically considered an important milestone in the process of the total renunciation of war, although its restricted scope and the limited number of parties make it appear less significant for the purposes of an analysis aimed at the drawing of conclusions of universal nature. In Article 2, Belgium and Germany as well as France and Germany mutually undertook that they "they will in no case attack or invade each other or resort to war against each other". This provision, however, recognized three exceptions: the exercise of the right of legitimate defence; actions in pursuance of Article 16 of the Covenant of the League of Nations; and measures resulting from a decision by the Assembly or by the Council of the League, or in accordance with Article 15, paragraph 7, of the Covenant, provided in the latter case that the resort to force was merely a response to an attack.[58] The inclusion of "attack" and "invade" rendered the treaty an instrument more progressive than the Covenant in the field of the renunciation of the use of force, and in all probability ruled out the chance of a lawful humanitarian intervention between the states concerned.

For various reasons, neither the Covenant nor the Pact of Locarno strove to impose a comprehensive and universal prohibition on the waging of war, unlike the Treaty on the Renunciation of War as an Instrument of National Policy–commonly known as the Kellogg-Briand Pact–signed in Paris, on August 27, 1928. The treaty is surprisingly short and formulates the general ban on war in one single sentence:

> "The High Contracting Parties solemnly declare, in the names of their respective peoples, that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another."[59]

Similarly to the Covenant of the League of Nations, the Kellogg-Briand Pact did not contain specific provisions concerning armed intervention, including humanitarian intervention. In support of the assumption that the Pact did not affect the lawfulness, if any, of intervention on grounds of humanity, one should simply recall the arguments detailed with respect to the Covenant. The

[58] See Pact of Locarno, Annex A: Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain, and Italy, Locarno, 16 October 1925, Article 2. For the text of the treaty, see Grenville–Wasserstein: *op. cit.*, 145–147.

[59] Treaty on the Renunciation of War as an Instrument of National Policy, Paris, 27 August 1928, Article I.

treaty outlawed war, not the use of force. Furthermore, it merely renounced war "as an instrument of national policy", but a humanitarian intervention, *per definitionem*, had to be free from selfish motives and direct national interests. However, due to the issue of human rights being within the domestic jurisdiction of states, it is dubious if the use of force for humanitarian purposes classified as war could be an instrument of international policy, and as such, a measure arguably not prohibited by the Pact.

As the treaty was meant to achieve a total prohibition of war, it is more likely that the phrase "war" contained therein embraced not only war in a formal sense, but also any use of military force against another state.[60] It was the conclusion reached, for instance, by Ian Brownlie in the 1960s, who claimed that there had been only two implicit exceptions to the comprehensive renunciation of force: self-defence and measures taken in accordance with Article 16 of the Covenant.[61] At first sight, this assertion is unquestionably convincing, but it does not seem to be unambiguously supported by past and present international lawyers. It has to be acknowledged that the number of contemporaneous authors accepting the lawfulness of humanitarian intervention apparently decreased after World War I, but academics usually refrained from declaring all forms of the use of force illegal under the Kellogg-Briand Pact. For example, as Ferenc Faluhelyi stated a year after the conclusion of the treaty:

> "It appears worthy only of a remark that the statement of news articles, which emphasize in connection with the Kellogg Pact the total erasure of war from the dictionary of international law, is false. It is out of question."[62]

[60] Article II of the Pact providing for the peaceful settlement of disputes strengthens this supposition. Being the inverse of the prohibition of the use of force, and inseparable from that, this obligation may be construed as outlawing not only war but also all manifestations of forceful self-help.

[61] See Brownlie, I.: *International Law and the Use of Force by States.* Oxford, 1963. 89.

[62] Faluhelyi: *op. cit.*, 11. (Translation mine.) For similar conclusions, see e.g. Brown, P. M.: Undeclared Wars. *American Journal of International Law*, 33 (1939), 540; Buza: *A nemzetközi jog tankönyve. op. cit.* 357; Wehberg: *Die Völkerbundsatzung*, 96. Even the address delivered by Aristide Briand before the signing of the Pact was phrased in a cautious manner: "It may now be appropriate to explain what is finally the essential feature of this pact against war. It is this: For the first time in the face of the whole world through a solemn covenant involving the honor of great nations, all of which have behind them a heavy past of political conflict, war is renounced unreservedly as an instrument of national policy, that is to say, in its most specific and dreaded form–selfish and wilful war. Considered of yore as divine right and having remained in international ethics as an

Josef L. Kunz expressed an essentially similar view in 1951, but he also gave the grounds for that:

> "But the admitted legality of self-defense and the delegation to each state of the right to be the only judge to determine whether the conditions of self-defense exist, make this Pact practically only a restatement of general international law. [...] Experience had shown that the Covenant and the Kellogg Pact, because of the aura of uncertainty hovering around the legal concept of "war", made it possible to wage "wars in disguise."[63]

Slightly more than two decades after the undertaking of the solemn obligation at issue, Kunz articulated an exceedingly critical opinion on the Pact labelling it as a mere "restatement" of general international law. His point can only be understood if one treats the current regulation of self-defence independent from its status under traditional international law. In the pre-Charter period, self-defence was far from being the category with strict limitations as we know it today. On the contrary, its content was broad and vague, as a result of which it was often barely separable from self-preservation, self-help or other lesser categories, such as reprisal, necessity, and even intervention. In addition, it could afford a legal basis even for an offensive action, provided that the danger triggering the measure was "instant, overwhelming, leaving no choice of means, and no moment for deliberation", and the state exercising this right "did nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it".[64] Under such circumstances, it is no wonder that in some of the

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attribute of sovereignty, that form of war becomes at last juridically devoid of what constituted its most serious danger–its legitimacy. [...] Thus shall war as a means of arbitrary and selfish action no longer be deemed lawful." Extracts from the speech of Aristide Briand, French Minister of Foreign Affairs, to the Plenipotentiaries before Signing the Pact for the Renunciation of War, in *The Paris Pact* (Frank B. Kellogg pref.), 1934. 13–14.

[63] Kunz, J. L.: Bellum Justum and Bellum Legale. *American Journal of International Law*, 45 (1951), 532–533. For concurring views in works published after 1945, see e.g. Dinstein: *op. cit.*, 80; Jiménez de Aréchaga, E.: International Law in the Past Third of the Century. *Recueil des Cours*, 159 (1978-I), 87; Schwarzenberger, G.: The Fundamental Principles of International Law. *Recueil des Cours*, 87 (1955-I), 329; Stone: *op. cit.*, 32; Waldock, C. H. M.: The Regulation of the Use of Force by States in International Law. *Recueil des Cours*, 81 (1952-II), 473–474.

[64] Parts of the diplomatic correspondence following the *Caroline* incident are quoted in Hall: *op. cit.*, 324.

contemporary treatises humanitarian intervention and self-defence seem to have overlapped.

If the Kellogg-Briand Pact nevertheless outlawed humanitarian intervention, a dual regime was established–supposing, of course, that such interventions had been legal beforehand. As a consequence, this measure became unlawful for parties in their subsequent relations with one another, whereas in the relations of parties and non-parties as well as between non-parties, the customary law remained in force, whatever its exact content was.

Conclusion

Based on the pre-Charter literature, the definition of humanitarian intervention valid for the period of traditional international law can be worded as follows: dictatorial interference involving the use of force, but not qualifying as war, carried out as a last resort and free from selfish motives by one or more civilized states against another state in absence of the consent or request thereof, with a view to coerce it to cease the grave and widespread violations of fundamental freedoms and human rights of its own nationals. Surprising as it may seem, but the submitted definition does not contain any referral to the question of legality. The reason for that is fairly simple–humanitarian intervention was not a generally accepted legal title.

To be able to draw a clear picture of the lawfulness of intervention on grounds of humanity in the pre-Charter era, the coexisting customary law has to be examined first. Having taken into account the relevant literature once again, it may be found that the teachings of international lawyers did not provide a definitive answer; moreover, nearly as many outstanding scholars considered humanitarian intervention lawful as those who explicitly rejected it. Similarly ambiguous results are reached following the analysis of rights of intervention based on treaty stipulations, a possible outlast of legality stemming from the doctrine of *bellum iustum*, the general principles of international law recognized by civilized nations, and the so-called *ius ad bellum*. Furthermore, as war and intervention were two separate categories of law, it is also extremely doubtful if the provisions of the Covenant of the League of Nations, or the Kellogg-Briand Pact affected the legality, if any, of humanitarian intervention. The Treaty of Mutual Guarantee annexed to the Pact of Locarno, however, appears to have gone beyond these instruments in this respect, but its restricted scope as well as the limited number of its parties considerably decreases its relevance for the purposes of this study.

In sum, a definitive conclusion pertaining to the lawfulness or unlawfulness of humanitarian intervention can scarcely be drawn. Both extremes are verifiable, but neither is absolutely and undoubtedly correct. If I nevertheless had to make a judgement on this issue, I would say that the *spirit* of 19th century international law stood close rather to the legality than to the illegality of such interventions, but this spirit gradually altered during the first half of the 20th century. Thus humanitarian intervention could well be presumed lawful in the 1800s, but this presumption turned to the opposite in the years between the two World Wars[65]: a conclusion which, if correct, has serious implications on theories striving to demonstrate the present customary lawfulness of humanitarian intervention on the basis of the survival of an alleged traditional right thereof.

[65] "We must, however, admit that *the presumption is normally against* such action and in support of the rule of non-interference in the internal affairs of another state." Stowell, E.: Humanitarian intervention. *American Journal of International Law* 33 (1939), 734. (Emphasis added.) On the other hand, several authors of the post-Charter era have stated that humanitarian intervention had been lawful under traditional customary law. Cf. e.g. Glahn, G., von: *Law Among Nations: An Introduction to Public International Law.* 5th edition, New York–London, 1986. 160; International Law Association: Report of the Fifty-Fourth Conference. The Hague, 1970. 598–99, 611; Lillich, R. B.: Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in Moore, J. N. (ed.): *Law and Civil War in the Modern World.* Baltimore–London, 1974. 234–35; Reisman, W. M.–McDougal, M. S.: Humanitarian Intervention to Protect the Ibos, in Lillich, R. B. (ed.): *Humanitarian Intervention and the United Nations.* Charlottesville, 1973. 171.

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The Scales as the Symbol of Justice in the Iliad

Abstract. The idiom of the *scales of justice* is commonly known and widely used. Iustitia can frequently be seen in different representations holding scales in her hand. The scales as a means or a symbol of justice (justness) or the administration of justice can be encountered in various places in Greek literature, one of its earliest instances being the *Homeric Hermes' Hymn (Dikés talanta)*. According to these loci Zeus holds the scales of Diké, that is to say, the scales of justice in his hand. In the Iliad (23, 109–213) one may come across a scene presented in context, thus suitable for being more amply analysed, in which Zeus is pronouncing justice over the heroes using a pair of scales. In search of the meaning of *Dikés talanta*, this study tries to clarify the concept of law and justice (justness) in Homeric epic (I.), then by a structural (II.) and comparative analysis (III.) of certain lines of the weighing scene, decisive in the combat of Achilles and Hector, it formulates a few remarks on the origin and meaning of the concept of the scales of justice.

One cannot claim that this idea of Egyptian religion had been transferred in its entirety into Greek thinking, but it is not surprising, as one can barely encounter an unaltered Egyptian borrowing in Greek mythological thinking. Nonetheless, some Egyptian influence, possibly with Cretan transmission, can be detected in the development of the Greek versions of psykhostasia and kerostasia. Pictorial as well as textual manifestations of such influence can be found on the one hand in vase-paintings, and on the other hand–undergoing a specific alteration of aspect in the form of kerostasia–in Homer, who paved the way for the scales of justice of Zeus and Iuppiter to become the symbol of Diké and Iustitia, and subsequently of the administration of justice itself.

Keywords: scales of justice, dike, Homeric law, kerostasia

The idiom of the *scales of justice* is well-known, its use is widely spread, Iustitia can frequently be seen with scales in her hand in different representations.[1] The scales as the symbol of justice and administration of justice can be encountered in various places in Greek literature, one of its earliest instances can be found in the Homeric *Hermes's Hymn (Dikés talanta)*.[2] Then, to mention only a few examples, this picture can be detected in Bakkhylides,[3]

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[1] *Cf.* Lange, H.: Die Wörter Aequitas und Iustitia auf römischen Münzen. *Zeitschrift der Savigny Stiftung für Rechtsgeschichts, Romanistische Abteilung*, 60 (1940) 296. sqq.

[2] Rademacher, L.: *Der Homerische Hermeshymnus*. Wien, 1931. 213.

[3] Bacchyl. 4, 12; 16 (17), 25.

while in Theognis[4] Zeus is measuring out richness and poverty with the help of a pair of scales. According to these loci Zeus is holding in his hand the scales of Diké.[5] In the *Iliad* one can encounter a scene presented in context, thus suitable for being more amply analysed, in which Zeus is pronouncing justice over the heroes using a pair of scales. Searching for the meaning of *Dikés talanta* this paper will first try to clarify the concept of law and justice as it appears in the Homeric epic (**I.**), then, by the structural (**II.**) and comparative (**III.**) analysis of some lines of the weighing scene, decisive in the combat of Achilles and Hector, some remarks will be made on the origin and meaning of the concept of the scales of justice

I. The word *diké* is traditionally derived from the root **deik* of the verb *deiknymi* (to show, to point at, to explain, to testify); its basic meaning of *direction, way, custom* is completed with the meanings *customary procedure, decision, resolution, trial*, and *law*.[6] (These two meanings, traditonally derived from each other are approached from a new aspect by Palmer, according to whom the meaning of *signalling, custom, characteristic, particularity* and the meaning *decision, resolution*, of the word *diké*, originally the *borderline* drawn between two litigant parties derived from the root **deik*, developed parallelly, independently from each other so neither of these can be considered secondary, derived from the other.[7]) The primary meaning of the word *diké*–or in any case the one mentioned first–(generally in genitival and adverbial constructions) frequently occurs in the *Odyssey* as *a quality, a particularity, a way of behaviour* characteristic of a given group of people.[8] It is also worth scrutinizing the other meaning of the word *diké*, which can be performed together with the examination of the verb *dikadzein* and the adjective *dikaspolos*.[9] In this sense *diké* originally signifies *a border* or a *dividing line,* most often dividing two plots of land, which constitute the object of two persons' claims of ownership.

[4] Theogn. 157.

[5] Aisch. *Ag.* 250; *Pers.* 345. sk; *Hik.* 822. *Cf.* E. Wüst: Die Seelenwägung in Ägypten und Griechenland. *Archiv für Religionswissenschaft,* 36 (1939) 166.

[6] Gonda, J.: *ΔEIKNYMI: Semantische Studie over den Indo-Germanische Wortel DEIK.* Amsterdam, 1929. 224. sqq.; Gagarin, M.: „Diké" in the „Works and Days". *Classical Philology,* 68 (1973) 82.

[7] Palmer, L. R.: The Indo-European Origins of Greek Justice. *TPhS Oxford,* 1950. 157. sqq.

[8] *Od.* 4, 690–692; 11, 216–218; 14, 58–60; 18, 274–275; 19, 43; 19, 67–70; 24, 254–255.

[9] Gagarin: „Diké" in the „Works and Days". *op. cit.* 83.

Naturally, this borderline can be either straight or curved,[10] the meaning of the word *diké*, determining, dividing the parts of the litigants in a legal process, and thus deciding the matter of dispute, possibly developed from this fact.[11] If they did not want to decide the dispute between two persons over a certain issue (over property, or over the blood money to be paid for the murder of a relative etc.) by violence (*bié*) but by way of peaceful decision (*diké*), but they could not reach a solution, which would satisfy both parties they could make appeal to an objective third person, who was not interested in the case, to make a proposal (*dikadzein*) for deciding the dispute. They could agree to solve their contradiction (*dikaspolos*) according to the opinion of a single person, or they could ask different persons for proposals for decision, and then to end the dispute by yielding to the solution most acceptable for both of them. So *diké* was the proposal for decision, at the same time *diké* was the whole contradictory process itself, although the society of the Homeric epoch probably did not know the compulsive force to constrain the individual to subject himself to *diké*.[12] Two descriptions of such a procedure, in which, as the sources also demonstrate it, the oath naturally played an important role as well, can be found in Homer: one connected to the argument between Antilochus and Menelaus following the chariot race, risen over the primacy and the reward in the contest,[13] the second description of the legal procedure occurs in the description of Achilles's shield in the *Iliad*.[14] As it becomes evident especially from the second locus the straightest *diké* does not necessarily have to coincide with the claims of either party–which might seem surprising at first sight because in the legal cultures based on Roman law a legal process had to end either with acquittal or condemnation[15]–because the essence of the Homeric trial most probably consisted of finding and implementing the most acceptable compromise with the help of the *dikai*.[16] Whenever the verb *dikadzein* occurs in the active in the *Iliad* and the *Odyssey*,[17] it always means deciding a certain case, its medial form *dikadzesthai* means the dispute, or representing a concrete case in

[10] Palmer: *op. cit.* 159.

[11] Gagarin: „Diké" in the „Works and Days". *op. cit.* 83; Gagarin, M.: Diké in the Archaic Greek Thought. *Classical Philology,* 69 (1974) 187.

[12] Bonner, R. J.–Smith, G.: *The Administration of Justice from Homer to Aristotle I.* Chicago 1930. 46. sqq.; Gagarin: „Diké" in the „Works and Days". *op. cit.* 83.

[13] *Il.* 23, 540–554; 566–586.

[14] *Il.* 18, 497–508.

[15] *Cf.* Földi A.–Hamza G.: *A római jog története és institúciói* (History and Istitutes of Roman Law). Budapest, 2005. 153.

[16] Gagarin: „Diké" in the „Works and Days". *op. cit.* 85.

[17] *Il.* 1, 540–543; 8, 427–431; *Od.* 11, 547.

the course of the dispute,[18] the expression *dikaspolos* can be encountered in the sense of sentence passing judge.[19] The basic interpretation of *diké*, meaning *decision* is corroborated by the Homeric loci, which designate *diké* as the portion to which somebody is lawfully entitled,[20] at the same time, elsewhere it designates the legal process itself, the solving of particular contradictions peacefully,[21] by way of legal disputes, in other places it signifies a whole chain of decisions, possibly the legal procedure *en général.*[22] Two further loci[23] testify that *diké* in the singular could mean a lawful procedure, a peaceful judgement.[24] (As two basic meanings of the word *diké* are differentiated, this can also be done in the case of the adjective *dikaios* and the adverb *dikaiós*, in most cases meaning proper conduct, in accordance with custom, or, in the negative meaning deviation from accepted behaviour,[25] in some cases however, they designate lawful,[26] rule following procedure.[27])

At the same time, Diké as a divine being is Zeus's daughter as well, thus being a so-called *Person-Bereich Einheit*, partaking of a certain kind of abstraction as well. The *Person-Bereich* thinking was for the ancient man a specific way of experiencing things in the course of which he experienced some physical reality (an object, a process or a state), and, at the same time, he experienced it also as a divine being.[28] The thing and the divinity was designated by the same concept. Sometimes–because antique writing did not differentiate between the maiuscula and the minuscula–it causes great difficulty in textual tradition to decide whether to write *fortuna* or *Fortuna* in a given instance. Naturally, either form is preferred, the other is tacitly part of the concept and should be taken into account as well. Designating a concept with identical words would outwardly suggest juxtaposition, but in fact it shows the unity of the person and the field represented or function fulfilled by him or her,

[18] *Od.* 11, 543–546; 12, 437–441.

[19] *Il.* 1, 232–239; *Od.* 11, 184–187.

[20] *Il.* 19, 179–180.

[21] *Il.* 16, 541–543; *Od.* 11, 568–571.

[22] *Od.* 3, 244. 242–245.

[23] *Il.* 16, 384–388; *Od.* 14, 83–84.

[24] Gagarin: „Diké" in the „Works and Days". *op. cit.* 85–86.

[25] *Od.* 3, 52. 133; 14, 90; 18, 275; 18, 414 = 20, 322; 6, 120 = 8, 575 = 9, 175 = 13, 201; 20, 294 = 21, 312.

[26] *Il.* 11, 832; 13, 6; 19, 181.

[27] *Cf.* Gagarin: „Diké" in the „Works and Days". *op. cit.* 86; Gagarin: Diké in the Archaic... *op. cit.* 188.

[28] Pötscher, W.: Person-Bereichdenken und Personifikation. *Literatur–Wissenschaftliches Jahrbuch*, 19 (1978) 229.

in which one or the other aspect comes to the fore.[29] (It is problematic though, to what extent can the cult be considered a crucial proof of the fact that the given divinity was also experienced as a person, or, more precisely the lack of a cult does not prove that the personal component was missing from the given divinity. It is a widespread opinion that if a god did not have a cult, it is only an impersonal power, *mana*, thus belonging not so much to the religious sphere but rather to the magical one.[30] Undoubtedly, the widespread cult with prayers, sacrifices, clergy and temples is a definite proof of a personal god-image. However, the cult is not the only possible form of expressing religious veneration and it is a question whether there was any need to consecrate separate temples for the gods who were experienced spectacularly and with intensive emotions. At the same time, in the case of certain gods, who were experienced by the Greeks and Romans as *Person-Bereich Einheit,* the cult was considerably widespread, e.g Zeus, who had been originally the Indo-European God of Sky and Rain, or the river Tiber–with the cultic name Tiberinus–or Ares.[31])

II. In the following I would like to expound briefly on the development of Greek soul-weighing in order to highlight the importance of scales in the course of the legal process. The dramatic climax of the twenty-second song of the *Iliad* is the description of Hector's death. The heroes Achilles and Hector, preparing for the final combat have already gone round the Greek camp three times, then, when they reach the well for the fourth time, the following happens before the final combat ending in Hector's death takes place:

> *Καὶ τότε δὴ χρύσεια πατὴρ ἐτίταινε τάλαντα,*
> *ἐν δὲ τίθει δύο κῆρε τανφλεγέοιν θανάτοιο,*
> *τὴν μὲν Ἀχιλλῆος, τὴν δ' Ἕκτορος ἱπποδάμοιο,*
> *ἔλκε δὲ μέσσα λαβών· ῥέπε δ' Ἕκτορος αἴσιμον ἦμαρ,*
> *ᾤχετο δ' εἰν Ἀΐδαο λίπεν δέ ἑ Φοῖβος Ἀπόλλων.*[32]

The scene is completely picture-like and unambiguous, it is only the *dyo kére*, measured by Zeus, i.e. the expression *two kére* that needs futher explana-

[29] Pötscher, W.: Das Person-Bereichdenken in der frühgriechischen Periode. *Wiener Studien,* 72 (1959) 24.

[30] Pötscher: Das Person-Bereichdenken... *op. cit.* 26.

[31] Pötscher: Person-Bereichdenken und Personifikation. *op. cit.* 219.

[32] *Il.* 22, 209–213.

tion.[33] The view according to which *kér* would only mean dead soul, was categorically refuted by Malten. Malten, deriving *kér* from *kéraion*, calls it a harmful spirit, a malefic demon (*Schadegeist*).[34] He does not connect it directly with the human soul, but he regards it as a general destructive force that can manifest itself in the form of a god, a human or an animal,[35] according to the given situation.[36] Similarly, the opinion according to which the *kér* would be only the synonim for human soul, *psykhé* is untenable, because comparing the description with pictorial representations to be discussed later, one can see that when in the vase-pictures Zeus is measuring the little figures representing the souls (*psykhai*) with the scales, the result of the measuring is contrary to the one known from the *Iliad*, namely the scale pan with the winner's soul descends and the one with the loser's soul ascends.[37] The idea that Zeus would measure malefic gods or harmful demons with the scales is likewise to be discarded, because although this meaning of *Kére* can be found elsewhere,[38] the deities are always powerful beings,[39] so it would seem absurd to measure their ability to destroy a man or a heros.[40] I think that we can find a plausible explanation for the conceptual pair *Kér/kér* in the idea of *Person-Bereich Einheit.* How is the *Person-Bereich Einheit* represented in this case? The *Kér/kér* means at the same time a destructive, harmful god (godess) as its personal component and it also includes its material aspects, i. e. a mortal force or energy. The human soul attacked by the deity *Kér*, also became *kér*, a substance permeated by destructive power, infected by corruption. So Zeus, in the course of the *kerostasia*, is placing onto the scales the souls who became possessed by *Kér*, and thus were transformed into *kér* themselves.[41]

The *kerostasia* found in Homer–ultimately the weighing of souls transformed into *kér*–is based on a much earlier belief about soul-measuring, which becomes evident from the following. We have knowledge of a tragedy by Aeschylus entitled *Psykhostasia* and we have numerous vase-pictures on which we can see Zeus and Hermes placing souls onto scales. The Homeric epic gives a vivid

[33] Roscher, W. H.: *Ausführliches Lexikon der griechischen und römischen Mythologie II.* Leipzig, 1884–1937. 1136. sqq.

[34] Malten, L.: *Ker.* RE Suppl. 4. 883. sqq.

[35] *Il.* 18, 115=22, 365; *Il.* 2, 352; 5, 652.=11, 443; *Il.* 3, 6.

[36] Dietrich, B. C.: The Judgement of Zeus. *Rheinisches Museum,* 1964. 103. sqq.

[37] Pötscher, W.: Schicksalswägungen. *Kairos*, 15 (1973) 61.

[38] *Il.* 12, 326.

[39] *Il.* 18, 534.

[40] Pötscher: Schicksalswägungen. *op. cit.* 61.

[41] Pötscher, W.: Moira, Themis und timé im homerischen Denken. *Wiener Studien,* 73 (1960) 15. sqq.

description of the ideas that the ancient Greeks had of the human soul. The *Odyssey* calls the dead *amenéna karéna*[42] because they lack *menos*, the vitality characteristic of the living. The souls of the dead are flying about like bats,[43] they cannot be touched, just like shadows or dreams,[44] and the *psykhé* is flying away like a bird.[45] Archeological findings also corroborate this. The more ancient vase-paintings using black figures represent the human soul almost exclusively as a little winged figure, or, in some cases, without a wing.[46] The transformation of *kerostasia* into *psykhostasia* only indicates the changing of the aspect of measuring. While in the course of *psykhostasia* it is the scale pan of the soul possessing more *menos*, thus being more powerful, more vital that descends and the scale pan of the loser, the weaker part ascends, in *kerostasia* this happens the other way round, because the soul penetrated with *kér* to a greater extent possesses less *menos*, it is precisely the lack of vital power that signifies the power and greatness of the destructive force (or, to use psychological terms, it shows how the death instinct overpowers the life instinct). The fact that the scale pan containing the soul condemned to die descends is also explained by the localization of Hades, the underworld.[47]

In order to render the idea complete–and hopefully to clear up some misbeliefs–here I would like to make some remarks on the role of Fate in Homeric thinking. *Moira* means *part*, *share*[48]–Nielsson observes that the essence of the concept is given by the translation *portion* (*Portion*), because in time the concepts *part (Teil)* and *share (Anteil)* became somewhat abstract, though in the beginning they did not possess such abstract meaning. This is also shown by the loci of the *Iliad* and the *Odyssey,*[49] where *moira* appears with the following meanings among others: a part of a god's rule over the world,[50] a given period of time,[51] the share received from the prey,[52] a portion

[42] *Od.* 10, 521.
[43] *Od.* 24, 5. sqq.
[44] *Od.* 11, 205.
[45] *Il.* 16, 856; 22, 362.
[46] Nielsson, M. P.: *Geschichte der griechischen Religion I.* München, 1968. 196; Waser, O.: Über die äussere Erscheinung der Seele in den Vorstellungen der Völker zumal der alten Griechen. *Archiv für Religionswissenschaft,* 16 (1913)
[47] Pötscher: Schicksalswägungen. *op. cit.* 62.
[48] Nielsson: *op. cit.* 362.
[49] Eberling, H.: *Lexicon Homericum I–II.* Hildesheim, 1963. I. 1113. sqq.
[50] *Il.* 15, 195.
[51] *Il.* 10, 253.
[52] *Il.* 9, 318.

at a meal,[53] or in the plural it can signify pieces of meat.[54] The idea of Fate originates in the concrete share of luck *(Lebensglück)*, one person's *moira* is in close connection with that of another person, therefore the *moira* did not become an abstract concept of destiny. Fate, designated with *moira* is often represented as a person or persons, these are the godesses of Fate, the *Moirai*. Instead of personification it seems more adequate to regard this phenomenon as a *Person-Bereich Einheit.* The *Moira/moira* is also one of the concepts in which the personal and the physical spheres constitute an indivisible unity.[55] Although–as we could see–the presence or absence of the cult does not prove the lack of the personal component of the deity, in the case of *Moira/moira* the existence of the cult is proved.[56] The number of *Moirai* is three, which originally only meant that several *Moirai* existed in Greek religious thinking, as in a more ancient stage of the Greek language the smallest number that could stand in plural, (*pluralis*) was three due to the fact that in the respective period the language was aware of the dual (*dualis*).[57] Later, following the pattern of other divine trinities, their number was fixed in three, and the role of each person (*Klóthó, Lakhesis, Atrópos*) came to be precisely determined. However, the relationship of the *moira* and Zeus as well as the *moira* and other gods is more essential and also causing more debate. The views appearing in the literature of the subject can be classified in three main groups: While one group is placing the *moira* below Zeus and the other above him, the representatives of the third group maintain that posing the question of subordination and superiority is not in accordance with Greek religious thinking. In their view the *moira* is a heterogeneous concept, perfectly separable from the gods, and the fact that the *Moirai* are godesses themselves did not cause disturbance in the Greek mythological world, which was completely lacking a logically constructed theological or dogmatic system.[58] The gods guarantee order, so their role is more active than that of the *moira*, yet the *moira* is also a part of the order sustained by the gods. Thus in one sense Zeus and the gods stand above the *moira*, because they implement it, but in another respect the *Moira/moira* stands above the gods because it expresses the order that must be implemented by the gods.

[53] *Od.* 3, 66; 8, 470; 14, 448.

[54] *Od.* 20, 260.

[55] Pötscher: Moira, Themis und timé im... *op. cit* 103.

[56] Roscher: *op. cit.* 3089. sqq.

[57] Kühner, R.–Blass, F.–Gerth, B.: *Ausführliche Grammatik der griechischen Sprache I–II.* Hannover, 1890–1904. 1. 362.

[58] Nielsson: *op. cit.* I. 364.

III. The vase-pictures representing soul-weighing deserve more attention, in these it is Hermes who regularly places the souls of the two heroes Achilles and Memnón onto the scales.[59] (In some representations Zeus is also present but it is not him who performs the weighing. The two heroes can unquestionably be identified as Achilles and Memnón because their mothers Thetis and Eos are present in order to influence with their prayers the outcome of the weighing meant to decide the result of the combat.) The Aeschylean Psykhostasia mentioned before also deals with the combat between Achilles and Memnón, ending with the former's victory,[60] but here the scales are not in Hermes's but in Zeus's hands.[61] If we take a quick glance at the Egyptian sources we can easily find similarities and analogies between Greek and Egyptian psykhostasia.

The most mature and most precise description of Egyptian soul-measuring can be found in Chapter 125 of the Book of the Dead written in the time of the XVIII. dynasty (16th–15th century BC.).[62] According to this the other wordly judging–and the soul-measuring, constituting the object of the present analysis as part of this–was performed in the following way. Osiris sat on a throne in a huge hall, the hall of the two Maat-s,[63] which was roofed by flames and the signs of Justice, in front of him were standing Anubis and the Horus-sons, and a beast combining the features of a crocodile, a lion, and a hippopotamus in his appearance, which had the task of devouring the defendant eventually found guilty in the verdict. The forty-two judges appointed by Osiris were sitting in the back of the hall (their number symbolising the number of the districts of Egypt), the scales on which the dead person's heart was to be placed stood in the front part of the hall. The Godess of Justice (Maat) received the deceased person coming into the hall, whose heart was placed by Horus and Annubis in one of the scale-pans–while a feather or an eye was placed in the other (both being the symbols of maat)–, then they weighed it to see whether it was lighter than justice. If the pointer did not move, the weighing was considered succesful, whereas if the pan containing the dead person's heart ascended, the beast devoured the culprit. The result of the weighing was noted down by Thot, the divine scribe, who later told it to Osiris. The dead person stepping into the hall made a negative confession, i.e. he denied commiting the sins connected to the forty-two judges, offending the ethical codex of the Egyptians, and then

[59] Roscher: *op. cit.* II. 1142. sq.; Wüst: *op. cit.* 164. sqq.

[60] Wüst: *op. cit.* 165.

[61] Plut. *aud. poet.* 17a

[62] Erman, A.: *Die ägyptische Religion.* Berlin, 1909. 101. sqq.; Spiegel, J.: *Die Idee vom Totengericht in der ägyptischen Religion.* Glückstadt, 1935.

[63] Morenz, S.: *Ägyptische Religion.* Stuttgart, 1960. 117. sqq.

enumerated the names of the judges.[64] (During the confession the deceased person wishing to clear himself had to name and to greet the judge connected to the respective deed. So, for example he had to state that he did not commit injustice, robbery, he did not use force against anyone, did not steal, did not kill, and did not instigate anyone to do so. He did not cause damage to the temple or the gods, did not take away anything unlawfully from the sacrifices destined for them, did not commit adultery, did not fornicate, did not falsify the measuring device of grain, did not violate the borders of someone else's land, did not commit false measuring, etc. Naming these circumstances reveals a great deal about the ideas of the Egyptians about the maat–which can be parallelled from a structural point of view with the Greek themis or diké.)

Let us consider now the paralells between the Egyptian *Book of the Dead* and the Greek vase-paintings (disregarding for the moment the fact that scales are used in both cases)![65] Both Thot and Hermes fulfill in mythology the role of *psykhopompos*, the guide of souls in the underworld, both of them are so-called literate gods, at the soul-weighing they are either performing the act or playing the role of the scribe. At the process both Osiris and Zeus are present as principal gods. It is hardly by accident that both in the vase-pictures and in Aeschylus Achilles is confronting Memnón, king of Aithiopia whose homeland was believed by Homer to be South-East from the Greeks. Presumably, the Greeks originally appropriated the idea of soul-weighing for Achilles's combat with a hero whose homeland was thought to be close to the place where this belief had originated, and later–after integrating these elements into their own religious world-picture–they used it more freely and with a wider scope.[66] The fact that the symbolism of the scales of justice reached the islands of the Aegeian Sea very early, in the years 1500–1200 BC., is proved by archeological discoveries as well. In a Mycenean grave–excavated by Schliemann–in which two women lay buried along with their babies, they found two golden scales in good condition. A butterfly can be seen on the upper part of each of their pans. Although many experts[67] wished to consider these findings only articles of personal use, it is probably not over-hasty to draw some further conclusions from the symbolism of the scales.[68] As it was mentioned *per tangentem* before, the human soul was often represented by the ancient Greeks

[64] Budge, E. A. W.: *Egyptian Religion–Egyptian Ideas of the Future Life*. London, 1979. 130. sqq.

[65] Wüst: *op. cit.* 167. sqq.

[66] Wüst: *op. cit.* 168.

[67] E.g. Fimmen, D.: *Die kretisch-mykenische Kultur*. 1924. 124; Wüst: *op. cit.* 167.

[68] Diertich: *op. cit.* 121.

as a winged figure. It is not only at the Greeks, but also at the Germans and the Albanians that the so-called soul butterfly picture can be encountered.[69] On a vase found in the Cyprian Encomy, dating from around 1300 BC. according to Nielsson, two men are represented, who are standing on a chariot, facing another man holding a pair of scales, presumably Zeus.[70]

With all these I naturally do not wish to mingle the Egyptian *psykhostasia* with the Greek one, as the differences between them are obvious. In Egypt the soul of every deceased person is placed on the scales of justice, the Greeks do so only with the souls of a few exceptional heroes, preparing to fight one another, and this happens while they are still alive. The Egyptian idea carries a moral content, whereas the Greek one decides and approves the–possibly morally justifiable–outcome of the fight.[71] It seems worth taking a quick glance at the transformations and changes of aspect through which the *kerostasia* of the *Iliad* reached Roman literature. The most typical example for this can be found in the twelveth song of Virgil's *Aeneid* where the final combat between Aeneas and Turnus is described: *"Iuppiter ipse duas aequato examine lances / sustinet et fata imponit diversa duorum, / quem damnet labor et quovergat pondere letum."*[72] The *fata* of the two persons are placed onto the scale-pans and whereas in Homer the reader is informed about the result of the weighing, in Virgil we can infer that the outcome was favourable for Aeneas only from the events on earth.

So we cannot claim that this idea of Egyptian religion would have completely been transported into Greek thinking but this is not strange, as we cannot encounter any unaltered Egyptian borrowing in Greek mythological thinking.[73] At the same time, some Egyptian influence–possibly with Cretan transmission–can be detected in the development of the Greek version of *psykhostasia*. The pictorial, as well as the textual proof/manifestation of this influence can be found on the one hand in vase-paintings, on the other hand–undergoing a specific alteration of aspect, in the form of *kerostasia*–it can be found in Homer, from whom directly leading to Zeus's and Iuppiter's scales of justice becoming the symbol of Diké and Iustitia, and then the symbol of the administration of justice itself.

[69] Waser: *op. cit.* 337. sqq.

[70] Nielsson, M. P.: *Homer and Mycenae*. London, 1933. 267. sqq.

[71] *Cf.* Malten, L.: Elysion und Radamanthys. *Archäologisches Jahrbuch,* 38 (1913) 35. sqq.

[72] Verg. *Aen.* 12, 725–727.

[73] Dietrich: *op. cit.* 114. sqq.

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Harmonisation of the Hungarian Legal Order with the EU's Common Commercial Policy

Abstract. In this essay is analysed the conceptual relation between the common commercial policy (CCP) of the European Union and the Hungarian foreign trade law, illustrating the dynamic extension of the CCP and the character of the competences in this field. Moreover the reader can get an insight into the so-called "rest competences" of the member states. In consequence of the nature and logic of the CCP was induced the mostly deregulatory modifications in the Hungarian legal order and the functional alteration of the foreign trade administration of Hungary. The author highlights this complex question consisting of the required modifications of the international conventional engagements and the harmonisation of Hungarian foreign trade material and procedural law in relation to the accession. He comes to conclusion that Hungarian accession to the EU might even be advantageous and it opens up a new prospect. Therefore the Hungarian foreign trade administration and diplomacy have to recognise the opportunity within the framework of the decision-making procedures of the Community as an initiative canalizing and enforcing the interests of the Hungarian producers and other market participants in all cases, when any kind of intervention is necessary in the relation of the third states.

Keywords: European Union, European law, community law, exclusive competences, common commercial policy, foreign trade law, enlargement of the EU

1. Introduction

The interactions between states of the 'global world market' are most likely to become more difficult and manifold in the next decade. However, among these ties–which result in a stronger inter-dependence between countries–the interactions of external economy, especially the foreign trade interactions remain determinative presumably. Therefore it can be expected that the normative system regulating foreign trade processes should also be modified, in accordance with the conditions of the 'new world order' and the new needs. In case we would like to consider this topic from the aspect of the new *EU 25*: the starting point of the disquisition is the common commercial policy (CCP)

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and its normative base, Art. 133 of the Treaty establishing the European Community (TEC), but we try to concentrate on the specific segment of this problem. In the following will be introduced those questions, how can be implemented the common commercial policy from Hungarian point of view, particularly the necessary changes of legal framework of the Hungarian foreign trade after the EU's enlargement.

2. The Functional Alteration of the Hungarian Foreign Trade Administration

In relation to our accession to the EU, it is the transformation of the Hungarian foreign trade law, the effect of which was rather considerable already on the day when the Accession Treaty entered into force. The logic of the Hungarian *Act III of 1974 On Foreign Trade* was irreconcilable with our EU accession, since the common commercial policy requires an absolutely different activities by the national foreign trade administration and a different functioning of the foreign trade law itself. The new function is nothing else but the requirement of the application of the *acquis commtnautaire*. This means that by the day of the accession, the national foreign trade administration had to be transformed to be appropriate for the efficient implementation of Community law instruments of the customs union and common commercial policy. From that date on, the Hungarian foreign trade administration is allowed to take autonomous measures only within a narrow compass, similarly to the administration of the other member states.[1]

From this point of view, this change can be said to be outstanding. It is sufficient to think over that our export into other EU member states, and the import from those states–which forms a considerable part of the commerce crossing our borders–today, in reality, does not come under the ruling of the foreign trade law which is subordinated to the new function, but falls within the uniform internal market regulation. As a practical illustration of this function alteration, we can refer to the reformed Hungarian institutional system of customs authorities, the function of which is increasingly resembles a market-like service organisation, taking into consideration that the customs clearance of the import crossing the customs frontier of the EU can occur in any member state according to the general rules, but the state of the authority

[1] See below: the possibility of derogation is only permitted in certain cases: usually in relation with special group of products (e.g. commerce of war supplies), or in special circumstances (e.g. crisis, natural catastrophe).

who executes the clearance is allowed to keep a certain proportion of the customs revenues.[2] In a figurative meaning, the Hungarian customs authorities lost their 'monopoly', that is why, if the Hungarian budget intends to claim the above mentioned revenues, it has to establish and operate an administration system which–in relation to the authorities of the other states–can be considered as competitive.[3]

3. The Cornerstone of the CCP: Exclusive Competence on the Art. 133 TEC

Art. 133 of TEC contains general guidelines for the CCP, in fact it is the external trade policy of the European Union towards third countries. Or in an other approach: it is the external side of the economic and social policy of the European Union.[4] The opinion of the European Court of Justice confirmed that CCP holds exclusive competence as regards trade in goods, but specified that member states and the Union share joint competence to deal with trade that does not involve goods.[5] This 'exclusiveness'[6] also includes the competence of

[2] 75% of the customs revenues will be the part of the EU budget, the member state is allowed to keep 25% in its own budget, but only to finance the maintanance of the customs admistrative system. The previous calculations expect a 60 billion Forint fall in revenue a year. http://www.vaminfo.hu/Art.s/vamunio.php (17/05/2005).

[3] That is why it is unquestionable, that in the early days of the accession, the crashing of the domestic informatic customs management system did not inspire confidence. However, we can add that this is the way how the aspiration, which covers that customs clearance of import that enters the EU from the Far-Eastern markets should be executed by the Hungarian authorities and later they want to reach the receiving markets of the other states from Hungary as a regional logistic distribution centre, gets into the center e.g. of the Hungarian foreign trade diplomacy.

[4] Ipsen, H. P.: *Europäisches Gemeinschaftsrecht.* Tübingen, 1972. 815.

[5] ECJ *Opinion,* No. 1/94, World Trade Organization, [1994] *European Court Reports* I-5267. See Pescatore, P.: Opinion 1/94 on Conclusion of the WTO Agreement: is there an escape from a programmed disaster? *Common Market Law Review,* 1999. 387–405.

[6] Generally for the EU's competences in the CCP see: Cremona, M.: Policy of Bits and Pieces? The Common Commercial Policy After Nice. *Cambridge Yearbook of European Legal Studies,* Vol. 4., 2001. 61–91., Griller, S.–Gamharter, K.: External Trade: Is There a Path Through the Maze of Competences? In: Griller, S.–Weidel, B.: *External Economic Relations and Foreign Policy in the European Union.* Vienna–New York, 2002. 66–111., Herrmann, Ch. W.: Common Commercial Policy after Nice: Sisyphus Would Have Done a Better Job. *Common Market Law Review,* 2002. 7–29., Krenzler, H. G.–Pitschas, Ch.: Progress or Stagnation?: The Common Commercial Policy After Nice. EFAR, 2001. 291–

the European Union in relation to GATT/WTO.[7] At this point, we can refer furthermore to the view formed after the *Opinion No. 1/94* of the European Court of Justice, according to which the exclusive competence of the commercial policy only refers to the traditional area of regulations of the CCP, to the ones affecting trade. In the new fields of the CCP–such as trade of services–that gained increasing importance in the last decade of the previous century, the CCP has no exclusive competence. This idea has been transplanted into the primary law by the Amsterdam and Nice amendments of the founding treaties.

Art. 133 (1) TEC lists several areas in which the CCP of the EU is to be applied, but this enumeration is non-exhaustive, i.e. intended only as illustrative and not as limitative.[8] Regardless of the discussion on the substance of the CCP, two advising remarks concerning the list of commercial areas in Art. 133 (1) are justified. Firstly, the list clearly indicates that the EU derives its powers to take both autonomous (change of tariff rates and measures to protect trade) and conventional (conclusion of tariff and trade agreements) measures to implement its commercial policy from Art. 133. Secondly, changes in tariff rates must necessarily be made in accordance with the Treaty's Part 3, Title 1, Chapter 1, entitled 'The Customs Union', which again has to be enacted consistently with WTO provisions and international agreements concluded by the Union.

The norm groups related to the CCP can be categorised as follows: *(a)* single import system, *(b)* single dxport system, and *(c)* system of international trade agreements. Essentially, the following comments can be made on these categories.

a) It is a common–supposedly constant–experience that states try to provide the possible greatest protection for their own producers. This is true for the European Union, as well; the obvious methods are to regulate the import and to apply different safeguards to limit the competence of the foreign partner states on the market, and in consequence of this the majority of restrictions regards the relations of import. However, as time passed by, it was realised that the excessive import protection, the protectionism has negative consequences

313., Neframi, E.: La politique Commerciale Commune selon le Traité de Nice. *Cahiers de Droit Européen*, 2001. 605–646. The art of the CCP's exclusiveness has been pointed out also in the Hungarian literature, see Horváthy, B.: A kereskedelempolitika dinamikus értelmezése a közösségi jogban [The Dinamic Interpretation of the Commercial Policy in the Community Law]. *Jogtudományi Közlöny*, 2004/10.

[7] *„The Community has assumed the powers previously exercised by the Member States in the area governed by the General Agreement GATT"* C-21 and 24/72 International Fruit Company v. Produktschap voor Groenten en Fruit, [1972] *European Court Reports*, 1219 at para. 18.

[8] See *Opinion* No. 1/78, International Agreement on Rubber, [1979] *European Court Reports*, 2871.

for all states and induces slower economic growth. Therefore, an international regulation (GATT) on import protection has been established, which is an international field of force with a significant impact on the import regime of the European Union, as well. Its regulation frame is changing, which is necessarily going to bear upon the rel`ted regulation of EC Law. Hence it is also necessary to examine the related international law frames, by showing the Community regulations on customs, the system of administrative barriers, and the normative frames of the trade safeguards.

More concretely, the most important type of measures in this category concerns the EU's Community Customs Code and Common Tariffs (CCT). The cornerstones are the Regulation on the tariff and statistical nomenclature and on the Common Customs Tariff,[9] the Regulation establishing the Community Customs Code,[10] and the Regulation on its provisions for the implementation,[11] completed with many regulations and directives which previously govern customs procedure and other administrative aspects of customs law. The other set of rules deals with the autonomous protective measures of the EU against the import arising from third countries causing damages to Community actors[12] or/and against unfair trade practices.[13]

b) Increasing export is one of the main objectives of trade policy, therefore–unlike in the case of import–not the confinement, but the incentive is the most common ambition. Regarding the amount of relevant regulations within Community Law, there are significantly less regulations on export system than on e.g. the import regime. Most of the regulations relate to incentives: especially the topic of the subventions is of great significance, which is also well regulated

[9] *Council 2658/87/EEC Regulation* of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, and see also: *Commission 1359/95/EC Regulation* of 13 June 1995 amending Annexes I and II to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, and repealing Regulation (EEC) No 802/80.

[10] *Council 2913/92/EEC Regulation* of 12 October 1992 establishing the Community Customs Code.

[11] *Commission 2454/93/EEC Regulation* of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code.

[12] See Art. 16 *et seqq.* of the *Council 3285/94/EC regulation* of 22 December 1994 on the common rules for imports and repealing Regulation (EC) No 518/94.

[13] *Council 384/96/EC regulation* of 22 December 1995 on prohibition against dumped imports from countries not members of the European Community; *Council 2026/97/EC regulation* of 6 October 1997 on protection against subsidized imports from countries not members of the European Community.

by the international law within our scope.[14] Still, there are regulations for the export confinement (e.g. regulation on the dual use products) but only with smaller significance.

c) Numerous trade agreements in different commercial subjects and with various parties settled around the world were concluded by the European Union.[15] In the literature, the authors have come up with numerous systematizations and classifications of the EU's trade agreements. On the basis of the so-called 'concentric circles theory'[16] four types of the agreements can be distinguished: the innermost circle consist of the Agreement on thd European Economic Area, the second one of the European Agreements, thirdly the development associations[17] can be mentioned, and the last circle comprises diverse forms of trade and co-operation agreements with countries in the Americas, Asia, Far-East etc.[18]

It has to be added that between the first and second circles the agreement on EU-Turkey relations must be mentioned which was in fact, based originally on a 'European Agreement', but today, extending this agreement, it already means a legal ground establishing the single bilateral customs union relation of the EU with third country. Stressing the importance of this fact, the EU-Turkey customs union consequently implies more than a normal European Agreement (second circle).

[14] See above: in the import regime mentioned antisubvention action means the inverse measure of this. *Viz.* in a given case, against the EU's not allowed subvention can be applied antisubvention measure by a third country on the conditions of the import regulations of the country concerned.

[15] For the whole system of trade agreements see: *Directory of Community legislation in force Chapter 11.: External relations.* The document is accessible on the following page: http://www.europa.eu.int/eur-lex/lex/en/report/index_11.htm

[16] The theory was worked out by Verloren van Themaat former ECJ's Advocate General. See: Kapteyn, P. J. G.–Verloren van Themaat, P: *Introduction to the Law ot the European Communities.* London–The Hague–Boston, 1998. 3rd ed. 1328 et seq. The system of trade EU's agreements was summerized in the Hungarian literature by Balázs Péter first member of Republic Hungary in the Commision, see Balázs, P.: *Az Európai Unió külpolitikája és a magyar-EU kapcsolatok fejlődése* [The EU's Foreign Policy and the Evolution of the Relation EU-Hungary] Budapest, 2002.

[17] A traditionally important part of the external relations of the European Union is the support provided for the developing countries. The evolvement of the common development policy has been supported by the tendencies appearing from the 60s and by the increasing role of the developing countries. Elements of the EC-law, like GSP system, the former Lomé Convention and the its successional Cotonou Agreement (see below at para. 6.2.a.) should be mentioned in this scope.

[18] *Ibid.*

Finally, it is to be remarked that the second circle naturally also embraces the latest forms of the association agreements concluded in the preceding years which intend to set up in many cases not only the free trade between the EU and the country concerned but the fulfilling other objects as well (to stabilize an democratic political system, e.g. in the so called Stabilisation and Association Agreements[19]).

4. Residual Competences of the Member States Relating to CCP

4.1 It also appears that the above-mentioned function alteration can be derived from the exclusive character of the common commercial policy. This means that the exclusiveness of the commercial policy competences results in the fact that national authorities that possessed competence before the accession are deprived of their right to determine the framework of commercial policy and to issue measures after our accession. Naturally, this can be perceived in a way that this is the price of our accession to the customs union and the single market. Not to speak of the fact, that a considerable part of the commercial policy instruments – e.g. the commercial defensive measures – were applied by Hungary with low efficiency,[20] this way the fact that the determination of commercial policy was transferred onto the level of a more active participant, namely the EU, might provide an essentially greater security for the Hungarian market.

4.2 In the case of member states, the remaining competences only mean implementing authorities and, in a rather narrow circle, certain regulative 'residual competences', as well. The commercial policy competences that can be exercised on the level of member states are the following:

a) Originally in practice, and later in the parallel competence cases, proposed in the Opinion No. 1/94 of the ECJ. These cases, after the amendment of the

[19] See Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part. *Official Journal,* L 026 28/01/2005. 1., Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part. *Official Journal,* L 084 20/03/2004. 13.

[20] Since 1994 for instance there has been no example of any antidumping duty. As a reason for this, we can mention that in the multilateral global commercial scope, the ability of our country to enforce interest is rather insignificant. Otherwise, in certain cases, the compensation of the applied market protection measures or the retorsion imposed against it would have struck the domestic producers with serious consequences.

TEC are defined by the primary law. In these fields, the internal competences of the member states are established; e.g. in the subjects concerning the trade of certain services;

b) The transposition into the national law of the rules of EC Law referring to this field, (if it is necessary);

c) The fulfilment of obligations under EC law, e.g. determining the amount of the customs bond, or the establishment of the institutional framework (operation of customs authorities, etc.);

d) Taking measures, referring to the third countries, if EC Law makes it possible, and if the measure is not under the effect of Art. 133;

e) Similarly to delegation, the member states had the opportunity to maintain those commercial agreements that had been concluded in the transition period, namely before 1 January, 1970. For the prolongation of these agreements the delegation of the community is necessary in each case.[21] This delegation is bound to the condition that the relationship of the member state maintained with the third country does not contravene the CCP;

f) The so-called actio pro communitate, when the Community is unable to exercise its otherwise exclusive competence because of some sort of objective reasons (usually in the field of international law)[22] and therefore in fact the member states stand up in the name of the Community;

g) The determination of the import and export of arms, munitions and war equipment, if the applied measures do not have a negative effect on the competition within the common market in view of the products that are not explicitly for military goals (Art. 296 of the EC Treaty);

h) The member states are allowed to apply temporary measures extensively in order to maintain the public order (e.g. in the case of war), this way they can deviate from the CCP – in principle, these measures might also affect the common market disadvantageously, if a member state can secure acceptance of

[21] See *Council 2001/855/EC Decision* of 15 November 2001 authorising the automatic renewal or continuation in force of provisions governing matters covered by the common commercial policy contained in the friendship, trade and navigation treaties and trade agreements concluded between Member States and third countries. *Official Journal*, L320 05/12/2001 13.

[22] As a historical example one may recall the special contact established between the EC and the Eastern-European–former 'Soviet Bloc'–countries: because refusing the EC's legal personality by these countries in the 1970s, the technical agreements on field of the commercial policy were concluded between the country concerned and the member states (and not the EC). *Id est* the exclusiveness of the competence apparently was infringed, but it was absolute necessary to arrive at an agreement. Kapteyn: *op. cit.* 1323.

these measures during the consultations with the other member states (Art. 297 TEC);

i) The literature[23] mentions in this sphere measures that can be applied against other member states which are made possible by Art. 28 TEC. The measures issued in accordance with the legal interests based on the Art. 30 TEC and which do not require harmonisation,[24] are valid to third countries, as well.[25]

The above-mentioned cases do not mean that in the listed spheres the member states are able to maintain their regulative authority unconditionally, since each and every exception requires the individual delegation or the contribution of the Community,[26] or in special cases the rest of the member states have the right to appeal against the measure of the member state at to the European Court of Justice.[27]

However, the question is whether the residual competences can be constitutive or their executive character only empowers them with declarative characteristics? From the above introduced list the character of the parallel competences,[28] the subject out of the effect of Art. 133,[29] the permitted exceptions,[30] the restrictions affecting the commerce of war material,[31] the measures taken on behalf of the public order[32] seem to be self-evident: if a member state fulfils the special formal requirements (e.g. the contribution of the Community or the other member states), then the measure applied by it means an independent, constitutive practice of competence. However, the cases

[23] See *e.g.* Hohmann, H.: *Angelassene Außenhandelsfreiheit im Vergleich.* Tübingen, 2002. 218.

[24] *Ib.* According to Hohmann, if harmonisation in this field shall be required, the member states lose their own regulatory competence.

[25] *Cf.* with *Council 2603/69/EEC Regulation* of 20 December 1969 establishing common rules for exports, Art. 11.: „Without prejudice to other Community provisions, this Regulation shall not preclude the adoption or application by a Member State of quantitative restrictions on exports on grounds of public morality, public policy or public security ; the protection of health and life of humans, animals or plants ; the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property."

[26] Paras. *(b)–(f).*

[27] Paras. *(g)* and *(h).*

[28] Para. *(a).*

[29] Para. *(d).*

[30] Para. *(e).*

[31] Para. *(g).*

[32] Para. *(h).*

of the actio pro Communitate[33] have to be perceived as declarative, specific executive measures, since in this case the exclusive competence still exists on the level of the Community. The only difference is that the vindication becomes possible only by the above introduced intercalation of the member states.

4.3 In the case of CCP the role of the direct enforcement–namely enforcement by the Community authorities–is less significant. In contradiction, we can speak of indirect enforcement when the enforcement of the Community law–in certain cases the CCP, as well–is accomplished through the bodies member states. One case of this is the above-mentioned para. *(c)*, when during the implementation, the member state authorities directly apply Community law having direct effect, which means that the task of the member state legislator only expands to the establishment of the institutional system, while it is not necessary to transpose the Community law norm. As opposed to this, para. *(b)* covers the cases–considered to be exceptional in the CCP–when on the member state level the Community norm has to be transposed by a legislative act, that is, the latter will be applied by the local authorities through national law.

As it has already been mentioned, the implementation of the CCP is an obligation of the member states,[34] deriving from EC Law. This results partly from the supremacy doctrine of the EC Law[35] and partly from Art. 5 TEC. In special cases, the European Court of Justice concretised the general formula of Art. 5. This way, referring to the CCP, the implementation contains the following obligations:

- the national law has to indicate the enforcement authorities,36 which have to be created by the member states in a way that they are able to function effectively.[37]

[33] Para. *(f)*.

[34] The executional framework of the Community Law in the earlier literature was assumed by Zuleeg (Das Recht der Europäischen Gemeinschaften im innerstaatlichen Bereich. *Kölner Schriften zum Europarecht*, 9, 1969), basing on this theory, Pescatore divided the execution and application of the EC-law in levels (Das Zusammenwirken der Gemeinschaftsrechtsordnung mit den nationalen Rechtsordnungen. *Europarecht*, 1970. 307. et seq.)

[35] Weatherhill, S.–Beaumont, P.: *EC-law*. 2nd ed., London, 1995. 307 *et seqq.* In the Hungarian literature to this subject see: Kende, T.–Szűcs, T.: *Európai közjog és politika* [European Public Law and Policies]. Budapest, 2002. 559. et seq.; Kecskés, L.: *EU jog és jogharmonizáció* [EU Law and Harmonisation of Law]. Budapest, 2003. 368.

[36] 66/79. *Amministrazione delle finanze dello Stato v. Salumi* [1980] *European Court Reports*, 1237

- provided that are more national authorities being responsible for the enforcement, the member states are obliged to circumscribe the powers of the different bodies.[38]
- the enforcement authorities have to be put under effective supervision,
- the measure of necessity has to be taken into consideration while creating the member state enforcement regulations, this means that only those norms have to be issued that are absolutely necessary for the effectiveness of the EC Law norm,
- the member state authorities are obliged to apply the community regulations, they cannot be subdivided, and there cannot exist any member state regulation that would effect the force of the community regulation in a unlateral way.[39]

5. The Order of Foreign Trade of Hungary after the Accession to EU

5.1 It belongs to the traditional sovereign rights of the Hungarian Republic– and derivable from the Hungarian Constitution, as well – that it influences the foreign trade and economy with appropriate legal measures, with the aid of administrational institutions. However, because of the above-mentioned reasons, and because of the fact that the EU also forms a customs union which has to operate properly, the member states are not allowed to practice their sovereign rights, which means that the guidance of the procedures occurs through harmonised and unified community means.

However, the disbelief, according to which the transposition of the focal point of foreign trade and economy activities can be evaluated as a loss of sovereignty, has to be dispelled. It is more accurate to say that the Republic of Hungary did not lose its sovereignty after the accession to the EU in this field, but changed its mode of practice, and in the future, on behalf of our EU

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[37] See Hilf, M.: Möglichkeiten und Grenzen des Rückgriffs auf nationale verwaltungsrechtliche Regeln bei der Durchführung von Gemeinschaftsrecht. In: Schwarze, J. (ed.): *Europäisches Verwaltungsrecht im Werden. Schriftenreihe des AEI.* Band 14. Baden-Baden, 1982. 71. Also the national legal framework of the procedures should be disposed on the method which ensures the efficiency of the Community Law having direct effect, see 118/76 *Balkan Import Export v. Hauptzollamt Berlin Packhof.* [1977] *European Court Reports,* 1177.

[38] 240/78. *Atalanta Amsterdam BV v. Produktschap voor Vee en Vlees* [1979] *European Court Reports,* 2137.

[39] 39/72. *Commirsion v. Italy* [1973] *European Court Reports,* 101., 93/71. *Leonensio v. Minstero dell' Agricoltura e Foreste* [1973] *European Court Reports,* 101.

membership, it will practice them together with the other member states and with the EU itself. This view can be derived from the Hungarian Constitution's Art. 2/A, paragraph 1, according to which: "By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties (...)". This common exercise of competences can be realised in a way that in the case of a concrete task, only the bodies of the Community will proceed (e.g. the European Commission in the case of an antidumping procedure).[40] These are also in conformity with that constitutional obligation of Hungary, which declares that "The Republic of Hungary shall take an active part in establishing a European unity in order to achieve freedom, well-being and security for the peoples of Europe".[41]

5.2 This type of transformation of the practice of sovereignty occurred with our Accession Treaty.[42] According to the facts emphasised above, the CCP has to be homogeneous; theoretically, after our accession there is no possibility of derogation from its rules. There is only one real exception to this: not later than 1 May 2007, the Hungarian foreign trade administration is allowed to establish an annually decreasing customs contingent in the case of raw aluminium.[43] Because of our accession to the CCP, the transformation of the system of means became necessary. According to the *Act XXIX of 2004 On the accepted amendments concerning the accession* Art. 140 paragraph 1: "the export and import of commodities, services and rights representing material value in intercommunication and the transference of them through the Hungarian Republic can be restricted only in accordance with an international treaty". Consequently, according to the main rule the overturn of foreign trade is free, but as the emphasis put on 'international treaty' refers to the fact that today the influencing or restricting of foreign trade (through customs, allowances, etc.) can occur mainly by the rules laid down in international law

[40] *Hungarian Constitution*, Art. 2/A para. 1. last sentence: "(...) these powers may be exercised independently and by way of the institutions of the European Union".

[41] *Hungarian Constitution*, Art. 6. para. 4.

[42] *Act XXX of 2004* on the promulgation of the Accession Treaty.

[43] See Annex X, Section 9 of the *Accession Act* which belongs–as an integral part–to the Accession Treaty promulgated by the Act XXX of 2004. Practically, this 'temporal derogation' affects directly only the Hungarian aluminium imports from Russia, it amounts to saying that three years *moratorium* is allowed to Hungary to find alternative stock sources/exporters *in lieu* of the Russian one (e.g. from a number of countries bounded by bilateral free trade agreements to the EU can be imported customs-free aluminium).

and in the Accession Treaty (and EC law) and not by the autonomy of the country.

5.3 In our foreign trade law, our obligation of modification because of the accession is being dealt with two regulation levels. On the one hand, we had to harmonise our international law obligations of commerce subject with the CCP, and on the other hand, on the level of our national law, namely: our customs law, our foreign trade licensing system, the application of the quantitative measures, and in the imposition of the protective measures, it was necessary to implement some corrections until the end of the accession procedure. In some cases, the obligation could only be fulfilled by deregulation, but in other cases we had to perform a positive legislative task. The particular fields can be surveyed according to the above introduced grouping in the following points.

6. The Harmonisation of our International Treaties with the CCP

6.1 Among the contractual means, it was the multilateral framework, more precisely the WTO–GATT rules that raised several questions concerning our accession. Both Hungary and the Community are founding members of the WTO, consequently both the WTO agreement and its annexes have to be applied, the change had occurred only in the sense of legal techniques.

This legal technical change basically refers to the relationship between the national law and the norms of WTO, since all the obligations originating from WTO membership, for example, the decision of the dispute settlement body today, is not directly embraced by the international law–Hungarian law *forlula*, but it is represented as an obligation through the EC Law, as a special *transmitter medium*. This theoretical problem is one of the controversial questions of the CCP, a lot of monographs and studies deal with this problem. According to the technical literature, there are two major extremes in this question: on the one hand, WTO obligations can be perceived in the relationship between the international law and the EC Law, but on the other hand, there is another view, which is increasingly accepted: the WTO norms access directly onto the level of EC Law norms and assert themselves through a special direct effect.[44] The answers given to these seemingly theoretical questions have

[44] This problem is assumed by OTT, A: *GATT und WTO im Gemeinschaftsrecht.* Köln–Berlin–Bonn–München, 1997. Also see Zonnekeyn, G.: EC Liability for Non-implementation of Adopted WTO Panels and Appellate Body Reports. In: Kronenberg, V. (ed.): *The European Union and the International Legal Order: Discord or Harmony?* The Hague,

serious practical consequences, as well: for example, whether it is possible to refer to WTO norms in the processes of the European Court of Justice depends on this factor.

It was indispensable for Hungary–on a multilateral level–to form an identical level concerning the facultative obligations, as well. Thus, our individual colmitments to GATT in 1994 could not have been maintained after our accession: for example, we have to adopt the system of the tariff commitments in its entirety. The analyses made before our accession point out that in the case of Hungary and other non-EU member commercial partner countries, it will result in the decrease of the customs level.[45] However, we have to add that our international trade before the accession–showing one of the highest rates among the candidate countries–was mainly carried out with the member states of the EU; therefore this change of our multilateral level obligations only affected the importers and exporters in their relationship with the third states. Naturally, the change of the average customs level induces demands of compensation; however, the undertakings concerning this do not belong to the competence of the national foreign trade administration, but that of the EU.

At this point, it is useful to mention the commodity agreements. The requirement of the harmonisation emerger in this case as well. According to the practice of the European Court of Justice, the commodity agreements connected with the operation of the UNCTAD belong to the sphere of CCP.[46] However, there is a difference in the commodity agreements concerning the

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251–272.; Royla, P.: *WTO-Recht–EG-Recht: Kollision, Justizibialität, Implementation.* Europarecht, 2001/4. and Sander, G.: Zur unmittelbaren Anwendbarkeit der WTO-Abkommen in der europäischen Rechtsordnung. *Verfassung und Recht in Übersee,* 2.

[45] Ld. Jánszky, Á.–Meisel, S.: *Magyarország EU-csatlakozásának WTO-összefüggései* [The WTO-aspects of the Hungarian Accession to the EU]. Budapest, 1999. According to calculations based on the year 2001, after the accession, there will be only approximately 1600 higher EU-MFN tarrifs Art.s than the Hungarian equivalent.

[46] See ECJ *Opinion,* No. 1/78. Upon a request by the European Commission, the ECJ to give an opinion on the compatibility the TEC with the Treaty of the draft international agreement on natural rubber which was the subject of negotiations in the UNCTAD, and whether the Community is competent to conclude the agreement in question. See para. 45 of the opinion: "Art. 113 empowers the Community to formulate a commercial "policy" based on "uniform principles" thus showing that the question of external trade must be governed from a wide point of view and not only having regard to the administration of precise systems such as customs and quantitative restrictions." and para. 63. "(...) The envisaged International Natural Rubber Agreement, in spite of the special features which distinguish it from classical trade and tariff agreements, comes under the commercial policy as it is envisaged in Art. 113 of the EEC Treaty."

question whether only the EU has the right to become a member of the multilateral agreements, or the member states have this opportunity as well? In the case of the former, the membership of Hungary could not outlast the accession (e.g., the sugar agreement), but in the case of the latter, our accession inferred that we become members in certain commodity agreements, which had not been accepted yet, because of the marginality of the national interest on those fields (e.g., tropical tree agreement).

6.2 Our accession also implicitly affected the bilateral agreements, like the free trade agreement. The reason for this is that the maintenance of these is contrary to the principles of CCP, therefore, they could not remain in force after 1 May 2004.[47] However, thd change here is a question of legal techniques, as well, since for instance, the CEFTA member states having remained outside the present enlargement circle made an association agreement with the EU, thus the only factor that will change is the legal basis of the liberalised trade. However, the change caused some problems in practice. Here, we can refer to the Hungarian–Romanian circulation of commodities which until our accession was regulated by the CEFTA-agreement. Although Romania made an association agreement ('Europe-agreement') with the EU on 1 February 1993 which, regarding the accession, was amended, it has not been reinforced by the European Parliament yet, thus it has not come into force. In the above-mentioned modification, the original preferences of the CEFTA were also included, but because of the duration of the ratification process the present trade is on a normal customs level, it seems to be in a 'vacuum'. This situation–based on the pre-accession customs level–causes considerable damage both to Hungary and to Romania, in the relation, which is one of the highest volume circulations among the CEFTA members. However, this case is a good example for the fact that the Hungarian foreign trade administration is not capable of stepping up, even under the pressure of the national producers, to solve this problem, since it does not possess any direct means for this because of the exclusive competence character of the CCP.[48]

[47] *Accession Act,* Art. 6. (1): „With effect from the date of accession, the new Member States shall withdraw from any free trade agreements with third countries, including the Central European Free Trade Agreement (...)".

[48] The Hungarian influence is possible only in an indirect form, like the pressing of the ratification by the Hungarian members of the European Parliament, which was done in this case, see The European Parliament has ratified the extension of the Romanian association agreement. *BRUXINFO* (23. 02. 2005.)

Besides, we can refer to the fact that our member state status resulted our accession to several bilateral trade agreements. Accordingly, Hungary became (and will become) a part of the system of the preferential and other bilateral agreements of the EU. These agreements may come under the following four categories:

a) Firstly, as an individual category the so-called Cotonou Agreement should be mentioned,[49] to which Hungary (with the other new member states) acceded 'automatically' by the Accession Act as of 1 May 2004.[50]

b) The Agreement on the European Economic Area[51] belongs–tebhnically speaking–to an other group. The new member states can accede under special conditions laid down in Art. 128 of this Agreement.

c) Thirdly, the accession to a number of agreements and conventions shall be agreed by a conclusion of a protocol between the Council, acting unanimously on behalf of the member states, and the third country, countries or international organisation concerned. The Commission have to negotiate these protocols on behalf of the Member States on the basis of negotiating directives approved by the Council, acting in unanimity, and in consultation with a committee comprised of the representatives of member states.[52] It is particular in these cases that the new member states have to apply the provisions of the agreements at issue, as from the date of accession, and pending the conclusion of the necessary protocols referred above.[53] Strictly speaking, it means that the new member states have to implement the provisions of these agreements in their national legal order temporarily.[54] As a special example the

[49] Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part. The agreement was signed on 23 June 2000 in Cotonou (in the 'administrative'–but non official–capital of Republic of Benin). See *Official Journal,* L 317 (15. 12. 2000.) 3.

[50] See *Accession Act,* Art. 6. (4)

[51] Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Kingdom of Sweden, *Official Journal,* L 1 (3. 1. 1994.) 3. Hungary will accede prospectively to EEA Agreement in the course of 2005. See The Agreement between Hungary and EEA can be signed in Mai 2005. *BRUXINFO* (12. 04. 2005.) and Decision of the Hungarian Parliament 4/2004. (III. 2.).

[52] *Cf.* with *Accession Act,* Art. 6. (2)

[53] *Accession Act,* Art. 6. (6)

[54] Agreements and conventions of this art are in force in relation with the following countries for instance: Algeria, Armenia, Azerbaijan, Bulgaria, Croatia, Egypt, FYROM, Georgia, Israel, Jordan, Kazakhstan, Kyrgyzstan, Lebanon, Mexico, Moldova, Morocco,

association agreement between the Community, its member states and the Republic of Turkey can be highlighted, which was amended by a protocol establishing as of 1996 Customs Union. But the extension of this agreement to the new member states could not have hitherto come into force owing to Turkish foreign policy: namely, this act would be interpreted as a *de facto* recognition of the Republic of Cyprus. In spite of this fact, as is to be expected, Turkey will sign the new protocol of the agreement before engaging in accession negotiations on 3 October 2005. Up to that date the system of bilateral free trade agreements between Hungary and Turkey remains in force[55] in which, naturally, the provisions of the EC Law were implemented before our accession. Namely, the level of the liberalization in the relations of Turkey and Hungary is as the same as after the extension of the Ankara Agreement, and that is the most important difference between the position of the above outlined CEFTA Agredment and the other multilateral agreements concluded before the enlargement. We had to denounce the first one, before accession, but in the relations concerned by the second group of agreements we can maintain the agreement until the conclusion between the 'EU25' and the third country in question.

d) The fourth category consists of agreements concluded formally in the same procedure as stated in the preceding paragraph (c) (the Commission negotiates a protocols on behalf of the Member States on the basis of negotiating directives approved by the Council etc.), but the principal difference is in the legal consequences, i.e. the new member states are not obliged to apply these agreements by way of temporarily transplanting their provisions into the national legal order.[56] The agreements concluded with Switzerland, Belarus, Chile, China, or the agreement negotiated with the Mercosur countries belong to this group.

Romania, the Russian Federation, San Marino, South Africa, South Korea, Syria, Tunisia, Turkey, Turkmenistan, Ukraine and Uzbekistan. In fact, all of the agreements on textil goods signed by the Community before enlargement belong to this category, *cf.* with *Accession Act,* Art. 6. (7). But we can add that the importance of these textil agreements decreased significantly because of change of the multilateral legal framework at the beginning of 2005.

[55] See *Act XX of 1998.* On the promulgation of the Free Trade Agreement between Republic of Hungary and Republic of Turkey.

[56] *Accession Act,* Art. 6. (2)

7. The Harmonisation of Hungarian Foreign Trade Material and Procedural Law and their Framework after the Accession

7.1 By our accession, the logic of the regulation of our foreign trade material and administrative law has utterly changed. This naturally can be derived from the above-mentioned function alteration. The stages of the regulatory process concerning our foreign trade administrative law are the following:

a) On the top level of the hierarchy is the primary legislation of the EU, this way the forming of our foreign trade administration can only happen in accordance with the rules of the primary EC Law. Among the regulations of the primary sources of EC Law (founding treaties, the amendments, attached protocols etc.) the following ones are rather fundamental from the point of view of this field: Art. 23–31. TEC (The Customs Union), Art. 131–135. TEC (Common commercial policy, Customs cooperation), Art. 296–298. TEC (national reservation in certain cases, internal market "safeguard clause" etc.), Appendix IV of Accession Act, para. 5. (the effects of the accession on the customs union), Appendix X (*Ad interim* provisions regarding Hungary), Accession Act Art. 27. para. 1. (Application of customs and customs reduction in the field of the EURATOM) and Art. 37. (provisional safeguard clause).

b) The obligations of the international law (GATT–WTO etc.) are on the second level. However, if these obligations refer to the field that is not regulated by the EC Law, affect the competence of the Hungarian authorities, and by the omission of the next level, namely the EC Law level, they affect directly the Hungarian regulatory level, and hereby the operation of national authorities. It also follows from the rulings of the objective effect[57] of our new customs act. A similar case can only exist, if the given question does not belong to that central core of the CCP, which substantiates the exclusive competence of the Community, inasmuch as in a case of a norm of the international law is only allowed to oblige the Community and not a member state or a member state body.

c) It is the EC-law that contains the core of substantive law of the customs and the administration of customs, the regulation of the export and import regimes and the common executive regulations.

d) The next level is the national regulatory level, which can be divided into two other levels: e.g., in the case of Hungarian customs law, the central norm

[57] *Act CXXVI. of 2003.* On the implementation of Common Customs Code Art. 2. (1): "This act, and the provisions of international treaties having effect in Hungary (...) shall be applied to the subjects not regulated in the Community law (...)."

is the *Act CXXVI of 2003 On the implementation of Common Customs Code* and the implementation regulations belong here, as well.[58]

7.2 As it has already been mentioned, the implementation of the rules and instruments of CCP can occur in diverse ways. There are some instruments, e.g. the international agreements discussed in the section of the contractual instruments, the implementation of which can only take place with the co-operation of community bodies. Contrarily, it is more typical that the implementation of the norms mentioned above is possible by the cooperation of the bodies of the Community and the member state institutions, or it happens exclusively on a member state level. The antidumping measure can be mentioned as an example for the previous one, since the course of the proceedings and the imposition of the antidumping duty belong to the community bodies (Commission, Council). However, the real execution and collection of the antidumping duty happens through the authorities of member states. In the case of the latter, we can mention as a good example the regulation that intends to hinder the marketing of the piratical products, since in this case the execution process happens completely through the member state authorities.

7.3 The harmonisation of the national customs law had already started before the accession negotiations; therefore, the national customs law was able to apply the institutions of the EC Law before our accession. The *Act C of 1995* has been worded according to the Community Customs Code and it deviates from it only in some points, e.g. in the regulations of the customs-free zones. By the accession, the above-mentioned community customs rules, mainly the Community Customs Code, its enforcing regulation and the common tariff possess direct effect, so the pertinent regulations of our customs law and customs tariff had to be overruled.[59] Besides, the transformation of the organisation system of the customs administration has begun earlier, as well. In this process, the

[58] E.g. processual frameworks of *ex-post* controlling, warehousing system, the interpretation of the customs tariffs etc.

[59] The above-mentioned pre-accession analysis concluded that the reception of the common customs tariff results in the decrease of 5500 customs items and the increase of 1600. However, it was already obvious at that time that it would not considerably affect the export-import rates, since the latter was mostly realized in the directon of the member states of the EU. This was determined before our accession–primarily among the industrial commodities–by the free trade commissions of our association agreement, in relation to which this way our integration to the internal market did not result in any considerable position change.

sources provided by the PHARE tenders, and the participation in other programs financed by the European Commission, also helped.[60] In accordance with this, our new customs act[61] was accepted by the Hungarian Parliament at the end of 2003, the most fundamental aim of which was to insure the functioning of the unified internal market and the implementation of the community customs law. The area of application of the act expands to the territory of the Republic of Hungary and the proceedings of customs offices established abroad. The technique of regulation follows the well-settled method of other member states; namely, it attaches the national executive procedure norms directly to certain provisions of the Customs Code.[62] This means that it explicates some commissions of the Community Customs Code, and if it is possible, it determines some complementary regulations (e.g. the caritative usage of the to-be-abolished commodities).

The realization of the rules of the community customs law and the national implementation rules occur through the organisational system of the *Customs and Excise Guard* (CEG).[63] The role, the operation and the organisational system of the CEG is determined in the *Act XIX of 2004*. The elements among the scope of duties that are in closer relation with the implementation of the CCP are the following:

- the customs control of the circulation of commodities and passengers through the customs borders, the imposition and collection of the non-community charges and duties in connection with the customs process and the customs dues;
- directly or indirectly – in a certain special circle–the examination of the identity of goods (quality, classification according to tax rules) and the examination of the fact whether or not the examining process have taken place;
- the customs and statistics oriented checking, correction, registration, totalizing, data processing and deliverance of the data of the customs documents;

[60] E.g. a project, directly supported by one the European Commission which advances the connectivity of the informatic systems and the accession of them into the European systems of the Hungarian customs management.

[61] *Act CXXV of 2003.* On the implementation of common customs law.

[62] The subsidiary background norm to-be-applied is the *Act IV of 1957* On the general rules of the administrative procedures.

[63] 'Vám- és Pénzügyőrség' in Hungarian.

- the fulfilment of the taxing, controlling and post-controlling tasks determined by customs, tax and other legislations.[64]

7.4 The transformation of the export and import regime happened according to the logic of the customs administration concerning our accession. The import and export rules of the Community as the elements of the CCP of exclusive character prevailed directly after 1 May 2004.

Within this field the most important segment is the sphere of commercial defensive devices, which directly affects the Hungarian market, as well. Since the gaining of membership, the more or less 140 protective measures (anti-dumping and countervailing duties) of the Union that are in force against third states function as a 'protective shell' around the Hungarian market, as well.

The transformation of thd licensing administration happened in connection with the implementation of the export and import regime. As a successor of the Licensing and Administrative Office of the Ministry of Traffic and Economy the *Hungarian Commercial Licensing Authority* (HCLA) was created[65] as a central office possessing a nationwide competence. The most important part of its activity–in relation to our topic–is the fulfilment of the import and export licensing tasks referring to certain goods or countries and being derived from the community law and the international economic agreements. To make it clear, besides the customs authorities the HCLA is the executive basis of the CCP. Relating to the implementation of the CCP, as its most fundamental competence, it fulfils the import and export licensing tasks referring to the implementation of the restrictions and those referring to certain goods or countries and being derived from the EU Law, the international economic agreements and separate legislation. However, it also operates the licensing order on fields that only partly belong to the CCP (the foreign trade of the dual-use products and technologies[66]) or do not belong to it at all (e.g., the trade of certain military engineering, the prohibition of chemical weapons). Though it does not belong to our topic closely, it is worth mentioning that the HCLA accomplishes

[64] See *Act XIX of 2004* Art. 2. Besides the tasks enumerated above, the CIG exercises other–in our examination not relevant–types of powers, e.g. implementation of the common agricultural policy, investigation authority in revenue tax cases, completion of other international cooperative tasks etc.

[65] *Governmental Decree* No. 36/2004. (III. 12.). On Hungarian Commercial Licensing Authority.

[66] *Governmental Decree* No. 50/2004. (III. 23.). On Licensing of the foreign trade of the dual-use products and technologies.

authorial registration tasks and functions as a permissive authority regarding certain internal and foreign economic affairs.[67]

It is the *Governmental Decree No. 110/2004. (IV.28) on Export an Import of Commodities, Services and Rights Representing Material Value* ('licensing decree'–LD) that created the harmonised frames of the licensing order. This LD does not use the expression 'foreign trade' any more, since the more comprehensive notion of 'trade' both refers to the internal market-oriented–this way it does not cross the common customs borders–import and export.

The force of LD affects the following fields:

a) Commodities, services and rightr representing material values, which means that

- export to other member states of the EU crossing the border of the Republic of Hungary, or its import from the other member states. In the case of certain commodities, the same rules are valid to the contracting countries of the so-called European Economic Area as to the member states;[68]
- export to countries outside the EU crossing both the frontier of the Republic of Hungary and the common customs frontier, or its import from such countries;
- the transition of it through the Republic of Hungary.

b) Enterprising export and import.

The circulation licence and the function licence belong to the force of LD, according to the previous practice. It is the obligation of request for licence that is–directly and occasionally–attached to the affair of the export, import or transit of the commodities in the case of circulation licence. However, in the case of a function licence obligation, the import, the export or the transit cannot be carried out without a function licence.

The circulation licence commodities can be classified into the following two groups:

- The export69 of certain commodities from the territory of the Republic of Hungary (including re-export) to such countries that are not members of the EU, or the import[70] of these goods from those non-member countries. The commodities belonging to here e.g., the pyrotechnical devices (gun-

[67] E.g. the licensing of public depositories, of acquirement of timeshare properties, enrollment of some activities (tour operators and guides etc.).

[68] Besides the 25 member states, Norway, Iceland and Liechtenstein.

[69] See LD Appendix 2 *(a)*.

[70] See LD Appendix 2 *(b)*.

powder, fireworks), safety equipment (bullet-proof waistcoat, gas mask), and goods that are doubly dangerous to public safety and certain fire-arms that are permitted for civil usage.

- The export of certain goods from the territory of the Republic of Hungary (including re-export) in any sort of relations, and in any respect, the import of these goods into the territory of the Republic of Hungary and this transport[71] through country (certain pyrotechnic devices and services and e.g. the special safety paper that is used for printing money).

There are some sorts of activities that can only be performed by possessing a function licence,[72] e.g. in connection with certain radioactive materials, pyrotechnics, certain fire arms, with doubly dangerous-classified devices, with military engineering-defence technology and definite commercial activities related to safety papers.

The LD contains the sanctions of the violation of the licence obligation, as well. According to this, the issue of the licence can be denied and the issued licence can be withdrawn, if

- the functioning of the entitled of the licence is contrary to the law or any other rule, including the regulations of the EU,
- the circumstances at the time of the issue have been altered in a way that the denial of the petition would be appropriate and the licence does not fulfil the regulations determined in this order or the conditions determined in the permission,
- the petitioner reported unrealistic data,
- the petitioner does not possess the necessary official licence.

Nevertheless, any sort of foreign trade activity without an official licence can be conshdered to be a crime, since according to the *Act IV of 1978 on the Criminal Code* Art. 298 ("Foreign Trade Activities without Licence"), the person, who engages in foreign trade activities subject to licence without a licence, or exports or imports goods without a licence for exportation or importation, commits a felony, and shall be punishable with imprisonment of up to three years. Although the elements of the crime have been mitigated in 1993, but the seriousness of the sanction still conjures up the pre-1990 period when the foreign trade activity was a state monopoly.

Besides the CEG and the HCLA there are more organisations and institutions that have a role in the implementation of the devices of the CCP. In a

[71] See LD Appendix 2 *(c)*

[72] See LD Appendix 3.

wide sense of implementation, the role of the Hungarian legislative authorities can be taken into consideration when the issue of national law is also necessary to the appropriate transposition of the CCP. Besides, there are a lot of co-operating authorities which – during the implementation process – help the job of certain institutions as subsidiary authorities, or their initiation into the proceedings is indispensable. Thus, in the licensing process of certain goods the preliminary agreement of the *National Headquarters of the Police*, the preliminary opinion of the *Expert's Institute of the National Security Service*, or the opinion of the *Hungarian Financial Supervisory Authority* and the *National Bank of Hungary*. The aspects of certain military products are elaborated by the *Interministerial Committee on Foreign Trade of Military Technology* which is composed of the representatives of certain Ministries.

8. Closing Remarks

Consequently, it is obvious that the commercial policy authority of the EC is exclusive, as a general rule, any national legislation cannot be executed and in the moment of the entry into force of the accession treaty, the complete CCP legal material is gradually constructed on the national law and order in a determinant way. The Hungarian foreign trade administration is thd indirect and internal executor of this commercial policy law material.

Before our accession to the EU, the importance, the scope for action of the foreign economic policy and, consequently, the ability to enforce interests of Hungary was rather negligible (e.g., if we consider the regional tension–e.g. Hungarian-Polish relations–which had not been resolved within the framework of the CEFTA). From this point of view, our accession to the EU might even be advantageous, since the central factor in our ability to enforce interests against the third states is the Union. However, the aim of the EC is not to create a 'pan-European-like view' on its own, beside its autonomous intention, but these ambitions–thanks to the decision-making mechanism of the CCP–can be directly traced back to the intentions of member states.

Therefore, that is what the foreign trade administration and diplomacy have to recognise, and stand up–within the framework of the decision-making procedures of the Community–as an initiative canalizing and enforcing the interests of the Hungarian producers and other market participants in all cases, when any kind of intervention is necessary in the relation of the third states.

Naturally, it can be derived from the character of certain devices of the CCP that not only the foreign trade administration, but also the market participants

need to observe the processes affecting them more actively, and they have to take the opportunity and initiate the launching of these processes at the European Commission in cases when the conditions of application of directly applicable common devices (anti-subvention and antidumping procedures, trade barrier regulations) prevail. However, to reach this, a more active maintenance of the relationship between the national market participants and the representative organisations of certain common branches of industry is essential (e.g., EuroFer, COLIPA, COTANCE); the success of the action can only be assured in this manner.

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BOOK REVIEW

The Hungarian Status Law: Nation Building and/or Minority Protection (Eds.: Zoltán Kántor, Balázs Majtényi, Osamu Ieda, Balázs Vizi, Iván Halász). Hokkaido University, Sapporo: Slavic Research Center, 2004. 627 p.

In early 2005, one could hardly think of a more timely topic than a thorough, carefully edited investigation of issues involving nation-building, kin minorities, and the acceptable norms regulating minority and Diaspora politics in the post-communist region. Only a few months have passed since the European Union was significantly expanded, thereby introducing into the European political discourse the concepts of kin minorities, kin state and home states. (The very creation of this terminology is due to the Venice Commission.) The fierce legal, political and academic debates on ethno-cultural aspirations, Diaspora state policies and ethnicity-based dual citizenship, as well as a constitutionally recognized right for minority identity are now European issues, adding a new angle of scrutiny to questions that are already familiar.

For the Hungarian readership, this in-depth, multidimensional and multi-faceted analysis of the Hungarian Status Law could not be timelier, as both the Hungarian Diaspora and politicians from the entire Hungarian political spectrum are in the process of recovering from the trauma of an unsuccessful referendum that proved to be damaging for all political platforms. Held on December 5, 2004, this referendum posed the question of providing dual citizenship for kin minorities.

The selection of academic essays from authors with a diverse geographical background (Central-Eastern Europe, Western Europe, the US, East-Asia) also represents a wide range of disciplines (legal, historic, social scientific), providing a unique assessment of a very symptomatic social phenomenon: the Status Law-syndrome.

The book consists of nineteen essays by prominent scholars, followed by a fascinating and thorough chronology of the Hungarian Status Law's saga, and an exceptionally useful bibliography. The extensive selection of original documents included in the volume is also invaluable. As readers, we are ushered through the various stages of the Hungarian Status Law's legislative history, and find statements, declarations and other documents produced by an altogether unique Diaspora institution: the Hungarian Standing Conference. Also included are a number of bilateral instruments (memoranda of understanding, agree-

ments), reports from international organizations–the Venice Commission, the Parliamentary Assembly of the Council of Europe, the OSCE, and various European Union organs–as well as texts of the Slovak, Slovene and Romanian status laws (or similar legislations).

The volume's greatest strength is its diverse range of essays. This also involves a slight shortcoming, one that is an inherent weakness of the essay-collection genre: due to the diversity of approaches and the authors' uncoordinated analyses, the descriptions on legislative and political history strike the reader as somewhat repetitive if the papers are read consecutively. This is nonetheless a is a price that is definitely worth paying, given the distinctive originality of the various contributors.

The book groups the essays by discipline, with a section each for history, social sciences, and legal studies. I will follow this tripartite division schema.

Approaches from History

The first section opens with a long essay by one of the editors, *Osamu Ieda,* a Professor of History at the Hokkaido University (Sapporo, Japan), entitled "Post-communist Nation Building and the Status Law Syndrome in Hungary". Professor Ieda gives a detailed description of the legislative history as well as a thorough analysis of the Act. On a theoretical note, he regards the status law syndrome–nation building across state borders and integrating the kin minorities abroad through legislation–as a clear symptom of the failure of mega-area nation state systems (such as the Soviet empire), and also as an institutional necessity for national re-conceiving and re-adjusting in the post-communist environment of European integration. He claims that "status laws were not simple reflexes of ethno-national concerns, but also reflected the requirements of the supranational process of regional integration in Europe." (p. 4.). The status law is thus a phenomenon generated by three interactive factors: the communist and Soviet imperial heritage; the emerging new national consciousness; and the eastward extension of European integration.

The second essay by *Nándor Bárdi*, research fellow at the Teleki László Institute (Hungary) focuses on policy considerations behind the birth of the Status Law. The author covers the historical background through a detailed description of various post-1990 government policies concerning minority and Diaspora politics and provides a comprehensive assessment of Hungarian Diaspora politics throughout the 20th century, with special emphasis on the political transition of 1989, and subsequent bilateral (so-called basic) agreements between Hungary and its neighbors.

Approaches from the Social Sciences

Written by *George Schöpflin* of University College London, "Citizenship and Ethnicity" opens the social sciences section with an assessment (and defense) of the Status Law-concept. The author investigates the Hungarian legislation in the context of two opposing post-Cold War polarities that exist in reciprocal potentiation: universalism and particularism. He claims that ethnicity and the ethnic dimension of the nation has been the particularism that attracted the greatest attention and disapprobation, since in the past decades democracy was understood as dependent on universalism.

The author points out that the citizenship legislation of all pre-enlargement EU member states contain ethnic elements (to do otherwise and stick to a pure ius soli principle would create chaos and absurdity, given the rising number of parents who work abroad when their children are born). He considers it a fact of life that the very existence of the Hungarian state generates some sort of relationship between Hungary and the kin minorities–just as the mere fact that the same philological language is spoken by the Francophone in Switzerland, Belgium and France makes them have "more in common then not and this necessarily means defining a relationship with France.". (p. 94.) Given this, Professor Schöpflin is perplexed as to why the West became indignant when Hungary tried to regulate its ethnic problems overtly, legibly and transparently. All the Status Law does, according to him, is recognize and regulate ethnic problems, because "it is not possible to decouple culture from political power and political power is, at some level, necessarily vested in the state." (p. 94.).

The author concludes that the FIDESZ-government was ahead of its time with its belief that the shared sovereignty-principle of European integration could be applied to Diaspora policies; the Western answer consisted in a resounding "no" to ethnicity and the pooling of sovereignty was to be limited to the European Union. But this leaves the Hungarian government with very little choice according to Professor Schöpflin: no alternative but to opt for dual citizenship.

The next essay entitled "Status Law and 'Nation Policy'" was written by one of the volume's editors, *Zoltán Kántor* (Teleki László Institute, Hungary). Throughout the book, on many occasions, he is referred to as a leading expert and theoretician in the field. He scrutinizes one important aspect of the Status Law controversy: difficulties in defining the nation, membership in the national community and possible approaches to understanding what the concepts of cultural and political nation might mean. Besides providing a sharp, extensive analysis of the legislative history, he gives detailed descriptions of theories that

oppose the concept of the status law (expressed by Hungarian opposition liberals and representatives of international organizations like Günther Verheugen and Eric Jürgens).

The central theme is the juxtaposition of the ethnocultural and the political conception of nationhood. Although the author does not refrain from showing moderate sympathy for the law, he manages to provide a well-balanced and thorough analysis of a number questions:

- How can one determine objective and/or subjective criteria for membership in the nation?
- What is the relationship between domestic minority rights and aspirations of the kin-state nationalism?
- How are we to understand constitutional languages (found in the Hungarian constitution, for example) like "minorities are nation-constituting elements"?
- If an ethno-national minority joins a government coalition, does that automatically make them a member of the home state's political nation?
- How are we to perceive multiple identities of, for example, the Roma, Jews or Germans living in neighboring countries if they also identify themselves as Hungarians?

In the next essay entitled "The Hungarian Status Law: A New European Form of Transnational Politics," the anthropologist *Michael Steward* (University College London) provides an especially thorough and deep historical and anthropological background (dating back to the 19th century), rebutting the suggestion that the Hungarian Status Law would be a post-modern bypassing of the nation state. He shows that the paradoxical insistence to keep the kin minority in the host states is, in fact, an expression of residual territorial revisionism. He thereby dismisses arguments that see the Status Law as an envisioning of new, multiple and overlapping identities and affiliations, that is, as a step beyond the territorial state and the modernist notion of a single, exclusive citizenship. He claims that the Status Law is in fact only a "transformation of an older set of concerns to recreate ... a homology of democratic distribution and 'nation', ... an attempt to give this kind of soft revisionism a new content." (p. 122.).

The paper also links the Hungarian case to the broader transnational literature–on Haitians, Filipinos or Dominicans in the United States. His inquiry centers around the role of the state as promoter and sustainer of transnational social fields. Using the distinction between "traditional" Diaspora (people living in some sort of an exile) and the new form of "deterritorialized nation" (people may live anywhere, but will always 'bring the state with them'), he argues that the Hungarian Status Law is "no more than an attempt to

turn a 'traditional' Diaspora into a 'new' transnational nation. And in the very possibility of this simple shift much of the novelty of 'transnationalism' dissolves." (p. 147.).

János Kis, probably the most influential Hungarian political philosopher, is the author the next essay entitled "The Status Law: Hungary at Crossroads". He follows a traditional jurisprudential method of analysis in showing how and why the Status Law was a mistake.

On a side note, the author points out that nothing prevents liberals from being open to recognizing the nationalist reading's target community–the Hungarian minority, say. After all, a minority position may have inherent disadvantages that cannot always be counterbalanced by rights established for the individual. International law is therefore not hostile to the idea of collective rights; still, de collective does not become an ultimate bearer of the rights. The community of democratic states does not recognize collective rights as non-derivative principles, a reasoning based on the well being of supra-individual collectives.

In his conclusion, Professor Kis remarks that in general, even though collective minority rights can be recognized, the improvement of the minority situation should not begin with collective rights, because their recognition raises difficulties for the majority. Those rights should be demanded first which the majority can accept relatively easily, that is, classical individual rights. More specifically, the Status Law should support minority organizations and institutions, but not the creation of new constitutional subjects and status.

Brigid Fowler (University of Birmingham) is another author to whom a number of other contributions refer, some approvingly, others critically. In her essay ("Fuzzing Citizenship, Nationalising Political Space: A Framework for Interpreting the Hungarian 'Status Law' as a New Form of Kin-state Policy in Central and Eastern Europe") the author sets forth a sympathetic assessment of the Hungarian Status Law, seeing it as a possible model for a post-modern, post-national step beyond the traditional modernist notion of statehood, which is based on absolute territorial sovereignty, singular national identities, and exclusive citizenship as the only possible legal and political relationship between states and individuals. She argues that the Status Law polemics bring academic and political attention to notions of citizenship, or quasi-citizenship beyond the nation state. These post-modern conceptions of kin-state relations challenge the archetypical 'modern' norms of citizenship and territoriality. The Status Law goes even beyond the relatively new EU-practices and institutionalizes relationships between states and individuals who are neither citizens nor residents. "Inasmuch as Status Law-type legislation creates rights claimable by particular individuals against specific states, it creates a form of citizenship;

but it is a 'fuzzy citizenship', since it is not full citizenship, it does not coincide with any existing legal relationship between states and individuals, and its terms are often unclear." (p. 183–184.).

In her concluding remarks, the author contrasts the Romanian and the Hungarian concepts, identifying the former as a representative of the 'modern' approach, one which adheres to the French style, state-led conception of equal citizenship rights built on a singular national identity and homogenous political community.

According to the article, Hungary is supposed to represent the 'post-modern' conception. Unlike Romania, Hungary is viewed as embracing alternative principles of statehood, where the conceptual separation of state and nation implicitly opens the way to kin-state relationships which challenge modernist principles and make way for attenuated sovereignty and differential treatment to members of a single citizenry.

Brigid Fowler brings attention to another interesting feature that both "camps" appeal to: 'Europe' and the European Union as a savior and an arbiter. The 'modern' approach envisages Europe as a place where differences of national identity are superseded by a culturally neutral, equal European citizenship which leaves existing state-based arrangement intact, while for the right-wing Hungarian government that advocated the Status Law, the European Union is the community of communities; a construction where different national identities are protected, cherished and can even supersede the territorial state.

Constantin Iordachi (Central European University) employs a double comparative perspective in his essay entitled "Dual Citizenship and Policies toward Kin-minorities in East-Central Europe: A Comparison between Hungary, Romania and the Republic of Moldova". First it contrasts the Hungarian Status Law with Romania's legislation on dual citizenship and its impact on Romania's relationship with Moldova. Furthermore, it situates the Status Law within the overall patterns of ideological conflict between Romania and Hungary. The author looks at the various legislations: the Hungarian Status Law, the Romanian laws (1971, 1991 and 2003) and the Moldavian laws (1991 and 2000) on citizenship as attempts at reconstructing the national 'imagined communities' against the background of radical post-communist socio-political and territorial reorganization (p. 240.).

Regarding the Hungarian Status Law, the author argues that it is in fact a substitute, or a veiled form of dual citizenship, providing a peculiar combination of ethnic, territorial and statist principles. He evaluates the 1991 Romanian citizenship law as an instrument for unifying ethnic Romanians into a single political community that will pave the road for a future reunification

with Moldova.[1] By way of an insight into the complexity of the region's Diaspora politics, we also find here a valuable (and rare) analysis of the Moldovan citizenship legislation and policy.[2]

Professor Iordachi argues that all these legislations are atypical, the Romanian citizenship law differs from classic repatriation laws, as it does not require former citizens to relocate in the country. The Hungarian Status Law, too, goes well beyond a law on minority protection. Furthermore, both employ a 'statist' perspective, by targeting former citizens who lost their citizenship as a result of border changes. The author notes that there is a difference here: while the Romanian law includes all former citizens, the Status Law introduces an "ethnic" filter. Nevertheless, this compensatory attitude towards involuntary loss of citizenship, according to Professor Iordachi, will create the suspicion of irredentism for both countries. Another similarity is that both the Hungarian and the Romanian laws clash with the internal legislation of the neighboring states (Romania and Slovakia, and Moldova and Ukraine respectively). Also, neither legislation seems to have served their political purpose, given that inter-state relations have become more tense...

James Goldgeier and *Zsuzsa Csergő* (both at George Washington University) scrutinize the interplay between the two aspects mentioned in the title of their paper: nationalist strategies and European Integration. They offer a typology that distinguishes four models of nationalism, each with a separate set of strategies and institutional logic, as well as a vision of what kind of alliance the EU ought to be.

The first model is that of 'traditional nationalism', a political strategy aimed at ensuring the convergence of political and cultural boundaries. This envisions a territorially sovereign, culturally homogenous nation-state. The authors bring the examples of Northern Irish Catholics, Basques, Croatia, Estonia, Latvia, Lithuania, Macedonia, Serbia, Slovakia, Bulgaria and Romania. Not surprisingly, for this model, the European Union is ideally an alliance of nation states.

The second model of 'substate nationalism' describes those groups that consider themselves rightful owners of a homeland that they do not have.

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[1] Between 1991 and 2000 alone, Romania granted citizenship to some 300,000 Moldovan citizens.

[2] Moldova granted full citizenship rights to all its permanent residents (who were former Soviet citizens). It means that Romania's offer for citizenship would only have applied to ethnic Romanian citizens of Moldova–who constitute only about two thirds of the latter's population. Also, the Moldovan legislation did not recognize dual citizenship. In light of all this, it is no wonder that no overwhelming political will has been formed to unify the two states...

These historical, genuine minorities (as differentiated from relatively recent migrants) do not seek independent statehood (and thus are different from the secessionist movements that characterize the previous group), their aim is only secure existence for their community and strong political representation vis-à-vis the state. According to the authors, Bavaria, Catalonia, North Rhine-Westphalia, Salzburg, Scotland, Wallonia, and Flanders belong to this group. For this model, the European Union ought to be an alliance of nations.

The third model is that of 'transsovereign' nationalism, in which nations do reach beyond state boundaries, but for various reasons abandon the idea of border-changes. These states (like Austria towards South Tirol, Russia towards Latvia or Ukraine, Romania towards Moldova) create institutions to link the nation with the kin minority across state boundaries. For this model, too, the European Union is ideally an alliance of nations. The authors see Hungary's nation-building strategies as particularly vivid examples of this model.

Finally, in the case of the last model of 'protectionist nationalism', the priority is the preservation of traditional national culture in the face of immigration and social change. This way, for countries like Austria, Belgium, France and Germany, the EU should also be an alliance of nation states–but, again, for a different set of reasons.

The authors' most important claim is that nationalism and integration are two inter-related and dynamic processes, and the fact that a particular state chooses a particular form of nationalism-model, does not set it into stone. The European Union not only 'pools and shares sovereignty', they claim, but members also pool and share different varieties of nationalism. Furthermore, EU-developments themselves may affect nationalism-strategies. If, for example, the European Union moves in the direction of an alliance of states, rather than an institutional framework that de-emphasizes boundaries, sub-state nationalists may decide to shift to secessionism as a way for better interest-representation.

Also, the authors claim that in contrast with the opinion widely held among scholars, nationalism is not necessarily anti-integrationist. Some projects–like Hungarian trans-sovereignty–fit well within the European Union's endeavors. What is more, some groups will see the EU as a vehicle for achieving long-sought goals through non-traditional and non-violent means (p. 296.).

What is really important, the authors conclude, is that European integration may serve as a flexible tool for all these aspirations. President de Gaulle may have thought of the EU as a union of states, Chancellor Kohl could have imagined the EU as the Europe of regions, and Hungarian Prime Minister Orbán would have envisioned the European Union as a community of communities (p. 287.).

Closing the social sciences section is a wisp of an essay by *Miroslav Kusy* (Komensky University, Slovakia), "The Status Law in the Hungarian-Slovakian Context", tuned to play in a reconciliatory key. The author draws attention to the fact that the Status Law dispute is not between two hostile states, but between two good neighbors, who otherwise co-operate intensively (for example in the framework of the Visegrád process, the Council of Europe, the OSCE, and recently in the European Union). The solution should therefore consist in the use of discreet diplomatic language and a mutual search for consensus.

Legal Approaches

The last section contains shorter, and occasionally quite technical legal essays. It is worth noting the degree of concurrence characterizing this section. Unlike the previous sections, which presented side by side defenders and witty critics of the Status Law-phenomenon, all of the legal approaches conclude that Status Law legislations are apparently permissible by international legal or constitutional standards. The reason for this seems to be the legal approach as such. A passage from Renate Weber's analysis (see below) demonstrates this rather characteristically: "...It has been said that it is ridiculous to hold and carry a document attesting one's membership of a national group. It may be. But what is ridiculous is not illegitimate as long as it is not used in order to discriminate against the holder..." (pp. 357–358.).

Herbert Küpper's (Institute for East European Law, Germany) essay describes the political, constitutional and legislative background, as well as the foreign policy and international law implications of the Status Law ("Hungary's Controversial Status Law").

The vast majority of the author's analysis is dedicated to the poor legislative standards and technical shortcomings of the law. He criticizes its 'skeleton law' nature, which means that most pertinent legal matters are referred to special legislation. He also draws attention to the undesirability of using legal concepts that exist in European law (like the free movement of persons) with different meaning in the Status Law. Also, he points to the fact that varied phraseology has been employed for the same phenomenon in the domestic context and in the case of neighboring countries. For example, the domestic Act on Minorities uses the term "national and ethnic minorities", while the Status Law, referring to the kin minority, operates with "Hungarian national communities." The author also emphasizes that 'programmatic phrases', norms without regulative content (which should ideally be limited to preambles of

Acts) are detrimental to the force of 'genuine' legal norms, because they serve to blur the difference between meaningful legal norms and propaganda. Another objectionable feature mentioned by Herbert Küpper is the all too frequent use of vague legal terms like "public educational institutions", "cultural goods", "Hungarian national traditions", "Hungarian cultural heritage", etc.

Three of the volume's editors co-authored the next essay: *Iván Halász, Balázs Majtényi and Balázs Vizi.* All are international lawyers and researchers at the Hungarian Academy of Sciences.

In "A New Regime of Minority Protection? Preferential Treatment of Kin-minorities under National and International Law", the authors' aim is to assess centrally recurring debates on the Hungarian Status Law. They focus on the question of whether or not the law violates the principle of equality by discriminating among citizens of foreign states on the basis of ethnic origin.

Having found that positive distinctions are not discriminatory, the analysis turns to the question of whether the fact that the preferences are provided for citizens of other states would make such practices impermissible on the grounds that it would clash with the principle of state sovereignty. According to the authors, the problem of infringing the sovereignty of other states seems to be a more relevant and central issue of compliance with international law, and not that of discrimination. In addressing this, the authors first provide thorough analyses of national constitutions (of Russia, Romania, Slovakia, Poland, Ukraine, Portugal and the original German Basic Law[3]), then consider Status Law-like legislations across Europe (in Slovakia, Romania, Slovenia, Russia, Bulgaria, Greece, etc.), finding that this practice also appears to be in line with international customary law.

The authors conclude that the shortcomings of the Status Law have less to do with its objectives, rather than with the way it was drafted and the political terms in which it was presented.

Renate Weber (Open Society Foundation, Romania) is the author of the next essay entitled "The Kin-State and Its Minorities: Which European Standards?".

The author aims to look beyond the rhetoric and evaluate the law from the standards of international law. All in all, her conclusions concur with that of the previous essay. First, she argues that there are no minority rights that could be affected by the Status Law at all, because the legal obligation to uphold minority rights should be clearly distinguished from the option of providing preferential treatment.

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[3] Which, in its preamble, had specific references to Germans who had lived in the Soviet occupation zone and were removed after reunification. Section 116 still has explicit references to Germans from the Volga region and Transylvania).

Second, she claims that no provisions of the law can be considered discriminatory against the majority or other minority populations in neighboring countries. She clearly dismisses that, for example, Romanian citizens of Romanian origin would be discriminated against on the basis of their ethnicity if another country provided benefits and privileges to its kin minority. Even if those privileges go beyond the human and minority rights recognized by international or community law, their application would not deprive "other" Romanian citizens of their universal human rights. (Whether such conduct may result in tension within the home country, she adds, is another issue entirely.)

The author argues that there are only two prima facie concerns that may hold water: one relating to a general principle of international law, namely that of friendly relations between states, and another, human rights protection for those who are potential beneficiaries of the law themselves. In her conclusions, Renate Weber dismisses the latter concern, while admitting a certain degree of culpability with respect to the first one.

Former president of the Hungarian Constitutional Court *László Sólyom* was also the most charismatic among the Court's presidents. As a member of the Venice Convention, in his essay entitled "What Did the Venice Convention Actually Say?", he takes on the duty of clarifying certain conclusions of the Convention's lengthy and often misinterpreted report on the Hungarian Status Law. Such an explanation is timely, the author claims, as there are indeed difficulties about the terminology (translation), and even Günther Verheugen, Commissioner for Enlargement of the EU, referred to the report incorrectly in a legal assessment sent to the Hungarian Prime Minister.

László Sólyom makes the following major points: The Commission declares that a new and original form of minority protection is emerging; the Hungarian Law is a part of this process. Although the appearance of such preferential measures is a positive phenomenon, they are too recent to account for the legal concept of customary international law. Such unilateral acts are therefore acceptable only if they meet the following four conditions:

a) there is respect for the territorial sovereignty of states

b) respect for treaties,

c) respect for friendly relations between states, and

d) respect for human rights and fundamental freedoms–with special emphasis on the prohibition of discrimination.

In his conclusions, Professor Sólyom stresses the Commission's recommendations that the system of bilateral and multilateral agreements should remain the main tool for minority protection.

The next essay entitled "Connections of Kin minorities to the Kin-state in the Extended Schengen Zone" is written by *Judit Tóth*, professor of constitutional law (University of Szeged and the Hungarian Academy of Sciences), one of the field's leading experts.

Her article scrutinizes certain aspects of the Schengen regime and its ramifications with respect to Diaspora policy–thereby providing a unique angle and framework for the legal analysis of the Hungarian Status Law.

The author draws attention to the fact that although all candidate states have Diaspora and minority communities, these topics have not been included in the European Union-accession talks, nor were representatives of kin minorities or ethnic groups involved in the negotiations.

She describes in detail the European Union's approach to minority protection, and concludes that the EU prefers an 'indirect' approach: it tends to target contribution to cultural diversity, anti-discrimination, welfare, employment, regional development. Alternatively, the EU mentions minority protection vaguely as one of the political criteria for enlargement. With the European Constitution not yet in force, and with the resulting absence of proper regulatory mandate for EU institutions, the protection of minorities remains an internal matter for the member states–which are not necessarily members to relevant Council of Europe documents in the field.

According to Professor Tóth, the problem has to do with the following: the introduction and gradual enforcement of Schengen and migration acquis has had a fundamental impact on the strategic relation of new members with kin minorities outside the Union. Thus, while candidate countries were doing their best preparing to reconstruct their visa regime and border control-policies, they felt obliged to adopt compensatory measures, such as unilateral acts on kin minorities or bilateral agreements.

This therefore is an additional important context in which the Status Law should be considered.

Fernand de Varennes's (Murdoch University School of Law) essay follows the classic tradition of legal argumentation by trying to answer the challenges that have been brought against the Hungarian Status Law. His paper ("An Analysis of the 'Act on Hungarians Living in Neighbouring Countries' and the Validity of Measures Protecting and Promoting the Culture and Identity of Minorities Outside Hungary") asks whether from the perspective of international legal obligations and minority rights, the statue would be extraterritorial, or alternatively, discriminatory. For the author, the underlying question concerns benefits provided for minorities, more precisely, whether or not states can provide these beyond their borders, and whether or not states can actually ban their citizens from seeking or accepting these. According to the

author's findings, the latter argument is entirely devoid of validity under international law. It would make all government fellowships for university study abroad programs illegal–a clearly bizarre outcome.

Along with Professor de Varennes' essay, we find two detailed assessments of the Hungarian Status Law and its international and conceptual environment. *Kinga Gál* (Hungarian Academy of Sciences) documents the legislative and diplomatic history of the Status Law, placing it in a demographic and an international legal context ("the Hungarian Legislation on Hungarians Living in Neighbouring Countries).

Enikő Felföldi (University of Szeged), another Hungarian academic, employs a somewhat similar approach in her essay ("The Characteristics of Cultural Minority Rights in International Law–With Special Reference to the Hungarian Status Law"). In her minority rights-oriented project, she first addresses the social and legal definitions for identity and culture–concepts that are corollary to minority policies. Following, she gathers applicable international legal materials (hard and soft law alike), as well as case law pertaining to cultural and educational rights. She then weights these findings in the context of the Hungarian law.

Both essays provide useful additions to the international legal assessment of the Hungarian Status law.

The volume's closing essay, written by *Attila Varga* (Associate Professor of Babes-Bolyai University and Member of the Romanian Parliament), entitled "Leigslative Aspects and Political Excuses: Hungarian–Romanian Disagreements on the 'Act on Hungarians Living in Neighbouring Countries'", begins with a thorough analysis of various policies and legislative aspects of the Hungarian Law.

The essay gives an illuminating account of the legislative counter-initiative that was prepared by the extremist Greater Romania Party, which would have regarded all Hungarian Certificate-holders as dual citizens and on those grounds would have disqualified them from holding any public office.

We can confidently say that the editors and the authors have produced a volume that is a unique, comprehensive and fascinating collection of wide-ranging analyses, approaches, and methodology. The book's value, and no doubt, its success, resides in its outstanding diversity of angles–its exploration of the conceptual and practical interdependence of identity, politics, minority rights, and Diaspora politics, as well as its travels beyond, towards other social, political and legal tribulations, ails and symptoms behind the Status Law-syndrome.

András L. Pap

Sulyok, Gábor: **A humanitárius intervenció elmélete és gyakorlata** (The Theory and Practice of Humanitarian Intervention). Gondolat Kiadó, Budapest: 2004. 361 p.

It is rare and for this reason all the more gratifying to welcome a new monograph in Hungarian on international law, especially in the field of humanitarian intervention where the legal problems are manifold and the domestic legal writing is sparse. This book is a revised version of a doctoral thesis that was conducted in conjunction with the University of Miskolc and the Institute for Legal Studies of the Hungarian Academy of Sciences.

The result is impressive indeed. Already the cover attests to the ambition of the author as it highly resembles the lay-out of the textbooks of the Oxford University Press. Fortunately its merits do not stop here.

The book is divided into 2 main parts, the much longer first part dealing with the theoretical questions of humanitarian intervention, while the second part assessing the relevant cases. Both parts are presented in a historical perspective following the classical method. The book is heavily footnoted and the long pages of bibliography indicate a very thorough research.

In the first chapter the readers get a comprehensive overview of just war theory and the evolution of the doctrine of intervention on behalf of the oppressed citizens of a state. The author lists Francisco de Vitoria, Hugo Grotius, Emeric de Vattel and Raphael Lemkin as they were mentioned in the legal literature as the possible inventors of the category and term *humanitarian intervention.*[1]

In the end Mr. Sulyok attempts to give a functional definition of humanitarian intervention by analysing the definitions of major scholars and condensing their common elements. The author empasizes that the initiation of a humanitarian intervention does not necessarily have to be lawful therefore he includes also those definitions whose publicists did not regard humanitarian intervention a legal institution.

The elements are the following:

- The subject of humanitarian intervention is one or more states or an international organization.
- The intervening state or organization has to observe dominantly humanitarian motives.

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[1] I consider the authorship of Raphael Lemkin highly improbable as Antoine Rougier already used this term in 1910. See Antoine Rougier, 'La théorie de l'intervention d'humanité' (1910) 17 Revue Generale du Droit International Public, Vol. 17, 1910, 468 quoted in Simon Chesterman, *Just war or just peace?* Oxford, 2002. 128.

- The object is always a state and the intervention is carried out without its consent.
- The beneficiaries are the citizens of the targeted state.
- The basis is grave, widespread and deliberate violation of human rights.
- The targeted state is actively or passively responsible for these violations.
- The scope is limited i.e. the intervention is confined to terminating the breaches or preventing further violations.
- The recourse to armed violence is an ultima ratio measure, i.e. a measure of last resort.
- During the execution of the intervention the rules of international armed conflict are applicable.
- The intervention cannot breach the right to internal self-determination of the target state.

Chapter 2 expounds the delimitation of humanitarian intervention from the related notions of international armed conflict, self-defense, reprisals, peace-keeping, humanitarian assistance and armed support of the fight for the right to self-determination. Some of these categories can be intertwined with humanitarian intervention: all humanitarian interventions are necessarily international armed conflicts as well, while humanitarian assistance endeavours to cure the symptoms of the same humanitarian tragedy that humanitarian intervention attempts to eradicate by military force. Hence, the author argues that the denial of humanitarian assistance – if it reaches the threshold of breaches usually warranting humanitarian intervention – could theoretically justify intervention.

In Chapter 3 the author presents the basis of humanitarian intervention, i.e. explains the rights and the scale of their breach that vindicate intervention. He gives a short overview of the development of human rights and after a thorough analysis of the relevant human rights conventions comes to the conclusion that the breach of certain first generation non-derogable rights such as the right to life, freedom from torture and from inhuman or degrading treatment or punishment, freedom from slavery or servitude and certain procedural rights can be a ground for intervention.[2]

[2] The author compared the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter of Human and Peoples' Rights and the Arab Charter on Human Rights. The author also examined the minimal requirements of humanitarian international law and concluded that they were virtually identical in their content to these non-derogable rights.

In determining the scale of human rights breaches or the so-called quantitative segment of humanitarian intervention, the author notes that publicist starting from Lassa Oppenheim supported intervention when the violations of fundamental human rights had „shaken the conscience of mankind". Taking that into account, the author concludes that the minimal quantitative threshold of intervention is the commission of crimes against humanity.

Chapter 4 explores the question of the legality of the initiation of humanitarian intervention. Mr. Sulyok methodically analyses and disproves every argument that seek to make humanitarian intervention compatible with the UN Charter system even though he cautiously admits that it might have been lawful in the XIX. century.

The author affirms that the prohibition of use of force, enshrined in Art. 2 (4) of the Charter, is absolute and despite its frequent breaches it has not eroded. The argument of certain scholars stating that humanitarian intervention is not in violation of this provision as it is not aimed *„against the territorial integrity or political independence of any State"* is at odds with the *travaux preparatoires*. The legality of intervention cannot be deduced from relying on the *Uniting for Peace* resolution either, as it has not been used to authorize use of force since the Korean War and even if it was in force, it could only be used in cases of breach of peace or act of aggression. Mr. Sulyok also rejects the idea of an independent customary right authorizing humanitarian intervention noting the jus cogens status of Art. 2 (4) and the scarcity of *opinio juris*.

Finally, the author lucidly illustrates that the theories of implied and *ex post facto* authorization of intervention that seek to prove Security Council approval in the absence of express authority to use force are highly speculative and do not enjoy widespread support.

As a consequence, the single legitimate way of resorting to humanitarian intervention is by an express Security Council authorization taken under Chapter VII of the UN Charter.

The second part of the book is comprised of succinct and articulate case studies. In each case the author first gives an account of the events and then attempts to legally evaluate them utilizing the criteria laid down in the first part.

This part is divided into 3 chapters the first dealing with the alleged humanitarian interventions until 1945, in the „classical" era of international law, the second inspecting events between 1945–1990, while the last one assessing the post-1990 interventions.

Following a very rigorous approach Mr. Sulyok finds only a few cases that meet his requirements. In some cases the protection of human rights only served as a pretext to conceal other, less laudable motives (e.g. 1877–1878 intervention in Bosnia-Herzegovina and Bulgaria), in others the intervening

State acted to protect its own citizens (e.g. 1979 Uganda). The practice of some authors including American interventions restoring democracy (e.g. 1989 Panama) is also rejected by the author.[3] The author similarly declines to include those instances where the intervening State gravely breached the provisions of humanitarian international law.

The author raises some doubts about the 1999 NATO intervention in Kosovo. Even though he concedes that the Final Report of the ICTY Committee has not found evidence of clear violations of humanitarian international law,[4] the author still claims that the „means and methods were almost undeniably unproportional" and concludes that NATO committed „grave breaches of international humanitarian law" (p. 316). Nonetheless, he is still willing to accord the status of humanitarian intervention.

At the end, the author only accepts unqualifiedly 5 interventions as humanitarian interventions. Apart from the Kosovo intervention, he includes the French intervention in the Central African Empire in 1979, the Tanzanian intervention in Uganda in 1979, the protection of Shiites and Kurds in North and South Iraq in 1991–1992 and the actions of the American-led UNITAF peace-keeping force in Somalia in 1992–1994.

The great strength of *The theory and practice of humanitarian intervention* is the huge amount of sources the author has drawn on and the intellectual rigour employed to dissect and clarify the notion of humanitarian intervention. His book is a welcome return to the stricter adherence to the positive sources of law. Mr. Sulyok cogently proves the fallacies of those scholars who try to find a place for humanitarian intervention under the present UN Charter system and eloquently argues against those proponents of the intervention who assert that even unlawful humanitarian interventions are necessary to protect human rights.

It is difficult to challange his conclusion that the present system of collective security is adequate to defend human rights if there is a political will and a customary right of humanitarian intervention would only lead to a series of abuse. Even today, it is not the threat of a possible Security Council veto that restrains states from acting against massive human rights violations but the lack of interest in a given conflict.

However, not even this book is free of all controversies. One could question the approach of the author that first examines scholarly opinions and thus

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[3] See e.g. D'Amato, A.: The Invasion of Panama was a Lawful Response to Tyranny. *American Journal of International Law*, Vol. 84, 1990. 84, 516.

[4] See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 9 June 2000.

constructs a unified definition containing the main elements of those views and later applies that definition to actual state practice to determine whether a certain intervention was humanitarian intervention. This approach seems to neglect the importance of *opinio juris*. Yet, Mr. Sulyok's method is understandable since there is hardly any record of explicit reliance on the doctrine of humanitarian intervention by any states.

An other question is closely related to the first one. Given the author's positivist approach, it is not entirely understandable why he classifies humanitarian intervention in its entirety as a legal category. Mr. Sulyok admits that interventions are unlawful in the absence of Security Council authorization. Yet, he emphasises that he regards even these instances as falling under the legal notion of humanitarian intervention. However, if these acts are unlawful, it is difficult to comprehend why they should be classified as a legal phenomenon. Under international law, these acts are breaches of the prohibition of the use of force or even aggressions and labelling them humanitarian interventions seems to have no legal significance.

On balance, I can only commend this book for the immense work invested that touches upon virtually all the major and minor questions of humanitarian intervention. Mr. Sulyok's book will serve as a valuable addition to library of all who are interested in this phenomenon.

Tamás Hoffmann

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