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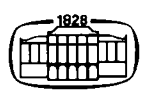

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ANDRÁS SAJÓ*

Constitutional Sentiments

Abstract. The principal claim of the essay is that sentiments and assumptions about sentiments

- have an important role in setting up constitutional designs and interpretation ("evolving standards of decency");
- constitutional arrangements do have impacts on social emotions;
- the disregard of the interrelation of emotions and other forms of cognition condemns legal theory to one-sidedness and the efforts of behavioral economics seem not to undo this one-sidedness.

For example, fear is present in the making of many constitutions. Constitutions are designed to give assurances against fear that stems from, among others, pre-constitutional oppression, mob rule and factional passions. Constitutional rights are also structured by emotions: Compassion and indignation serve as emotional grounds to accept and claim human rights.

A simplified vision of modernity claims that law and constitutional design is all about rationality. Brain imaging studies indicate that moral emotions guide many moral judgments or are in competition with reasoning processes. Of course, moral emotions contribute to the shaping of law through moral judgments. To the extent law intends to shape behavior, it will rely on its legal folk psychology. A theory of constitutional sentiments shall reconstruct the assumptions on human nature as emotional nature that shape the constitution and its interpretation.

Historically, constitutional path dependence presupposes emotional choices and emotional action tendencies that are institutionalized and 'imposed' on law and society. Paradigmatic changes in constitutional law cannot be explained without considering the path-breaking rule of emotions. For example, the commitment to abolish slavery cannot be explained without the emotional condemnation (based on disgust and resulting in indignation) of the institution. The ban on torture is also rooted in sentiments of disgust. Concepts of cruel and unusual punishment are rooted in emotions of disgust. Law is both trying to script emotions (in order to prevent challenges to the status quo) and accommodates prevailing (or preferred) emotions (hence the difficulty of a non-revenge based criminal policy).

Keywords: constitutional design, psychology, enlightenment, militant democracy, politics of emotion, social risk evaluation, populism

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And it is fortunate for men to be in a situation in which,
though their passions may prompt them to be wicked,
they have nevertheless an interest in not being so.
Montesquieu

It is not obvious that sentiments and assumptions about sentiments are crucial in setting up constitutional design or that constitutional arrangements have impacts on social emotions. To show that such relations are important I could use the genuine indignation that women's rights triggered in Afghanistan among the faithful, but I prefer to discuss fear, empathy, and compassion in democratic constitutional contexts to illustrate the role of sentiments in limiting government power and in accepting or rejecting certain fundamental rights. This will be followed by an analysis of political emotionalism and irrational risk handling that challenge the institutional design of liberal democracy.

A discussion of the role of emotions in constitutional law and political institution design presents methodological difficulties as well as challenges related to the conflicting scientific knowledge that is generated regarding emotions. The methodological problem is this: emotions are individual empirical phenomena, even if occurring in a social environment in social interaction. Institutions, on the other hand, are collective normative expectations and patterns, or symbols, or what not.

Strictly speaking, one can speak about emotions that *might* have existed in individuals who designed institutions. More importantly, in the making of a constitution, constitution makers have assumptions about human emotions. But these are hardly measurable. Is it relevant in the creation of institutions what the related actual individual emotional processes are? How do we observe or reconstruct such emotions? After all, it is quite possible that the constitutional design is the work of a small drafting elite's false consciousness about emotions. It might be the false assumption of judges who redesign the constitution. The assumptions on emotions might be wrong: nevertheless the constitution will be operative. But at what price?

My research hypothesis is that emotions, through complicated mechanisms, do have an actual impact on constitutional design. By improving our knowledge regarding emotions, we can improve constitutional design.

Such research has to consider many interrelated matters: first, it is about the impact of sentiments and assumptions regarding emotions on constitutional law; secondly, it is about the effort of constitutional law to handle and shape public sentiments; thirdly, it considers the public reactions, including emotional reactions, to constitutional arrangements; and finally, it is about the actual impact of constitutional and other legal designs on the social construction and

use of sentiments. Consideration of these matters will enable the discussion of policy issues of how to deal with emotions.

I am not offering any definition of emotions in the constitutional context. Instead, I use the 18th century term *sentiment* to indicate that in constitutional design what matters is the assumption about social emotions. Sentiments refer to prevailing language usage regarding the social interpretation of behavior and related expectations. I hope that in the long run a closer relationship between sentiments, which serve as social-normative shorthand in constitutional and political reasoning, and emotions, understood here in a scientific, e.g. neurological sense, can be developed.

The term constitution is used here in a broad sense. It goes beyond constitutional texts and includes various judicial and other legally and socially relevant meanings, constitutional conventions, practices and customs that emerge in the use of public power. On the other hand, I limit myself to constitutional settings that emerge under the paradigm of constitutionalism. Here constitutionalism entails democracy and 19th century liberalism. I understand constitutionalism as a crucial part of the reason-based modernity project, something that became quite problematic recently, because of, among other things, the mistreatment of emotions in favor of distorted reason.

It is true that in a desiccated tradition political institutions claim legitimacy precisely because they are able to operate rationally, hence efficiently. They claim to deserve respect and obedience because these constitutional institutions enable rational behavior in society. Contemporary constitutional systems are typically presented as if they were operating according to rationality, or at least as if their problems were related to some problem of bounded rationality, some difficulty in intellectual processing. All the above is in line with the centrality of reason, the alleged core assumption of modernity. Today people take pride in debasing reason-based modernity. At a time when reason is suspicious, constitutions join the usual suspects in the academic round up. But the reason-passion opposition is a gross simplification: the goal of the enlightenment was not the oppression of sentiments, but self-control that enables propriety in the display of sentiments. The enemy of reason is not passion; it is fanaticism. This message of Voltaire is to be remembered in our age of new fanaticism.

Constitutionalism and the administration of justice are often presented as institutions that claim to improve efficiency in human affairs by promising the eradication of emotion from the constitutional public sphere. Notwithstanding the relevance of sentiments for constitutionalism, constitutional law allegedly neglects this relevance. Why is that so? There is a historical path dependence here. The paradigm of fundamental rights is provided to the modern world by the 1789 French Declaration of the Rights of Man and Citizen. The Declaration

offered a rationalistic frame and this is what became prevalent in constitutional thinking. But it would be wrong to consider the Declaration to be a pure negation of sentiments and an example of the modernist plot of enlightened reason. The French revolution was a sentimental revolution.

Let me quote the Marquis de La Fayette arguing at the National Assembly in favor of the Declaration: "Let me call to mind the *sentiments* which Nature has engraved in the heart of every citizen, and which take a new force when they are solemnly recognized by all: For a nation to love liberty, it is sufficient that she knows it; and to be free, it is sufficient that she wills it."[1] In this approach, liberty exists in natural sentiments and reason is only there to remind us of our sentiments. It is only the result of positivist science and legal positivism that moral sentiments are pushed into oblivion in scholarship and positivist ideology.

While in the Middle Ages behavior was taken to be shaped by certain passions, this was gradually replaced by conceptions of interest as the proper source of guidance for and basis of explanation of social behavior. It should be added that the 18th century cult of sentiments is related to the attempt to use them as a crucial technique of social control under Louis XIV. The technique faded away in favor of scientific positivism, but it seems to me that it is back in the culture of narcissism. In a culture of narcissism, rational arguments are replaced by narratives of suffering that are amplified in the hope of manufacturing indignation and compassion.

The dismissal of passions did not result in the annihilation of sentiments in some socially construed and institutionalized quarantine of mental asylums, poor houses, educational institutions, and correct manners, as one could conclude from a superficial reading of Foucault. It is only in the positivism of the 19th century that sentiments are neglected in political thinking and in law, with some exceptions like crimes of passion.

Among many others, Hume, Adam Smith, and Rousseau have emphasized that sentiments are constitutive to social institutions. Rousseau's crucial sentiment in this regard is pity and related empathy or, as it was called, sympathy. It is through sympathy, Edmund Burke wrote, "that we enter into the concerns of others; that we are moved as they are moved, and are never suffered to be indifferent spectators of almost any thing which men can do or suffer."[2]

The simplest reference to the foundational tenets of constitutionalism that prevailed in the 18th century will suffice to prove that modern constitutional design, although it is a rational venture, is intended to handle human sentiments,

[1] Quoted in Paine, T.: *The Rights of Man*. Hormondsworth, 1792.

[2] Burke, E.: *A Philosophical Enquiry into the Origins of Our Ideas of the Sublime and Beautiful*. Oxford, New York, 1757. Section XIII.

even beyond constraining passion. True, constitutions are silent about sentiments, and modern law is to a great extent a set of decisional norms that tends to create barriers to the operation of emotions in legal and judicial decisions. But silence is not the sign of indifference. On the contrary, it disguises preoccupation.

As proof of this claim, let us quote Madison:

> "AMONG the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. [...] By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community. [Factions bring] instability, injustice, and confusion introduced into the public councils [that is, they destroy rational deliberation]. In particular this is the source of the tyranny of the majority."[3]

In Madison's view the problem is solved by representative government, separation of powers, and federalism. These institutions do not allow people to have their passions directly operate. This way "the [passionate] majority must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression."[4]

Please note that the constitutional plan is not about the prevention of the emotionally driven irrationality of factional thinking and action. These cannot be prevented. There is no place for pedagogical optimism here. Madison offers a purely rational design that limits the success of irrational mass movements and the irrationality of all monopolies. Further, Madison, following Montesquieu, attributes emotions to the constitutional bodies:

> "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. [...] Ambition must be made to counteract ambition. [...] It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all *reflections on human nature*? If men were angels, no government would be necessary."[5]

[3] Madison, J.: *The Federalist,* 1787.
[4] *Id.*
[5] Madison, J.: *The Federalist,* 1788.

Constitutions cannot annihilate sentiments. More importantly, they do not intend to do so. Constitutional law is not about the annihilation or disregard of moral sentiments; it is about the *manipulation* of sentiments. It offers mechanisms to cool down passions that endanger the constitutional system. (This, of course, includes oppressive mechanisms that serve the maintenance of the political status quo.) Constitutional pre-commitments, the difficulty of constitutional amendment, gag rules, etc., are some examples of such mechanisms. Sentiments might result in social instability: institutions offer solidarity and permanence and these become more and more important to the constitutional designer. "The dead weight of institutions, which have a life of their own, then gradually tames the impetus" of the original sentiments.[6]

It is not by accident that the victorious politics of emotions often pushes for constitutional reform or a new constitution. Constitutions are often replaced in very emotional social processes. In 1958 General de Gaulle decided to disregard the existing rules of constitutional amendment that were available to him and preferred to have a new constitution of France via plebiscite. De Gaulle's gamble was to generate emotional support for his constitution by generating personal sympathy towards his rule.

Collective political sentiments are decisive in constitutional design. More precisely, fear is one of the crucial social experiences that dictate specific fundamental constitutional solutions. Fear was important in shaping Madison's plan, but here I am referring to a collective emotional experience as the creative force shaping the constitution. The 1789 French Declaration, many of the solutions that were accepted at Philadelphia in 1787, and the German Basic law after WWII were all clearly dictated by considerations of fear. Indeed, fear helped to overcome collective and individual resistance to certain solutions.

In July 1789, the French Constituent Assembly was in the middle of a bitter debate about the meaning of the rights of man. Quite a remarkable treat, given that the matter was declared to be obvious in the light of reason. It was hotly debated, for example, if free exercise of religion would be extended to Protestants. It was only thanks to a most emotional speech of a pastor that the Assembly considered reason to favor a more equitable position. At the end of July an epidemic of hatred raged through the villages of France. Within a fortnight, French peasants successfully burned the documents containing feudal privileges together with the castles where the documents were held. When the news reached the Assembly on the night of August 4, the debate on the Declaration came to a sudden halt and in an all-night session the panicked delegates of the Assembly one after another voluntarily renounced their feudal privileges, as if

[6] Canetti, E.: *Crowds and Power*. New York, 1984. 24.

subject to a miraculous act of reason. Two weeks later the abolition of feudal privileges was proclaimed by the National Assembly. A couple of days later, and without much additional debate, a list of fundamental rights was adopted, without the catalogue ever having been finished.

The works of fear generated by the Shays rebellion and the Philadelphia mob rule (or call it premature democracy) had their obvious impact on the US Constitution. The American and the 1948 German Constitutions do not allow for referenda, because of fear of irrational mob reactions. Other constitutions considerably limit the subject matter of referenda. Fear resulting from past injustice is expressly present in the German and South African Constitutions, and in other post-totalitarian constitutions (see prohibition on totalitarian political organizations, the right to resist, etc.)

While the impact of a fearful consideration of the past is undeniable, the methodological problem remains. How did these considerations make their way into the constitution, and how do these considerations influence future constitutional developments? To what extent do these considerations, which are the reconstruction of emotions and shorthand for the scholarly observer, have real emotional equivalents? Were the drafters actually afraid? Did they feel fear? Did they assume that people or at least their constituency were afraid and expected them to alleviate that fear by institutional design that promises safety? Does it matter? Assuming that the small elite that actually drafted the constitution shared the public fear, or a group dynamics of fear did play a role in the negotiations, is this to say that the constitution actually expresses and radiates social fear?

Fundamental rights offer a second illustration of the relationship that exists between constitutional institutions and moral sentiments. Rights are hard to deny when they meet emotional resonance.

Torture is rejected because other people's suffering triggers disgust and compassion. But torture is culture dependent. The ancestors of the same Frenchmen who today abhor the death penalty took pleasure in the brutal execution of the regicide Damiens in 1757 when he was torn in pieces by horses. By the way, Adam Smith was working on the manuscript of his *Theory of Moral Sentiments* that very year. He claims that other people's pain is felt as one's own through mechanisms of empathy. I assume that empathy does play a role in the contemporary success of socio-economic rights claims, and in humanitarian intervention. In a more troubling way, as Nietzsche has indicated, *ressentiment*, this strange marriage of bad consciousness and envy, plays an enormous role here.

To use a different example, altruism urges us, not always with success, to give alms, although we have quite rational strategies to avoid the good deeds of the heart. Social welfare is justified in the eyes of the compassionate, although

the socially decisive factor is to whom we feel compassion. (See the social war on the construction of the deserving poor.) Given these sentiments, it becomes difficult to attack welfare policies. The acceptance of anti-welfare reasons has to overcome personal emotional resistance.

It has to be emphasized that under ordinary circumstances empathy and resulting solidarity feelings as such do not result in action. The compassion is without a specific object of action and its importance is primarily to facilitate the operation of reason, or to offer a predisposition for collective action. How this collective action is structured, and what are its norms and objectives, cannot be decided on the basis of moral sentiments. Social representations will determine with whom and how one should feel solidarity and compassion. Gertrude Himmelfarb describes the difficulty of compassion-triggered action:

> "In its sentimental mode, compassion is an exercise in moral indignation, in feeling good rather than doing good; this mode recognizes no principle of proportion, because feeling, unlike reason, knows no proportion, no limit, no respect for the constraints of policy or prudence. In its unsentimental mode, compassion seeks above all to *do* good, and this requires a stern sense of proportion, of reason and selfcontrol."[7]

There is a long way to go from compassion to social rights, and this is not a one-way street. Changes in the social patterns mobilizing compassion might result in the reversal of legal arrangements. The object of empathy, like other emotional objects, is determined, at least according to sociological and phenomenological theories of emotion, in the *Lebenswelt.*

Compassion today plays a contradictory role. As Marco Steenbergen states: "On first sight there indeed appears to be 'compassion fatigue' (Kozol 1995) in American society including the prevailing social indifference in face of the dismantling of the social safety net. [... But] Americans talk individualism but often behave in the spirit of compassion."[8] Already Tocqueville noted that Americans were quite willing to offer assistance to those in need, in spite of their emphasis on the norm of self-reliance.

This is not to suggest that sentiments can explain constitutional change. Abolitionism was not the result of a sudden compassion epidemic: it was the result of long-term processes (including economic processes) with group dynamics

[7] Himmelfarb, G.: *Poverty and Compassion: The Moral Imagination of the Late Victorians*. New York, 1991. 5.

[8] Steenbergen, S.: Compassion & American Public Opinion: An Analysis of the NES Humanitarian Scale. *NES Pilot Study Report,* (1996), 1–2.

that sped up certain cognitive changes that then enabled the re-framing of slaves as being humans. At this historical point, keeping them in slavery met indignation. On the other hand, constitutionalizing the dictates of sentiments helps to sustain and extend the cultural environment that provides interpretive schemes to sentiments, or, if emotions are cognition dependent, it may shape the emotions. Social sentiments become normative patterns through constitutionalisation. The constitutional solution, be it in the text of the constitution or in a judicial decision that embodies rights, finds echo in the public sentiment. The best-case scenario is that the constitution meets with constitutional enthusiasm: the constitution offers values for public identification. Constitutions are often acts of nation and state formation and the reception of the constitution, or its rejection, is part of identity formation. Such identification increases both the short-term and long-term success of the constitution. The present difficulties of the new European Constitution indicate that lack of enthusiasm may result in the failure of the constitution-making exercise.

Now we have a sketch of how sentiments shape constitutions: public sentiments influence constitutional design directly in some of the cases, but more importantly, constitutional decisions operate with assumptions about the current sentiments and also contain assumptions about emotions that will be generated by the constitutional design. Much of the constitutional arrangements is designed to *predict, anticipate,* and *cope with* what the drafters or judges imagine are popular sentiments.

To illustrate the complexity of the relation between sentiment and constitutional design, I would like to discuss only the impact emotions have on modern democracies. This story indicates how difficult, perhaps impossible, it is to keep public sentiments within the boundaries of constitutionalism. I will discuss militant democracy that deals with the arguably illicit use of emotions in politics.

As mentioned above, fear dictates that post-totalitarian constitutions include provisions that enable preventive measures against anti-democratic movements and actions. This preventive repertoire is called militant democracy. The name comes from a 1937 article of the German émigré political scientist, Karl Loewenstein.[9] He argued that democracies should not stick to formal liberal and democratic processes when fascists are abusing these processes.

According to Loewenstein, authoritarian regimes and movements are held together not by violence, but by emotionalism. This is what replaces the rule of law. Authoritarian regimes and fascist movements possess an arsenal of techniques for emotional mobilization. Nationalist fervor and intimidation,

[9] Loewenstein, K.: Militant Democracy and Fundamental Rights I., II., *American Political Science Review,* 31 (1937) 417, 638.

which is conjured up with the image of physical coercion, are the most common elements of political emotionalism. The only genuine goal of such politics is to seize and retain power at all costs. In this, movements may succeed even if they operate within the democratic institutional infrastructure. Loewenstein talks explicitly about the perfect adaptation of the politics of emotions to democracy. An example of this is when new elections or referenda are extorted by means of emotional mass politics, including threatening mass demonstrations, strikes, etc., bordering on violence. It is not by accident that reputable democracies refrain from having national referenda, or limit the right to demonstrate. In direct decision-making methods, the politics of emotional manipulation and its momentary considerations prevail at the expense of the more or less rational problem-solving methods of constitutional institutions. Therefore, a constitutional democracy must be ready and able to confine the politics of emotions.

For militant democracy, decisions based on emotional impulses are suspect. Given the fear of the consequences of emotional politics, militant democracy becomes risk averse. This is in net opposition to freedom-maximizing constitutionalism that stands for constitutional risk-taking. Risk aversion is troubling in a constitutional democracy that stands for liberty. Risk-taking is required for liberty, at least according to Justice Brandeis, who gave the following justification for not limiting freedom of speech:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail against the arbitrary. [...] They believed [...] courage to be the secret of liberty [.... and] that the greatest menace to freedom is an inert people."

Further, he referred to the negative consequences of preventive oppression: "fear breeds repression [...], repression breeds hate."[10]

Along these lines of risk-taking for liberty, Brandeis (referring to speech) suggested that the seriousness of the evil, the probability of occurrence, and the reasonableness of the assumption regarding the probability are to be taken into account. The problem is that fear and other emotions, and emotionally conditioned perceptions, undermine the probability calculus.

As mentioned above, if a society operates under the assumption of risk aversion in matters of political action, liberty-based reasoning is not attractive. The inclination to social risk aversion increases where specific historical

[10] Whitney v. California, 274 U.S. 357 (1927). 375.

experiences dictate precaution; once again, constitutions may help to perpetuate past experiences of fear.

In order to counter the politics of emotion one has to rethink the basic risk-taking position of liberty-enhancing constitutionalism. In practical terms, this means that, for example, the authorization of mass demonstrations requires a rethinking of arrangements that were considered to be settled under the liberty paradigm. See, for example the problems related to the authorization of anti-globalization demonstrations, like the one at the G-8 Seattle meeting. Authorizing demonstrations remains a matter for constitutional rethinking, when certain groups make it clear that they cannot achieve their goals without seriously burdening other citizens and the public order.

President Franklin Roosevelt said that the only thing we have to fear is fear itself. The intellectual hero of the Hungarian anti-communist movement, István Bibó's most often quoted line among dissidents was that "he who is afraid cannot be a good democrat." But most political systems do not subscribe to this pathos. It remains part of the research agenda to determine to what extent and under which circumstances the fearlessness position make sense, in light of the decision-shaping capacities of emotions, including fear.

With increased social fear it is difficult to sustain institutionalized risk-taking. Here risk-taking, also known as liberty, is replaced with the precautionary principle.

The politics of emotion remains a fundamental challenge to deliberative democracy. Terrorism generates emotional reactions that may preclude reasonable reactions. Liberty is curtailed in panic, but such action might be justified by the dictates of sentiments.

The politics of emotion is with us even without terrorism. Ordinary electoral processes and referenda are fought and won by mobilizing emotions. Democracy understood as popular election is turned into a process of choosing leaders from the elite on the basis of unconscious preferences (hardly a robust republican theory). This clearly negates the fundamental assumption of constitutional law that democracy is legitimated as a process that enables socially optimal decisions through participation and deliberation. The opportunities for reasonable arguments are further undermined by the prevailing culture of narcissism where victimhood and related suffering become trumps, especially where suffering is visualized enough to generate emotions, including indignation and sympathy. In this way, politics has become a beauty contest of public indignations.

Of course, the constitutional institutional design contains elements that are intended to diminish emotionalism and related populism. An important organizational solution aims at insulating public institutions from the emotional public

process. Insulation means that social decisions are taken by experts, instead of being decided by politically accountable institutions or directly by the people. These allegedly neutral experts deliberate on the basis of allegedly professional considerations. Examples range from central banks to constitutional courts as policy makers.

The argument is that these professional bodies will be deliberative. However, given well-known organizational interests, actual partisan influences, bounded rationality, personal emotions within the organization unchecked by public scrutiny and accountability, and other trends like cascades, professional decision-making might be as emotionally loaded as any plebiscite.

The ambivalent role of emotions in democracy is well illustrated in the current debate between Cass Sunstein of Chicago Law School and his critics regarding the proper handling of social risks. The debate centers on those public risks that are quintessential for constitutional law: terrorism, nuclear energy, global warming, etc. Sunstein claims that humans are irrational risk evaluators, partly because of affect that determines risk perception. Scientifically trained experts are less vulnerable to cognitive defects originating in emotional distortions. It thus makes sense to transfer decision-making in these areas to experts insulated from political processes.[11] The opposite view was recently presented by Dan Kahan and co-authors. They point to the enormous discrepancies among experts in matters of risk perception. Increased government regulation that bypasses the democratic process shows shortcomings that are not that different from public democratic judgment. In particular, Dan Kahan and colleagues argue that the disagreements between lay and expert perceptions of risk are grounded on different value choices. These value choices are emotionally grounded, but emotions and values cluster in society, as they are culturally shaped. The Dan Kahan approach is based on the assumption that "culture is *cognitively* prior to facts in the sense that cultural values shape what individuals *believe* the consequences of such policies to be."[12]

One cannot deny the existence of these cultural choices that serve for the emotional reactions regarding facts and assumptions. As Martha Nussbaum summarized it recently,[13] emotions are not thoughtless surges of affect but value-laden judgments shaped by social norms. There is a place for democratic

[11] See Sunstein, C.: *Laws of Fear: Beyond the Precautionary Principle.* Cambridge, 2005.

[12] Kahan, D. *et al.*: Fear and Democracy or Fear of Democracy? A Cultural Evaluation of Sunstein on Risk, *Yale Law School Public Law Working Paper,* (2005), 17–18.

[13] Nussbaum, M.: *Upheavals of Thought: The Intelligence of Emotions.* Cambridge, 2001.

political choice that cannot be replaced by expert regulation; it is not an issue for expert knowledge which of the following dangers you prefer: gun-induced violence under a right to bear arms regime, or the anxiety and the danger of being left without personal self-defense in case guns are prohibited.

The above debate is decided partly on normative grounds, i.e., what follows from one or another theory of democracy and theory of the constitution. But the formation and acceptance of such theories depends on an underlying, emotionally shaped risk preference. It seems risky to leave vital matters to be decided by normative considerations only.

At this point, scientific knowledge regarding the impact of emotions becomes decisive. An informed theory of constitutional sentiments should provide enough knowledge to enable a critical approach to the assumptions about sentiments that prevail in constitutional choices. Are political and legal scholarship and practices going to use the lessons emerging from behavioral sciences? Law is an interest-driven practical activity. It is not out of the question that interests will prevail in law in disregard of improved knowledge about emotions. Or, perhaps a better understanding of emotions will only add to the repertoire of legal manipulation. Feminist and other scholars offered evidence regarding the role of emotions in legally relevant behavior, but the legal profession resisted the accommodation of that knowledge, because of mental rigidity and special interests of domination, among other reasons.

Lawyers and regulators may distort knowledge but this is not to say that the scholarly analysis of constitutional emotions lacks a proper subject.

These short remarks are certainly far from covering all the important relations between emotions and constitutional law. I hope, however, that this was sufficient to show that constitutional decisions and critical thinking about government requires the taking into consideration of public emotions.

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RUTH DONNER*

Dual Nationality in International Law

Abstract. The presentation begins with introductory remarks centred principally on the topicality of the legal status of dual nationals. Whereas earlier the doctrine of State sovereignty required that an individual have only one nationality, the status of dual nationality is now increasingly accepted, though not created, by States. The development of human rights law is of importance insofar as statelessness is now considered to be a greater evil. It then continues with some basic principles in international law, the first being that it is for each State to decide who are its nationals. This leads to a discussion of some landmarks in the development of the international law of nationality: the *Tunis and Morocco Nationality Decrees* before the PCIJ in 1923; the League of Nations codifying Convention on Certain Questions Relating to the Conflict of nationality Laws, 1930; and the *Nottebohm* case before the ICJ, 1953, in particular. Te greatest contribution to the topic has come from the Iran–United States Claims Tribunal, for three reasons: for rejecting Article 4 of the 1930 Convention, embodying the principle of non-responsibility; further, it clarified how dominant and effective nationality can be determined for the purposes of the nationality of claims; and it developed the equitable doctrine contained in the *caveat* to *Case A/18* that the status of dual nationality must not be used unjustly or fraudulently. Lastly, the possibility of a "dormant" nationality is accepted, and the European Convention on Nationality, 1997, and the International Law Commission's drafts on Diplomatic Protection noted.

Keywords: public international law, dual national status, dominant and effective nationality, diplomatic protection, Iran–United States Claims Tribunal, dormant nationality

Introductory Remarks

The subject of my presentation[1] is both an interesting and a topical one. I say 'interesting' because, though not unique in this, questions relating to dual nationality arise in national law, private international law–or, as the Americans say, conflict of laws–and public international law. Public international law comes last, but in this questions of nationality touch on the very definition of

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statehood, the existence of a permanent population being an essential pre-condition for it.

And I say 'topical' because whereas when national status was the sole link between the individual and international law, and allegiance and protection the links between the individual and the ruler, it was for each individual to have one, and only one, nationality. At the Hague Conference on the Codification of International Law, 1930, there was reference to the 'twin evils' of statelessness and dual nationality in connection with the Convention on the Conflict of Nationality Laws. In his classic work on Dual Nationality of 1961, Professor Bar-Yaacov refers to the 'problems' of dual nationality.

In recent years, however, it has become more common for countries to recognize the status of dual nationality. This is not to say that States create dual nationals. On the contrary, it only means that States recognize that their nationals may also possess the nationality of another State and that they do not lose their nationality by operation of law on acquiring another one, as, for example, was common practice when a woman acquired the nationality of her husband on marriage. One can mention the recent nationality legislation of Spain (2002), Finland (2003) and Ireland (2002). As a matter of policy, the Egyptian Minister of the Interior was using his administrative powers in 2004 to pass Egyptian nationality to children of Egyptian mothers and alien fathers, mostly from neighbouring Arab states, pending amended legislation permitting married women to retain their nationality. Since 1998, Mexicans naturalized in the United States have been able to retain Mexican nationality.

Acceptance of dual national status in national law has resulted in renewed interest in dual nationality as a sociological fact and as a problem in political science. Thus the 1997 publication of the British Institute of International and Comparative Law entitled, *Citizenship. The White Paper* lists in Part One eighteen "Hallmarks of Citizenship", of which 14 are rights and 4 duties.

Also of present concern is the question of how far modern developments in human rights law are relevant to our topic.

Art. 15 of the UN General Assembly's 1948 Universal Declaration of Human Rights states that "Everyone has the right to a nationality." Art. 24 (3) of the UN Covenant on Civil and Political Rights, 1966, and Art. 7 (9) of the UN Convention on the Rights of the Child, 1989, provide for a child's right to citizenship, or nationality. In the International Convention on the Elimination of Racial Discrimination, 1966, Art. 5 (d) (iii) refers to "The right to nationality." However, these articles do not amount to a right to a specific nationality, and highlight the dysfunctional, or asymmetrical, nature of international human rights law. A State, by virtue of its sovereign powers, may divest itself of rights in favour of individuals, but it cannot in the same manner pass over its

duties and liability for civil wrongs. International criminal courts are another matter. A State cannot be sentenced to prison.

On the other hand, Art. 15 of the 1948 Universal Declaration continues, "No one shall be arbitrarily deprived of his nationality." Other attempts have been made to curb the number of stateless persons. The UN Convention on the Reduction of Statelessness, 1961, which entered into force in 1975, went further than earlier enactments in that it placed an obligation on States. Deprivation of nationality is not just condemned when "arbitrary", but when it results in statelessness (Art. 8). States parties undertake to grant nationality to persons, otherwise stateless, who reside on its territory.

In November 1999 the Organization for Security and Cooperation in Europe adopted the Charter for European Security at Istanbul. There it was stated that "no one should be deprived of his or her nationality arbitrarily... We also commit ourselves to further the international protection of stateless persons." With the development of human rights law it has become clear that statelessness is a greater "evil" than dual nationality.

Dual Nationality and International Law

1. Some basic principles

The basic principles in public international law as regards this topic–bearing in mind that nationality differs from citizenship, which is more relevant in national law, and also from "ethnic nationality"–may be listed as follows:

(a) It is for each State to determine who are its nationals, and if this should lead to a person possessing two nationalities it does not mean half of one nationality and half of another.[2]

(b) A State cannot decide who are the nationals of another State. For example, an English court has stated that there is no such thing as a German national by English law.[3]

And to this one may add:

(c) There is no such thing as a State's national by virtue of international law.

I could mention two instances when an international body has been confronted with this, though both are concerned with reinstatement of an earlier existing nationality.

[2] Donner, R.: *The Regulation of Nationality in International Law.* 2nd ed., New York, 1995. 205.

[3] *Oppenheimer v. Cattermole; Weekly Law Reports* (1975), 347.

First, the case of Mr Baruch Ivcher Bronstein, a national of Israel by birth, who acquired Peruvian nationality by naturalization in 1984 and was deprived of it in 1997 following his broadcasts disseminating news on torture committed by members of the Peruvian Army Intelligence Service. On March 31, 1999, the Inter-American Commission on Human Rights submitted the case to the Inter-American Court of Human Rights and requested that the Court order Peru to restore and ensure Mr Bronstein's full enjoyment of his rights that had been violated, and in particular that he be able to have his Peruvian nationality fully and unconditionally recognized.[4]

In the Eritrea-Ethiopia Claims Commission, Eritrea requested, *inter alia*, that the Commission order the reinstatement of the Ethiopian nationality of tens of thousands of people, referring to Ethiopian nationals of Eritrean "descent, blood or affiliation" who were deprived of their Ethiopian nationality during the conflict of 1998–2000. The Commission found this to be outside its jurisdiction.[5] Further to this, the Commission recognized that some States permit their nationals to possess another nationality while others do not: "International law prohibits neither position".[6]

2. Some landmarks in public international law

The Advisory Opinion of the Permanent Court of International Justice in the *Tunis and Morocco Nationality Decrees*[7] was the first pronouncement of the International Court regarding nationality questions. There Britain had objected to French decrees of 1921 granting French nationality also to British nationals resident in the French protectorates of Tunisia and the French zone of Morocco, without giving such persons an option of nationality, and had finally taken the matter to the Council of the League. France, on the other hand, argued that nationality questions were solely within the domestic jurisdiction of States, and hence outside the competence of the League and the Permanent Court. The question of competence was put before the Court by the League, and in its Opinion the Court stated, in a famous passage: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.

[4] International Legal Materials, 125 (2001), 40.

[5] Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27–32, December 17, 2004, Paragraphs 23–25.

[6] *Ibid.* paragraph 59.

[7] Permanent Court of International Justice, Series B, No. 4 (1923) 24.

Thus, in the present state of international law questions of nationality are, in the opinion of the Court, in principle within the reserved domain."

This left open the development of international law as regards nationality. In the League of Nations codification of international law, the Committee of Experts set up by the League in 1924 considered a number of topics as possibly ripe for codification, finally settling on three topics for the Codification Conference, one of which was Nationality. The resulting Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930, entered into force in 1937 and was, as already mentioned, especially concerned with cases of dual nationality. In particular, Art. 4 stated: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."[8] This was so drafted in order to ensure the principle of non-responsibility, that a State was not responsible in the international sphere for injurious acts against its own subjects.

On the other hand, dual national status in fact was implicitly recognized in the Convention. Where a conflict arose, account should be taken of the person's choice. Thus, Art. 5 of the Convention: "Within a third State a person having more than one nationality shall be treated as if he had only one... [A] third State shall recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected."

Similar wording appears in Art. 1 of the Protocol Relating to Military Obligations in Certain Cases of Double Nationality.[9] A dual national is liable for military service in that country of his nationality where he ordinarily or habitually resides. This is a formula applied in treaty law concerning military service of dual nationals. So, too, in other connections as, for example, for judges on international courts or, indeed, international civil servants in general. This was applied most recently for judges on the ICTY or the ICTR (the International Criminal Tribunals for the Former Yugoslavia and Rwanda respectively) who might be nationals of two or more States. Security Council Resolution 1411 of 17 May 2002 amended Art. 12 of the ICTY statute and Art. 11 of the ICTR statute, providing that such judges be regarded as bearing solely the nationality of the State in which they "ordinarily exercise civil and political rights." The wording is slightly different.

[8] *League Nations Treaty Series,* Vol. 179, 9. The Preamble stated that every person should have "one nationality only." Donner: *op. cit.* 46, note 47.

[9] *League Nations Treaty Series,* Vol. 178. 227.

The *Nottebohm case* before the present International Court of Justice further clarified the meaning of a dual national's "close connection" with the State of one of his nationalities. The principal facts of this case were as follows: Friedrich Nottebohm was born in Hamburg, Germany, in 1881 and under German law was a German national. In 1905 he moved to Guatemala and resided and worked there until his arrest in 1943. In 1939, shortly before the outbreak of the Second World War, Nottebohm went to Liechtenstein and there acquired Liechtenstein nationality within a matter of weeks, before returning to Guatemala. This was in accordance with the Liechtenstein Law of Nationality of 1934, which permitted dispensation from the normal residence requirements in special circumstances. He then lost German nationality. After the end of the War Liechtenstein, as the country of his nationality, espoused Nottebohm's claim and resorted to international judicial proceedings, before the International Court of Justice, claiming special and general damages for Guatemala's wrongful arrest, detention, and expulsion of Mr Nottebohm (as well as) the restitution of property wrongfully seized from him between 1942 and 1946. Here Liechtenstein exercised its right to diplomatic protection of one of its nationals.

In its 1953 Judgment the Court dismissed Guatemala's preliminary objection to jurisdiction on the grounds that the Court was not properly seised of the case.[10] In its 1955 Judgment,[11] on the merits, the Court dismissed Liechtenstein's claim as inadmissible on the grounds that the factual connection between Nottebohm and Liechtenstein "in the period preceding, contemporaneous with, and following his naturalization" was found not to be sufficiently close.[12] Before that, the Court had stated that "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence...".[13] But the Court here was dealing not so much with the requirement of a genuine link for purposes of naturalization but with a question of opposability. This is clear in that the Court goes on to state that Liechtenstein was "not entitled to extend its protection to Nottebohm vis-à-vis Guatemala."[14] The Court did not overrule Liechtenstein's conferment of nationality on Nottebohm. It could not do that. Nor did it revive his German nationality. Here I do not entirely agree with the

[10] *I.C.J. Reports*, 1953. 111.
[11] *I.C.J. Reports*, 1955. 4.
[12] *Ibid.* at 24
[13] *Ibid.* at 22.
[14] *Ibid.* at 26.

Encyclopedia of Public International Law,[15] that the Nottebohm case deals "only with diplomatic protection as a consequence of conferment of nationality by naturalization."

At the same time, we must remember that Nottebohm had never acquired Guatemalan nationality. The Iran–United States Claims Tribunal, on the other hand, deals with claims brought by dual Iranian–United States nationals.

3. The Iran-United States Claims Tribunal

This was the first major claims commission to function since those established in connection with the peace settlements at the end of World War II. Thirty-four volumes of the Iran–United States Claims Tribunal Reports have so far been published. Volumes 35 and 36 are already referred to as nearing completion.

The agreement to set up the Tribunal, being the Claims Settlement Declaration of 1981, was negotiated–although not face-to-face–between Iran and the United States in the Algerian capital Algiers. Its mandate was "to decide claims of nationals of the United States against Iran and the claims of nationals of Iran against the United States... [that]... arise out of debts, contracts... expropriations or other measures affecting property rights".[16] It has been estimated that at the time when the Islamic Revolutionary government was established in Teheran, in February 1979, some 40,000 United States nationals were residing and working in Iran. This was mostly in connection with what the late Shah's widow has recently called "the White Revolution". The Tribunal's function was a form of diplomatic protection in that individual claims of U.S. nationals were pre-empted, and withdrawn from United States courts.

The importance of this Claims Tribunal for our topic may be shown in three ways.

Firstly, in case *A/18*,[17] decided on 6 April 1984, the Full Tribunal was requested in accordance with its jurisdiction to interpret the meaning of United States national in Art. II of the Claims Settlement Declaration for purposes of presentation of a claim. This question arose because Iran objected to claims brought by naturalized American citizens on the ground that they were Iranian nationals by birth and Iran does not in its legislation recognize an individual's right to abandon nationality, except under strict conditions. Iran's argument before the Full Tribunal was based principally on Art. 4 of the Hague Con-

[15] Bernhardt, R. (ed.): *Encyclopedia of Public International Law,* Amsterdam (et al.), 3, (1992) 501 at 506.

[16] Art. II Claims Settlement Declaration, 19 January 1981.

[17] 5 Iran–United States Claims Tribunal Reports (U.S.C.T.R), 251.

vention of 1930, mentioned above, as being the expression of the classic rule of non-responsibility. The Tribunal dealt at length with Iran's argument and then rejected this line of reasoning on the basis of its analysis of historical practice, that international tribunals had long experience of dealing with claims of dual nationals, the doctrine on the subject, and also on an analysis of Art. 4 of the Hague Convention. The Full Tribunal held that Art. 4 must be "interpreted very cautiously", that not only was it more than 50 years old and much had changed since then, but also it was "found in a treaty to which only twenty States are parties..." To this I may add here that Habermas has noted that in 1998 only four member States of the European Community had ratified the Convention.

Taking into account that Art. 4 of the 1930 Convention no longer expresses an unambiguous rule, an international court must still consider the factual connection, the genuine link, between an individual and his State of nationality that would permit that State to grant diplomatic protection against another State whose nationality that person also possesses. The Iran-U.S. Claims Tribunal provides an abundant jurisprudence dealing with the determination of a dual national claimant's dominant and effective nationality.

Without looking at all aspects of this, I want to refer to one point. In his 1999 Hague lectures on "Conflits de Nationalités"[18] Michel Verwilghen was critical of my treatment of the *Malek* case before the Tribunal.[19] I am not sure that I follow his argument as to what I "insinuated", but I was indeed wrong in questioning the Tribunal's scrutiny of the whole life of the claimant in order to determine the dominant and effective nationality during the relevant (for the espousal of a claim) period from the date of the alleged injury until the date of bringing the claim, that is, the 19 January 1981, the date of the agreement to set up the Tribunal. It is general practice that for a dual national, in the "Art. 4" sense, a factual assessment must be made to determine the dominant and effective nationality during the relevant period, and in this a Tribunal, as the International Court in the *Nottebohm case*, "will consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment." In *Malek* the Tribunal then continued to elaborate on this, stating that "the entire life of the Claimant, from birth, and all the factors which, during this span of time, evidence the reality and the sincerity of the choice of national allegiance he claims to have made, are relevant."[20] The rather curious result is that the entire life of the claimant is

[18] Vol. 277 *Recueil des Cours*.
[19] 23 June 1988, 19 Iran–U.S.C.T.R. 48; Donner: *op. cit.* 89–104.
[20] *Ghaffari* in 31 Iran–U.S.C.T.R. 60 at 65.

relevant to determining dominance during the relevant period.[21] In this the Tribunal shows a steady jurisprudence, in cases both before and after *Malek.*

Thirdly, the Iran-U.S. Tribunal has contributed to the development of international law regarding dual nationality in its application of the *caveat* contained in case *A/18*. This provided that, "In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim", and "It is also often admitted that no international protection is given to a dual national as regards rights acquired by him through the use of his 'other nationality', if such rights are validly reserved to its citizens by the other State."[22] Although the Tribunal has found on numerous occasions that there is no cause for a claim to be barred by the *caveat* (e.g. *Ghaffari*) it has also found it to be applicable as, most recently, in *Aryeh (M) v. Iran.*[23] In particular, the Tribunal concluded here that "while the *caveat* in *Case A18* is relevant to this case, its application should result not in the barring of the entire claim, but in the applying of a discount to the market value of the property". And, "the Tribunal must rely on its discretion to quantify a discount that is reasonable and equitable taking into account all the circumstances in this case".[24] This invoking of equity is in line with the early *Esphahanian case*,[25] citing the *Flegenheimer case,*[26] to the effect that international courts may deny jurisdiction in cases of dual nationality "on equitable grounds in cases of fraudulent use of nationality."

The requirement of *bona fides* appears also in the United Nations Claims Commission. This is a quasi-judicial body, not an arbitral tribunal for traditional diplomatic protection and espousal of claims, set up under Security Council Resolution 692 of 20 May 1991 to handle the *circa* 2.6 million claims arising out of the Iraqi invasion and occupation of Kuwait. Although eligibility to bring a claim is not based on nationality it is stipulated that Iraqi nationals may not bring claims. This was further clarified in the Governing Council (of the Commission) Decree of 28 November 1991: "Claims will not be considered on behalf of Iraqi nationals who do not have *bona fide* nationality of another State."[27]

[21] Aldrich, G. H.: *The Jurisprudence of the Iran–United States Claims Tribunal,* 1996. 59.

[22] *A/18* at 265–266 and 274.

[23] 33 Iran–U.S.C.T.R, 368.

[24] *Ibid.* 395, paragraphs 85 and 86.

[25] 2 Iran–U.S.C.T.R, 161–162.

[26] *U.S. v. Italy,* 14 *UN Reports of International Arbitration Awards*, 327 at 378.

[27] See 31 *International Legal Materials* (1992) 1009. Donner: *op. cit.* 386.

4. "Dormant" nationality

One matter not referred to so far, but of contemporary relevance, is the question of what I have called "dormant" nationality, where one full nationality exists together with a dormant one.[28] This phenomenon is not quite the same as dual nationality because there are not two, or more, concurrent nationalities of, in principle though not necessarily in fact, equal weight. But it also has the character of dual nationality in that the dormant nationality may be activated at any time, simply on request and following certain formalities.

An example of this occurred in Germany before reunification.[29] Art. 16 of the West German Basic Law dealt with nationality of the Federal Republic, while Art. 116 covered those persons who possessed German nationality within the borders of territory of the German State as it existed on 31 December 1937. This was in accordance with Art. 146 of the Basic Law in which the concept of a united Germany was reiterated. In the *Teso case* before the W. German Federal Constitutional Court, 1987,[30] this same concept of a common German nationality was applied in favour of an East German national even though the 1967 Nationality Law of the Democratic Republic had no equivalent to Art. 116 of the Federal Republic's Basic Law. Thus when the inhabitants of the former East Germany streamed west just before the collapse of that State, West German embassies could take them in, in Hungary and Czechoslovakia.

The same applies in other divided States. Thus in the 2001 Irish Nationality and Citizenship Act, "section 3.6.-(1) Every person born in the island of Ireland is entitled to be an Irish citizen." The case of Korea is more complex due to the magnitude of the problems involved: the number of inhabitants is more evenly divided than in the former two Germanies; the poverty is greater in the one half, here the northern; the common border is even more impenetrable; and the neighbours less accommodating. Yet even there I understand that North Koreans who reach South Korea are given South Korean nationality on preferential terms. Citizenship of the European Union adds further interest to this question.

As international law does not prohibit dual nationality, there can be no such prohibition on a State, by virtue of its inherent sovereign powers, granting its nationality preferentially to whomever it pleases. No conflict of nationalities is involved, because the one only becomes active where there is a genuine link

[28] Donner: *op. cit.* 204–i.e. in preference to "virtual" nationality.

[29] Donner: *op. cit.* 288–291.

[30] (91) *International Law Reports,* 213–235.

and where the individual invokes his right to it. The nationality is not imposed on the individual against his will because it is only dormant.

Concluding Remarks

The European Convention on Nationality, 1997,[31] is relevant for a number of the points discussed here. Although this is a regional treaty it is important because there are now forty-six members of the Council of Europe and, in addition, States not members of the Council may be parties to its treaties.

Art. 4 (b) provides: "Statelessness shall be avoided." There is no such prohibition of dual nationality.

On page 16 of the accompanying Explanatory Report it was acknowledged that the conflict of laws arising from multiple nationality was the "most important area which it has not been possible to include in the Convention... However, a growing number of States are making use of the notion of 'habitual residence', when persons regularly and effectively live in a particular place."

Further, the International Law Commission had by August 2004 produced one Preliminary and five consequent numbered Reports on Diplomatic Protection, partly of relevance for our topic today. Thus Art. 6 of the First Report, of 7 March 2000, states: "Subject to Art. 9, paragraph 4, the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual's [dominant and effective] nationality is that of the former State." A note states that Art. 9, paragraph 4, will read: "Diplomatic protection may not be exercised by a new state of nationality against a previous State of nationality for injury incurred during the period when the person was a national only of the latter State." It is not clear what this adds to the present rules on continuity of nationality.

Finally, and in conclusion, it may be said that the greatest contribution to this topic in recent years has been made by the Iran-United States Claims Tribunal: it has improved on the tools for dealing with complex factual situations in the determination of dominant nationality, and it has applied equitable principles to control the status of dual nationals. This is to say, in international law an individual who has dual nationality has a right to choice as in the objective determination of his dominant and effective nationality, but, also, he has the duty not to abuse this right, as provided in the *caveat* in the *A/18* case.

[31] *European Treaty Series*, No. 166.

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Ius Matrimoniale Concordatarium

A comparative approach

Abstract. The comparative examination of the matrimonial parts of the treaties bond between the Holy See and the states (concordatarian law) shows that during the 20th century, the Catholic Church has contracted in this matter such a way that it was able to conclude stronger treaties with the local secular sovereigns. The *actuality* of the examination of the Catholic Church's international treaties becomes obvious during the examination only. In the treaties of the last decade, a significant change can be followed in the Parties' legal relationships, which is an important step in the course of the gradual formation from the first half of the 20th century. As a result of the *examination of the legal structure of treaties* of these ten years, the tendencies of the former decades can better be understood as well. *Recently* such a treaty-material is available for us, on which it is possible and *worth* carrying out an examination.

This essay contains the detailed examination of all matrimonial parts of the Catholic Church's international treaties with a consideration of all legally relevant bearings to be found in them.[1] In the Appendix, one can find the whole text to examine in English.[2] This essay, as it issues from its genre, is to be read with the Appendix together.

Keywords: concordatarian intention, treating force, canonical legal order, local secular legal order, canonical bond of matriomony, legal link, secular legal effects

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[1] It means only such parts of treaties are left out which are not effective to the legal main figures and as exceptions are not significant either.

[2] *Usage of the Appendix:*

1. Numbering of chapters in the Appendix (after a "A") follows that in the main text.

2. a) The original text of the treaty can be found in the Appendix if one of its original languages is English. In this case the texts stays without quotation marks.

b) If neither of the treaty's original language is English, and most of them are such, the Appendix shows the possibly literally translated text, containing all legally accurate and relevant terms (instead of a translation of literature). The translation uses the legally relevant terms of the same English equivalent to have the most reliable text as a basis of the examination. In this case the texts is put in quotation marks.

3. The sign of source, the translation of which can be read next to it, stays in the first place on the left side, the rest of them lists the legally equivalent norms.

4. The structure of signing the sources: *Country year/article* E.g.: Italy 29/34 = the 34th article of the agreement of Italy of 1929.

1. Introduction

1.1. Preliminary theoretical and methodological remarks

It is ascertainable about the legal nature of the material to be examined (Catholic Church's international treaties) that they are *sources of law of international law*. We have to set out from this by elaborating the methodology of examination. On the one hand, the consensus of the international practice and literature of international law claims that the agreements are part of the sources of law and even the formal consideration is the reason for it. On the other hand, most of the treaties *declare* themselves *as law* meaning the Parties consider them as law. Further on, from the point of view of the content *they establish rights and duties* between the Parties. The Catholic Church contracts exclusively legally good considerable agreements with nations and political communities.[3]

As for these treaties, they contain material of law to be examined by a methodology of law. *A comparative methodology* with a positivistic attitude is used here starting strictly out of the text of treaties. This still will not lead to an exaggerated cardboard and poor result, because the text of treaties are amazingly rich in phenomena, from which connections and tendencies can be disclosed.

Catholic church's legal order[4] (the canon law) is current around the world[5] while secular sovereigns' law is local. The collisional law relating to a certain part of the Catholic Church, which coincides with a certain secular sovereign's territory is the concordatarian law, which is obviously local country by country as well. However, it is possible to make a comparison among concordatarian legal regimes, and this comparative examination has an international public nature as well. The scope of the present essay is restricted to the matrimonial law parts of concordats exclusively.

[3] The term is taken over from the 3. canon of the Codex Iuris Canonici (abbr.: CIC 3.)

[4] Basic sources (fons cognoscendi): 1. current from 1983: *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus. Fontium, annotatione et indice analitico-alphabetico auctus*, Citta del Vaticano 1989. (abbr.: CIC), 2. it was current from 1917 to 1983: *Codex iuris canonici Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus, fontium, annotatione et indice analitico-alphabetico ab E.mo Petro Card. Gasparri auctus*, Typ. Pol. Vat 1974. (abbr.: CIC'17).

[5] Canon law jurists call it as universal law as well. This universality is discernible from the context of the 3. canon of the current Codex too, which is dealing with international treaties: "Codicis canones initas ab Apostolica Sede *cum nationibus aliisque societatibus politicis* conventiones non abrogant neque iis derogant; eadem idrico perinde ac in praesens vigere pergent, contrariis huius Codicis praescriptis minime obstantibus." (CIC 3.)

It is worth going over the legal examination and explaining the agreements in their broader context. The results of comparative law examination can call the attention to the different ways of approach in different countries.[6] Besides the juridical methodology, the methods of social history and of diplomacy should be used. The premise of this stage is that the *text* put down in treaties is the projection of the actual certain age and moment, *from which as an indicator,* the intentions and their backgrounds can be deduced brought into existence by the treaty (the principle of the contextuality of the comparative law).[7] Putting findings together in a broader view, it will outline the Catholic Church's concordatarian politics in the field of the matrimonial law.

1.2. Competence of legal orders and their collision

If a matrimonial bond comes into being between two parties, its different legal effects (sacred and profane) are set up *in different fields of the human life.* The single legal orders are ruling that field of human life, which is in their competence by own right. The Church reserves exclusive jurisdiction in the field of sacred entities, and the secular state (on a basis of its own principles) does not lay claim to it. One can see that *the two legal orders* (both on a basis of their own principles), *independently of one another and all by oneselves,* subsist and succeed. A connection between them is just a possibility and the expressed intentions of the Parties bring it into being.

In the matrimonial law however there is a *collision*, but *just concerning the fact of matrimony.* In regard to the matrimony of the Catholics, who are obliged to the canonical form, the canon law is competent.[8] Since the establishment of secular matrimonial laws at the end of the 19th century, the secular legal orders declared themselves competent in it as well. The canon law however does not deal with its consequences[9] regarding to property, inheritance, (in case of family taxation) taxation,[10] etc., but the secular legal orders distinguish them.

[6] Wienczyslaw, W. J.: Comparative law: its methodology and development in the United States. *Comparative Law Review* (1991), 2, 7.

[7] Konijnenbelt, W.: *Discours de la methode en droit public comparé.* In: *Comparability and Evaluation in Honour of D. Kokkini-Iatridou,* Dordrecht, 1994. 125–126.

[8] Leo XIII., Litt. Enc. *Arcanum,* 1880. II. 10, in: *Acta Sanctae Sedis* 12 (1879–1880), 393 contains that the church in matrimonial cases has juridical power of its own right, and not as a result of the local state's concession.

[9] "Item non ipsa ignorat neque diffitetur sacramentum matrimonii, cum ad conservationem quoque et incrementum societatis humanae dirigatur, cognationem et necessitudinem habere cum rebus ipsis humanis, quae matrimonium quidem consequuntur, sed in genere

This has multilayer consequences:

1. Since the secular legal orders are changing in that direction, that the same legal effects are attached to the mere cohabitation to the matrimony, Christians are less and less interested in the celebration of matrimony according to the secular law. Therefore, in countries where the secular legal order does not oblige the secular celebration before the ecclesiastical one, the Christians less and less get married by secular celebration. As a consequence they can not expect without concordatartian law to be regarded by the secular forum as living in matrimony.[11]

2. Other secular legal orders oblige the parties to declare their matrimonial consensus in face of the secular registrar before the ecclesiastical matrimony. As several secular laws at the end of 19th century went in this direction, a theoretical problem arose in the canon law. The canon law thinks from a point of view of the natural law and according to the natural law the first declaration of matrimonial consensus is valid. This was the cause that led to the formation of the canonical principle according to which the secular celebration on ecclesiastical forum is not an invalid legal act but a *non-existing* legal act.[12] This was necessary for re-establishing the normal (initial) position (the two legal orders succeed independently and parallelly with each other) after duplicating the matrimonial legal regime from the secular Party's part.

The canonical legal order (like secular ones) defines its competence on a basis of the legal status of legal subjects (persons). Those persons' cases (of matrimony bond in canonical form), belong to the canonical matrimonial law's competence, where at least one of the parties is catholic. However, the concordatarian law never thinks on a basis of the persons' legal status, but always on the basis of the form of of a bond coming into existence (we should speak about the canonical status of the bond). A collision law starting out of the persons' legal status would be impracticably complicated.

The concordatarian matrimonial law (after the positive law came into being by concluding the agreement) deals with the *fact of the matrimony* and with taking on the obligation of the secular Party, it attributes legal effects into its own legal order. On the other hand the concordatarian law does not deal with

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civili versantur, de quibus rebus iure decernunt et cognoscunt qui rei publicae praesunt." Leo XIII., Litt. Enc. *Arcanum*, 1880. II. 10. in: *Acta Sanctae Sedis*, (1879–1880), 399.

[10] If, for instance, an intervening decision in an ecclesiastical suit is needed regarding such a matter, the ecclesiastical court will adopt (receptio iuris) the local secular law, current in its territory of competence (cf. CIC 22., 110., etc.).

[11] Perhaps it can prohibit a married woman using the name of the husband in personal papers.

[12] This means that its nonentity does not need verification.

the established legal effects in the canonical and secular legal orders, because after their rise they independently succeed in the single legal orders and do not have any interference. Therefore connection just comes into existence between two legal orders where the concordatarian law positively makes it.

Summing it up:

1. The *concordatarian intention* is directed towards the partial or the whole withdrawal of the pressure of the double contract from the part of the secular Party, thus the Christians do not have to declare their matrimonial consensus twice in favour of legal effects in the secular legal order as well.

2. Therefore, the concordatarian law always concentrates on one thing: to bring into existence the *legal link between*

a) – the canonically formed contraction (declaration of matrimonial consensus) or
   – the canonical bond (vinculum matrimoniale)[13]

b) *and* its secular consequences (secular legal effects).

1.3. Essential similarity of fundamental rules

The canonical main figure has shaped up from the verbal contract inherited from the Roman law since the Constantinian age.[14] There is a regulation in the authentic collection called *Liber Extra* (promulgated in 1234.) of Gregory the IX.,[15] but the definitive ruling has been accomplished only by the famous decree called *Tametsi* of the General Council of Trident in the 16th century.[16] Thereto, the concordatarian law is possible, because the main figure of contraction a matrimony (the celebration) in secular legal orders did not diverged from that of the main figure of the canon law during the evolution of the single national matrimonial laws. Without this, it would surely be impossible or at least rather difficult for the Parties to condescend.

During the examination, the ecclesiastical Party is unchanging. It is worth summarizing the basic principles of this. There are two fundamental concepts:

[13] The concept of the *matrimonial bond* (vinculum matrimoniale) has an important role in the canonical legal figure of the marriage. This promotes that the valid marriage would be considered in the legal practice as an objective legal fact, which is the consequence of the valid contraction.

[14] Gaudemet, J.: *Droit romain et principes canoniques en matière de mariage an Bas-Empire*, in *Studi Albertario II.*, Milano, 1950, 173–196.

[15] X. 4. 2.

[16] Concilium Eocumenicum Tridentinum, Canones super reformatione circa matrimonium, *Tametsi*, Sessio XXIV, Caput I, 1563. XI. 11, in: Alberigo, G.–Jouannau, P.–Leonardi, C.–Prodi, P.: *Conciliorum Oecumenicorum Decreta*, Freiburg, 1962, 731.

the *form of contracting matrimony* (forma celebrationis martrimonii) and the *matrimonial consent* (consensus matrimonialis).

1. a) The *canonical form* consists of three elements:
      - two parties
      - to declare his/her matrimonial consensus in the presence of the church's authorised representative,
      - two witnesses.[17]
   b) Here should stay the Hungarian Family Law[18] as an example which rules the formal properties of binding as:
      - *parties to be married* are jointly present,
      - *the registrar,* to declare personally that they intermarry with each other,
      - in the presence of *two witnesses,*
      + the registrar publicly registers it.[19]
2. The *matrimonial consent* (inherited from the Roman law) is considered by the canon law and secular legal orders as well as a verbal contraction, which is its establishing cause.
   a) Its *canonical definition* consist of three elements:
      - *legally able parties,*
      - *legally declared,*
      - conscious act.[20]
   b) In the Hungarian Family Law the definition of matrimonial consent does not exist.

1.4. Structure of matrimonial parts of the agreements

All matrimonial chapters consist of two main parts:

1. They *attribute* legal effects to the fact of the declaration of matrimonial consensus or to the canonical bond.[21] With this, the *connection* comes into existence *between the two legal orders* according to the concordatarian intention.
2. Further norms are ruling the
   a) conditions (if the secular law considers the elements of the fundamental rules otherwise as the canon law),
   b) circumstances,
   c) cessation of the legal effects.

[17] CIC 1108.

[18] 1952. year IV. law 2 §.

[19] The canon law doesn't rank the registration in the register of births among the formal properties but it is regulated separately (CIC 1121. 1. §, 3. §, 1122. 1. §, 1123.).

[20] CIC 1057.

[21] See the explanation in the Examination.

2. Examination

2.1. Attribution of the legal effect

2.1.1. The establishing norm of the legal effect

There are 17 agreements all dealing with matrimonial law, as well as protocols, which are independent, or the appendixes of the mentioned agreements. All agreements start with a norm *to establish the legal effects.*

TEXT ANALYSIS

1. The *attributive* verb:

a) Since the Italian Concordat from 1929 which was the first one dealing with the matter of marriage up to that bond with Malta in 1993, the verb *"recognises"* (riconosce) was used by turns. This idiom suggests as if the canonical and the national legal order were not of equal rank, and the secular Party would "grant" the validity to the canonical matrimonial bond. This passage is a typical one, where the legal principle of states formed during the wave of separation, and the claim of the state legal order to exclusiveness can be well manifested. From the state Parties thinking in this manner, the ecclesiastical Party could receive the civil effects of the bond as a concession.

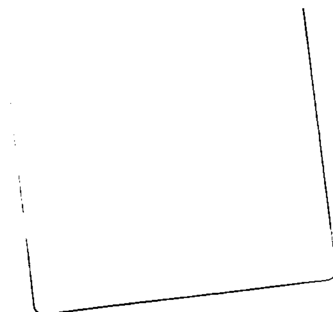
b) The *"brings about", "produces", "will have", "has the same force",* terms legally mean the same. The bond established in the canonical legal order by a valid contraction, in the same time, produces the equivalent legal effects in the secular legal order as well.

The concept of the *matrimonial bond*[22] (vinculum matrimoniale) has an important role in the canonical legal figure of the marriage. This promotes that the valid marriage would be considered in the legal practice *as an objective legal fact,* which is the consequence of the valid contraction.

2. The consideration of the *canonical marriage*:

a) To this concept, there are six different idioms in the agreements. The idiom *"sacrament of marriage"* to be found in the Italian agreement of 1929 could seem of a bit of pietism in an international agreement, but looking at the even more frequently appearing theological matters, it is aftermath less surprising. The Austrian agreement of 1933 presses legal approach by the idiom *"contracted marriage",* and it can also be found later in the Italian agreement of 1984.

[22] CIC 1134.



b) The idiom *"marriages celebrated in accordance with the norms of canon law"*[23] was used in the Spanish-Portugal cultural circle and in the southern European Malta's agreement as well. The secular Party's affection for the rite as an attitude of codification is possible, but I consider the cause of this formula is the cultural circle's social-psychological character and legal approach in which the person to person linkages are very important (in contrast with the Nordic institutionalism).

c) Legally, the *"catholic marriage"* and the *"canonical marriage"* forms are the most correct ones used by the Polish agreement of 1993, while in the same time the not really pleasant idiom of 'contract' is avoided in this topic.

CONCLUSIONS

ad 1. Looking at the dates, it is clear that the idiom "recognises" has been changed to "produces" after 1993. By this, the first definitive norm is transformed in its mechanism: *the legal effect in the secular legal order automatically establishes because of the concordatarian law itself,* although the further norms take ad validitatem conditions as well. By this, the canonical legal order in this respect is tacitly present as an equal legal order. This is part of that process, in which after the weakness of the concordatarian law at the turn of the century the negotiative force of the ecclesiastical Party is increasingly growing, and as it seems, it is able to assert its claims permanently. Shortly, it concludes an agreement only with a Party, which is ready to accept this mechanism.

ad 2. The change of the *consideration of the canonical marriage* is related to the preceeding tendency:

The idiom *"celebration"* expresses the event, (declaration of the matrimonial consensus), while all the other idioms enumerated in paragraphs a) and c) are expressing the matrimonial bond as a legal fact set up in the canonical legal order which was established as a consequence of that event. From the point of view of the legal practice, as a first approach, it seems to be the same that *a fact happened* in the order of the reality or *a fact of canon law* which has been established as a consequence of the previous, can be taken as a nearer cause producing the secular effect, since the canon law ensures the unequivocal correspondence between the declaration of the consensus and the bond. Further on, we can see that this is not such a simple thing.

The explanation based exclusively on the text:

It seems that the establishing from the event leads to ambiguity. This allows, that the declaration of the matrimonial consensus interprets the secular law on a basis of its matrimonial law, and it judges it valid or invalid. Moreover it also

[23] Matrimoni celebrati in conformita con le leggi canoniche.

means that only so much had been realized from the concordatarian intention that there are no two declarations of consensus, but only one, however the legal orders are interpreting that one according to its rules. Now, this does not mean that canonical bond becomes more effective in the secular sphere, but it merely indicates the elimination of the state celebration.

The intention of avoiding this ambiguity could lead to the later practice. These later agreements, using the automatically established form, are always establishing the secular effects from the canonical bond (except the Estonian agreement of 1998 only) while earlier, in those agreements where the "recognises" formula was used this had happened assortedly either from the event or from the canonical legal fact.

The change of the establishing norm resulting in 1993 means the better prevailing of the ecclesiastical Party's concordatarian intention, even though that the automatic establishing is coming from the matrimonial bond (vinculum matrimoniale). Such a way the canonical conditions of establishing the bond (vinculum) are automatically prevailing in the secular legal order as well. Hence, the agreement means, in the same time the whole canonical legal figure's prevailing in the secular legal order.

2.1.2. Conditions of the secular legal effects (conditions ad validitatem)

2.1.2.1. Reasons of the conditions

In my view, not the appearing of conditions is unusual, but the lack of them in the first two agreements (Italy 1929, Austria 1933). It is obvious, that the ecclesiastical and the secular legislators have other points in definition of conditions of validity of marriage (impedimentum). It would be difficult to examine it in details, since all national law thinks about it differently to some extent, according to their cultural particularity, to the momentary general agreement as well as the state of legal development in that country. The canon law however, being a sacral law, takes theologically determined points as well into consideration beyond the natural law, in other words the revealed law. The certain secular legal orders cannot construe these latter ones, and the natural law can differently be approached (e.g. in its theory of law it can be disputed that there are such norms, etc.), first of all on a basis of the social agreement taking shape on this.

It is logical in any case that the differences among the legal orders are appearing in the concordatarian law as a collision law. It would also be logical as well that this concordatarian law was taking shape along the differences of the matrimonial impediments used by legal orders. However, this did not happen in this way.

2.1.2.2. Transcription[24] and answering the secular law

SECTIONING

Ad validitatem conditions started with the Portuguese agreement of 1940. As regards to the transcription and the correspondence of the secular law, the turn of the 70's and 80's was a mile stone. Before this, the transcription was the ad validitatem condition, after this the conditions defined in the secular law will be mentioned. The Croatian agreement of 1996 brings again something new; it leaves out completely the transcription as an ad validitatem condition. These two points are dividing the changes in time of the codification's tendency *into three sections*. In the 80's and the first half of 90's, both conditions were used.

From this main tendency, the Estonian agreement of 1998 is an exception, in which the transcription appears again instead of the impediments according to the secular law. As it seems, in this agreement the Spanish-Portuguese model returns.

TEXT ANALYSIS

1. No conditions:

In the first two agreements, which include matrimonial law as well (Italian agreement of 1929 and the Austrian one of 1933), *there are not* any ad validitatem conditions. The Italian concordat-revision already includes certain conditions, so this seems now to be the strongest agreement from the ecclesiastical Party's point of view (beyond the agreements after 1993, which are on a basis of automatic mechanism).

2. The only condition is the transcription:

In the Portuguese agreement of 1940, the criterion is the transcription into the civil register *in a proper sense*; namely an administrative work. Taking literally the text this means that *only the canonical impediments are regulating the secular validity of canonical marriages, the secular laws do not effect it.* This is in all similar facts regarding to all agreements where only the transcription is the condition. As it will be clear, this is only formal.

3. The transcription *and* the secular laws:

The Italian agreement of 1984 is first mentioning the secular laws besides the transcription, as an ad validitatem condition, so the canonical marriages bond from this time have civil validity under a dual regime. In this agreement,

[24] This usage of the word is there in the agreement of Malta (1993. Art. 2.). One of the languages of this agreement is English and in the Appendix it can be checked (under A.2.3.3. deferred transcription).

only the transcription is the *formal* condition, but the correspondence of the secular laws is the condition of this.

In the Maltese agreement, the "handing over" (transmission) of the act is the condition, which will (obviously) be examined by the secular registry office on the basis of the secular laws. In the Polish agreement of 1993, the secular impediments are in the first place, by themselves, as a part of the collision law, and not in such a way that the secular registry officer was to apply at the transcription (albeit, the secular officer is clearly applying in practice). From the point of view of the codification technique this is *clearer than* the Maltese agreement.

4. Only the secular laws:

Here the transcription became superfluous, as an ad validitatem condition, and it will be sufficient to mention it among the further rules of the procedure. The Polish agreement of 1993, however still include it, and only from the Croatian one of 1996 onwards has been left out, as we can see it in the Latvian, Lithuanian and Slovakian agreements of 2000 as well.

CONCLUSIONS

ad 2. When the transcription is the only condition, it is not clear, whether the civil register's officer was allowed to ponder the transcription on its merits. A debate arose about it if the state officer is obliged to ponder it, since he/she is allowed to register what answers the conditions defined in the secular law. However it is also possible to argue in that case, that if the possibility of pondering in merits is not in the concordatarian law, he/she is not allowed to do it (stricte interpretatio), since this would restrict the legal claim for the civil effects of those who are living in a canonical bond which came into existence by the concordatarian law. And a right to be restricted is only possible in an explicit way. Such legal disputes are probably resolved by the common interpretation clause which is used in the final provisions, or, tacitly, in the practice.

ad 3. The matrimonial impediment by the secular law and the transcription, *as a dually applicated condition,* is the strongest legal construction from the secular Party's point of view. This practically resolves the dilemma and declares that the sate register's officer *must* ponder in its merit. Therefore, not all canonical bonds obtain a transcription. The contributor who makes the examination of the engages before the contraction, whether he knows that the future bond will not gain the secular recognition on the basis of the secular impediments, he cannot refuse the contribution at the contraction, because the parties have a canonical legal claim of taking the sacrament, which is just rejectable referring to a legal canonical impediment.[25] As it follows from the different

[25] CIC 1058.

matrimonial impediments of the two legal orders (and moreover this difference is varies always from country to country), there is a disparity between the bondable judged or valid bonds from the part of the two legal orders. Hence, if the civil register's officer decides upon the transcription of the bond according to impediments of the secular law, thus *this is a job made as one by the authorities.*

In the Italy 84/8[26] the civil register's officer examines literally the possibility of transcription; according to the Malta 93/1 and the Poland 93/10, it is already seen that the national law recognises or do not the canonical bond. This is an important change from a formal (codificational) point of view but regarding that the transcription is an ad validitatem condition in all these agreements as; the civil register's officer always decides as an authority.

ad 4. The Croatia 96/16 (the Latvia 2000/8, the Lithuania 2000/13 and the Slovakia 2000/10) do not show formal development, so up to the Maltese and the Polish agreement, the *legal figure of the concordatarian law* was done. The transcription became weightless among the further rules, it is a mere administration, and is not the decision of the authorities. In this way, the canonical matrimonial bond is not on the basis of the discretional right of the civil register's officer, but it is *qualified as an objective legal basis.*

To sum it up, it is apparent in the concordatarian law of a decade, how the collision law between the two legal orders concerning the ad validitatem matrimonial conditions shaped up from the practical approach to the clearer, legally more correct codification, in other words *to the collisionary correspondence between the two legal orders.*

2.1.3. Joint examination of the establishing norm of the legal effect and the ad validitatem conditions

TEXT ANALYSIS

1. First type:

a) The so called *"recognising"* agreements (all the agreements of the Spanish-Portuguese cultural circle, the Italian agreement of 1984 and the Maltese one of 1993) all give a *discretional* (of the authorities) right to the civil register's officer, *and* the secular legal effects are originating from the event (from the declaration of matrimonial consensus).

b) There is an exception: the system of agreements concluded with Colombia (Colombia 42/note, Colombia 73/3). The expressions in these agreements tightly interpreting the text, do not fit in the category of conditions ad validitatem, but in further rules of transcription (conditio ad liceitatem). These *oblige* the state

[26] The structure of this shorter way of signing is: *Country Year/Article.*

official to transcript the bond *on the basis of the act* that had been sent over in the required form, which means that, his/her discretional right has been limited to the rules of the form of sending over, so he/she does not have any discretional right in merit.

2. Transitional type:

The Polish agreement of 1993 which is the first of those stating the *automatically originating* civil effects, establishes the civil effects from the canonical bond, *while* it applies the transcription between the conditions ad validitatem as well. With this duality, this is a transitional, and not a clear structure.

3. Second type:

The agreements mentioning only the secular matrimonial impediments are all composed with an automatic originating rule and they originate from the canonical vinculum.

It is already clear that in the Polish agreement (and the Estonian one which is hanging out in a chronological sense as well), which has a mixed construction, the originating automatism and the clearly objective legal conditions *are going together.*

CONCLUSIONS

As it has been ascertained in both topics, the latter concordatarian legal figures, in both cases, were stronger for the ecclesiastical Party than the earlier ones. This joint statement is even more obvious. Thus, it is a mistake to see it as just a mere extensive growing of the negotiating strength of the ecclesiastical Party. Here, the change of the concordatarian system should be caught in act as well.

ad 1. First type: the mechanism using only the secular legal order:

The earlier 1) bending down verb "*recognition*", 2) that the civil effect does not originate from the canonical legal fact but directly from the fact of the order of the reality, 3) this legal effect is attributed and granted by a sate official, so all these are manifestations of that approach, that here the state legal order is contracting an agreement with a system not qualified as a true, real legal order. As it can be seen, in this concordatarian construction, we can reach from the fact of the reality to the civil effects exclusively through a mechanism originated from the secular legal order, that is to say, we do not need the mechanism of the canon law. Therefore, *here the canon law does not work as a legal order, it does not play any role*, the secular law is doing everything.

ad 2. Transitional type:

The transitional character of the Polish agreement of 1993 is apparent from more facts. As we can see, the Italian agreement and the Maltese one are not conspicuous in the Polish agreement, that the state officer decides on the

possibility of the transcription. However, from the whole phrase, it is evident that the canonical bond becomes effective in the secular legal order by the transcription. The composition already points towards the following section, while the mechanism of the whole norm works as it was in the earlier one.

The Estonian agreement of 1998 according to its time, brings the automatic legal effect, but to this, it makes the transcription as a condition, while the secular norms is not even mentioned. Besides this, it returns to the origin of secular effects from the fact of the celebration (declaration). The whole figure, *as it regards its mechanism,* is obviously a construction before the Italian agreement of 1984. Here the automatic origination of the civil effects is just a question of composition, as "it is automatic if the state official decides so". In this case, it is clear now, that the secular Party did not allow the Croatian-Latvian model.

The Estonian example shows, that the composition of the ad validitatem conditions gives the working mechanism of the legal construction, while the norm of the composition of the attribution is just a question of legal-diplomatic nature. It is not accidental, that the ecclesiastical Party firstly managed to bring the automatism into the agreement, and only afterwards could adjust the composition of the ad validitatem conditions, so that the automatism would really work as well as the Polish agreement shows.

ad 3. Second type: the mechanism using both legal orders:

Whereas, the construction of the Croatian, the Litvanian, the Slovakian and the Latvian agreements is 1) a canonical legal fact comes into being from a fact in the order of the reality *through the mechanism of the canon law,* 2) *which* (the canonical legal fact) *has itself* legal effects on a basis of criteria of the "input (the canonical) legal order".

2.2. Further rules concerning the form of the contraction (conditions ad liceitatem)

Until now the examination of the norms focused on the ad validitatem conditions of the secular legal effects, and now the *ad liceitatem conditions* are examined. These must be observed during the contraction, however if they are not, thereby the secular legal effects come into existence.

2.2.1. Proclamation of banns

The aim of the proclamation of banns is to bring the intention of parties to the community's knowledge, so that who knows a matrimonial impediment, could make it known. In the canon law, the Codex of 1983 does not give any order

on a universal level, but it entrusts it to the local bishop's conferences to make local norms, considering the circumstances.[27]

TEXT ANALYSIS

1. A rule of proclamation is only in the agreements of the first type, and it is not even there in all cases. The last norm of publication is in the Portuguese agreement of 1940, as an ad liceitatem condition. Later, it was left out or defined as an ad validitatem rule (see above Italy 85/4, Malta 93/1).

CONCLUSIONS

ad 1. Ad liceitatem conditions in the cases of the two legal figures:

a) In the case of *the second type,* the first, definitive part of the concordatarian legal construction (meaning the attributive norm and the conditions ad validitatem) the established construction has such a structure, by which *the mechanism "before" the canonical bond* (canonical legal fact) belongs exclusively to the sphere of the authority of the canon law. This means, it is not logical to introduce ad liceitatem elements by the concordat in the mechanism "before" the canonical bond, since it might worsen the possibility of interpretation. Obviously, both Parties can allow to insert, by international agreement, "foreign" elements in that mechanism which is fitted in the authority of its own legal order by the main figure, if this does not hurt the principals of its legal order. This would be a real compromise. As it seems, in the cases of the second type agreements the secular Party did not demand it.

b) It is easy to understand that this condition occurs in case of the *first type.* In this case, however there is not a real compromise, because the state makes the norm of publication obligatory just in its own jurisdiction; the ecclesiastical Party allows only that the state could comment an ad liceitatem condition on an act in face of the ecclesiastical authority.

2.2.2. Instruction of engaged couple

The future spouses must take part in instruction of engaged couple during a determined period, with the aim to study and to become aware of the teaching of the church upon the marriage.[28] There is an other institution in the canon law as well, the *examination of engages,* which is done as a main role by the parish priest according to the place of contraction, in which the legal control takes

[27] CIC 1067.
[28] CIC 1063/2.

place according to the canonical impediments and prohibitions.[29] The text of agreements does not determine the exact time of statements of the secular law.

TEXT ANALYSIS

1. There is not any mentioning,
2. the collaborator reads from the secular code of law after the contraction,
3. during the instruction of engaged couple, the one who conducts the instruction makes it known.

CONCLUSION

ad 1. and 2. First type agreements:

As it seems clearly from the distribution, in the first type of agreements either there is no reference to the information of secular legal effects, or the collaborator explains them after the contraction. It is evident, that it is the secular Party's interest to be arranged this matter well in the legal construction. In the Austrian Agreement of 1933, there is no reference to this, which means the state Party applies that principal of law that the ignorance of law does not release anybody from its authority. The other one is a resolution of compromise. On the one hand the secular norms are made known by the contributor, by a person who is a holy service keeper (and not a state official), on the other hand he merely has to read the secular code of law, in such a way he does not do anything by his own conscious act. By this kind of resolution, the principle remains intact, according to which in case of the secular effect originated from the event the whole legal mechanism is unfolding in the secular legal order.

ad 3. Second type agreements:

a) In case of the agreements fitting in the second type, the situation is different. Firstly, the information takes place before the contract, secondly the person does the instruction of engaged couple who makes known the related secular legal norms as well (and is not simply reading the code of law), i.e. he is carrying out a secular function.

b) One could raise the question, why the secular norm should made known before the contract in the second type agreements. One could argue namely, that from the declaration of consensus, the marriage to the canonical bond is exclusively the canon law active (as it was seen by the publication, in the second type agreements case) and the secular law takes the realised canonical bond as a basis. Just in this case, the information about the secular norms should not be placed before the contraction, since those are not at all effective to this section.

[29] CIC 1067, 1071.

The norm of the instruction of engaged couple in a tight sense allows two mechanisms: 1) two different effects of the sole declaration of matrimonial consensus are originating one at a time in the two legal orders, 2) the originating canonical bond has secular legal effects at the same time as well. In any of these two cases, the parties to be intermarried have to be aware of the secular effects of their legal act. From which of these two is the one (to say the Parties which choose of these) is clear from the composition's form of the concordatarian main figure. It is discernible that *the Estonian agreement has choosen the 1., the other three have choosen the 2.* And as we see in fact, in the Estonian agreement, there isn't any norm of the engaged couple (whereas, all the agreements are less detailed), only in the case of the other three ones.

Relating to the tactics of the Parties, we can point out that the ecclesiastical Party has chosen what we called at the publication's paragraph as a tactics of compromise. The former three agreements have permitted namely to fit in secular legal elements which sphere makes part unambiguously of the canonical legal order. In return for this a valuable gesture has been received: a holy service keeper person is doing a secular function. This is not a problem for the secular Party, because that person is a citizen of it.

2.2.3. Invitation of an official of the state

TEXT ANALYSIS

1. The Colombia 42/6 shows the whole form, which is explainable on its own. To explain the Spain 53 Add. Prot. 23 No. 1. we need the main rule in the former agreement of 1941, which still has the authority and the interpretation of which is this.

CONCLUSIONS

ad 1.

a) As a requirement, the presence of a state official at the contract is attached to the first type structure. This enforces the statement that these agreements are really originating the secular legal effects to the event. It is obvious, that in case of the other main figure this would not have any reason, because if the concordatarian figure attaches the legal effect to the canonical bond, the ensuring of the event belongs exclusively to the authority of the canon law.

b) The aim from the part of the secular Party could be to ensure and control the existence of the declaration of the consensus. The interest of the ecclesiastical Party is to weaken this element, which presses the omission of the consideration of the canonical legal order. Some danger also existed that those, who were present at the contract and obviously did not understand the

sovereignty (independence) of legal orders, could feel, that the state official being present at the contract had some role during the establishing of the canonical bond. The ecclesiastical Party had to avoid all sorts of misinterpretations, this has a question of principle, and therefore we do not find such a role in any of other agreements. This role in this agreement is showing the secular Party's force.

2.3. Rules of administration

2.3.1. Rules ad liceitatem of transcription

TEXT ANALYSIS

The certain agreements attribute different importance to transcription as it follows:

1. it is included in the ad validitatem rules: (see there)
   a) and *includes* rules that do not touch upon validity as well
   b) there is no further regulation (Polish 1993)
2. the agreement does not rule it:
   - entrusts it to the secular law (Croatian 1996/13 No 2, Slovakia 2000/10 No 1, Latvian 2000/8 No 2)
   - appoints a further agreement (Lithuania 2000).

CONCLUSIONS

ad 1. First type agreements:

a) Most of the first type agreements besides the ad validitatem rules of transcription include ad liceitatem rules as well. These norms are to be explained as they regard the working mechanism of the legal figure like that of proclamation, in the first type of agreements.

By the first type agreements the secular effects were originating by the transcription, i.e. it was an interest of the ecclesiastical Party to regulate the transcription. The correct ruling of the transcription in the agreement could ensure that the contracts would gain their secular effects. It is obvious, the interest of the ecclesiastical Party was that the transcription would not be an ad validitatem condition (as it was previously seen), however *ad liceitatem should be regulated in such a detailed manner as it was possible.*

b) The Polish agreement of 1993 does not include such a norm. Therefore it may be concluded that it was present in the secular law or it was regulated after contracting the agreement. Hereby this agreement is a transitional one between the two types.

ad 2. Second type agreements:

In this type, the transcription is regulated out of the agreement, or in the secular law, or they promise a future non-international agreement. The importance of the question is not so grave for neither Parties to put into the agreement. In this type, if a canonical bond does not have the secular registering, it is only a registration problem, to be corrected easily afterwards. But if the registration is missing in the earlier type, it means that the state has not recognised the bond.

2.3.2. Coming into force of the secular legal effects

CONCLUSIONS

ad 1. "from the date of its celebration":

During the period of the first type agreements, the evolution of the norm is showing that the negotiating power of the ecclesiastical Part is slightly gaining strength. The early norms relating the pure rules (which is in the Columbia's agreement of 1973 Prot. fin. 4.) are slightly restricting; in the end of the period the Italian agreement of 1984 shows extension.

The structure of the first type agreement shows that if the agreement does not say it explicitly that the secular effects are valid from the date of the bond, then it can be interpreted that it is valid from the date of the transcription, because (in this model) the secular legal effect comes into being by the transcription itself, i.e. the appearance of this phrase in the agreement means the retroactive extension of the secular legal effect by the period before the transcription (to say from the bond). It is palpable from the wording of the notes of Columbia agreement of 1942 that it consciously emphasizes the retroactive extension of the transcription.

ad 2. "from the moment of its celebration":

a) About the end of the period of the first type structure, in the agreements of Italy, Malta and Poland not the date but the moment of the bond is fixed in the text as a beginning of the terminus. This change of wording has not got any legal consequences because whole days are counted in all legal orders. This is rather only a wording difference, which just turns the wording style in that direction that it more emphasizes the bond itself. Therefore, it is preparing the way to that structure, in which the secular legal effect comes from the bond itself. It is obious, that this modification has taken place by the proposal of the ecclesiastical Party.

b) In the case of the second type structure (Croatia 96/13, Lithuania 2000/13, Latvia 2000/8) the explanation is not easy, because the canonical bond itself is empowered by the secular legal effects, which means that the origination of the secular legal effects is also bound to the existence of the canonical bond, so the

time of secular legal effects automatically derives from this. Thus, it is just tautology, in this case the term could be simply omittable. Thus the Slovakian agreement of 2000 does not contain it any more.

2.3.3. Deferred transcription

The legal reason of presenting the possibility of the deferred transcription in agreements is that the concluded canonical marriage, by all means, obtain its secular legal effects, i. e. the concordatarian intention would not fail by an administrational error.

CONCLUSIONS

ad 1. The deferred transcription occurs in the case of the *first type* agreements (except the Polish agreement of 1993). This is reasonable because in the second type legal figure it does not have any grave reason. Seeing that the concordatarian law binds the secular legal effects to the existence of the canonical bond, so whenever its administration can happen it has not got an effect on the force of secular legal effects.

It is clear that it was the ecclesiastical Parties' interest to present this rule in the agreement and in the first type structure (in the weaker for the ecclesiastical Part) it indicates its relative force.

ad 2. In the first agreement among the *second type* agreements (Poland 93/10) it is still there, but the criteria are already relatively lax, so the deferred transcription is possible practically unlimitedly. Afterwords there is no ruling on this. In the case of the marriages bound under the regime of these agreements the interest of the matrimonial parties is that the transcription has been done, because this is how one can refer to it in the presence of the secular legal forum (albeit the secular legal effects are existing).

It is worth noticing from a diplomatic point of view that the complex entireties of the rules connected to the transcription in the Italian agreement of 1984 are the strongest. The fact is surprising because this agreement has been bound firstly with Italy, secondly with a Christian democrat government.

2.3.4. The effect of death to the transcription

This point can be strange at first sight, since all matrimonial bonds come to an end in all legal orders if one of the matrimonial parties dies. So in this case the matter in issue is the deferred recognition of a matrimonial bond existed only in the canonical legal order. It is true, and it can be explained since there is a

legal interest of the living party to the past existence of the past marriage, and there is also the right of children (e.g. their legality, right of inheritance, etc). Furthermore, in the last case it needs the possibility to make the marriage valid in the case of death of any of the parties.

An other reason, not so much practical rather peculiar to the treating force of the representatives of legal orders is, that by including the possibility of the subsequent convalidation the ecclesiastical Party takes an other step towards making the *bond* accepted (more precisely in that time the declaration of matrimonial consensus) as a more objective entity and making the way of understanding weaker as a "pure ceremony" (which is conspicuously inaccurate).

2.4. Suit law

The church's legal claim for judgement in matrimonial cases has been canonised firstly on the Council of Trident.[30] The legal claim refers here not only to the sacramental aspect of the matrimony but generally, as a whole.[31] We could expect that in the time when the single secular states have created their own matrimonial law, those have been competing with the ecclesiastical jurisdiction. But the church did not consider it in this way. It did not hurt the church's legal claim because 1) the marriage bond on the base of the secular state's law is a non subsisting legal act from the church's viewpoint, and obviously it does not violate the church's legal claim if the state judges upon a legal act constructed by itself, 2) when earlier the ecclesiastical court judged on the non-sacramental consequences of the bond (inheritance, children's legality, etc.) it came about because the profane legal order did not cover the whole issue of human's life, so the church did not find the withdrawal from this area injurious.

It is a general principle and is held by all legal orders that a legal fact is judged on the base of the law of that legal order and is judged that a legal forum has to come into existence. Interstate agreements take this as an axiom and if they depart from it they must be regulated explicitly. The church's above-mentioned behaviour shows that the church considers the ecclesiastical and secular matrimonial laws living side by side on a base of 1) the legal orders independency and 2) the principle that the canonical and the secular legal orders' relationship is ruled by international public law. This behaviour made it possible that after the wave

[30] Concilium Eocumenicum Tridentinum, Canones de sacramento matrimonii, Sessio XXIV, canon XII, 1563. XI. 11, in: Alberigo–Jouannau–Leonardi–Prodi: *op. cit.* 731.

[31] Repeats the legal claim: Leo XIII., Litt. Enc. *Arcanum*, 1880. II. 10. in: *Acta Sanctae Sedis*, (1879–1880), 392.

of separation, the question could be easily managed on the base of international law.

As we have seen there are two ways to establishing the secular legal effects. The *first type agreements* are recognising the ecclesiastical declaration of matrimonial consensus by a legal act in the secular legal order. Therefore, this legal act is in the secular legal order and will be judged in that way. In the *second type agreements* the situation is twofold: the canonically formed declaration of matrimonial consensus (ecclesiastical celebration) causes the canonical matrimonial bond and *this causes* the secular legal effects as well. So it is clear, that the matrimonial *bond exists in the canonical legal order* hence it is to be judged in that way, while its secular legal effects are in the secular legal order, and the secular forum is to judge upon them. This principle just succeeds in such a clear way in the case of the Polish agreement.

2.4.1. Theological elements

In certain agreements some elements of the church's teaching upon the marriage appear. In the earlier agreements this has taken place according to a formula, and the single agreements hardly differ from each other in the formulation of this term. The first phrase of this formula is a self-evident statement, because if the parties are contracting the marriage on the base of the canon law, it is morally evident that they consider these rules obligatory on settling its further legal effects before the secular forum as well. The presentation of the theological principles in agreements is in the order of the ecclesiastical Party to make this evidence more obvious. It is clear that this is related to the order of matrimonial suits, so it is worth dealing with it in the part of the suit law.

CONCLUSIONS

ad 1. First type agreements:

a) In this case the situation is complex because of the mechanism. Here the secular effect comes into force by the decision of the registrar, so the only declaration of the matrimonial consensus causes the canonical bond and its analogue appears also in the secular legal order. The secular court has obviously an exclusive jurisdiction upon this, while upon the canonical bond the ecclesiastical court has the exclusive jurisdiction. This is the reason why the ecclesiastical Party has inserted into the agreement a part which reminds the parties to be married of their canonical duty. Such a way, it makes a legal effect to the canonical norm, which is sensible for the state as well, while this effect does not have any enforceability of the secular legal order itself. So this norm is rather only a commission without a sanction but the willingness of the

ecclesiastical Party is perceptible that upon the marriages bound according to the canon law the ecclesiastical forum could judge in an effective way.

b) From the Spanish agreement on it is not said that the parties to be married renounce the right for divorce but with the mentioning of the church's teaching in the agreement, the secular Party knows about it. Anyway, it is not explicit, and from the Spanish agreement on it is important for the secular Party. In this time such a definition appears on the main figure of suit law, which does not preclude the possibility of the jurisdiction of the of secular forum upon bound marriages according to the canonical form (cf. chapter of Delimitation of the jurisdictional competences).

The above mentioned ambition of the ecclesiastical Party is failed, and it does not succeed either afterwards, which shows the secular Party's force in these agreements.

ad 2. Second type agreements:

The form of the Polish agreement is substantially deferring from the earlier ones, because the rule in these is not related to the parties to be married, but the contracting Parties incure an obligation which means here the commitment of the Polish State. This norm does not strictly create law, it is just a declaration of an intention. Nota bene it is a declaration of intention related to a concrete ecclesiastical teaching, which is imaginable only in the post-modern time; national liberalism in the 19th century would not have had it. Phrases like this are even more frequent in the recent agreements.

2.4.2. Provision of legal force for the adjudication of the ecclesiastical forum

There are two possibilities for this: the delimitation of the jurisdictional competences *or* the provision of secular legal force for the decisions of the ecclesiastical forum.

2.4.2.1. By delimitation of the jurisdictional competences

This main figure of the suit law, in chapter 2.4.2.1.1. will demonstrate the transfer of the legal effect of the judgement of the ecclesiastical court in the secular legal order.

TEXT ANALYSIS

1. It compels the contracting Parties:

a) The most evident way of this approach is, that the Parties declare in the agreement: the ecclesiastical court has the jurisdiction to judge upon the fact of a canonical marriage, the state by the same time takes on that its court declares itself not competent if somebody enters an action by this legal title.

b) he above mentioned principle (legal facts are judged in that legal order in which they have come into existence) can be found in the clearest form in the Polish agreement of 1993.

2) It compels the matrimonial parties:

The other way of approach in codification is when not the contracting Parties but the matrimonial parties are obliged by the norm. Such shaped norms (Spanish 79/6, Malta 93/4 No. 2, Dominica 54/25 No. 2) are all including theological elements as well, as it was seen earlier.

CONCLUSIONS

ad 1. The "recognise" phrase in the Austrian agreement of 1933 just means that the ecclesiastical court is competent, but does not preclude that of the secular court. However, the intention of the contracting Parties that the legal orders should be clearly distinguished is evident from other parts of the agreement, so it is just a lack of precision in wording.[32] Agreements after the Austrian treaty have already eliminated this possibility of misinterpretation. The "exclusive competence" and the "are reserved" phrases are equivalent (only the ecclesiastical court is competent to judge upon it), so they are not variations.

The Maltese agreement of 1993 mentiones the competence of the ecclesiastical forum only, and leaves out the exclusivity, and as it will further be evident, the Parties do not interpret it exclusively as well. This formula is similar to the Austrian one of 1933, but the context interprets it right in the opposite direction.

ad 2. The conception of structuring the norm which *obliges the matrimonial parties* reinforces and extends the obligations in the canon law such a way that these would not be infringable using the other way of thinking of the secular law. This confirmation is obtained by mentioning the theological teaching about the sacrament of marriage, which makes the base of the canonical matrimonial law in the agreement. One can see that the Spanish agreement of 1979 and the Dominican one of 1954 which contain the renunciation and the theological teaching together are drafting loosely here, and the Maltese agreement of 1993 makes the parties to be married renounced here, namely written. Now here is the reason of legal relevance of mentioning the theological terms.

The *mechanism* here is theoretically double: 1) the parties to be married by the celebration itself (ipso facto) or separately, in a written form renounce the right to ask the divorce from the secular court, 2) the state Party is not allowed to receive a legal action which is conflicting with the agreement signed by

[32] "Ecclesiastical and secular courts ought to provide for each other legal aid *all on its own jurisdiction's field.*" Austria 1933/7. 5. §.

itself. In wide sense, this way of approach obligates the secular court as well to reject the legal action.

The situation is not so clear if we have a closer look at it. Among these three agreements only the Spanish one of 1979 does not contain either in the theological part, nor here that the parties take on by the celebration itself they will not ask the divorce. The Italian agreement of 1984 belongs to this category as well. It does not contain any explicit phrases about the delimitation of competences. Both agreements are restricting themselves and refer to the catholic teaching, which is laying emphasis on maintaining the jurisdiction upon spiritual goods to the ecclesiastical forum. This is, as I see, too lax a role to obligate effectively the state Party to reject the legal actions. It seems too lax especially looking at the Maltese agreement of 1993. This contains a reference to the renunciation of parties in one place, and in an other place, however, it refers to an earlier sentence of the secular court based on a caput nullitatis (grounds of nullity), which is not opposite to the caput nullitatis of the sentence of the ecclesiastical court. Thus such things, in fact, can be found despite of the explicit mentioning of the renunciation. Therefore, it does not necessarily follow mean that the secular Party would take on the reject of legal action if the agreement contains the parties obligating renunciation.

2.4.2.1.1. Attribution of the secular legal effects

TEXT ANALYSIS

1. In the procedure of the first group, the sentence will only be communicated and the secular court declares the secular legal effects. This is the same way as it was in the case of the automatic method of legal effects (second type).

2. In the other group, the secular court has a real sphere of authority of examination, in merits. This is parallel to the recognisional way of transfer of the matrimony. In the Spanish agreement of 1979, the aspects of the examination are undefined in detail, in the Italian one of 1984 and in the Maltese one of 1993, they are all enumerated in a taxative way.

CONCLUSIONS

ad 1. The Spanish agreement of 1953 is using a special way of procedure: to reach the secular legal effects in the future this role makes it obligatory, that during the ecclesiastical suit procedures one of the parties asks the secular court to regulate the future secular effects of the ecclesiastical sentence. It is disquieting whether the two procedures authority personals mutual influence could be eliminated.

ad 2. The Spanish agreement of 1979 is the strongest one from the state Party's viewpoint. The guidelines are undetermined and it allows the secular court to examine the case in a wider scale, since it is possible to rehear the case in its merits as well, or, at least, the criticism of the sentence.

The Italian agreement of 1984 and the Maltese one of 1993 enumerates all the competences of the secular court; it cannot examine either less or more. Both agreements make sure the right of defence of the parties and the examination of the competence of the ecclesiastical court. It is evident, that the secular court claims the right of the examination of defence, but the examination of the competence of the court could be rather strange. It means namely that the secular court demands an account of the application of a canonical norm. This can be an interesting precedent under the aspect that the secular forum can adopt canonical norms (as it is a practice that the ecclesiastical forum adopts the norms of the local secular laws).

It is furthermore appearing from the detailed enumerations that both the Italian agreement of 1984 and the Maltese one of 1993 were discussed for a long time and they are results of a compromise. E.g. the Italian agreement deals with the decision made by the ecclesiastical court *as a foreign sentence*, which shows the ecclesiastical Party's force. This is albeit a theoretical question, because it does not generally cause the secular legal effects of ecclesiastical courts with other decisions brought in other cases, it only relates to matrimonial sentences. However, it is sure, this term was not used in other agreements before, and this is the first appearance of this way of thinking. The Maltese agreement contains a phrase, that the secular court cannot examine the sentence in merits, which means a relative force in this agreement-group. Re-examination of the merits is possible on a basis of the Italian and the Spanish agreements, which show the secular Party's force in these agreements.

The fact that the Maltese agreement is a solution of compromise is apparent also from the phenomenon that the validation of the secular effects of resolutions of dispensation (i.e. a decision made by a dicasterium of the Holy See, so this is not a local ecclesiastical court's sentence) is reduced to formal, so the importance of the diplomatic hierarchy is high in this case.[33] In this agreement, there is a pair of rules, which is unknown in others. This pair of rules says that on the one hand a secular court is not allowed to receive a legal action under such a legal title on which ecclesiastical court has already brought definitive sentence, on the other hand a secular court of appeal is not allowed to declare

[33] "The *Highest Court* orders the *recognition* of the decree if it is about a matrimony bond *according* to the Catholic Church's *canonical norms*." Malta, 1993/7.

secular legal effects for such a definitive sentence of an ecclesiastical court whose legal title was already used by a sentence of a secular court. This pair of rules is apparently asymmetrical, since the secular court is not allowed to deal with it at all, but the ecclesiastical one can, but it will not have any secular legal effect. This sort of solutions shows the ecclesiastical Party's force.

It is worth mentioning with regard to the Maltese agreement, that its figure (structure) uses too much instruments, so it is too complex and rather difficult to interpret. This is not conductive to the legal security. In shaping up the figure there is a phrase delimitating jurisdictions (obligates the contracting Parties), the another one which obligates matrimonial parties, and although both (separately as well) are to be interpreted that the secular court does not have any jurisdiction, however it takes it into consideration elsewhere. This agreement does not seem to be the most excellent one from this point of view, but there are shortly drafted, axiomatically formulated phrases, which can help the interpretation of other agreements.

2.4.2.2. Providing secular legal force for the adjudication

The *main figure* of the suit law in this group is *implicit*. There is not any formula of recognition, only "the sentences and the decisions are communicated".

TEXT ANALYSIS

1. The Maltese agreement of 1993 is a transitional form: beyond the delimitation of jurisdiction, there is a new element, the recognition of the sentences and of the decisions of dispensation.

2. In the Croatian, Slovakian and Lithuanian agreements there are not any delimitations of jurisdiction, so the question is ruled only by the transcription of decisions.

COCLUSIONS

ad 1. It would be the ecclesiastical Party's aim to make this rule present, and it might want to shift it towards a new structure of agreement. This is supported by the tendency that the agreements following it use only the recognition of the decisions.

ad 2. The new formula is the clearest in the Croatian agreement of 1996. The decisions are communicated to the secular Party and are validated by its court. There might be some difficulties in the interpretation of their wording. The term "put into effect, adempimento" on the one hand stresses that the secular court does not have any right of examination, on the other hand the "according to the legal norms of the Republic of Croatia" term could mean that it has a right of examination, whether the sentence is according to the practice

of the secular administration of justice. As I see it is not the point in this case, but it has to be interpreted together with the 9§ of the Maltese agreement of 1993, which contains a more unambiguous rule: on its merits, the secular court cannot intervene in the ecclesiastical sentence, but its further secular effects (which can be rather complicated) has to shape up according to the law of the Republic of Croatia.[34]

The formula in the Lithuanian agreement of 2000 is not so clear, because instead of the "put into effect" there is the more active "regulates", however this activity is to be restricted, according to the above-mentioned things, to the further effects of the ecclesiastical sentence.

The mechanism of the Slovakian agreement of 2000 at the first look seems to be the same as that of the Lithuanian one. It can cause some difficulties that cannot be found in any of the earlier formulas before the administrational rules of transfer by which the Parties attached secular legal force to the ecclesiastical sentences and decisions by the agreement. But these phrases, without a main figure, can have a totally different meaning. In this form, they mean that the sentences are communicated to the Slovakian state and it decides about the taking over as it likes. In fact, if an ultrapositivist Slovakian judge looks at this text, he/she might easily say this. But why this matter is there in the agreement since the Slovakian state, after a legal supervision, can take over whatever decisions are made in a foreign legal order without any international agreement. As I see, the *mere mentioning* of the administrational rules of transfer in the text means that *the concordatarian intention of the Parties* was to agree upon the transfer of the ecclesiastical sentences. Consequently, *there is* the earlier main figure (implicitly) and in such a way, the whole regulation works in fact as it can be seen in the case of the Lithuanian agreement of 2000: the secular judge cannot interfere, on its merit, in the decision of the ecclesiastical court, and his/her activity is limited to the attachment of secular legal effects to the sentence.

To sum it up, the following can be ascertained:

1. the recognition of the decisions of the ecclesiastical forum is clear from the concordatarian intention,

2. this recognition is full-scale, namely it does not only extend over the sentences of nullity, but over the peculiar decisions of ecclesiastical suit law (like privilegium paulinum, dispensatio super ratum, etc.). This shows the treating force of the ecclesiastical Party.

[34] "... the secular legal effects are *regulated by secular laws*." Malta, 1993/9.

3. The secular forum must take over these decisions without a right of pondering, on its merit, and it must formulate the legal consequences according to its own legal order. This shows the treating force of the ecclesiastical Party.

4. The lack of the delimitation of jurisdictions, the secular forum (in its own order) can divorce married couples (which does not have any interference with the ecclesiastical legal order). This shows the treating force of the secular Party.

2.4.3. Tendencies in the suit law

Summing up it can be ascertained, that the unequivocal direction cannot unambiguously experienced in the suit law which could be seen in the case of the secular legal effects validation of the ecclesiastical marriage, namely in the rising of the ecclesiastical Party's treating force.

1. The competence of the secular forum:

a) Until the Columbian agreement of 1973 the norm shaping up the main figure was built on the delimitation of jurisdictions. In that time, all agreements were precluding the jurisdiction of the secular forum, which shows the ecclesiastical Party's force.

b) From the middle of the 1970s, the secular Party insists on the right of judgement upon such a matrimonial bonds. Hence, after the Spanish agreement of 1979 only the Polish one of 1993 contains exclusive ecclesiastical jurisdiction, in the rest of the agreements the secular courts have jurisdiction as well, which signs the secular Party's force.

2. Concerning the coming into existence of the secular legal effects of the sentences of the ecclesiastical court the tendency is complex:

a) Until the Columbian agreement of 1973, it is practically an administrational procedure after a canonical supervision, which takes place before the publication of decisions.

b) In the middle of the '70s there was a change in this respect as well: the secular court received the examinational right. This is the case in the Spanish agreement of 1979 (here the secular court can intervene in its merits as well), in the Italian one of 1984 and in the Maltese one of 1993 (formal examination on the base of canonical and secular law).

c) In the newest Croatian, Latvian, Slovakian and Lithuanian agreements this question is not ruled, because the main figure of suit law is defined such a way that the sentence of the ecclesiastical court on base of the agreement itself (ipso iure) has secular legal effects, the task of the secular court is only to endow it with content (property rights, etc.) according to the secular law.

It can be seen, that the change of the mechanism occured in the suit law approximately at the same time, after the beginning of the '90s, when it was

in the matter of the contraction as well. The takeover of the decisions of the ecclesiastical forum became automatic too, but the ecclesiastical Party renounced the exclusivity of the jurisdiction.

3. Summary

In this essay I have set the aim to examine the matrimonial parts in the Holy See's international agreements, and to show characteristics and tendencies in them. I have chosen from the agreements the parts with the same functions and I have compared their legal structure, their legal terms, and their technique of codification. The legal analysis can and should be examined in the context of history, concerning cultural circles, history of politics, etc. This makes on one hand the examining system more compound, on the other hand it helps to find the legal characteristics from outside of law.

Norms concerning matrimonial law can be found on the one hand only in a smaller part of agreements, on the other hand the relating chapters are generally not too long. This provides the possibility for a detailed text analysis, in which I practically presented the whole relevant legal material, and *I examined it entirely and in detail.*

CONCLUSIONS

1. During the examination I came to the conclusion, that in the early and late agreements two different main figures (models) were used. In the case of the first model, the Parties agreed, that the secular law would attribute to the fact of the ecclesiastical matrimonial contraction (celebration) the legal effect of the secular matrimony. In the second model, the concordatarian law itself attributes secular legal effects to the canonical bond (vinculum matrimoniale) which has come into existence in the celebration (declaration of the matrimonial consensus). In the first case besides the mechanism of the canon law the secular law was working as well (both in their own legal order), in the second case *the mechanism of the secular law has been built upon the result of the canon law's mechanism.* By this, not only the canonical contraction is recognised by the agreement, but the canonical matrimonial law as well.

2. This change (after the beginning of 1990s) of the main figure in the suit law can be observed as well. The takeover of the decisions in the ecclesiastical forum became here automatic as well, and from the sentences of nullity it extended to the declarations of dispensatio as well.

* * *

As it is discernible from the examination, the newer type of the concordatarian treaties, containing matrimonial law, was *stipulated by turns with the countries of Eastern-Central-Europe*. The reason for that is that these countries considered to re-establish their relations, interrupted after the World War II., with the Catholic Church as an important part of their social transition. It is characteristic that *the matrimonial sections constitute more and more a constant part* of the treaties stipulated with the Holy See of these transitional countries. A few years ago a possible stipulation of a treaty containing such a part regarding Hungary came up as well.

4. Appendix

Numbering of chapters in the Appendix (after a "A") follows *that in the main text.*

A.2.1. The attribution of the legal effect

A.2.1.1. The legal effect's establishing norm

FIRST TYPE agreements:

Italy 1929/34	"The Italian State *recognises* the secular legal effects of the sacrament of marriage provided by the canon law"

Austria 1933/7, Italy 1984/8	"The Republic of Austria *recognises* the secular legal effects of marriages contracted in accordance with the canon law."
Portugal 1940/22, Spain 1953/23, Colombia 1942/4, Dominica 1954/15, Spain I. 1979/6, Malta 1993/1	"The Portuguese State *recognises* the secular legal effects of marriages celebrated in accordance with the norms of canon law."

SECOND TYPE agreements:

Poland 1993/10	"... the catholic marriage *brings about* the effects of the marriage bond provided by the Polish law."
Croatia 1996/13, Latvia 2000/8	"The canonical marriage ... *produces* the legal effects by the law of the Republic of Croatia."
Estonia 1998/8	"Marriages celebrated in the Catholic Church, [...] *have* civil effect."
Lithuania 2000/13	"A canonical marriage *will have* civil effects pursuant to the legal acts of the Republic of Lithuania"

Slovakia 2000/10	"The marriage contracted in accordance with the Canon Law ... *has* on the territory of the Republic of Slovakia the *same force and the same legal consequences* as it has the marriage contracted in accordance with civil form."

A.2.1.2. Conditions of the secular legal effects (conditions ad validitatem)

2. just the TRANSCRIPTION:

Portugal 1940/22	"provided that *the act of the marriage* is carried over the competent authority of the secular state"
Colombia 1942 notes	"... the *registration* of the competent civil registry office will be a necessary condition that the catholic marriage reach civil legal effects"
Spain 1953 Additional Protocol 23.	[to recognise the civil legal effects] "... will be sufficient that the contraction of the marriage would *be written into* the competent civil registry"
Colombia 1973/7	"To the validity of this recognition the competent ecclesiastical authority hands the copy of the act over to the competent functionary of the State who *has to send a note* to the civil registry."
Spain I. 1979/6	"To the complete recognition (of marriage) the *registration* into the civil Registry is necessary ..."
Estonia 1998/8	"[have civil effect] upon *registration* and for which a certificate of marriage has been issued by the civil registry office [...]"

3. transcription AND to meet civil legal requirements as well:

Italy 1984/8	[are recognised] *with condition of*: 1. *is transcripted*, 2. previous *publishing the banns* at the local authority, *the transcription is not possible if*: 1. lack of age according to civil laws, 2. no remedy impediment according to civil laws,
Malta 1993/1	1. " [... are recognised ...] provided that: a) it clearly appears from a certificate issued by the Marriage Registrar that the banns required by civil law have been published, or that a dispensation from the same has been granted; such certificate shall constitute definitive and conclusive proof of the regularity of the banns or of the dispensation therefrom; b) the Parish Priest of the place where the marriage was celebrated transmits an original of the act of marriage to the Public Registry compiled in the form established by common accord between the Parties, and signed by the local Ordinary or the Parish Priest or their Delegate, who has officiated at the celebration of the marriage. 2. The Holy See takes note that the Republic of Malta recognises

	the civil effects of canonical marriages where no spouses and *impediment* exist which can cause the nullity of the marriage and that the stated civil law considers it as mandatory or not dispensable."
Poland 1993/10	[brings about the effects] *if*: 1. no *impediments* between the parties according to the *Polish law*, 2. "they unanimously *manifest* their *intention* willing to trigger such effects, 3. it *is transcripted*"

4. just to meet CIVIL LEGAL REQUIREMENTS:

Croatia 1996/13 Latvia 2000/8	[produces the legal effects] *if*: "there are no civil impediments between parties to the contract and they meet the requirements stated by the laws of the Croatian Republic."
Lithuania 2000/13 Slovakia 2000/10	" [will have civil effects ...] *provided* there are no impediments to the requirements of the laws of the Republic of Lithuania."

A.2.1.3. The joint examination of the establishing norm of the legal effects and the conditions ad validitatem

Colombia 1942 notes	"...the State has to write into the civil register that canonical marriages, whose act was handed over in the adequate form by the competent ecclesiastical authority."
Colombia 1973/7	"...the competent ecclesiastical authority hands over the authentic copy of the Act to the competent official of the State who has to transcript it into the civil register."

A.2.2. Further rules concerning the form of the contraction (conditions ad liceitatem)

A.2.2.1. Publishing of banns

Italy 1929/34, Portugal 1940/22	"The *publishing* of banns [...] has to take place beyond the parish *at the local authority*."
Portugal 1940/22	"It is allowed to contract the marriage *without the previous publication of banns* in danger of death, in case of imminent birth and the explicit authorisation of the ordinary because of grave moral motive."

Austria 1933/7	"These marriages (banns) are to be pubished according to the canon law. The Republic of Austria reserves the right to order the secular publication as well."
Colombia 1942/4	"The publication of a catholic marriage (banns) will be in the form prescribed by the canon law; but the State can order the

	secular publication as well and, to the same aim, the parties to contract are obligated to inform the competent official about their intention to contract a catholic marriage."

A.2.2.2. The instruction of the engaged couple

Italy 1929/4, Colombia 1942/8, Italy 1984/8	"The parish priest immediately *after* the celebration explanes to spouses the secular legal effects, reading the adequate articles to the parties treating the rights and obligations of spouses of the secular code of law."

Croatia 1996/13, Poland 1993/10 No. 2., Lithuania 2000/13	"The preparation of a canonical marriage *includes* the explanation of the future spouses the teaching of the church about the dignity, the unity and the undissolubility of the sacrament of the marriage as well as the civil legal effects of the bond of marriage according the laws of the Republic of Croatia."

A.2.2.3. Invitation of an official of the state

Colombia 1942/6	"For the effects in the Civil Register the State can order, that *one of its officials* would present at the religious celebration, however in no case the presence of the said official is necessary that the marriage produces legal effects."
1942/7	"Before the celebration the priest who will assist *requires* authentic copy of parties that certifies that the Civil Regiter's authorized *official is invited* to day, hour and place to the ceremony. *Forbear from requiring inviation of* the official is possible in case of marriage in articulo mortis, on missionary territory if the place of celebration is farther than 20 km from the residence of the official."
Spain 1953 Add. Prot. 23. No. 1.	"In no case the *presence of state official* to the celebration of canonical marriage will be considered as a necessary condition to the recognition of civil effects."

A.2.3. Rules of administration

A.2.3.1 Rules ad liceitatem of transcription

Italy 1929/34	"[The parish priest after the celebration ...] issues the marital act whose entire copy in 5 days should be handed over the local authority to be transcripted into the civil states's register."
Colombia 1942/8	"Aftermath the parish priest or his delegate, the parties, the witnesses and the state official subscribe the act in 2 copies. One of them the parish priest hands over to the authorised state official of the Civil Registrar in 6 days after the contraction."

Portugal 1940/22, Italy 1984/8, Malta 1993/2,	"The parish priest in 3 days hands an entire copy of the act of marriage over to the competent office of civil registrar for transcription; the transcription has to be carried out in 2 days and the competent official on the following day of the transcription declares it to the parish priest indicating the date of transcription."
Spain I. 1979/6	"[the recognition of secular effects] ... which is realised by the *simple presentation* of the ecclesiastical certificate of the existence of the marriage."

Croatia 1996/13 No. 2., Slovakia 2000/10, Latvia 2000/8	"The *way* and the until time to be registered in the civil register a canonical marriage is prescribed by the adequate *law of the Republic of Croatia*."
Lithuania 2000/13 No. 2.	"The time and manner of recording a canonical marriage in the civil register shall be established by the competent authority of the Republic of Lithuania, in co-ordination with the Conference of Lithuanian Bishops."

A.2.3.2. Coming into force of the secular legal effects

Portugal 1940/23, Spain 1953 Add. Prot. 23. No. 4.	"The marriage produces all its civil legal effects *from the date of its celebration* if the transcription takes place within 7 days. If does not, it produces effects to a third person only from the date of its transcription."
Colombia 1942 Notes	"the catholic marriage does not produce civil legal effects *from the date of its celebration* unless through the writing into the competent civil register."
Colombia 1973 Add. Prot. 7.	"The civil effects of the properly transcripted catholic marriage come into force *from the date of the celebration* of the declared marriage."

Spain I. 1979/6	"The civil effects of the canonical marriage come into existence *from the moment of the celebration*."
Italy 1984/8	"The marriage has civil effects *from the moment of the celebration*, even if the state official because of whatever cause has been late with the implementation of the transcription."
Mata 1993/1, Poland 1993/10	"[The civil effects are recognised ...] *from the moment of the celebration* [...]"

Croatia 1996/13, Lithuania 2000/13, Latvia 2000/8	"[The catholic marriage ...] *from the moment of its celebration* [produces the civil effects ...]"

A.2.3.3. Defered transcription

Spain 1953 Add. Prot. 23. No. 2.,	"The transcription of a catholic marriage which has not been recorded into civil registers immediately after the celebration,

	is possible to be implemented at any time and at the request of anybody of parts or who has a legitimate interest."
Colombia 1973 Add. Prot. 7. No. 1.	"To do this the presentation of an authentic copy of the ecclesiastical act will be sufficient."
Italy 1984/8	*The deferred transcription is possible if:* – at the request of both parties or of one of them with the other's knowledge and without his/her opposition, – both remain uninterruptedly in independent status since the marriage, – third party's legally obtained interests are not damaged.
Malta 1993/2	"Should the transmission of the act of marriage not be effected within the established time limit, it shall be the duty of the Parish Priest to effect the same as soon as possible. The spouses, or either of them, always retain the right to demand such transmission. *Late transmission* shall not be an obstacle to transcription."
Poland 1993/10	"[in 5 days ...] this *deadline becomes extended* if has not been observed because of a vis maior until its end."

A.2.3.4. Death's effect to the transcription

Portugal 1940/23, Spain 1953 Add. Prot. 23. No. 3., Colombia 1973 Add. Prot. 7. No. 1.	"Death of one or both of the parties *does not hinder* the transcription."

A.2.4. Suitlaw

A.2.4.1. Theological elements

Portugal 1975 Add. Prot. I., Portugal 1940/24, Dominica 1954/15 No. 2.,	"The spouses with the celebration itself of a catholic marriage *assume responsibility* in face of the Church *for adher to* the regulating canonical norms, particulary to the essential attributes. The Holy See reinforces the teaching of the Catholic Church about the indissolubility of the bond of the marriage, remind the spouses who have contracted a catholic marriage of the heavy duty concerning them, not to use their civil faculty of the request of the divorce."
Spain I. 1979/6 No. 3., Poland 1993/11	The same without the last clause.
Italy 1984/8	"[...] the Holy See considers it necessary to *reinforce* the unaltered worth of the catholic teaching about the marriage and the encouragement of the Church for the dignity and the worth of the family, the basis of the society."

Malta 1993/4 No. 2.	"The Church shall enlighten prospective spouses about the specific *nature* of canonical marriage and, [...]"

Poland 1993/11, Slovakia 2000/11	"The Contracting Parties manifest they will *cooperate* for defence and to respect the institution of the marriage and the family, basis of the society."

A.2.4.2. The provision of legal force for the decisions of the ecclesiastical forum

A.2.4.2.1. By delimitation of the jurisdictional competences

1. Compels the contracting Parties:

Colombia 1942/9, Colombia 1973 Add. Prot. 8.	The cases of nullity, of dispensation from marriages rato et non consummato, of the procedure of privilegium paulinum are in the *exclusive competence* of the ecclesiastical courts and congregations."
Spain 1953/24	The same and the cases of separation as well.
Italy 1929/34, Portugal 1940/25, Dominica 1954/16 No. 1., Colombia 1973/8	"As it concerns the cases of the nullity of the marriages and the dispensation from marriages rato et non consummato are *reserved* for ecclesiastical courts and congregations."
Austria 1933/7 § 3., Austria 1933 Add. Prot. 7. No. 1.	"The Republic of Austria *recognises the competence* of ecclesiastical courts and congregations in case of the nullity of the marriages and the dispensation from marriages rato et non consummato." "The Republic of Austria *recognises the competence* of the ecclesiastical Authorities in case of the procedure of privilegium paulinum as well."
Malta 1993/4 No. 2.	"[... specific nature of canonical marriage] and, consequently, about *ecclesiastical jurisdiction* concerning the marriage bond."

Poland 1993/10 No. 3., No. 4.	"It is in the *exclusive competence* of the ecclesiastical authority to judge upon the validity of canonical marriage, and upon the other matrimonial cases issued in canon law." "To judge upon matrimonial cases concerning the legal effects provided in the polish laws is in the *exclusive competence* of the statal coursts."

2. Compels the parties:

Spain I. 1979/6 No. 2.	"Concordant with the provisions of the canon law the *parties can appeal* to ecclesiastical courts for the declaration of the nullity or ask for the pontifical dispensation from marriages ratum et non consummatum."
Malta 1993/4 No. 2.	"[... the ecclesiastical jurisdiction concerning the bond of marriage.] The prospective spouses shall, by way of acceptance, formally *take note of this in writing*."

Dominica 1954/15 No. 2.	"[...] by the mere fact of celebrating a canonical marriage the spouses *renounce* the secular faculty of asking for divorce, which therefore will not be applicable for canonical marriage by civil courts."

A.2.4.2.2. Providing secular legal force for the decisions

Malta 1993/3	"The Republic of Malta *recognizes* for all civil effects, in terms of this Agreement, the judgements of nullity and the decrees of ratification of nullity of marriage given by the ecclesiastical tribunals and which have become executive."
Malta 1993/7	"The decrees of the Roman Pontiff super matrimonium ratum et non consummatum *are recognized*, as regards civil effects by the Republic of Malta, upon request, accompanied by the authentic copy of the pontifical decree, presented to the Court of Appeal by the parties or by either of them."

Croatia 1996/13	"The decisions of ecclesiastical Courts upon nullity of marriage and those of the Supreme Authority of the Church upon dispense from matrimonial bond are *communicated to* the competent civil Court *to put into effect the civil consequences* of the measurement, according to the legal norms of the Republic of Croatia."

Slovakia 2000/10 No. 2.	"The decisions of the Catholic Church upon nullity of marriage and upon dispense from matrimonial bond are *communicated to* the request of one of the interested parties to the Republic of Slovakia. The Republic of Slovakia will proceed according to its juridical order."

Lithuania 2000/13 No. 4.	"Decisions of ecclesiastical tribunals on the nullity of marriage and decrees of the Supreme Authority of the Church on the dissolution of the marriage bond are to be *reported to* the competent authorities of the Republic of Lithuania with the aim of *regulating* legal consequences of such decisions in accordance with the legal acts of the Republic of Lithuania."

A.2.4.3. Attribution of the secular legal effects

Austria 1933/7. § 4., Italy 1929/34, Colombia 1942/9, Spain 1953/24 No. 4.	"The provisions and the judgements when they are definitive are *brought to* the Supreme Court of the Secretariat which controls if the rules of the canon law were observed relating to the judge's competence and the summoning and of the representation or keeping away of the parties. The declared provisions and definitive judgements with the relative decisions of the Supreme Court of the Apostolic Secretariat are handed over to the Supreme Court of Austria. The civil effects come into force by decision of the execution made in secret meeting of the Supreme Court of Austria."

Portugal 1940/25, Dominica 1954/16 No. 2.	The same but the handing over is through a diplomatic way.
Spain 1953/24 No. 3., Colombia 1973/8.	The same, but leaving out the Secretariat, the ecclesiastical court *communicates* the judgement to the secular court.

Spain 1953/24 No. 2.	"[...] is the civil Court's task is to *decide* at the interested person's request about the norms and the precautionary measures regulating the civil effects of the case under way."

Spain I. 1979/6 No. 2.	"At request of anybody of the parties the said ecclesiastical provisions will have effects in the civil legal order *if* they are *declared conform* with the State law by a resolution issued by the competent civil court."
Italy 1984/8 No. 2.	The same bat the court of appeal *decides in judgement with conditions*: "– whether the judge were competent in the case, if the celebration took place on the basis of the Agreement, – whether in proceedings of the ecclesiastical court the right to act and to defend were provided in a way not different from the basic principles of the Italian legal order, – whether they correspond to the other *conditions* prescribed in the Italian law *for the proclamation* of effects *of foreign judgements*. The court of appeal can make interim economical measurements, in the judgement with which it implements the canonical judgement, to the advantage of one of the parties whom marriage has been declare null, sending them to the competent judge to decide in the matter."
Malta 1993/5	"[The judgements ... are recognized ...] *provided that*: a) a request is presented, by the parties or either of them, to the Court of Appeal together with an authentic copy of the judgement or decree, as well as a declaration of its execution according to canon law issued by the tribunal that has given the executive decision; b) the Court of Appeal ascertains that: I. the ecclesiastical tribunal was competent to judge the case of nullity of the marriage insofar as the marriage was celebrated according to the canonical form of the Catholic Church or with a dispensation from it; II. during the canonical juridical proceedings the right of action and defence was assured to the parties, in a manner substantially not dissimilar to the principles of the Constitution of Malta; III. in the case of a marriage celebrated in Malta after the 11 August 1975 the act of marriage laid down by the civil law has been delivered or transmitted to the Public Registry; IV. no contrary judgement pronounced by the civil tribunals and which has become res judicata, based on the same grounds of nullity."

Malta 1993/8.	"In the exercise of its specific functions as regards to the recognition of the decrees mentioned in article 7, as well as of the judgements of nullity or of the decrees of ratification of nullity of marriage mentioned in Article 3, the Court of Appeal *does not re-examine* the merits of the case."

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The Relationship between the EC Competition Rules and National Competition Laws

(A developmental approach with regards to supremacy)

In the field of Competition Law, the European Union and the Member States (MSs) have parallel competencies; this derives from the dualism of Competition Law. Nevertheless, EU Competition Law may pre-empt national competition laws to a certain extent.

In the case of a conflict between national and Community competition laws, since 1969, the general rule is that Community law should prevail.[1] While both Community and domestic competition law can apply, domestic law cannot be applied in a way which infringes the principle of supremacy of Community law.[2]

Furthermore, by virtue of the loyalty clause of Art. 10 of the EC Treaty MSs have to refrain from taking measures which can jeopardize the application of the competition rules, in order to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the Treaty's objectives.

Competition rules apply to both private and public undertakings.[3] According to Art. 86 (1) of the EC Treaty MSs have to refrain from taking measures contrary to the competition rules of the EC with regard to public undertakings or undertakings to which they have granted special or exclusive rights. The very

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[1] Case 14/68, Walt Wilhelm and others v. Bundeskartellamt, *European Court Reports* (1969), 0001.

[2] *Supra*, par. 4, 7 and 8; and also in: Case 106/77, Administrazione delle Finanze Stato v. Simmenthal SpA, *European Court Reports* (1978) 629. This is also stressed out in Art. 3 of the new regulation on the application of Art. 81 and 82 of the Treaty that puts the relationship in question into a normative form. To be detailed later.

[3] Undertakings controlled by the Member State or the local authority of a Member State.

narrow limitation to the above follows in Art. 86 (2): in so far as the development of trade is not affected to such an extent as would be contrary to the interests of the Community.[4]

Seeing the *ratione materiae* and every-day application of the competition rules of the EC Treaty, the problem of the relationship of the community laws on competition and national antitrust laws becomes rather complex.

Under the first regulation on the application of Art. 85 and 86 (after the Treaty of Amsterdam: 81 and 82),[5] Art. 85 (1) and 86 had direct effect and since they were also directly applicable, they could be relied upon by private individuals and undertakings in national courts. Moreover, like the Treaty itself–ex Arts. 88 and 89 (now Arts. 84 and 85)–, Regulation No 17 had created a regime of shared responsibilities between the Commission and the Member States in applying ex Arts. 85 and 86.

Also, the simultaneous application of national competition laws and Community rules on competition was later recognized in the case law of the European Court of Justice.

The Modernization of Competition rules by the European Commission in 2004 had introduced a few adjustments to the situation.

The paper introduces the development of the European Court of Justice's case law in this field and attempts to identify the novelties established by the modernization of the competition rules.

The Court's case law

1. The Walt Wilhelm Case, the specified primacy of EC Competition law

In the *Walt Wilhelm*[6] case, the ECJ had established for the first time the important doctrine–of corresponding application–in relation to conflicting competencies.

The ECJ had recognized that community law and national laws approach restrictive practices from different points of view. Therefore it is possible for a National Competition Authority (NCA) to take a decision, which is already the subject matter of a case before the Commission; however this cannot

[4] Such limitation benefits the undertakings that are entrusted with the operation of services of general economic interest.

[5] Regulation No 17 of 1962 implementing Art. 85 and 86 of the Treaty, *Official Journal* P 13, 21 of February 1962. 0204–0211.

[6] Case 14/68, Walt Wilhelm and others v. Bundeskartellamt, *European Court Reports* (1969), 0001.

prejudice the uniform application of the Community law.[7] So, the national authority is required to take proper account of the possible effects of the decision taken by the Commission, and if it appears during the proceedings before the national competition authority that the Commission's decision will be contrary to the decision to be taken by the national authority, it should take all appropriate measures. Such an appropriate measure could be the staying of the proceedings.

The other question that was referred to the ECJ by the Kammergericht, concerned the possible risk resulting from the parallel application of Community rules and national laws and consequently the possible double sanction imposed by the Commission and the national authorities with jurisdiction in cartel matters.

The ECJ had answered this saying that the possibility of concurrent sanctions does not mean that the possibility of two parallel proceedings pursuing different ends is unacceptable. The Court further stated that the acceptability of a dual procedure of this kind follows from the special system of sharing jurisdiction between the Community and the Member States with regard to cartels. However, in these cases the general requirement of natural justice demands that every previous punitive sanction is being taken into account in determining the sanction to be imposed.[8]

In other words, the exclusion of competence of the national authorities–once the Commission has initiated proceedings–does not apply when the national authorities are acting in pursuance of their national competition laws.

Under this formulation, it was therefore–in theory–perfectly legitimate for national law to prohibit conduct which satisfied the jurisdictional criteria of Art. 81(1) but had not received an exemption under Art. 81(3) or, where the conduct in question did not infringe Art. 81(1) and therefore did not attract the sanction of nullity under Art. 81(2).

2. The "French perfume" cases

In the *"French perfume cases"*[9] the ECJ concluded that, in the view of Arts. 2, 6, 19 (3) and 21 (1) of Regulation No 17, if the required constitutive effect is not reached by the publication of the letter as required, the MSs' national courts can

[7] This is based on the presendece of the Community Law, developed by the Court in the Costa v. Enel case. Case 6/64, Costa v. Enel, *European Court Reports* (1964), 585, also see: par. 9 of Walt Wilhelm, cited in 4.

[8] Cited in 4, par. 11.

[9] Cases 253/78 and 1–3/79, and case 37/79, detailed later.

come up with different findings with respect to their national competition laws and the facts disposed to them, as a result of the fact that community competition law is limited to actions that may affect trade between MSs.

Second, the Court had found that the initiation of the procedure by the Commission–according to Art. 9 (3) of the Regulation No 17–does not prevent national courts from adjudicating in matters related to Art. 85 (1) as a result of their obligation to guarantee the rights arising from the direct effect of the paragraph (1) of Art. 85. Furthermore, these national courts can come up with different findings on the basis of the information available to them with regard to the application of Art. 85 (1). The prerequisite for the above was still that the "initiation of the proceeding" and the "letter" by the Commission is purely administrative.

More specifically, in the *Giry, Guerlain* cases[10] under ex Art. 177 (now Art. 234) the *Tribunal de Grande Instance* of Paris has submitted questions to the Court of Justice on the interpretation of Art. 85 of the Treaty. The questions arose during the criminal proceedings brought against several perfumeries under the French order No 45-1483 of June 1945 on prices on the charge of refusal to sell.

The claimants–retailers who were not part of the selective distribution system–criticized the selective distribution systems on the basis that the companies were refusing to sell to certain retailers. These companies referred to a letter that each of them had received from the DG Competition of the Commission, which stated that on the basis of the facts known to it, there was no further need for it to take action under the provision of Art. 85 (1) of the Treaty. The accused stated in the procedure that those letters of the Commission must be regarded as decisions applying Art. 85 (3) of the Treaty, therefore by the reason of pre-eminence of the Community rules, national authorities could not prohibit–by applying national law–restrictions on competition if they had been recognized as to be lawful from the point of community law.

The Court first concluded on the nature of the letters. It stated that if the Commission wants to give negative clearance pursuant to Art. 2 of Regulation No 17 or wants to take a decision in application of Art. 85 (3) of the Treaty, it is bound by the dispositions of the Regulation 17, in particular Arts. 19 (3) and 21 (1); so it has to publish the summary of the relevant application of the notification or the decision in the case of exemption under Art. 85 (3).[11]

[10] Joined cases 253/78 and 1–3/79, Procureur de la Rėpublique and others v. Bruno Giry and Guerlain SA and others, *European Court Reports* (1980), 02327.

[11] *Supra*, par. 11.

In conclusion, the Court stated that these letters in question do not constitute neither negative clearance nor an exemption under Art. 85 (3) according to Arts. 2, 6, 19 (3) and 21 (1) of Regulation No 17.[12]

Furthermore, those letters were based solely upon the facts available to the Commission, and could not reflect other than the Commission's assessment of the case, and so did not prevent the national courts, before which the agreements in question were alleged to be incompatible with Art. 85 of the Treaty, from reaching a different finding on the basis of the evidence and information available to them. Important however, that although the letters do not bind the national courts, they are to be considered as factors for the national courts when deciding upon a case.[13]

In virtue of the Walt Wilhelm case and the above, the Court concluded its reasoning with saying that the ending of procedures by the Commission on the basis of the facts available to the it does not however prevent the national authorities from applying to those agreements the provisions of national competition law which may be more rigorous than the community rules. Moreover, if a practice has been held by the Commission not to fall within the ambit of the prohibition of Art. 85 (1) and (2)–the scope of which is limited to actions capable of affecting interstate commerce–, in no way prevents that practice from being considered by the national authorities to be incompatible with their respective national competition rules if the effects their produce are recognizable on a national scale.[14]

The second judgment in the "perfumes cases" was delivered on the same day. In the *Marty v. Estée Lauder* case[15] the Tribunal de Commerce had asked three questions under Art. 234 of the Treaty.

The French commercial court was dealing with a case where the claimant–Marty–was complaining that the defendant had not fulfilled an order given out to them by Marty, and this practice was against the provisions of the French order on prices which prohibits a refusal to sell.

Similarly to the *Giry* and *Guerlain* cases, the referring court was interested in finding out the legal consequences of such "comfort letter"; in other words, whether it constitutes a negative clearance under Regulation No 17; and if the answer was to be affirmative to this question, could this letter be invoked in

[12] *Supra*, par. 12.
[13] *Supra*, par. 13.
[14] *Supra*, par. 18.
[15] Case 37/79, Anne Marty SA v. Estée Lauder SA, *European Court Reports* (1980), 02481.

relation to third parties and is binding upon the courts of the Member States of the Community?

Yet, in the present case, the referring court went further and asked the ECJ about the effect of the possible negative answers to the first two questions, inquiring that which authorities were competent to enforce Art. 85 (1) of the Treaty, and subsequently, had there been a procedure initiated under Art. 9 (3) of the Regulation No 17?

The ECJ first concluded that–as in paragraph 11 of the Giry and Guerlain cases–the administrative letter stating that the Commission does not consider that there is a need for it to take action in respect of the contracts in question, and closes the procedure; does not itself mean that it has given negative clearance according to Art. 2 of Regulation No 17 or that it has taken a decision in application of Art. 85 (3) of the Treaty, since these types of decision must be published, as provided for by Art. 21 (1) of Regulation 17/62.[16] As the Court further evaluated, these letters reflect the Commission's assessment on the case, and "do not have the result of preventing national courts before which the agreements in question are alleged to be incompatible with Art. 85 from reaching a different finding as regards the agreements in question on the basis of the information available to them".[17] The reasoning continued, that even as the letter does not bind national courts, "the opinion transmitted in such letters nevertheless constitutes a factor which the national courts may take into account in examining whether the agreements ... are in accordance with the provisions of Art. 85".[18]

As regard to the third question, the ECJ had referred to its previous decisions of *Sabam* and *Haecht*[19] and stated that the "... jurisdiction of national courts before which the direct effect of Art. 85 (1) is relied upon is not restricted by Art. 9 (3) of Regulation No 17."[20]

[16] *Supra*, par. 8.

[17] *Supra*, par. 10.

[18] *Supra*.

[19] Case 127/73, Belgische Radio en Televisie v. SV Sabam and NV Fonior, *European Court Reports* (1974), 51; and Case 48/72, SA Brasserie de Haecht v. Wilkin Janssen, *European Court Reports* (1973), 77.

[20] Case 37/79, cited in 15, par. 16.

3. The Masterfoods case

In addition, in its *Masterfoods* judgment,[21] the ECJ had gone further.

In the present case the Irish Supreme Court had referred to the Court of Justice for a preliminary ruling under ex Art. 177 of the EC Treaty three questions on the interpretation of Arts. 85, 86 and 222 of the EC Treaty; the questions were raised in two sets of proceedings between Masterfoods and HB Ice Cream, in connection with an exclusivity clause contained in agreements for the supply of freezer cabinets concluded between HB and retailers of impulse ice cream. The above were adverse parties on the market of ice cream.

In March 1990 Masterfoods brought an action before the High Court of Ireland seeking, *inter alia*, a declaration that the exclusivity clause by HB–requiring its retailers to keep only its products in the freezer cabinets supplied by HB–was null and void in domestic law and under Arts. 85 and 86 of the EC Treaty. HB brought a separate action for an injunction to restrain Masterfoods from inducing retailers to breach the exclusivity clause.[22]

On 28 May 1992 the High Court gave judgment in the actions brought by Masterfoods and HB respectively, dismissing Masterfoods' claim and granting HB a permanent injunction restraining Masterfoods from inducing retailers to store its products in freezers belonging to HB. However, HB's claim for damages was dismissed. Masterfoods appealed against those judgments to the Supreme Court.

In parallel with those contentious proceedings, on 18 September 1991 Masterfoods lodged with the Commission of the European Communities a complaint against HB under Art. 3 of Council Regulation No 17. The complaint concerned the supply by HB, to a large number of retailers, of freezer cabinets to be used exclusively for HB products. On 29 July 1993 the Commission, in a statement of objections addressed to HB, concluded that the distribution system operated by it infringed Arts. 85 and 86 of the Treaty.

HB later altered his system and applied for exemption under Art. 85 (3), however the Commission finally found that HB could not be exempted. Consequently, HB brought an action under the fourth paragraph of ex Art. 173 of the EC Treaty for the annulment of the Commission Decision 98/531.

Under those circumstances the Irish Supreme Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

[21] C-344/98, Masterfoods Ltd v HB Ice Cream Ltd; HB Ice Cream Ltd v Masterfoods Ltd, *Common Market Law Review* 4 (2001), 14.

[22] *Supra*, par. 6.

„1. In the light of the judgment and orders of the High Court of Ireland dated 28 May 1992, the decision of the Commission of the European Communities dated 11 March 1998 and the applications by Van den Bergh Foods Ltd pursuant to Arts. 173, 185 and 186 of the Treaty establishing the European Economic Community (EC Treaty) to annul and suspend the latter decision:

(a) Does the obligation of sincere cooperation with the Commission as expounded by the Court of Justice require the Supreme Court to stay the instant proceedings pending the disposal of the appeal to the Court of First Instance against the aforesaid decision of the Commission and any subsequent appeal to the Court of Justice?

(b) Does a decision of the Commission which is addressed to an individual party (and which is the subject of an application for annulment and suspension by that party) declaring such party's freezer cabinet agreement to be contrary to Art. 85(1) and/or Art. 86 of the EC Treaty thereby prevent such party from seeking to uphold a contrary judgment of the national court in that party's favor on the same or similar issues falling under Arts. 85 and 86 of the Treaty where that decision of the national court is appealed to the national court of final appeal?"[23]

In response to the above questions the Court concluded, *inter alia*, that the Commission, entrusted by Art. 89 (1) of the Treaty–now 85 (1)–with the task of ensuring application of the principles laid down in Arts. 85 and 86 of the Treaty, is responsible for defining and implementing the orientation of Community competition policy. It is for the Commission to adopt, subject to review by the Court of First Instance and the Court of Justice, individual decisions in accordance with the procedural rules in force and to adopt exemption regulations.

Furthermore, the Commission shares competence to apply Arts. 85 (1) and 86 of the Treaty with the national courts.[24]

„The latter provisions produce direct effects in relations between individuals and create direct rights in respect of the individuals concerned which national courts must safeguard. The national courts thus continue to have jurisdiction to apply the provisions of Arts. 85 (1) and 86 of the Treaty even after

[23] *Supra*, par. 18.

[24] Case C-234/89, Delimitis v. Henninger Bräu, *European Court Reports* (1991), I935, par. 45.

the Commission has initiated a procedure in application of Arts. 2, 3 or 6 of Regulation No 17".[25]

The ECJ however found, on the basis of the division of powers, and in order to fulfill the role assigned to it by the Treaty, the Commission cannot be bound by a decision given by a national court in application of Arts. 85 (1) and 86 of the Treaty. The Commission is therefore entitled to adopt at any time individual decisions under Arts. 85 and 86 of the Treaty, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision.[26]

The ECJ continued by referring to its previous case-law, and said that the it is the Member States' duty under Art. 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising from Community law and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty; and this obligation is binding on all the authorities of Member States respectively.

It is important to see, that the Court had held previously, in *Delimitis,*[27] that in order not to breach the general principle of legal certainty, national courts must, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of Arts. 85 (1) and 86 and Art. 85 (3) of the Treaty. It is even more important that when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance.

The Court therefore has concluded, that

„... when the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community Courts, unless it considers that, in the circumstances of the case, a reference

[25] Case 344/98, cited in 21, par. 47. In line with Case 37/79, cited in 15, par. 16.
[26] Case 344/98, cited in 21, par. 48.
[27] Case C-234/89, cited in 24, par. 47.

to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted."[28]

In its final assessment, the ECJ had stated, that

„where a national court is ruling on an agreement or practice the compatibility of which with Arts. 85 (1) and 86 of the Treaty is already the subject of a Commission decision, it cannot take a decision running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance. If the addressee of the Commission decision has, within the period prescribed in the fifth paragraph of Art. 173 of the Treaty, brought an action for annulment of that decision, it is for the national court to decide whether to stay proceedings pending final judgment in that action for annulment or in order to refer a question to the Court for a preliminary ruling."[29]

Regulation 1/2003[30]

Regulation No 1/2003 has been adopted by the Council of Ministers on 16 December 2002, and took effect on 1 May 2004; by this it replaced Regulation No 17/62 and established the procedures governing the enforcement of EC Competition Law. Followed by numerous guidelines and notices, this so called "modernization package" has brought new developments into the application of EC Competition Law.[31]

[28] Case 344/98, cited in 21, par. 57.

[29] *Supra,* par. 60.

[30] There are several Arts. on the new regulation. On this issue, see further, for example: Garzaniti et al: Dawn of the new era? Powers of investigation and enforcement under Regulation 1/2003. *Antitrust Law Journal* 72 (2004), 159–209.; and also in: Müller: The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition. *German Law Journal* 5 (2003), 721–740.

[31] Commission Notice on cooperation within the Network of Competition Authorities, *Official Journal* C 101 of 27 April 2004. 43–53.; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Arts. 81 and 82 EC, *Official Journal* C 101, of 27 April 2004, 54–64.; Commission Notice on the handling of complaints by the Commission under Arts. 81 and 82 of the EC Treaty, *Official Journal* C 101 of 27 April 2004. 65–77.; Commission Notice on informal guidance relating to novel questions concerning Arts. 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), *Official Journal* C 101 of 27 April 2004. 78–80.; Commission Notice–Guidelines on the effect on trade concept contained in Arts. 81 and

The amendment to the application of the EC Competition Law, which turned it into a decentralized application, has placed the member states of the Union into the arrangement when they are expected to fully participate in the application of the community rules on competition.[32] National Competition Authorities and the national courts are now unequivocally required to contribute to the application of EC rules in this field of law.

Indeed, as part of the new regulatory package on competition policy, the Commission has introduced Regulation 1/2003.[33] which has cleared up the pitch for the playing partners; however, there might be still some grounds that seem to remain obscure.[34]

The introduction of the new regime has the added benefit of clarifying the supremacy of Community law over national law, as opposed to the traditional–but vague–formula in the *Walt Wilhelm* case that national law should „not prejudice the uniform application throughout the common market of the Community rules on competition law and of the full effect of the measures adopted in implementation of those rules".[35]

Today, Regulation 1/2003[36] deals with the relationship between Arts. 81 and 82 EC Treaty and national competition laws. As it is emphasized in the Recitals, "... In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Art. 83 (2) (e) of the Treaty the

82 of the Treaty, *Official Journal* C 101of 27 April 2004. 81–96.; Communication from the Commission–Notice–Guidelines on the application of Art. 81(3) of the Treaty, *Official Journal* C 101 of 27 April 2004. 97–118.

[32] It is well beyond the scope of this study to describe the general alternatives of relations between „local and central, federal and state, or regional and sub-regional (and national)" laws. For the point of importance further read on the diversions of four types of regulatory mechanisms (yardstick competition, international trade, locational cooperation, and choice of law) in: Epstein, R. A. and Greve, M. S. (eds.): *Competition laws in conflict: antitrust jurisdiction in the global economy.* Washington, D. C. 2004. 31–66.

[33] Council Regulation (EC) 1/2003 of December 16, 2002, „on the implementation on the rules on competition laid down in Arts. 81 and 82 of the Treaty", *Official Journal* L 1 of 04 January 2003. 01–25.

[34] As Mark Furse has put it „The relationship has been at least clarified by recent legislation but the position is not simple although a straightforward statement of basic principles may make it seem so.", in. Furse, M.: *Competition Law of the EC and UK.* 4th ed., Oxford, New York, 2004. 43.

[35] Vertical restraints: new directions in EU policy. Extract from The Antitrust Review of the Americas 2004, available on: http://media.gibsondunn.com/fstore/documents/pubs/VerticalRestraints_EAR.pdf, consulted on 9 December 2005.

[36] Cited in 33.

relationship between national laws and the Community competition laws."[37] Hereby, the EC legislator wants to make sure that agreements having a cross-border effect are treated in the same way across the EU.

1. The regulation on anti-competitive behavior

A) To which situations do derogations of Regulation 1/2003 not apply?

When discussing the relation of community law to national competition laws, one need to observe Art. 3 of the above piece of Community legislation, where it is unmistakably affirmed to which situations the regulation does not apply.

It is clearly stated in paragraph 3 of Art. 3, that "without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply *national merger control laws* nor do they preclude the application of provisions of *national law that predominantly pursue an objective different* from that pursued by Arts. 81 and 82 of the Treaty."[38]

The rationale behind the above rule is explained in Recital 9:

> "Arts. 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, *which protects other legitimate interests* provided that such legislation is compatible with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory... This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration."[39]

[37] *Supra*, Recital 8.
[38] *Supra*, Art. 3 (3).
[39] *Supra*, Recital 9.

As seen in Art. 3 (3), merger control had also maintained its previous "nature" given to it by Regulation 4064/89.[40] According to the above paragraph of Regulation 1/2003 and also according to Regulation 139/2004,[41] when the concentration has Community dimension, the Commission pre-empts and bears responsibility for the authorization.[42] Member States are only concerned so far as the planned merger does not reach the threshold of the Regulation and so does not qualify to be a merger with community dimension. In these cases the assessment of such fusion will be done according to the national laws on merger.

The other exception to the claimed primacy of the Community law is that

> "... the regulation does not apply to *national laws which impose criminal sanctions on natural persons* except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced."[43]

[40] *Council Regulation (EEC) No 4064/89* of 21 December 1989 on the control of concentrations between undertakings, *Official Journal* L 395 of 30 December 1989. 0001–0012.

[41] *Council Regulation (EC) No 139/2004* of 20 January 2004 on the control of concentrations between undertakings, *Official Journal* L 024 of 29 January 2004. 0001–0022.

[42] *Supra*, Art. 1, which reads:

„A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

[43] Regulation 1/2003, cited in 33., Recital 8.

As it is foreseen and explained also in Recital 9:

> "... Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market."[44]

B) The scope of application of Regulation 1/2003

Recital 8 of the Regulation furthermore provides that

> "the application of national competition laws to agreements, decisions or concerted practices within the meaning of Art. 81 (1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law".[45]

According to Art. 3 (1) of Regulation 1/2003 the Commission not only shares the competence to apply Arts. 81 and 82 EC Treaty with the national competition authorities and national courts, but also "seeks to ensure full primacy of the Community's over national antitrust".[46]

> "Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Art. 81 (1) of the Treaty *which may affect trade between Member States* within the meaning of that provision, they shall also apply Art. 81 of the Treaty to such agreements, decisions or concerted practices."[47]

In these situations, national competition law may not prohibit the agreement in question, because according to Art. 3 (2):

> „The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted

[44] *Supra*, Recital 9.

[45] *Supra*, Recital 8.

[46] Ullrich, H.: Anti-Unfair Competition and Anti-Trust Law: a Continental Conundrum? *EUI Working Paper, Law* (2005), 7, www.iue.it, consulted on 16 December 2005.

[47] Regulation 1/2003, cited in 33, Art. 3 (1).

> practices which may affect trade between Member States but which do not restrict competition within the meaning of Art. 81 (1) of the Treaty, or which fulfill the conditions of Art. 81 (3) of the Treaty or which are covered by a Regulation for the application of Art. 81 (3) of the Treaty."[48]

Thus, it is not possible for national competition authorities to prohibit agreements that do not infringe Art. 81 (1) EC Treaty or the criteria of Art. 81 (3) EC Treaty or which are covered by a Community block exemption.

This appears to resolve the previous doubts as to the possible application of national competition law in the situation where there was a finding of non-applicability under EC Competition law.

Subsequently, a question could be asked: Since there is practically no more room for the independent application of national law in cases where EC Competition law also applies, does Art. 3 (2) represent a commanding incentive for Member States to harmonize their national competition rules with EC competition law?

The issue of placing the Community law "supra" of the national laws in view of interstate commerce, the Regulation is consistent with previous jurisprudence, but formal findings to this effect by the European Commission, at least, are likely to be rare.[49] Again, one can see the development of the case law of the ECJ from the Walt Wilhelm case, for the reason that by Art. 3 of Regulation 1/2003, which Art. excludes all application of stricter national law–because both Art. 81 (1) and (3) always take precedence–the relation of national and community competition rules had altered.

In line with the previous jurisprudence, the Member State authorities were free to subject restrictive practices to stricter national antitrust law unless the Commission, which in that respect had exclusive jurisdiction, had exempted the practice from the application of Art. 81 (1) by an affirmative act, which could have been either a case specific decision or a regulation exempting certain types of agreements.[50] Therefore it is no longer possible to see the equivocal interpretation by the national authorities and the Commission of the same practice with the same effects. This latter is also supported by Art. 10 of the

[48] It should be noted, however, that the incentive to harmonize in Art. 3 (2) only concerns substantive competition rules. The rules of procedure are most likely to remain national unless, harmonizing legislation is adopted at Community level.

[49] Freeman, P.: UK competition law after modernization–Lord Fletcher lectures, 15 March 2005, http://www.competition-commission.org.uk/our_role/speeches/pdf/freeman_lord_fletcher_lecture_150305.pdf, consulted on 9 December 2005.

[50] See also in: Ullrich: cited in 46., Footnote 8.

new regulation which gives to Commission the power to act on its own initiative if the case is related to Community public interest.[51]

In particular, Art. 3 (2) makes no reference to the need for any positive Community purpose and it makes no exceptions. The only situation in which national law can be applied in this way is where it is held that the agreements in question do not affect trade between member states.[52]

Of course, with the empowerment of NCAs to apply EC competition law in addition to national competition law and the European Commission's giving up of its exclusive power to apply Art. 81 (3), possible conflicts between national and EC competition law may arise within.

One of the situations that gives ground for problems is that the national authorities have obligation to decide on the basis of the facts whether the case effects trade between Member States or not.[53]

Therefore, according to the paragraph 1 of Art. 3 of the new regulation, the dividing line between the parallel application of the community rules and of the national rules is the so called "interstate commerce", and not the scope of the national/community laws.[54]

[51] This should be read together with Section C of Commission Notice on handling of complaints by the Commission under Arts. 81 and 82 of the EC Treaty, *Officional Journal* C 101 of 27 April 2004. 65–77. This section deals with inter alia the situations when the Commission will deal with the case. Such cases are: when community public interest is at stake; competition policy on new issue arises; etc. 68.

[52] Is this simply a rule attributing competence in antitrust matters? Does this mean that Art. 3 (2) leaves "the 'big' cases for community competition rules, and the 'small' cases are left to control by national competition law, as, indeed control over the exercise of relational market power mostly (though not necessarily) is intended to protect small and medium-sized enterprises"? See in Ullrich: cited in 43. 7., Also: Can we witness some sort of subsidiarity in Art. 3 (2) in leaving the competition policy on small industry to Member States? For example, in Hungary, the latest realignment–entry in force: 1 November 2005–of Act LVII of 1996 on the prohibition on unfair and restrictive market practices did not explicitly prove that the smaller industry is better protected, the harmonization of national law on competition directs towards the achievement of the zeal by the provisions on state aid which favors small and medium-sized enterprises, which first was introduced already in 2001. See on: http://www.gvh.hu/index.php?id=2704&l=h, consulted on 12 December 2005.

[53] The Commission has created guidelines to help the authorities in deciding whether the given case has effects on trade between MSs. Cited in 3.

[54] The Commission, seeing the not easy task of the establishment of the possible effect on trade between Member States, introduced a guideline, which was designed to help the NCAs to find the path when deciding upon the issue. In: Commission Notice, Guidelines on the effect on trade concept contained in Arts. 81 and 82, *Official Journal* C 101 of 27 April 2004. 81–96.

One could subsequently ask the question, whether there is a need for a diverse protection of the conceivably "two markets", such as one with national scope and one with community scope, when applying the competition rules to anti-competitive measures?[55]

C) The principle of subsidiarity in the view of Art. 3 (2) of Regulation 1/2003

Art. 3 (2) addresses the non-prohibition side of Art. 81 of the Treaty. It does not have to contend with the prohibition side of it because it has been dealt with in the Court's case law. In its Walt Wilhelm decision, the ECJ held that an agreement cannot be declared valid under national law if it is prohibited by Community rules on competition.[56]

However, what the new regulation did by introducing the above Art. is, it ensured that national laws cannot prohibit agreements that are not prohibited by Community competition rules. In other words, according to the procedural rules, when the Commission finds inapplicability under Art. 10 of Regulation 1/2003, stricter national laws cannot apply.[57]

> "1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Art. 81 (1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Art. 81 of the Treaty to such agreements, decisions or concerted practices."[58]

Indeed, by Art. 3 (2), the Council reinforced the principle of supremacy.

[55] Perhaps, this could also be pictured as the achievement of the previous National Courts Notice. See in: Notice on the cooperation between National Courts and the Commission in applying Arts. 85 and 86, *Official Journal* C 039 of 13 February 1993. 0006–0011.

[56] See in Walt Wilhelm case, cited in 6.

[57] Regulation 1/2003, cited in 33. Art. 10 reads:

„Where the Community public interest relating to the application of Arts. 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Art. 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Art. 81(1) of the Treaty are not fulfilled, or because the conditions of Art. 81(3) of the Treaty are satisfied.

The Commission may likewise make such a finding with reference to Art. 82 of the Treaty."

[58] Regulation 1/2003, cited in 33, Art. 3 (2).

However, the principle of supremacy in competition law is somewhat different that the general rule of supremacy developed by the ECJ, first in the *Costa v. Enel* case.[59]

a) The development of the principle of supremacy

Since the Treaty of Rome remained silent on this issue, in the landmark case of *Costa v. ENEL case*[60] the ECJ unequivocally declared the principle of supremacy.

The Court held that unlike other international treaties, the EEC Treaty created its own legal system and the Member States thereby limited their sovereign rights–albeit within limited fields–, and have created a body of law that binds them as well as their nationals.

Therefore, unilateral actions taken by individual member states cannot supersede the Community legal system, nor can they be inconsistent with it. The ECJ had 14 years later reemphasized the principle of supremacy in its *Simmenthal-decision,*[61] where it stated that,

> „...any provision of a national legal system ... which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legal provisions which might prevent Community rules from having full force and effect is incompatible with those requirements which are the very essence of Community law".[62]

Again, this theory covers the situations in the areas where the Member States have agreed to act as a Community, therefore they limit their own national power to act, in other words; this doctrine highlights the priority of the norms of the EC law over the norms of the national legislation of Member States, i.e., the latter should not contradict the former.

With the words of the judgment of the Court in the Costa v. ENEL case: "The precedence of Community Law is confirmed by Art. 189, whereby a Regulation 'shall be binding' and "directly applicable in all member states". This provision, which is subject to no reservation, would be quite meaningless

[59] Case 6/64, Flamino Costa v. ENEL, Judgment of 15 July 1964, *European Court Reports* (1964), 585.

[60] Case 6/64, cited in 57.

[61] Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, Judgement of 9 March 1978, *European Court Reports* (1978), 629.

[62] *Supra*, par. 20.

if a state could unilaterally nullify its effects by means of legislative measure which could prevail over community law.[63]

Therefore, any conflict between a Community norm and a national norm that have the same scope of application should be sorted out by a non-application of conflicting national law, or else the claim of unified application of European law might be endangered.

b) The principle of supremacy in Competition law[64]

Consequently, it was many years later reiterated in the *Michelin II* judgment of the ECJ that Community rules on competition have primacy over national competition law,[65] on the matter of the direct effectiveness of Art. 82 EC.[66]

The supremacy of the Community competition laws is not only that these rules advance national laws on competition, but rather it is that the specific nature of the laws that define the application of community rules to certain practices of undertakings. This dividing line–since 1 May 2004–is the reinforced "interstate effect".

How did the new regulation complete the specific requirement to clear up the problem of supremacy in relation to the two laws?

In the light of Art. 83 (2) (e), the Council was required to determine the relationship between national laws and the Treaty provisions on competition.[67] Following the case law of the ECJ in the Walt Wilhelm case–which was

[63] Case 6/64, Flamino Costa v. ENEL, Judgment of 15 July 1964, *European Court Reports* (1964), 594.

[64] A detailed explanation of the development of the principle of supremacy in competition law is intruduced by Walz, R.: Rethinking Walt Wilhelm, or the Supremacy of Community Competition Law over National Law. 21 (1996) *European Law Review*, 449–464.

[65] See also the Court's findings in case C-344/98, Masterfoods Ltd v. HB Ice Cream Ltd; HB Ice Cream Ltd v. Masterfoods Ltd, *Common Market Law Review* 4 (2001), 14, par. 47.

[66] Case T-203/01, Manufacture française des pneumatiques Michelin v Commission of the European Communities, OJ C 304/24 of 13 December 2003, par. 112 and 166; and further in: Case 127/73, BRT and Others *European Court Reports* (1974), 51, paragraphs 15 and 16; Case 66/86, Ahmed Saeed Flugreisen and Others *European Court Reports* (1989), 803, paragraph 23; and Irish Sugar v Commission, Case T-228/97, Irish Sugar v Commission *European Court Reports* (1999), II-2969, paragraph 211.

[67] Art. 83 of the Treaty reads:

„1. The appropriate regulations or directives to give effect to the principles set out in Arts. 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

... e) to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this Art.."

decided by the Court in the historical context of developing Community Competition law–, the Michelin II case and the Masterfoods judgment,[68] the Council introduced Art. 3 (2) of Regulation 1/2003, which prohibits national laws that are more lenient to be applied when the decision, practice or an agreement is prohibited under Art. 81.

The introduction of such normative rule that guarantees exclusive application of Community law abandons the possible jeopardizing effects deriving from the Walt Wilhelm doctrine.[69]

However, the possibility for the Commission to call in a case if it finds that the community public interest is at stake, and also its option to define community policy[70] through the guiding role guaranteed by Arts. 11 and 16 of Regulation 1/2003, reflects the view of the Commission to transfer the supremacy of the Community rules into a quasi harmonization of national competition rules in order to assure the alike application of community competition rules across the EU.

2. The Regulation 1/2003 on abusive behavior of undertakings

Seeing the new regulation on anti-competitive behavior, it is useful to take a look at the relevant derogations on abusive behaviors. Indeed, the attitude towards abusive practices under Art. 82 of the Treaty is somewhat different.

Namely, "... where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Art. 82 of the Treaty, they shall also apply Art. 82 of the Treaty."[71]

Here, the dividing line of the probable effect on trade between member states is unclear. As cited, the disposition applies to *any* abuse that is prohibited by Art. 82. Furthermore, the restrictive pre-emption of the community rules expands in stating, that "... Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings."[72]

[68] Cited in 62 and 63.

[69] That is the „insecure effect" of comfort letters to undertakings. Those undertakings that received a comfort letter stating that Art. 81 (1) cannot be applied could not be sure that their practices would not be also judged under national standards.

[70] This is also shown in the Commission Notice on the handling of complaints by the Commission under Arts. 81 and 82 of the EC Treaty, *Official Journal* C 101 of 27 April 2004. 65–77.

[71] Regulation 1/2003, cited in 33, Art. 3 (1).

[72] *Supra*, Art. 3 (2).

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These stricter national laws may also include provisions which prohibit or impose sanctions on abusive behavior towards economically dependent undertakings.

By contrast to Art. 81 of the Treaty, in the case of abusive behaviors, the ability of the Member States to apply stricter national norms did not alter.

"As a matter of procedural enforcement, Commission decisions refusing to apply Art. 82 are not of an affirmative (constitutive) nature, and because as a matter of substantive law, Art. 82 prohibits only abuse and, therefore does not define or favor any forms of acceptable or desirable practices."[73] This is also further specified by Art. 3 of Regulation 1/2003, as cited above.

In other words, stricter national law can be applied to single-firm conduct that does not violate Art. 82; for example, in Germany, antitrust law prohibits abusive behavior by companies with superior market power that falls short of dominance. The substantive change here is reserved, since European law already prevails over national law–on the basis of the principle of supremacy–, and national competition laws seldom apply stricter rules than the Commission.[74]

Conclusion

The relationship between the EC Competition rules and national competition laws has not always been crystal clear and is still not. However, Regulation 1/2003 with its far–reaching implications for the enforcement of the EC Competition rules had somewhat cleared up the ground–if not more, at least concerning the anti-competitive behavior of market participants. Indeed, in order to spot an even clearer playing field, there is a need to achieve the same level of clarity in the field of abusive activities of dominant firms. If this cannot be achieved by central regulatory means than it is suggested that the national courts to refer questions to the ECJ for preliminary ruling, which via Art. 234 will be of assistance to interpret the community competition rules. Whether other alternative means of the harmonized procedural rules or a better enhanced judicial review of Commission decisions can parallel exist, it is also to find out.[75]

[73] Also in: Ullrich: cited in 46, Footnote 8.

[74] See also: Falk et al.: *An Expanded European Union.* Washington Legal Foundation, (19), 2004. www.wlf.org, consulted on 12 December 2005.

[75] On these issues see: Maja Brkan (2005): Procedural aspects of private enforcement of EC Antitrust Law: An analysis from an evolutionary perspective. 28 W. Comp. 4: 479–507., and Laura Parret (2005): Judicial Protection after Modernisation of Competition Law. *Legal Issues European Integration* 32 (2005), 339–369.

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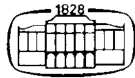

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CSABA VARGA*

Codification on the Threshold of the Third Millennium

Abstract. The core of codification is invariably the idea of a system in the law's composition and structuring, doctrinal reflection and conceptual building up, including judicial reference to codal definitions as well. Or, codification is (1) an exclusive body of law (2) implementing unity in its regulatory field (3) with logical coherence and consequentiality. The dream of a common European codification penetrates into the very heart of the law, presupposing the unification of all the intellectuality and underlying approach that has ever distinguished Civil Law and Common Law. The more the advancement of the European unification progresses, the more inverse the assessment of European codification becomes, making us its past trends, values and regulatory techniques reconsidered. That is, as if we on the Continent had not so much become statal national units unified by a sequence of national laws but, being too conceited of our most promising collective heritage within the transitory phase of an infantile disorder, became rather fragmented in national isolation from one another, which now comes eventually to a final end.

Keywords: codification & substitutes; objectification, systemicity, coherence, conceptuality of law; tradition, democratism in law; Civil Law & Common Law convergence; European Union

What are the developments of the past quarter of a century in the field of codification?[1] The practice appears to have been following the already covered paths

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[1] As antecedents, cf., from the author, *Codification as a Socio-historical Phenomenon* [in its original version in Hungarian, 1979]. Budapest, 1991. viii + 391 pp. and A kodifikáció és határai [Codification and its limits]. *Állam és Igazgatás* XXVIII (1978) 8–9, 702–718 as well as, in a recent summary, Codification in *The Philosophy of Law* An Encyclopedia (ed. Gray, Ch. B.). New York & London, 1999. 120–122 [Garland Reference Library of the Humanities 1743]. Cf., as reviews on previously published chapters of the monograph, Gérard Conac in *Revue internationale de Droit comparé* 29 (1977) 861–862; M. A. Supataev in *Sovetskoe gossudarstvo i pravo* 1978/12, 148; in *An Overview of Sociological Research in Hungary* (ed. Szentes, T.), Budapest, 1978. 86; in *Strane pravne zivot* [Belgrade] (1978), No. 98, 26–28; Jörgen Dalberg-Larsen in *Retfaerd* [Copenhagen] (1978), No. 8, 86–93; Braun-Otto Bryde in *Rabels Zeitschrift für ausländisches Privatrecht* 42 (1978) 3, 587–588; Heinz, K. E. in *Archiv für Rechts- und Sozialphilosophie* LXV

undisturbedly, driven by its own impulse. At the same time, setting new targets by re-dreaming thousand-year-old European and commonly shared dreams in response to the present-day policies of the European Union, theory seems to be ready to revise, moreover, reverse earlier perspectives apparently thoroughly established and conventionalised, hoping to beat new paths now. Debating policies and methodologies in terms of codification is fashionable again: it is in the focus of discussions and its dilemmas appear as vital as regards our decisions on the future.

Considering the distinctive episodes of the recent past in terms of mere data, more than fifty codes have been promulgated since the end of the World War Two. The complete re-drafting of the classical civil codes in Portugal (1967), in the Netherlands (1992) and in Quebec (1994),[2] of the penal codes in Spain (1995),[3] in France and in Belgium, as well as the civil law re-codification in Louisiana, in Germany (for the law of contracts) and, in the Central and Eastern

(1979) 1, 146–148; María del Refugio González in *Boletino Mexicano de Derecho Comparado* XII (1979), 300–302; on the monograph in Hungarian, in *Jogtudományi Közlöny* XXXII (1977) 233–240; Rodríguez, F. E. in *Boletino Mexicano de Derecho Comparado* XII (1979) 672–673; Malonyai, P. in *Magyar Nemzet* XXXVI (1980) 199, 4; Visegrády, A. in *Állam- és Jogtudomány* XXIII (1980) 3, 534–539, Majoros, F. in *Revue internationale de Droit comparé* 32 (1980) 4, 873–876; Szabó, J. in *Österreichische Zeitschrift für öffentliches Recht* 32 (1981) 1, 123–128; Bianchi, L. in *Právny Obzor* [Bratislava] 64 (1981) 60–63; Sipos, S. in *Universitate Babeş-Bolyai: Iurisprudentia* [Cluj] 26 (1981) 76–78; in *Referativniy zhurnal po obshestvennie nauki* Pravo [Moscow] 1981/4, 26–29; Bónis, Gy. in *Századok* CXV (1981) 1325–1327; Nagy, E. in *Állam és Igazgatás* XXXII (1982) 506–514; Bolgár, V. in *The American Journal of Comparative Law* 30 (1982), 698–703; Brunner, G. in *Rabels Zeitschrift für ausländisches Privatrecht* 46 (1982) 579–580; Szabó, I. in *Magyar Jog* 30 (1983) and in his *Ember és jog* Jogelméleti tanulmányok [Man and law: studies in legal theory] Budapest, 1987. 94–106; on the monograph in English, Tallon, D. in *Revue internationale de Droit comparé* 44 (1992) 740–741 and Legrand, P.: Strange Power of Words: Codification Situated. *Tulane European & Civil Law Forum* 9 (1994), 1–33.

[2] Cf., e.g., Legrand, P.: De la profonde incivilité du Code Civil de Québec. 1–13 and Parent, S.: Le Code civil de Québec: incivilité ou opportunité. 15–25, both in: *Revue interdisciplinaire d'Études juridiques* (1996), No. 36. The fact that the doctrine, masterly deepened with exemplary accuracy, of the Civil Code was completed in practically the last moment of its effect–*Quebec Civil Law* An Introduction to Quebec Private Law (ed.: Brierley, J. E. C. & Macdonald, R. A.). Toronto, 1993. lviii + 728 pp.–, just to be replaced by an utterly new concept of codal implementation, indicates the defencelessness of mere theorising at all times.

[3] Cf., e.g., Blanco, M. G.: Codification et droit de la postmodernité: La création du nouveau Code pénal espagnol de 1995. *Droit et Société* (1998) 509–534.

European region, in Russia (1996), and in preparation in Poland and Hungary (supplemented also by re-codification of criminal law in the latter), all represent developments of the recent past.[4]

*

First, in guise of general observation, a rather striking statement can be made. Notably, as the end of the second millennium was approaching, codification itself started increasingly to lose in purity and in the consistency of its classical ideals that once used to constitute a strict and coherent system. And this holds good of more than one aspects. On the one hand, the *supremacy of statutory law* with its function of exhaustively embodying the law gradually shows the signs of waning.[5] On the other hand (and in result of the above), the requirement developed half a century ago as a logical perfection of the European ideal of codification, namely that a *codificational determination of the law* be maintained through re-drafting law-codes periodically recurrently, by keeping pace with changing historical, economic and social conditions given at any time, has itself weakened. (As is known, it is socialist codification having set itself the objective of the codal embodiment of the law that realised this requirement in the most principled way, purely and consequently, also as a pattern which later became, upon the pressure of the need for modernization, a model enthusiastically followed by the Afro–Asiatic developing countries as well.)

For practical considerations, this leap into the opposite extreme can be perceived as a pendulum-effect. From now on, it is not re-codification any longer but the utter negation of codification itself (i.e., the abandonment of codifi-

[4] Cf., e.g., *Renaissance der Idee der Kodifikation* Das neue niederländische Bürgerliche Gesetzbuch 1992. (hrsg.: Bydlinski, F.–Mayer-Maly, Th.–Pichler, J. W.). Wien–Köln–Weimar, 1992. 157 pp. [Schriften zur Rechtspolitik 5]; Sacco, R.: Codificare: mode suprato di legifare? *Rivista di diritto civile* XXIX (1983) 1, 117 et seq., specially at 120; as well as Zweigert, K.–Puttfarken, H.-J.: Allgemeines und besonderes zur Kodifikation. In *Festschrift für Imre Zajtay* (hrsg. Graveson, R. H.). Tübingen, 1982. 569 et seq.

[5] According to Kübler, F.: Kodifikation und Demokratie. *Juristenzeitung* (1969), 645 et seq., especially at 651, the crisis of the law in general is "nothing but normal in a democratic industrial society [where] the fragmentary and periodical character of the statute is a part of the ordinary state of affairs". A similar view can be found in, e.g., Esser, J.: Gesetzesrationalität im Kodifikationszeitalter und heute. In: *100 Jahre oberste deutsche Justizbehörde* Vom Reichjustizamt zum Bundesministerium der Justiz (hrsg. Vogel, H. J.–Esser, J.). Tübingen, 1977. 13 et seq. [Recht und Staat in Geschichte und Gegenwart 470].

cation in order to reach a state of "de-codification"[6]) that comes to the forefront more and more forcefully as a new landmark. More precisely, the emphasis is increasingly shifting from the code itself to the actual filling of one-time codal functions. In other words, the systemic *form of objectivation* of the law suitable to provide a *gapless response* to any question at will within its field of regulation seems to be eventually substituted by the actuality of whatever reply only channelled by the code, maybe by providing nothing but systemic or taxonomic loci to which, conceptually or institutionally, the freely contextualisable judicial stand may refer.[7] According to the new mainstream opinion, regarded as exclusively justified by the ideologies of postmodernity, the alleged "authoritarianism of codification" of the past will have to yield its place (both as an ideal and as the technique of regulatory practice) to a kind of *"democratic openness"*,[8] in pursuance to some development typologies mostly rooted in American experience but increasingly generalised so as to include European practices as well.[9]

[6] Irti, N.: *L'età della decodificazione.* 3rd ed. Milano, 1989. 195.

[7] According to the expression of Sacco, 125, it is no longer the code-form that is superior but the idea of its (suit)ability to offer a solution: *"Il codice non è [...] superato. È superata l'idea che un codice possa nascere privo di lacune, e che la sua sola lettera possa offrire une buone soluzione per tutti i possibili casi del futuro."*

[8] According to Kübler, p. 651, there is a "change of the authoritarian codification state towards a system aiming at democratic openness where legislation has become a political instrument of a permanently required adjustment" in progress. According to Lasserre-Kiesow, V. : La codification en Allemande au XVIIIe siècle: Réflexions sur la codification d'hier et d'aujourd'hui. *Archives de Philosophie du Droit* 42 (1998), 215–231, quotation on 223 and 231, "the future is no longer to be found in the past. [...] [C]odification based on paradigms of statism as well as on perfection of form and contents certainly does not have any future any longer."

[9] See, as a first formulation, from the author, Átalakulóban a jog? [Law in transformation?] *Állam- és Jogtudomány* XXIII (1980) 4, 670–680 and Logic of Law and Judicial Activity: A Gap between Ideals, Reality, and Future Perspectives. In: *Legal Development and Comparative Law* (ed. Péteri, Z.–Lamm, V.). Budapest, 1981. 45–76, particularly para. 5, as inspired by Wasserstrom, R. A.: *The Judicial Decision* Toward a Theory of Legal Justification. Stanford, 1961. 122 et seq.; Per Olof Bolding Reliance on Authorities or Open Debate? Two Models of Legal Argumentation. *Scandinavian Studies in Law* 13 (Stockholm, 1969), 65 et seq.; Mangabeira Unger, R.: *Law in Modern Society* Toward a Criticism of Social Theory. New York–London, 1976, ch. II; and, especially, Nonet, Ph.–Selznick, Ph.: *Law and Society in Transition* Toward Responsive Law. New York, 1978.

As a logical consequence to this, present-day legislators tend to leave behind all former endeavours for systemic purity and consistency (as if these were nothing but instances of a kind of doctrinarian atavism), only to make way for the pragmatism of borrowing from just anywhere, and thereby accepting both the partialness and fragmentation of results.[10] In addition to all these, a new kind of localism, transitionalism and pragmatism making headway under the aegis of globalism rapidly gaining ground, explain the attempt at absolutising currently ongoing endeavours with the wish to also re-write the past (a practice far from unfamiliar in France of the earlier days). Notably, a paradigmatic shift is at stake as a tendency becoming more and more general, in terms of which the codification once completed by Napoleon and also its magnificent and lasting type-framing features seem nowadays to be swept out of collective memory and taken notice of, if at all, rather as a historically incidental exception in the birthplace of classical codification, only to relativise the very term 'codification' (along with the idea and the historical achievement represented by its one-time realisation), by reducing its meaning to the practice of rationalising one aspect of the mass-scale and all-inclusive management implied by today's public administration, that is, to the continuous consolidation of its legal normative staff (from statutes to governmental decrees, including also administrative regulations).[11]

This short-sighted and extreme simplification (forecasting "the end of history" with all the a-historical conceptual misrepresentation inherent in Francis Fukuyama's contemporary Utopianism)–in addition to its rather controversial nature, as such a 'codification', taken as the genuine piece of consolidation,

[10] According to Bergel, J.-L.: Les méthodes de codification dans les pays de droit mixte. In *La formation du droit national dans les pays de droit mixte.* Aix-Marseille, 1989. 21–34, "from now on, there is nothing but mixed laws" (34), because "the mixed character grows widespread by becoming the general rule" (35).

[11] As a vice-president of the National Committee for Codification, Braibant, G.: Codification. In *Encyclopaedia Universalis* 6, Paris, 1995. 9–42 has visualised today's practice, drowned in everyday hygiene and poorly lacking any concept, as the great universal achievement of mankind. Because, although "codification has been an ancient dream of mankind" (39), yet its manifestations "hardly have more value than the texts adopted or issued by them". Namely, "codification itself is nothing else than the operation or policy of the fabrication of codes, through re-arranging former norms or creating new norms" (39). Accordingly, the term 'codification' itself has a twofold meaning. True, there was once also "a great work of codification", the *Code civil,* yet, today also "systematic codes" are available to us. For, as he goes on, "the renaissance [of codification] took place after the [Second World] War" (40).

has to first "transcript", then "transgress" the positivated legal staff processed by it, tearing this staff out from its original texture, by placing it into another context, and thereby finally "transdict" it[12]–is not only sheer "conceptual abuse"[13] but is obviously indicative of decline, too.[14] All this slowly starts to characterise our age to an extent that some observers believe to discover exactly opposite, counter-running tendencies among the trends in the United States of America and in the European Union, pointing out that while *there* the re-assertion or the launch of codification, *here*, on our continent, de-codification has been put on the agenda.[15]

A kind of scepticism has become general–first, in the form of disillusionment and then, as a general awakening, due to the vanishing of the myths of the European ideal of codification[16]–which, as extended also to the past, has gradually but surely been transferred from the loss of confidence placed in the regulatory force of and normative foresight by the law, to the general *disappointment in codification* itself. Some present-day sober explanations

[12] Terms by Timsit, G.: La codification: transcription ou transgression de la loi? In his *Archipel de la norme*. Paris, 1997. ch. V, 145–159, especially at 151, 155 and also 159. Actually, Timsit speaks about consolidation, yet, indicative of uninhibited actualisation, he terms it codification all along [as done also by both Catta, E.: Codification et la loi fétiche. In *Interpréter le droit* Le sens, l'interprête, la machine (dir. Thomasset, C.–Bourcier, D.). Bruxelles, 1997. 63–69 and de Bèchillon, D.: L'imaginaire d'un code. *Droits* (1998), No. 27: La codification 3, 173–184], and blames it basically for "transcendence of the limits of the law" (151) and for "a mummification of the law" (159), that is, for the fact that exactly this false codification, operating with original sources of the law, falsifies them unpronouncedly, because it re-positivates them in a new context and medium.

[13] This conceptual extension is expressly considered as an abuse by, e.g., Gaurieu, D.: La rédaction des normes juridiques, source de la métamorphose du droit? Quelques repères historiques pour une réflexion contemporaine. *Revue générale de droit* 31 (2001) 1–85.

[14] Having apparently passed the great moments of codification once and for all (accompanied by the gradual erosion of the belief in rational plannability and in any *Gesamtplan*'s logical executability, in addition to the lack of appropriate political and legal circumstances) may perhaps account for the fact that "The importance of codes will decrease, and the drafting of truly new ones–capturing and organizing new realities–will be, at least for the moment, an almost impossible task." Damaska, M.: On Circumstances Favoring Codification. *Revista Jurídica de la Universidad de Puerto Rico* LII (1983) 355–371, quotation on 370.

[15] Shael H.: The Fate and the Future of Codification in America. In: *Essays on European Law and Israel* (ed. Rabello, A. M.). Jerusalem, 1996. 89–129, especially 124.

[16] E.g., Arnaud, A.-J.: *Pour une pensée juridique européenne*. Paris, 1991. 294 [Les voies du droit] speaks about "reassuring, alleviating myths of the simplicity, permanence and abstract character of the law".

trace this back to the expectations over-intensified yet puristic (and, in this regard, also doctrinarian), thus excessive all through (and, therefore, impractical, consequently proving unsuitable to stand the test of time), fixed back in the age of the Enlightenment, of the birth of classical codification.[17] This is the recognition from which immediately a consequence is also drawn, according to which only the kind of codification could prove successful with lasting effects and applicable in the long run, where its drafters were the least inclined to over-enthusiasm.[18] We seem to have left behind once and for all, as the one-time children's room of our (post)modernity, the claim for codifying the law with the intent of "establishing a new unified legal system", and we are going only to draw on codification in as much as it is inevitable "to safeguard the interests of the community by restricting, as far as possible, the political aspects and influence of different lobbyists",[19] not excluding out the possibility either that the instrument of classical codification will one day be replaced by artificial intelligence and its new media technicalities.[20]

*

Well, what is codification like and where is it heading at the threshold of the new millennium? Most responses seem to confirm my earlier monographic

[17] E.g., Schmidt, K.: *Die Zukunft der Kodifikationsidee* Rechtsprechung, Wissenschaft und Gesetzgebung vor den Gesetzeswerken des geltenden Rechts. Heidelberg, 1985. 79. [Juristische Studiengesellschaft "Karlsruhe" 167].

[18] "The reason why in Countries with old Civil Codes the courts are still able to find their way lies in the fact that legislators did not attempt too much." Lorenz, W.: On the »Calling« of Our Time for Civil Legislation. In: *Questions of Civil Law Codification* (ed. Harmathy A.–Németh Á.). Budapest, 1990. 128.

[19] Kötz, H.: Schuldrechtsüberarbeitung und Kodifikationsprinzip. In: *Festschrift für Wolfram Müller-Freienfels* (hrsg. Dieckmann, A. et al.). Baden-Baden, 1986. 97 and, for contrasting past and future, cf. also Harmathy, A.: Codification in a Period of Transition. *U[niversity of]C[alifornia] Davis Law Review* 31 (Spring 1998) 783–798, quotation on 789. It is worthwhile to notice the irony inherent in the fact that the image of the past formed by such prominent civilian authors about codification, taken once as a creative power, is nothing else than the image of future major expectations formed within the European Union. Or, this is a proof that even if history does not repeat itself, we do ourselves. Thanks to our urge to adapt, we again and again draw on the past, its experiences and instrumentalities.

[20] "The arduous road to new integration will probably be paved by artificial intelligence better able to detect patterns in the complexity of the modern social life." Damaska: *ibid.*

stand,[21] which is found by certain dreamers of our future as something hopelessly embedded in (as formed by) the ideals of the past, therefore *statist*, and, as to declare what the law is, *authoritarian;* or, and briefly, *atavistic* and, as such, *to be transcended.* In sharp contrast with this, there is only an elastic, wishful image formed about the character of the future European civil code, vaguely sketched with exploratory uncertainty, far from being discernible in any aspect.

According to the theoretical literature (leaving, at the moment, the deconstructive reconstructions of the near future out of account), the core of codification is still the idea of a *system* manifested in both its composition and structuring, doctrinal reflection and conceptual building up, including the judicial practice of referring to codal definitions of institutions, legal constructs and dispositions as well:[22]

> "Putting an end to the rule of the fuzzy and uncertain, wrongly cut boundaries and of the only approximate classifications, by applying definite cuts and creating sharp boundaries, replacing the former by setting up clear classes."[23]

Or, codification invariably appears (1) as an *exclusive* body of law, (2) implementing *unity* in its regulatory field (3) with logical *coherence and consequentiality*;[24] or, showing the features of (1) *completeness*, (2) *freedom*

[21] Cf., Varga *Codification...*, passim.

[22] See, first of all (though tacitly admitting to be unable to comprehend the entire continental approach to law beyond the separation of what is systemic and what is non-systemic), Freeman, M. D. A.: The Concept of Codification. *The Jewish Law Annual* 2 (1979), 168–179, especially at 169. For the development in history of the concepts 'system' and 'legal system', see, from Sève, R.: Introduction. 1–10, and, for their analysis by example of the *Code civil*, his Système et code. 22–86, both in *Archives de Philosophie du Droit* 31: Le système juridique (1986).

[23] Bourdieu, P.: Habitus, code et codification. *Actes de la recherche en siences sociales* (1986), 4–44, quotation on 42, claiming that the "the system is built on [...] cognition as universal, through the inseparably logical and ethical necessity of it" (4).

[24] Humbert, H.: Les XII Tables, une codification? *Droits* (1998) La codification 3, 87–112, applies the collective incidence of all these characteristics to qualify the *lex duodecim tabularum* as a code (110–111). According to Arnaud, 135, codification is a "coherent and systematic regulation" achieved through "exhaustive totalisation" which, according to R. C. van Caenegem *An Historical Introduction to Private Law.* Cambridge, 1992), especially at 12, denotes "a general, exhaustive regulation of a particular area of law", by "involving a coherent programme and a consistent logical structure".

from contradictions and (3) *regulatory economy*;[25] or, furthermore, of a (1) *comprehensive* and (2) *systematic* (3) *enactment by the legislature*,[26] (4) promulgated as a *code*.[27] The theoretical attitude is conservative here: once the paths of the mere collection and textual embodiment of laws, once termed by me then as the *quantitative*, and later on, the systemic reshaping of the law according to the logical ideal of a system, termed by me then as the *qualitative*, types of codification have started to diverge, also the notion implied by the terms 'code' and 'codification' has become reduced to mean just the latter, that is, the qualitative type, carrying, as a *sine qua non*, the criterion of *systemicity* regarding the law processed all through.

Well, it is exactly this differentiation that seems to be disappearing as an outdated past achievement from the postmodernist visions of the political voluntarism of the European Union, not yet equipped with any encouraging practical experience in an all-comprehensive codificatory regulation.

The first guinea pig for experimentation in this immense ongoing endeavour is the effort at elaborating, one way or another, the *codification of private law of the European Union*. For the time being, we know less about the underlying motives and perspectives of common European legislation (including the

[25] Ost, F.: Le code et le dictionnaire: Acceptabilité linguistique et validité juridique. *Sociologie et sociétés* XVIII (avril 1986) 59–75.

[26] Zimmermann, R.: Codification: History and Present Signification of an Idea. *European Review of Private Law* 8 (1995) 95–120, especially 96–97. van Caenegem, R. C.: *Judges, Legislators & Professors* Chapters in European Legal History [Goodhart Lectures 1984–1985] Cambridge, 1987. on 42 defines the code as a comprehensive and systematic exposition replacing all previous laws in a new text promulgated as a law. Dölemayer, B.: Zivilrechtliche Kodifikationen in Europa im 19. Jahrhundert. In *Evolution of the Judicial Law in XIXth Century* ed. Grzegorz Górski {= *Law in History* [Lublin] 1 (2000)}, 117–130, on 118 identifies it simply as the "materially comprehensive, systematic, abstract and rational regulation of an entire area of law summarised in a code (*codex*)" ["*materiell umfassenden, systematischen, abstrakten und rationalen Regelung eines ganzen Rechtsgebiets in einem Gesetzbuch (codex)*"].

[27] Of course, there are softer definitions as well. According to Ascarelli, T.: L'idea di codice nel diritto privato e la funzione dell'interpretazione. [1955] In his *Saggi giuridici* (Milano, 1949), 48–49, for instance, "The code is characterised by a claim to construct a »new«, »complete«, and »definitive« legal order that includes amongst its formulations solutions for all possible cases", and, as stated by Pio Caroni *Lecciones catalanas sobre la historia de la codificación* [Lezioni catalane sulla storia della codificazione] (Madrid, 1996), 177, especially at 22–23 [Publicaciones del Seminario de Historia del Derecho de Barcelona 1], the code is a "written presentation aiming at plenitude, with a unificatory function".

clarification of the theoretical foundations and necessity of a systematic codification), reminiscent of the classical period of drafting constitutions and law-codes as well, than about the nature of "democratism" characterised by constant hesitation and the easy readiness to launch the bureaucratic machinery of common legislation in motion. No doubt, the dilemmas regarding the legal expression of the foundation of national states in the 18th to 19th centuries will gain new aspects in the current rush for the foundation of a truly inter-national state. Therefore, I still find the lessons drawn two centuries ago invariably remarkable, according to which "codes and constitutions have performed analogous institutional roles" in the legal performance of the *political* and *civil* foundation of a society, as supporting and complementing one another in the historically parallel rush for providing basic chartae and law-books.[28]

Well, returning to the issues pertaining to the common European codification, all we could experience about its outlines so far is that

– it does not aim at abstract conceptual clarity, consistence or exclusive pursuance of any ideal or actual model:[29] it will presumably represent the entire European and even all-Atlantic heritage in the tradition of values and techniques as a *practical whole* in a (perhaps even mosaic-like) new quality. At the same time,

– it does not aim at perfection, nor at any exclusive completeness.[30] As the result of a new definition of the law, it will have to openly accept, in the context of constantly changing interests and depending on the institutional moves at any given time, a sheerly *temporary* and *mediatory* role. Therefore, having drawn the lesson from the failures of codification up to now,

– it can be nothing more than just "*creeping*".[31] As soon as this figurative expression has reached consensus among the students of law taking part

[28] Gambaro, A.: Codes and Constitutions in Civil Law. In: *Italian Studies in Law* 2, (ed.: Pizzorusso, A.). Dordrecht–Boston–London, 1994. 79–104, quotation on 79.

[29] Basedow, J.: Codification of Private Law in the European Union: The Making of a Hybrid. *European Review of Private Law* 9 (2001) 35–49.

[30] According to Lasserre-Kiesow, what once, in the period of classical codification, embodied "the totalisation of knowledge" (221), is nothing else on the final analysis than "a patriotic and habitual juridical exaggeration [...] which only hinders the ideal of a legal Europe" (223). In a similar sense, see also Wiegand, W.: Back to the Future? *Rechtshistorisches Journal* (1993) 283.

[31] The term 'to creep' denoting 'to develop slowly and steadily [...] in the hope of advancement' was first used by Klaus Peter Berger *The Creeping Codification of the Lex Mercatoria.* The Hague, 1999.

in the debate (revealing also the poet, dreamer, innovator and/or social revolutionary hidden in each of us even if mostly suppressed by our scholarly discipline), the doctrinal (and maybe dry, yet systematic) reasoning of treatises in jurisprudence has become substituted (in a way unheard of in juridical literature at earlier times) by a rhapsodic subjectivism with lists of desires and the boundlessness (almost reminiscent of the ecstasy of the so-called 'honeymoon-period', characteristic of early modern and modern revolutions), even unrestraint and randomness, of a credo of "Anything is possible, because by virtue of the power of such a giant club, we are in a position to target anything at will!".

Accordingly, some keep day-dreaming hoping that a kind of the desired end-result will after all emerge one way or another, in one form or another, upon the pattern and with the automatism of the '*Volksgeist*' once active in SAVIGNY's thought, due to the emerging clarification of principles through their continuous testing in practice, their unfatiguing re-consideration and adjustments, combining the effect of scholarship and doctrine with the socialising force of living practice and the educational efforts available through general and vocational training.[32] According to other opinions, the desired unity of the European Union can, at most, emerge as the result of endeavours, in which the accumulation of principles (to be further shaped, re-asserted and represented all through by a truly inter-national European legal profession, capable of rising above national fragmentation) will be conceived in the womb of common European professional education and business practice, with a unifying legal scholarship and doctrine in the background. Therefore, it is *practicality* what the new European creed calls for and not pure scientism or self-complacent authorial egoism; for the latter can merely lead to selfishness, yielding only unnecessary complexity and contradiction, i.e., abstract and doctrinaire conceptuality which, as dried-out and lifeless fruits, cannot genuinely respond to the present, truly practical challenge. Or, new Portalises are needed, since only the *humility* of traditions can provide bases for a codification achieved at the level of *foundational principles*.[33] Among the authorial convictions, it seems to be a bit too daring to dream farther about (reminiscently, first of all, of the patterns offered by the American Restatement of the Law and the uniform legislation)

[32] Bergerm K. P.: The Principles of European Contract Law and the Concept of »Creeping Codification« of Law. *European Review of Private Law* 9 (2001) 21–34.

[33] Lando, O.: Some Features of the Law of Contract in the Third Millennium. *Scandinavian Studies in Law* 40, Stockholm, 2000. 343–402, especially 361–363.

experimental preparation of such projects as the Principles of European Contract Law or of European Civil Procedure, so as to be able to decide, given the newly acquired practical experience, how to go on (if one will be decided to go further at all);[34] or, partly preconceiving the response, leave the consummation of the codifying process to legal practice from the outset, whose result appearing some time in future can, of course, be applied to further refine either the normative material itself or any of its official commentaries.[35] No matter how the European legal profession may decide, we have to be aware of the fact that even in case any codification is eventually completed, "It could then take decades before today's level of predictability and rationality of decisions would be reached again."[36] At the same time and in an evident interrelation with this,

– the question of the future duality and/or eventual convergence of the British *Common Law* and the continental *Civil Law* is still raised as a vital issue.[37] This old-new question (earlier only a favourite delicacy for legal

[34] Hondius, E.: Towards a European Civil Code. In: *Towards a European Civil Code* ed. Arthur Hartkamp, 2nd ed. Nijmegen–The Hague–Boston, 1998. 3–19.

[35] As formulated by Schmid, Ch. U.: Legitimacy Conditions for a European Civil Code. *Maastricht Journal of European and Comparative Law* 8 (2001) 277–298, on 296, there will be an "integrative Restatement with a common European commentary section", onto which–more and more acceptedly anyway in West-European practice [cf., e.g., Schulze, R.: Vergleichende Gesetzauslegung und Rechtsangleichung. *Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht* (1997), 183 et seq. and Monateri, G.–Somma, A.: »Alien in Rome«: L'uso del diritto comparato come interpretazione analogica ex art. 12 preleggi. *Il Foro Italiano* (1999), V47]–a so-called comparative interpretation is going to be built. Although this seems to contradict the established practice according to which, from the very beginning, a "Cartesian style" has been dominant in the exclusive European judicial forum properly designed so far, i.e., the European Court of Justice, which is allegedly "inspired by the French tradition, in which judgments are more set up as binding conclusions of a quasi-scientific nature than justified argumentatively" [cf., e.g., Weiler, J. H. H.: The Function and Future of European Law. In: *Function and Future of European Law* (ed. Heiskanen, V.–Kulovesi, K.). Helsinki, 1999. 17 et seq. and Leible, S.: Rolle der Rechtsprechung des EuGH bei der europäischen Privatrechtsentwicklung. In: *Auf dem Wege zu einem Europäischen Zivilgesetzbuch* (hrsg. Martiny, D.–Witzleb, N.). Berlin, 1999. 55 et seq. and 73 et seq. [Schriftenreihe der Juristischen Fakultät der Europa-Universität Viadrina Frankfurt]. This is a practice that will, if not accompanied by a total shift in character, be downright inoperable in a kind of regulation carried out mostly on the level of mere principles.

[36] Schmid: *op. cit.* 287.

[37] The Clifford Chance Millennium Lectures *The Coming together of the Common Law and the Civil Law* (ed. Markesinis, B. S.). Oxford–Portland, 2000. and, in it, especially

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comparatists in generating intellectual pleasures) has now become, from the vague presentiment of the presumable consequences of a political resolution, the *sine qua non* of such a resolution and its feasible future realisation. For the common European administration of justice as practised in Luxembourg, Strasbourg, etc. for a few decades now has only required the commonality of results, with no relevance to the issue how these have been actually reached, with which ways and what procedures resorted to and which sources referred to in the process. However, a common European codification, contemplated now, already penetrates straight into the heart of the law. It presupposes the unification of all the intellectuality and underlying approach, conceptual thinking, subordination to logical and systemic forms (that is, sensitivity, skills and styles) which, on their turn and throughout the sequence of centuries, not only offered our continent a scope of law-positivations diverging in nature from those on the British Isles but, so to say, embodied a route and direction diametrically opposite to the hopes placed in this converging European future, both in the historical experiences and their scholarly reconstruction, in the conceptual and methodological frameworks of political and constitutional thinking, in the stake and nature of philosophising–or, in sum, in taking the choice between the pragmatic reliance on human and social experience or the mere pursuance of the barren logic of preconceived conceptual schemes, and, thereby, also between the empirical (inductive) and the principled and methodical (deductive) ways of construction–from the one-time accomplishment of the entire revolution in natural scientific thought.[38]

Or, to put it briefly, quite simply and also professionally simplified: those of us who, ready for action, await orders to carry them out, or those who, attending to each other benevolently, hope the diligent acts of the detail work (invisible in the humane everyday responsible practice) to produce

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Markesinis, B. S.: Our Debt to Europe: Past, Present, and Future. 37–66; Crosswald Curran, V.: Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union. *The Columbia Journal of European Law* 7 (2001) 63–126. One of the authors [Helmholtz, R. H.: Continental Law and Common Law: Historical Strangers or Companions? *Duke Law Journal* (1990) 1207–1228] remarks in conclusion (on 1228) that "Common lawyers always wished to avoid some aspects of Continental law, but they also habitually regarded it as a companion and resource to be called upon in need, not as a stranger."

[38] For the differing mentality, cf., from the author, *Lectures on the Paradigms of Legal Thinking.* Budapest, 1999. and Összehasonlító jogi kultúrák? [Comparative legal cultures?]. *Jogtudományi Közlöny* LVI (2001) 409–416.

the long desired result one day, can, at the highest, be specialists of *comparative law* in their entrenchment into legal texts, but by no means historically and anthropologically sensitive thinkers who have, at the same time, to bear in mind the essentials *of comparative legal cultures* as well.[39] For the latter are those who already know (or, at least presume at the level of hypothesis substantiating their approach and explorations) that law is not simply a mechanism built up of interchangeable parts, according to a product-type and operated as a machine, but an aspect of living human culture, separated relatively and only for professional purposes from the other factors and bearers of the order in making at a community level, only to be able with foreseeable security (as having stepped out from the everyday circulation of interests) to direct, influence and control the practice of conflict-resolution according to ready-made patterns, as the case may be, thereby also rendering it impersonal in the spirit of the ethos of the order itself, that is, an external Order which is, like the veil of *Justitia*, necessarily depersonalised.

(As a matter of fact, we can by far not be sure whether or not at all, and in which sense, the Anglo–American legal mentality may mean indeed 'rule' by 'law'. For instance, the early failure of the reformist effort by the British Law Commission (aimed at considering codification as late as in 1964) was indicative of an utter confusion as to the generalisability of the law as broken into and embodied by a series of concepts, as well as its arrangement and ordination according to abstract logical forms, with the implied possibility of also subordinating (subsuming) facts to rules.[40] For in

[39] For their conceptual and disciplinary separation and the requirements of the new approach, see, from the author, Comparative Legal Cultures: Attempts at Conceptualization. *Acta Juridica Hungarica* 38 (1997) 53–63 and Comparative Legal Cultures?, passim, pondering upon the topic covered by *Comparative Legal Cultures* (ed. & introd. Varga, Cs.). Hong Kong–Singapore–Sydney–New York, 1992. [The International Library of Essays in Law and Legal Theory: Legal Cultures 1.] and *European Legal Cultures* (ed. Gessner, V.–Hoeland, A.–Varga, Cs.). Aldershot–Brookfield USA–Singapore–Sydney, 1996) xviii + 567 pp. [Tempus Textbook Series on European Law and European Legal Cultures I].

[40] The effort of Jeremy Bentham–"The unity of a law will depend upon the unity of the species of the act which is the object of it" [in his *Of Laws in General* (ed. Hart, H. L. A.). London, 1970. 166.]–was reasserted to ordain the proper obligation or empowerment to each and every behavioural situation as a 'law/right' befitting it; Jolowicz' whole venture [*The Division and Classification of the Law* (ed. Jolowicz, J. A.). London, 1970.] set itself the aim of replacing this benthamite dependence on acts by a dependence on social facts; while Julius Stone pointed out, [in his *Legal System and Lawyers' Reasonings*. London, 1964. 269.] that even the most elementary natural facts (like, e.g., the rotting scrap of a

their codificatory thought, the Britons used to maintain that if law were traced back to a (re)posited series of rules at all, that what would be most meaningful of all this settlement for the judges could only be the rather informal reasoning based upon the *travaux préparatoires*, indeed worthy of the human intellect. And this is exactly what the 19th-century British-Indian codifier wanted to express when he remembered as follows: "we added as many illustrations as we thought necessary for the purpose of explaining it", and, therefore, it would be most beneficial to include these rules' grounds along with the rules themselves into such codes.[41] Well, they were actually, then and now, trying to beat a path lagging centuries behind Leibniz' age and recognitions. Actually, the very idea of codification arises from the theoretical understanding that codal law cannot indeed be anything else than a sheer sequence of abstract and general rules, while the underlying understanding of the common law is still related with the idea of something that can exclusively be grasped empirically, placed somewhere between the casual decision and the grounds for decision, equally drawn from tradition.)

Even just a glance through the literature pouring in this topic is enough to see that there are already painstaking case studies about the intensifying "Europeanisation" of the British jurisprudence[42] and all those "myths of codification"– according to which, to make mention of just one formulation,

"I. A codification can provide an accessible and complete formulation of the law and can enable the development of the law in a planned manner. II. Codal

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snail found in the beverage, as referred to in *Donoghue v. Stevenson* [1932] A.C. 562), may mean "dead snails, or any snails, or any noxious physical foreign body, or any noxious foreign element, physical or not, or any noxious element"; as other authors [Twining–O'Donovan–Paliwala: Ernie and the Centipede. In: *The Division...*] have also ventured to prove that "a black female poodle puppy can be classified by colour, sex, species or age". Freeman: *op. cit.* 172–173.

[41] *Black v. Clawson* [1975] A.C. 591; Macaulay's letter to Lord Auckland, quoted by Farrar, J.: *Law Reform and the Law Commission.* London, 1974. 58–59; F. Vaughan Hawkins in *Juridical Society Papers* 3 (1865), 110 et seq., especially at 112; as well as Farrar: 159. Quotation by Freeman: *op. cit.* 176–177.

[42] E.g., Zimmermann, R.: Der europäische Charakter des englischen Rechts: Historische Verbindungen zwischen *civil law and common law. Zeitschrift für Europäisches Recht* I (1993), 4 et seq.; Levitsky, J.: The Europeanization of the British Legal Style. *The American Journal of Comparative Law* 42 (1994), 347 et seq.

regimes are rigid and not adaptable. III. The common law's emphasis on case law techniques makes it admirably adaptable to new circumstances."[43]

–which, of course, as dreams and Utopian expectations, can be justified neither in the domain of Civil Law, nor that of Common Law. It may seem paradoxical, yet it is a truth worth considering that even, for instance, French law is more flexible, more suitable for practical adaptation and fertilising application from many aspects, than case-law directly made by judges. After all, the continental law-applying process steps out from general principles calling, by their nature, for interpretation, and it may initiate debate on the meaning and applicability of rules independently from the question of the very existence and systemically co-ordinated arrangement of the same rules, as opposed to English judge-made law reduced to an amalgam(ate) of casual decisions, which, like "an amorphous mass [...] [in which] there is no organizing principle",[44] directly carries on (because of the undifferentiated unity of the rules and their casual application) the legal character and self-identity of the whole, up to its last component as well.[45] Well, expectations linking positive or negative Utopianism to codification

[43] Markesinis: B. A.: The Destructive and Constructive Role of the Comparative Lawyer. [originally in *Rabels Zeitschrift* (1993), 438–448] in his *Foreign Law and Comparative Methodology* A Subject and a Thesis. Oxford, 1997. 36–46, quotation on 37–38.

[44] Watson, A.: The Importance of »Nutshells«. *The American Journal of Comparative Law* 42 (1994), 1–23, quotation on 11 and 12.

[45] See Tunc, A.: Codification: The French Experience. In: *Problems of Codification* (ed.: Stoljar, S. J.). Canberra, 1977. 73–74, as well as David, R.: *French Law* Its Structure, Sources, and Methodology. Baton Rouge, 1972. xviii + 222 pp., especially at 80 and 83.

It is to be noted that this is the line by which the question of the general part of civil codes becomes directly a regulatory problem of codification–as it defines, in principle, the upper layer of normative axiomatism (without which the "lawyer at sea in the law like a pilot without a compass" would helplessly roam [cf. Unger *System des österreichischen allgemeinen Privatrechts* I, 5th ed. (1892), 641, as well as Zweigert, K.–Kötz, H.: *Introduction to Comparative Law* I: The Framework, 2nd rev. ed. (trans.: Weir, T.). Oxford, 1987. 167]–, as well as the gap-filling technique of the Swiss *Zivilgesetzbuch*, commissioning the judge to become eventually an accidental substitute to the legislator (§ 1), the specific feature of which lays not only in the fact that it can be traced back via Kant even to Aristotle (*Nicomachean Ethics,* 1137b) but it also reasserts the continental regulatory principle (the judicial empowerment notwithstanding), by eventually declaring that "in order to be legal a decision must be based on a rule which can be formulated as a general one" [Wieacker, F.: *A History of Private Law in Europe* With Particular Reference to Germany {Privatrechtsgeschichte der Neuzeit, 1952, 2nd ed. rev. 1967} (trans. Weir, T.). Oxford, 1995. 391].

mostly appear mixed with manifestations of either the euphoric belief in a Common Europe[46] or, just to the contrary, an extremist rejection of it.[47] Any analysis of the signs, steps and events of actual rapprochement (or, at least, of effective interaction and mutual influence) is relatively rare a phenomenon. For instance, in Germany, the jurisprudence of the *Bürgerliches Gesetzbuch* has arrived from the one-time exegesis reached as a *"juristic game of chess"* to a *"case-law revolution"*,[48] while in the English legal thought, there is emerging an *"increased self-assertion of a kind of doctrinarism"* (as a feature indicating that

[46] Markesinis, B.: *The Gradual Convergence* Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century. Oxford, 1994.; Gordley, J.: *Common Law and Civil Law:* Eine überholte Unterscheidung. *Zeitschrift für Europäisches Privatrecht* I (1993), 498 et seq.

[47] Cf., e.g., from Legrand, P.: Legal Tradition in Western Europe: The Limits of Commonality. In *Transfrontier Mobility of Law* (ed.: Jagtenberg, R.–Örücü, E.–de Roo, A.). The Hague–London–Boston, 1995. 63–84 and How to Compare Now. *Legal Studies* 16 (1996), 232 et seq.; similarly Paasilehto, S.: Legal Cultural Obstacles to the Harmonisation of European Private Law. In: *Function and Future of European Law*, 99 and Bussani, M.: »Integrative« Comparative Law Enterprises and the Inner Stratification of Legal Systems. In: Feiden, C.–Schmid (ed.): *European Review of Public Law* 8 (2000), 57 et seq., especially at 85.

According to several opinions [e.g., Flume, W.: Beruf unserer Zeit für Gesetzgebung. *Zeitschrift für Insolvenz- und Wirtschaftsrecht* (2000), 1427 et seq., especially at 1429, as well as Collins, H.: European Private Law and the Cultural Identity of States. *European Review of Public Law* 3 (1955), 353], national legal arrangements with their codal expression are parts of the cultural heritage anyway, whereby they, being cultural monuments, can hardly be relinquished by any state without simultaneously giving up something of own statal identity.

For instance, Mengoni, L.: *L'Europa dei codici o un codice per l'Europa?* (Roma, Centro di studi e ricerche di diritto comparato e straniero, 1993), 3 [Saggi, conferenze e seminari 7] excludes unification through codification from the circle of possible alternatives: *"reconoscere che l'un codice per l'Europa non è un'alternativa realistica"*. Legrand, P.: Brèves réflexions sur l'utopie unitaire en droit. *Revue de la common law* 3 (2000) 1–2, 111–125 quotes from the work of P. d'Oribane *Cultures et mondialisation* (Paris, 1998), 324–325, according to which "The reason according to the taste of the French is more noble, more devoted to the beauty of theory, more attached to the pure and gratuitous things, more based on general systems and ideas, more brilliant, more abundant in elegant demonstrations, and more sharing the characteristics of *grandeur* than the English do".

[48] Partsch, J.: *Vom Beruf des römischen Rechts in der heutigen Universität.* Bonn, 1920. 50 pp. at 39, as well as Dawson, J. Ph.: *The Oracles of the Law* (Ann Arbor, 1968), 432, quoted, among others, by Zimmermann, R.: *Roman Law, Contemporary Law, European Law* The Civilian Tradition Today (Oxford, 2001) xx + 197 pp.

"these peculiarities and jagged edges, on both sides of the Channel, are in a process of being with away"[49]). Or, what is wanted is a disillusioning cold voice that would neither applaud, nor oppose, just remind us that, given the second millennium elapsed in European history, what has happened until now is not too much and not necessarily new either. Therefore, one can state that

> "To conclude on that basis that the common law is being »Europeanised« is probably as rash as to imagine that it was ever isolated in the first place."[50]

And indeed, we cannot be so oblivious as to forget that, just a few decades ago, the very idea of applying any universal abstract formulation, such as in case of the direct and uniform judicial enforcement of transnational human rights charters, had filled the House of Lords with dread. Similarly, English lawyers have proved to be unable or unwilling to propose (perhaps out of pretension) a means more suitable for the internal division of their own law than factual classification (i.e., the one arranging facts according to the initials of their English names);[51] acknowledging with complacency that human mind has never produced and could probably never produce anything more fitting than the purely alphabetical "chaos with an index"[52] of the words identifying legal loci and contexts.

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Now, looking back from the coming future to the past, what is codification of the various historical epochs like in the mirror of analyses by recent literature? As far as the early occurrences preceding the Greek and Roman codal forms are concerned, it is ascertained that they were, for the most part, not normative

[49] Zimmermann, R.: Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science. *The Law Quarterly Review* 112 (October 1996), 576–605, especially at 590 and quotation on 589.

[50] Lewis, X.: The Europeanisation of the Common Law. In: *Transfrontier Mobility of Law*, 47–61, quotation on 61.

[51] The aim of *The Division and Classification of the Law* (ed.: Jolowicz, J. A.) is admittedly nothing less than "A plea for a factual classification of the law [...] a factual division of the content of the law" (7). The situation has not changed since. As Bernard Rudden states in his Torticles. *Tulane Civil Law Forum* (1991–1992) 105, "the alphabet is virtually the only instrument of intellectual order of which the common law makes use".

[52] The expression of Sir Thomas Holland is quoted by Marsh, N. in *International & Comparative Law Quarterly* 30 (1981), 488.

sources of law[53] but "pious hopes and moral resolve rather than effective law"[54] or, at times, simply traditional literary compendia used for the official training of clerks,[55] which could of course serve also as reference manuals for the judges faced with troublesome cases.[56]

It is surprising how early the idea of order arose, so to say contemporarily with Justinian, but thousands of miles further, also in the West.[57] And in *conceptual arrangement*, substantive regulation is the first to get separated

[53] "Neither in the prologues nor in the epilogues nor elsewhere do the law-codes order any one to observe their provisions. Judgments in lawsuites pay no regard to the law-codes." Walther, A.: *Das altbabylonische Gerichtswesen.* Leipzig, 1917. 227. Also cf., in the same sense, Landsberger, B.: Die babylonischen Termini für Gesetz und Recht. *SDIOP* II, 221–222.

[54] Finkelstein, J. J.: Ammi-Saduya's Edict and the Babylonian »Law Codes«. *Journal of Cuneiform Studies* 15 (1961), 91–104. "Their primary purpose was to lay before the public, posterity, future kings, and, above all, the gods, evidence of the king's execution of his divinely ordained mandate." (103) Accordingly [as Oppenheim, A. L.: *Ancient Mesopotamia* Portrait of a Dead Civilization, rev. ed. (1977) states], Hammurapi's code (similarly to all former Accadian and Sumerian codifications) has no connection whatsoever with the legal practice of the age. Its contents can, from several main perspectives, be regarded rather as a traditional literary formulation of the King's social obligations and as the expression of the King's awareness of the differences between the existing and the desirable state of affairs. (And it is to be remembered that this edition also remarks in notes–rather thought-provokingly for the understanding of the all-European development–that the fatal approach trying to squeeze reality into a series of formal requirements is unknown in Mesopotamia and probably also in the entire ancient Near East. It was only a later and definitely peripheric development, notably, Judaism [having originated from the desire to generate, due to certain ideological motives, specific social relationships] that managed to bring about such a behavioural pattern.)

[55] Oppenheim, A. L.: *Ancient Mesopotamia.* Chicago, 1964. 14–21.

[56] Westbrook, R.: Biblical and Cuneiform Law Codes. [*Revue Biblique* 92 (1985), 247–264] In *Folk Law* Essays in the Theory and Practice of *Lex Non Scripta* (eds. Dundes Renteln, A.–Dundes, A.). New York–London, 1994. 495–511, especially at p. 503. For the entirety of these early forms, see also Sealey, R.: *The Justice of the Greeks* (Ann Arbor, 1994).

[57] Notably, it appears already as a programme in title 1 of the book II of the version of the unified (Visigothic and Roman) code of Recceswinth (654) as amended by Erwig (681) that the law-book has to provide "a clear and honest meaning, expressing clear precepts for the doubtful [...] in orderly arrangement [...] in ordered titles". Quoted by Fischer Drew, K.: The Barbarian Kings as Lawgivers and Judges, in her *Law and Society in Early Medieval Europe* Studies in Legal History. London, 1988. 7–29 and 15.

from procedural and evidentiary rules in early compilations, so that it can finally be declared:

> "all questions for which there is no regulation have to be answered upon the basis of the regulation given in the law. [...] The law becomes, out of something inherent in the things, a kind of order posited above the things, an autonomous power."[58]

New realisations are now made available about the *substitutes for codification* from antiquity up to the present day. On the one hand, we not only learn how widespread it was for official compilations to enter into effect in form of manuscripts (either due to lack of printing press or to some local custom), but there were even times when they were expressly designed to be made public by way of being deposited (for example, at the Town Hall in case of the *Coutumes de la ville d'Ypres*, 1535) as accessible to anyone to ask for a copy on payment of a certain amount,[59] just as the Icelandic law-speaker [*lögsögumaður*] centuries earlier (back in the age of the *Konungsbók* [*Codex regius*], 930–1262) could be approached to reassert occasionally for those who looked after justice, what the law was.[60] On the other hand, not only revealed holy books (like, e.g., the *Bible* for the first founders of the state of Massachusetts) can provide a rudimentary guidance as the law's summation but, at times and for want of anything better,

[58] [*"alle nichtgeregelten Fragen sich aus der im Gesetz gegebenen Regelung beantworten lassen müssen. [...] Das Recht (Gesetz) wird aus einer den Dingen innewohnenden eine über die Dinge gesetzte Ordnung, eine autonome Macht"*] Ebel, W.: *Geschichte der Gesetzgebung in Deutschland.* Göttingen, 1958. 107 pp. [Göttinger rechtswissenschaftliche Studien 24], on 75. According to his examples, such is the promulgation of a *Gerichtsordnung und Landrecht*, auch Polizei-, Holz-, Hütten-, Bergordnung und Reformation (1592) on the estate of Wildenburg a. d. Sieg or of a *Rechtsordnung* consisting of 16 titles (1663) as based upon the reformation of the *Bericht über Erbfälle und über etliche Mißbräuch* on the estate of Kurköln (1538) (73); and, as a conceptual systematisation, the issuance of a *Gerichts- und Landordnung* (verf. Joh. Fichard, 1571) in the county Solms and, as parts of it, a *Von den Landrechten* (with 32 titles) and a *Von Gerichten und gerichtlichem Prozeß* (with 40 titles) (74).

[59] E.g., the *Statutes of the Grand Duchy of Lithuania* (1529), as well as the *Sud'ebniks of the Grand Duchy of Moscow* (1497 & 1550). Cf. Uruszczak, W.: Les codes de droit en Europe à l'époque de la renaissance. In: *La codification européenne du Moyen-Age au siècle des Lumières* (éd. Salmonowicz, S.). Warszawa, 1997. 69–102, especially at 101.

[60] Sigurdur L.: Law and Legislation in the Icelandic Commonwealth. *Scandinavian Studies in Law* 37 Stockholm, 1993. 55–92.

maybe even practical guidebooks, written originally for didactic purposes to students.[61]

Well, especially in case of the great oeuvres marking the emergence of the *classical* type of codification (like, e.g., the *Allgemeines Landrecht*[62] and the *Code civil*), despite the former's authoritarian and the latter's revolutionary origin,[63] their one-time *embeddedness in traditions*[64] is increasingly re-discovered and emphasised now, especially in the light of today's intellectual and institutional

[61] The *Hexabiblos* (1345), compiled by the Thessalonian learned specialist Constantine Harmenopoulos and usually referred to as the "miserable epitome of epitomes of the epitomes", was applied throughout the late Middle Ages as a substitute source of the law in Greece and the entire Balkans. What is more, it was even confirmed by an order of February 23, 1835, of the Kingdom of Greece so that, in lack of any custom or judicial practice to the contrary, it had to be applied as a general source of the law until a civil code was finally drafted (which was actually done as late as on February 23, 1946). Or, in South-Africa, the Thirty-three Articles that constitutionally established Transvaal had stipulated in section 31 that '*hollandsche wet*' had to be taken as the basis of the law. The new Constitution (*Grondwet*, September 19, 1859) defined, in Annex [*bijlage*] 1, first Johannes van der Linden's *Rechtsgeleerd practicaal en koopmans Handboek*, secondly Simon van Leeuwen's *Het Roomsch-hollandsche recht* and thirdly Grotius *Inleidinge tot de hollandsche Rechtsgeleerdheid* (1631) to serve as its framework. That is, it ordained practical handbooks published in a wide circulation during the 17th century as the basic reference to law in the second half of the 19th century despite the fact that the new civil code of the Netherlands (*Burgerlijk wetboek*, 1838) had by then left the old law for decades behind, as a sheer preliminary. Watson, 20 and 19.

[62] According to Stein, P.: *Roman Law in European History* (Cambridge, 1999), 112, the main drafter of the *Allgemeines Landrecht* was Carl Gottlieb Suarez who shared the views of Christian Wolff, in terms of which it is the ruler's duty to guide his subjects to lead a perfectly reasonable life. Therefore, the Prussian Code had to have an educational purpose and, as addressed to the public, it had to be comprehensive, clear and definite as well.

[63] According to the witty remark of Domenico Corradini *Garantismo e statualismo* Le codificazioni civilistiche dell'Ottocento (Milano, 1971), 12 et seq. [Pubblicazioni della Facoltà di Giurisprudenza della Università di Pisa 39], the classical codes were originally drafted with the purpose of safeguarding either absolutism or basic freedoms. At the same time, Halpérin, J.-L.: *L'impossible Code civil*. Paris, 1992. 309 pp. [Histoires] points out that all the natural law, colouring the French Civil code, only served to conceal the novelty of its wording (289), while "the text finally adopted after struggles of nearly one and a half decade was the longest among all the proposals yet at the same time the least revolutionary." (287)

[64] Gordley, J.: Myths of the French Civil Code. *The American Journal of Comparative Law* 42 (1994), 459 et seq.

challenges that, as driven by a common "European interest" or under simple pressure of time and out of helplessness, look back rather on Savigny instead of Thibaut.[65] This is all the more remarkable because it appeared as the practical correction of the cardinal idea of the Enlightenment (namely, the ideals of rationality, logicality and universality[66] that once resulted in the emergence of the new, quality type of codification and which ideals were once believed to have absolute validity) at a time when all these revolutionary illusions, wish-dreams and incantations had to be put to the test of life by being implemented in practice.

Thus, it is no mere chance that Portalis' personal contribution to the drafting of the *Code civil* has now (in contrast to the disdainful tone once used when remembering him[67]) come to the limelight with the effect of revelation (revoking his bitter and disillusioned treatise with a non-mainstream picture of his age, once considered worthy of oblivion). Secondly, it is little wonder that it is through the interpretation of the *Code Napoléon* as a sociological phenomenon that we now start collecting the following facts about J. E. M. Portalis (1746–1807) as features determining his personality: He fled to Northern Germany during the Revolution, where he got into contact with Pietists; his attraction to the oeuvres of Pascal and Montesquieu deepened; it was also during that period that he started to castigate the one-time misery of his homeland in an essay only posthumously published. For in Germany, as he wrote, he had seen the materialisation of the good form of what he called *esprit philosophique:* small universities, closed

[65] Thibaut, A. F. J.: *Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland* (Heidelberg, 1814) and von Savigny, F. C.: *Von Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1814), both reprinted in *Thibaut und Savigny* Ihre programmatische Schriften (hrsg.: Hattenhauer, H.). München, 1973. 61 et seq. as well as 95 et seq. As to the movement and their debates, cf. Wrobel, H.: *Die Kontroverse Thibaut–Savigny im Jahre 1814 und ihre Deutung in der Gegenwart* [Diss.]. (Bremen, 1975) v + 307 pp.

[66] "A well conducted government must have a system as coherent as a system of philosophy, so that finance, police, and the army are coordinated to the same end, namely the consolidation of the state and the increase of its power. Such a system can only emanate from a single brain, that of the sovereign." Andrews, S.: *Eighteenth-century Europe.* London, 1965. 119. And, as Finer, S. E.: *The History of Government* From the Earliest Times, I–III (Oxford, 1997), 1456 continues this line of thought, showing the parallel between the great epochs of governmental bureaucracy and codification (1458), all this preconditions "belief in uniformities in Nature, the logicality of Reason, and correspondingly, the need to rationalize, systematize, and codify the laws under which subjects were to live."

[67] E.g., Planiol, M. : *Traité élémentaire de droit civil* I. Paris, 1900. § 80: *"n'a point dépassé la médiocrité"*.

intellectual circles without any major social or political irradiation, where ideas were not driven by the chance of materialisation, thus being unable to become directly dangerous either. The French Revolution had, on the other hand, originated from the *salons* of Paris, as launched by the "Sophists". The whole atmosphere of the Enlightenment in France with direct irradiation of ideas and mobilisation of the political elite itself, focussing on the idea of a mentally anticipated conceptual system with the urge of its systemic implementation, was suitable to tempt to both irresponsibility and extreme consistency, and, once inflicted on the Nation as a living practice, it might also elicit the eventual (ill)fortune of a whole country. Well, such a cry in Portalis' complaints[68] may remind the reader of present-day criticisms of the wantonly useless, bare intellectualism marking our modernity.[69] Accordingly,

[68] "How much we could have benefited since, if the idea of system had not thrown pernicious errors into the most useful truths, and if the wise lessons of experience had not been suffocated by exaggerated and absurd theories!" "It was the men of genius, of character and of vision, and not the Sophists who founded societies, built cities, and taught things to peoples. Sophists always appear at times when morals are corrupted. They are born therefrom and they are hardly suitable to raise, with their miserable influence, those spirits and hearts degraded. As soon as they formulate an idea, they believe to have brought about a kind of institution. But, as the ideas formulated do not, by themselves, capture people, they do neither take roots where they were sown. They just keep multiplying the laws, whereby they exactly achieve the debasement of legislation. And meanwhile everything gets lost: the false philosophical mind is like a deaf shell enclosing everything." Portalis, J. E. M.: *De l'usage et de l'abus de l'esprit philosophique durant le XVIIIᵉ siècle* [Paris, 1820] 3ᵉ éd. (Paris, 1834), 300–301 and 402–403, with a selected reprint in Portalis, J. E. M.: *Écrits et discours juridique et politique.* (Aix-Marseille: Presses Universitaires d'Aix-Marseille, 1988), 227 and 398–399.

[69] For present-day stands about intellectualism, see *Kiáltás gyakorlatiasságért a jogállami átmenetben* [A call for practicality in the transition to rule of law] (ed. Varga, Cs.). Budapest, 1998. 122 pp. especially with Kirckpatrick, J. J.: Introduction to her *Dictatorship and Double Standards* Rationalism and Reason in Politics (New York, 1982), 1–18 and, as a stand taken by the author, A racionális jogszemlélet eredendő ambivalenciája: Emberi teljességünk széttörése a fejlődés áraként? [The inherent ambivalence of a rational legal approach: development at the price of the fragmentation of our human integrity?] In: *A jogtudomány és a büntetőjog dogmatikája, filozófiája* Tanulmánykönyv Békés Imre születésének 70. évfordulójára [Philosophy of law and penal law: Festschrift for Professor Imre Békés] (eds. Busch, B.–Belovics, E.–Tóth, D.). Budapest, 2000. 270–277 as well as Önmagát felemelő ember? Korunk racionalizmusának dilemmái [Man elevating himself? Dilemmas of rationalism in our age]. In: *Sodródó emberiség* [Mankind adrift: on the work of Nándor Várkonyi's *The Fifth Man*] ed.: Mezey, K. (Budapest, 2000), 61–93. In a philosophical and socio-theoretical context, cf. also

> "Portalis may have arrived at the philosophical conviction of empiricism transformed into philosophy. This knows no system, only adaptation, that is, the adaptability of thought to the different requirements of the moment."[70]

To recognise again the moment of *tradition* embodied (among others) by the French revolutionary breakthrough in codification, as well as that of experience indispensable beyond reason and logic in the judicial profession, or to reconsider the debates revolving around codification having called to life the historical school of law in Germany from the second half of the 18th century on, well, all this cannot at all be alone attributed to an immanent interest in the history of ideas today. After all, we have to find fixed points that help us identify the paths of the future. More precisely, it is exactly the path to be followed in the near future about which we think we may ascertain that its uniqueness and the unprecedentedness of its venture are nothing but the extension, in European dimensions and with an all-European complexity, of the difficult and risky decision which had already been faced once at a national level in Germany of the 19th century, and for the intellectual dilemma of which perhaps the one-time movement of the German historical school of law can now be taken as the best example.[71]

Anyway, the recognition according to which the age of the series of pieces of national codification was limited in a social and political sense as well, as it embodied and emphasised a further stage of universal development, is reflected by the historical reconstruction of the birth of the Austrian *Allgemeines Bürgerliches Gesetzbuch*. For, according to its monographer,

> "the codification of civil law was an attempt to reconcile the modern notion of the state as the supreme public authority holding a monopoly of government with the idea of the rule of law as an objective and, indeed, absolute category of social cohesion, and as such not subject to the supreme will of public authority [...]. On the Continent of Europe, codified civil law provided the legal basis for the social and political pattern of the nineteenth

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Hayek és a brit felvilágosodás A konstruktivista gondolkodás kritikája [Hayek and the British Enlightenment: criticism of the constructivist thought] ed. Ferenc Horkay Hörcher. Budapest, 2002. [Jogfilozófiák].

[70] Carbonnier, J.: Le Code Napoléon en tant que phénomène sociologique. *Revue de la Recherche juridique* Droit prospectif (1981) 335.

[71] Cf., especially, Zimmermann: *Roman Law..., op. cit.* 14–17.

> and early twentieth centuries: the state of absolute sovereignty which yet remained a *Rechtsstaat*".[72]

At the time and under the given circumstances, this reconstructive requirement of the codal function had completely fulfilled what I had, in the monograph referred to above, described as the main (socio-legal) function of the national unification of law, on the one hand, and the apparently merely legal-technical function of the centralised state domination over the law, on the other, in terms of which the state may, in turn, control the entire theoretical and practical staff of the law and, thereby, decisively shape its everyday implementation as well.[73]

How far has the fulfilment of such major vocations and expectations progressed, as assessed by critical retrospection within a present perspective?

> "Obviously, some of the high hopes and expectations entertained at the time of the Enlightenment have not been fulfilled: neither have the codifications made the learned lawyer redundant, nor have they led to a lasting consolidation (or, to put it negatively: ossification) of private law. Still, however, they have significantly contributed towards the national fragmentation of the European legal tradition."[74]

Well, the realisation above may serve as a typical illustration of how certain evaluations can turn into their own opposite, depending on the historical evolution and practical developments, for, in the light of the present-day international process of unification in European proportions, that what once (just one or two centuries ago) was a landmark of the national legal unification is now (and not without any foundation) re-formulated as national fragmentation. Just as paradoxical is the following statement by the same historian of European law, well versed in deepened English legal studies, according to which

> "What German arms had achieved on the battlefields of France–political unity–had now also been peacefully accomplished in the area of private law: »One People. One Empire. One Law.«"[75]

[72] Strakosch, H. E.: *State Absolutism and the Rule of Law* The Struggle for the Codification of Civil Law in Austria, 1753–1811. (Sydney, 1967) vii + 267 pp.

[73] See Varga *Codification..., op. cit.* passim.

[74] Zimmermann: *Roman Law..., op. cit.* 1.

[75] *Ibid.*, 53, quoting Zittelmann, E.: Zur Begründung des neuen Gesetzbuches. *Deutsche Juristenzeitung* (1900), 2. Moreover, Windscheid, B.: Das römische Recht in Deutschland. In

Indeed, the requirement of both the overall *popular knowledge of the law* and *regulatory completeness* is not any longer featuring amongst the classical dreams and hopes regarding codification, or at least, not in the sense of the law's easy accessibility, cognisability and manageability.[76] Therefore, the dream originating from the age of the Enlightenment, postulating that society and law have to be established in one consciously planned and realised act around which the real life would revolve as planets of the solar system, turned out to be quite irrealistic.[77]

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his *Gesammelte Reden und Abhandlungen* (hrsg. Oertmann, P.). Leipzig–Duncker–Humblot, 1904. 48 desired the same: to provide "a German law for the German People" by building up "a cathedral of national splendour", a wish common to Europe as an objective of all the national states from the age of Napoleon. Cf., e.g., von Görres, J. in *Rheinisches Merkur* (April 7, 1815): *"Ein Reich, ein Recht!"* a quote by Gaudemet, J. in his La codification, ses formes et ses fins. *Revue juridique et politique* Indépendance et coopération 40 (Janvier–Juin 1986) 3–4, 239–260, especially 257. It may seem ironic, yet can perhaps be explained by the historical conditions of contemporary criticism that the first draft of the German *Bürgerliches Gesetzbuch* (1888) as characterised by Zimmermann: *ibid.*) "was condemned as being too abstract and pedantic, it was denounced as a pandectist textbook cast in statutory form and thus as being too unGerman; it was attacked as being out of touch with the realities of life and as lacking even a drop of socialist oil." Cf. also Varga: *Codification..., op. cit.* 135, note 84.

[76] "Today, one has given up all hope that the average citizen can be expected to comprehend the law. [...] A code may or may not be desirable: that it fails to promote general knowledge of the law cannot be regarded as a decisive argument within this debate." Zimmermann: *Codification..., op. cit.* 108.

[77] The Hegelian parallel–"Never since the sun has stood in the firmament and the planets revolved around it had it been perceived that man's existence centres in his head, i.e. in thought, inspired by which he builds up the world of reality." Hegel, G. W. F.: *The Philosophy of History* (*Vorlesungen über die Philosophie der Weltgeschichte* [1840] IV Berlin, 1970–1976. 926), 447, quoted by Varga: *Codification..., op. cit.* 302–is translated by Gambaro, 81, into a description of the doctrine of legal sources when he recalls: in the 19th century, "the so-called special statutes [were relegated] to the level of exceptional norms which rotated around the code, just as the planets of the solar system move around the sun". It is this same sense in which the root of the present decline of codification is seen by Irti, 27: "The *Codice civile* cannot be recognised as having [...] the value of general law, the seat of principles that are set forth and »specified« by external laws [...]. [For it] functions henceforth as a »residual law«, as a discipline for cases not regulated by particular provisions."

The wish-dream of both *total systemicity*[78] and *gaplessness*,[79] effecting comprehensive and exhaustive regulation on principle, has proved to be a similarly vain hope, and even more so the attempt at enforcing this through the prohibition of judicial interpretation.[80] Well, all these new developments are definitely meant to reaffirm the *trust* to be placed necessarily by the legislator in those who administer justice,[81] as a reminder of the gradual construction of the law and the inevitable *division of law-making contribution*, covering all stages of the entire process of the law's formation, by conceptualising them as "the two-graded process of the law's establishment" (to use the expression of Kelsen having written his second major treatise in 1922),[82] on the one hand, and they also reaffirm the function of the code which I had earlier characterized (in describing the life, posterior to the Second World War, of the *Code civil* and other classical codes) in a way that, in the process of the gradual building up of jurisprudence through merely referring to the code-text in the everyday practical development of the law, the code's genuine function gets reduced to nothing but *providing and indicating systemic-taxonomic locuses* for the judicial solution of the case, that is, to a most relative guidance by far not unambiguous or excluding alternatives, on the other.[83]

[78] "If you read the proceedings, you may be amused at finding the briskest of all the debate took place over the two little words »and hares« in a section relating to damage done by wild animals. Powerful language is used, and, for a moment, the given whole of the mighty project seem to be endangered by the conflicting interests of sport and agriculture. That is the touch of humour, required as a relief for so much civil virtue."–wrote Maitland, F. W.: The Making of the German Civil Code. In: his *The Collected Papers* (ed. Fisher, H.) III Cambridge, 1911. 482, declaring thereby that this was nevertheless the victory of the whole over each and all its individual components.

[79] Cf., e.g., Hübner, H.: *Kodifikation und Entscheidungsfreiheit des Richters* in der Geschichte des Privatrechts. Königstein, 1980. 74. [Beiträge zur neueren Privatrechts-geschichte 8].

[80] For Frederick the Great [*Publikationspatent* (1794), art. XVIII], judges are prohibited "to indulge in any arbitrary deviation, however slight, from the clear and express terms of the laws, whether on the grounds of some allegedly logical reasoning or under the pretext of an interpretation based on the supposed aim and purpose of the statutes".

[81] The necessary failure that can be traced back throughout our known history is described by Becker, H.-J.: Kommentier- und Auslegungsverbot. In: *Handwörterbuch zur Deutschen Rechtsgeschichte* (hrsg. Erler, A.–Kaufmann, E.–Stammler, W.) II. Berlin, 1978. 963 et seq.

[82] Kelsen, H.: *Allgemeine Staatslehre.* Wien, 1922.

[83] And this was already a total shift, equal to giving up the original function which had once historically brought the phenomenon known as codification, because thereby the code

Thereby, methodologically we have returned to the expectations towards a common European codification of private law, to the possible methodology of its realisation and to the formulation of the main function to be filled by it. Accordingly,

> "a codification [...] provides a system that all those who have to apply and interpret the law to see *»varitat[es] inter se connexa[e]«*[84] to appreciate and pay attention to the normative context within which a specific decision has to be seen, to avoid inconsistencies and to arrive at solutions that are not only fair and equitable per se but also fit in with the solutions found to other problems. [...] It provides a focus which enables him to relate seemingly disparate issues to each other and harmoniously to incorporate new strands of thought."[85]

Everything considered, what underlies the above statement is nothing else than the replacement of the idea of a system, closed into its axiomatic self, by the idea of a half-open and half-closed *autopoietic* system that shuts itself back and also re-generates itself each time it closes itself, utilising any of its original systemic definitions in any way only when it is closed back in practice and, therefore, changing its definitions and contextualisations any time it operates, depending on its given environment. Methodologically speaking, something similar may have been in mind after the Second World War was over, when the claim for "a natural law with changing contents" (as formulated by Rudolf Stammler after the First World War) became filled with concrete contents. As concluded by a contemporary author,

> "The eternal truths to be found in the sphere of the logic of things [...] do not constitute a closed system as once supposed by natural law, but arrive at various aspects through the entire material of the law, connected with powerful linkages to the decisions here and now to be made."[86]

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fell back from the codal role of determining the law to the mere role of indicating the mere systemic loci of the practical (judicial) shaping of the law. Cf. Varga: *Codification..., op. cit.* especially ch. V, para. 5.

[84] Wolff, Ch.: *Institutes juris naturae et gentium*, § 62.

[85] Zimmermann: *Codification... op. cit.* 110.

[86] Welzel, H.: *Naturrecht und materielle Gerechtigkeit.* Göttingen, 1951. 198.

With this, one has also formulated the new creed of the judicial profession in the light of the new, present-day conditions of codification. For

> "difficult problems can simply be wrongly analysed because, without conceptual discipline, it is not possible to be sure that previous cases were indeed like the one now before the court. The elementary principle of formal justice, that like cases be decided alike, is thus offended. Again, whole areas of the law can be neglected if in the absence of a map nobody can see that they are being insufficiently visited [...]. There is also another kind of damage at a higher level, in that, in the absence of a common conceptual structure, lawyers loose faith in the rationality of their endeavour [...]. It is perhaps the most important feature to be kept in mind: a code has to be brought to life, and has to be kept in tune with the changing demands of time by active and imaginative judicial interpretation and doctrinal elaboration. This requires the legislature to exercise considerable self-restraint."87

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The lesson to be securely drawn is that notwithstanding the untroubled pursuance of domestic practice, we are getting closer to a crossroads. The perspective of the common codification of private law within the European Union not only brings back (breaking through walls of silence of several centuries) memories of accomplishments and expectations of a long and distant past (once made universally valid in continental dimensions) as actual experience, but, at the same time, also refers us back to those points and moments (regarded for centuries as buried by the bygone past) from which, upon the basis of the joint acquisition of the shared Greek-Roman heritage and its differentiating (yet in a way somehow united) re-adaptation, the paths of development characteristic of the Civil Law and the Common Law started once to diverge.

The more the advancement of the European unification progresses, the more inverse the assessment of European codification becomes, reconsidering past trends, values and regulatory techniques. Thus, it is suggested as if we, on the Continent, had not so much become statal national units unified by a sequence

[87] Zimmermann: *op. cit.* 114. See also in a similar sense Kötz, H.: Taking Civil Codes Less Seriously. *Modern Law Review* 50 (1987), 13 et seq. and Birk, P.: The Need for the Institutes in England. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* Romanistische Abteilung, 108 (1991), 708 et seq.

of national laws but, being too conceited of our most promising collective heritage within the transitory phase of an infantile disorder, became rather fragmented in national isolation from one another. The meaning conveyed by our past and the paths actually covered have thereby become dubious again with open-ending alternatives.

The problem of codification in Europe seemed to be more or less settled for ever a few decades ago. Now, in the light of the new challenges that are coming from the facts of the newest European convergence, we have to resume not only our earlier investigations but, at the same time, also repeatedly re-consider the foundations and the historical (that is, as directed from the past towards the future, perspectivical) presuppositions of our thinking, perhaps not for the last time in our ever-changing world.

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Some Remarks on Reservations to Declarations of Acceptance

Abstract. The essay concerns the reservations attached to the declarations accepting the compulsory jurisdiction of the two International Courts.

As early as during the 1920s when States consented to the compulsory jurisdicition of the first World Court they attached limitations on, conditions or reservations to their declarations of acceptance. For these declarations, there were no rules whatever prescribing any sort of uniformity or similarity of content in any aspects, and States formulated more and more complicated restrictions to their declarations of acceptance.

After the International Court of Justice had been established, States continued the practice of attaching reservations to declarations of acceptance and, moreover, increased the number thereof, "inventing" more and more complicated reservations. Quite a few of such reservations placed much more limitations on the Court's compulsory jurisdiction than the interwar declarations of acceptance had done and a no small part of them left loopholes of escape from the jurisdiction recognized.

In analysing the problems of permissible reservations, the author refers to the rules and criterias developed in international treaty law on the reservations to multilateral treaties and to the jurisprudence of the two Word Courts. She concludes that the declarations of acceptance are unilateral acts and the States are free to attach any reservation to their declarations of acceptance.

Keywords: International Court of Justice, optional clause, declarations of acceptance, reservations to declarations of acceptance

In the law of treaties it is generally accepted that when signing, ratifying, approving or acceding to multilateral treaties States, in a formal declaration, may limit the effects of a treaty on themselves in relation to the other contracting parties as a condition for becoming a party to the particular treaty.[1] On the analogy of this there has emerged a State practice to include limitations, conditions in their declarations accepting the compulsory jurisdiction of the Permanent Court of International Justice and the International Court of Justice.

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[1] Cf. Lord McNair: *The Law of Treaties.* Oxford, 1961. 158.

Already the very first declarations of acceptance made after the entry into force of the Statute of the Permanent Court of International Justice, contained some stipulations by which States limited their consent given to the compulsory jurisdiction of the Court.

Both the literature of international law and the practice of the two Courts refer to such limitations, conditions, exclusions, exceptions or restrictions etc. as "reservations", a term not the most fortunate chiefly because the said clauses are not deemed to be real reservations and, as will be discussed later, differ in many aspects from reservations to multilateral treaties.[2] The appearance of such clauses was somewhat "unexpected", for at the time of drafting the Statute of the Permanent Court of International Justice the Committee of Jurists did not anticipate any reservation being made concerning the compulsory jurisdiction accepted.[3] On the other hand, the acceptance of compulsory jurisdiction with reservations was not really so "unexpected", since in interstate practice it is by no means a novelty that States made subject their consent to arbitration treaties to stipulations removing one or more specific issues from settlement by arbitration. Thus arbitration treaties frequently included stipulations to the effect that arbitration did not operate to issues affecting the "vital interests", the "national honour", the "independence" and such like of the given State. At the time this was taken for granted so much as to lead some authors to assert that "even when not definitely expressed, the stipulation concerning vital interests is yet included in all arbitration treaties."[4]

1. The Interwar Practice

In connection with declarations under the optional clause Article 36, of the Statute of the Permanent Court of International Justice provides the following:

[2] Cf. Maus, B.: *Les réserves dans les déclarations d'acceptation obligatoire de la Cour international de Justice*. Genève, 1959. 94.

[3] Cf. Oda, S.: Reservations in the Declarations of Acceptance of the Optional Clause and the Period of Validity of those Declarations: the Effect of the Schultz Letter. *The British Yearbook of International Law* 1989. 4.

[4] Cf. Wehberg, H.: Restrictive Clauses in International Arbitration Treaties. *American Journal of International Law*. 1913. 310.

"The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several Members or States or for a certain time"

In other words, certain limitations, namely reciprocity and certain limitations as to time, are permitted by the Statute itself. Hersch Lauterpacht explains this as follows:

"It is true that the Optional Clause does not provide *expressis verbis* for the possibility of reservations being made, but there is no necessity for any such express provision. As a general rule a State may qualify any treaty obligation by such reservations as it deems necessary; treaties of arbitration, as their history shows, certainly do not constitute an exception in this respect."[5]

In the early 1930s Alexander Pandelli Fachiri, writes that "... in the present state of international law the language of Article 36, with its reference to certain reservations, does not preclude the admissibility of further reservations one way or the other."[6]

The literature of international law of the interwar period nevertheless contains views that–since Article 36, of the Statute refers only to "reciprocity" and "a certain time"–*a contrario* one can come to the conclusion that no other reservations may be attached to declarations accepting the Court's compulsory jurisdiction.[7] That position found few followers, and, so far as we know, Judge Levi Carneiro was the only member of the two International Courts to identify himself with it.[8] As against this, the dominant view was that Article 36, had no restrictive character in this respect and that States were free to attach other limitations on or reservations to their declarations of acceptance.[9] An other

[5] Lauterpacht, H.: The British reservation to the Optional Clause. *Economica.* 1930. 168.

[6] Cf. Cf. Fachiri, A. P.: *The Permanent Court of International Justice.* London, [1932] 1980. 98.

[7] Cf. Higgins, P. A.: *British acceptance of compulsory arbitration under the Optional Clause and its implications.* Cambridge, 1929. and Brierly: *The Times* (1929) [1 October]. Quot. Maus: *op. cit.* 85.

[8] See the Dissenting Opinion of Judge Levi Carneiro in the Anglo-Iranian Oil Co. Case. *Anglo-Iranian Oil Co. Case.* Preliminary Objections. Judgement 2 July 1952. *ICJ Reports,* 1952. 154.

[9] Cf. Fachiri: *op. cit.* 98., and Lauterpacht: *op. cit.* 137., as well as Hudson, M. O.: *The Permanent Court of International Justice,* 1920–1942. New York, 1972. 399.

author points out referring to the first Hague Peace Conference that "in the effort to reconcile the idea of obligatory arbitration with the possession of inalienable sovereign rights, it was natural that the idea of implied reserves should be urged ... if a state negotiating an arbitration convention should fail to include therein the 'saiving clause' to protect its national honour and vital interests, the clause would still be considered by implication."[10] Apart from the permissibility of reservations, an author argued that if a State is free to accept or not to accept the obligations set forth in the clause, then, in the absence of contrary provisions, the freedom not to accept the optional clause includes the freedom to make acceptance subject to conditions.[11]

The disputes about the permissibility of limitations on or reservations to declarations under the optional clause were rather academic in nature from the very outset, for in practice States availed themselves of the possibility to make reservations. In the declarations of acceptance there appeared multifarious reservations of varying scope and contents besides those mentioned in Article 36, of the Statute.

The permissibility of reservations was likewise addressed by the League of Nations, its Fifth Assembly entrusting the 1st Committee with studying ways and means to clarify and refine the provisions of Article. 36, of the Statute of the Permanent Court of International Justice in order to facilitate the widest possible acceptance of the clause.[12] The question was finally discussed in a subcommittee,[13] on the proposal of which and of the 1st Committee the Assembly of the League of Nations in its resolution of October 1924 expressed the view that the terms of the optional clause were broad enough for States to adhere to the clause "with the reservations which they regard as indispensable."[14]

The 1st Committee of the League of Nations Assembly concurrently concerned itself with the elaboration of a draft protocol on the peaceful settlement of international disputes. According to Article. 3, of the draft prepared by the Committee, the signatory States recognize as compulsory the jurisdiction of

[10] Cf. Wilson, R. R.: Reservation clauses in agreements for obligatory arbitration. *American Journal of International Law*, 1929. 70–71.

[11] Cf. Williams, J. F.: The Optional Clause, The British Signature and Reservation. *The British Yearbook of International Law*, 1930. 637.

[12] For the resolution see League of Nations Official Journal Special Supplement No. 23. Records of the Fifth Assembly (Geneva 1924), 77.

[13] The members of the Subcommittee were Adatci, Apponyi, Loucheur, Erich, Fernandes, Sir Cecil Hurst, O'Bryne, Politis, Rolin, Scialoja, Titulesco, De la Torriente, Limburg, Unden. Cf. Maus: *op. cit.* note 35. 17.

[14] League of Nations Official Journal (Note 12), 225.

the Court in respect to the issues mentioned in Article 36, of the Statute, without, however, the Court's jurisdiction affecting the right of any State to make reservations consistent with the said clause.[15]

The limitations on reservations were also addressed by the aforementioned Committee. But who is to decide which reservations are consistent with the said clause? Scialoja pointed out on this score that the Court was always competent in the question of its own jurisdiction and that the problem of whether a reservation was consistent with the Statute was one of competence, which was therefore solved in that way.[16] An another view, expressed by Loucheur concerning the scope of reservations, a State may accede to the Statute including practically "all reservations" in its declaration.[17] That position calls for explanation today. More accurately, one should say that a State might as well include in its declaration all reservations that happened to be made at the time. Under present-day conditions, however, such a declaration can only be made in theory, considering the wide range of reservations.

In its report on reservations to declarations of acceptance the 1st Committee of the League of Nations Assembly stated that on the basis a thorough examination of the text it can be stated that its flexibility leaves room for any kind of reservations. Since State may recognize the Court's compulsory jurisdiction in some classes of disputes and may not in others, they are all the more free to recognize compulsory jurisdiction in only a fraction of one of those classes. For that matter, in its report the Committee enumerated the conceivable reservations, adding that the reservations attached to the obligations mentioned in Article 36, can be of quite a wide scope.[18]

During the preparations for the Disarmament Conference held in 1932 under the auspices of the League of Nations the question of reservations to declarations of acceptance was again on on the agenda, since comparatively few States had made a declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice and a part of the declarations had not come into force. The Subcommittee on Arbitration and Security of the Preparatory Commission for the Disarmament Conference discussed this question, and Assembly's resolution of 26 September 1928 on the General Act for the Pacific Settlement of International Disputes, dealing also with the optional

[15] *Ibid.* 498–499.

[16] *Ibid.* No. 24. Annexe 18.37. Quot. Maus: *op. cit.* 17.

[17] *Ibid.* 38. Quot. Maus: *op. cit.* 18.

[18] For the reservations see Societé des Nations Journal Officiel, Procès verbal de la 1ère Commission, 109–110.

clause, was adopted as a result of deliberations in the Committee and the 3rd Committee of the League of Nations Assembly. In its resolution the Assembly stressed its wish to remove the obstacles to the accession of States to the optional clause and called their attention to the possibility of making reservations limiting their obligations in respect either of time or of scope. It was likewise mentioned in the resolution "...that reservations conceivable may relate, either generally to certain aspects of any kind of dispute, or specifically to certain classes or lists of disputes, and that these different kind of reservation can be legitimately combined."[19]

Some authors considered that resolution of the League of Nations as an interpretation of the Statute, while others definitely rejected that view.[20] Whichever way we look at the resolution, it was unquestionably a political declaration without any binding force. At any rate, declarations accepting the compulsory jurisdiction of the Permanent Court of International Justice were made by several States after the adoption of the resolution. At the same time, however, the cited position of the League of Nations on reservations to declarations of acceptance had certain "negative" effects as well, for afterwards States came making more and more complicated declarations and multiplying the limitations on the jurisdiction recognized.

According to Hudson, the tendency for declarations to become more complicated was but encouraged by Article 39, of the General Act of Geneva, which enoumerated three classes of disputes which might be excluded from the operation of a treaty by reservation.[21]

The position of the League of Nations on reservations to declarations of acceptance is well reflected by the words of Politis at a meeting of the Committee on Arbitration and Security of the Preparatory Commission for the Disarmament Conference. He stated: a State should choose to accede, rather than not to accede, to Article 36, of the Statute with reservations sharply

[19] For the resolution see *League of Nations Official Journal* Special Supplement No. 64. Record of the Ninth Ordinary Session of the Assembly Plenary Meetings, 183.

[20] Maus argues that the interpretation of the Statute of the Permanent Court of International Justice by the Assembly of the League of Nations has no legal force, because the Assembly was not empowered to modify and to interpret the Statute. The Statute was a separate treaty independent of the Covenant and subject to separate ratification, and the Member States of the League were not required to accede to the Statute. In point of fact, the Statute was either for the Court itself or for the Conference of States signatory to the Protocol of Signature of the Statute of the Permanent Court of International Justice to interpret. Cf. Maus: *op. cit.* 19.

[21] Hudson: *op. cit.* 468.

restricting its obligations. Acceptance with reservations, no matter of how little import, constitutes a new obligation among the States concerned and is to be regarded as a sign of confidence in the Court.[22]

The efforts of the League of Nations for the widest possible acceptance of the optional clause continued to be a concern of many authors even many decades later. At the end of the 1990s Judge Kooijmans observed "... that the League of Nations, in its efforts to encourage acceptance of the Court's jurisdiction, endorsed the making of reservations to such acceptance (although Article 36, paragraph 3, of the Statute does not formally authorize a declarant State to make such reservations), but by so doing weakened the system it tried to strengthen."[23]

2. The Post-World War Two Reservations

With regard to the question of reservations to declarations under the optional clause the San Francisco Conference identified itself fully with the practice of the Permanent Court of International Justice, although ideas pressing for change were also voiced.

During the deliberations in Subcommittee D of Committee IV/1 of the Conference Canada proposed that Article 36, paragraph 2, of the Statute should enumerate the conceivable reservations and include a clause allowing States to make futher reservations, whereas Australia came forward with the proposal that there should be drawn up a list of permissible reservations similar to that of the 1928 General Act of Geneva. The Subcommittee rejected both proposals, however.[24]

In connection with reservations to declarations of acceptance the report of Subcommittee D to Committee IV/1 of the Conference noted the following:

[22] League of Nations Documents of the Preparatory Commission for the Disarmament Conference, Series IV, Minutes of the Second Session of the Committee on Arbitration and Security (Geneva: 1928), 57.

[23] See the separate opinion of Judge Kooijmans: *Fisheries Jurisdiction Case.* Jurisdiction of the Court. Judgement of 4 December 1998. Separate Opinion of Judge Kooijmans. *ICJ Reports* (1998), 489.

[24] Report of Subcommittee D to Committee IV/1 on Art. 36 of the Statute of the International Court of Justice. In: *UNCIO* Documents, vol. XIII, 558.

> "The question of reservations calls for an explanation. As is well known, the article (Article 36, of the Statute) has consistently been interpreted in the past as allowing states accepting the jurisdiction of the Court to subject their declarations to reservations. The Subcommittee has considered such interpretation as being henceforth established. It has therefore been considered unnecessary to modify paragraph 3, in order to make express reference to the right of the states to make such reservations."[25]

After the International Court of Justice had been established, States continued the practice of attaching conditions, limitations on or reservations to declarations of acceptance and, moreover, increased the number thereof, "inventing" more and more complicated reservations. Quite a few of such reservations placed much more limitations on the Court's compulsory jurisdiction than the interwar declarations of acceptance had done and a no small part of them left loopholes of escape from the jurisdiction recognized.

Incidentally, among the post-1945 declarations of acceptance there is hardly any by which, like the interwar declarations of acceptance by the Latin American States, a State accepted the Court's jurisdiction without limitations or reservations.

In connection with the various reservations the question may rightly be asked as to what all this can be traced to and what is the reason for the growing number of increasingly complex reservations. In our view there are fundamentally three grounds for this phenomenon.

First, as it is very wittily pointed out in the report to the 1964 Tokyo Congress of the International Law Association, practically "(A)lmost every State has some skeletons in its closets and might not wish to have them exposed before the Court."[26] The report goes on to say, that "Even if States could avoid some difficulties through reservations, they are usually afraid that they might have forgotten something important or that some new problems might arise which could not have been covered by specific reservations. It is this fear of unforseen consequences which has led some States in the past to a refusal to accept the jurisdiction of the Court or to its acceptance with sweeping, open-ended reservations."[27]

The second reason is related to the development of international law. As a consequence of the development of science and technology new subjects are

[25] *Ibid.* 559.
[26] *International Law Association Report of the Fifty-First Conference,* Tokyo, 1964. 87.
[27] *Ibid.*

emerging to be regulated by international law, issues which are also naturally likely to give rise to new and new international disputes, as is exemplified by the regime for the continental shelf. After it had become know that the continental shelves are rich in oil and gas resources, regulation by international law of these areas became inevitable, and a large part of the disputes submitted to the International Court of Justice are connected with the jurisdiction on and the delimitation of continental shelfs.

The third reason can be ascribed to the fact that States have learnt from the jurisprudence of the Court, in the sense that, relying on the tenets formulated in the decisions of the Court, they have "shaping" new reservations in order to prevent the occurrence of similar cases. This is best demonstrated by the reservations which sought to avoid "surprise applications" and have become very common after the Court's decision on the preliminary objections in the *Case concerning Right of Passage over Indian Territory.*

For that matter, the problem of reservations to optional clause declarations has been repeatedly addressed by the United Nations as well. Perhaps the most important is resolution 3232 (XXIX) on the "International Court of Justice", which was adopted by consensus on the motion of the Sixth Committee of the General Assembly. In it the General Assembly recognized the desirability for States to study the ways and means of accepting the compulsory jurisdiction of the International Court of Justice with the least possible reservations in accordance with Article 36, of the Statute.[28] That appeal and similar ones were scarcely heeded, with so many and so diverse reservations placed on some declarations that, with some exaggeration, they came to give cause for asking which are really the disputes in which the Court has jurisdiction in respect to a particular State under Article 36, paragraph. 2, of the Statute. In the *Case of Certain Norwegian Loans* Sir Hersch Lauterpacht in his separate opinon was refering that situation by saying:

> „In accepting the jurisdiction of the Court Governments are free to limit its jurisdiction in a drastic manner. As a result there may be little left in the Acceptance which is subject to the jurisdiction of the Court".[29]

[28] On this point see also the debate in the Sixth Committee. General Assembly 29th Session Sixth Committee, meetings 1465–1468; 1483–1486; 1490; 1492. Plenary meeting 2280.

[29] *Case of Certain Norwegian Loans.* Judgement of 6 July, 1957. Separate Opinion of Judge Sir Lauterpacht, H. *ICJ Reports,* 1957. 46.

The freedom to make reservations is recognized by most authors in the literature of international law, but occasionally one can meet with views that according to the new Statute no conditions, reservations to or limitations, etc. on declarations of accepting the compulsory jurisdiction other than those relating to "on condition of reciprocity" and "for a certain time", namely the ones mentioned in the Statute itself, are permissible.[30] One author holds that there is one more permissible reservation in addition to the limitations mentioned in the Statute, notably States may, in line with Article 95 of the Charter, exclude from the operation of their optional clause declarations those disputes whose settlement they have previously entrusted to another tribunal.[31] These positions are based on the fact that the wording of the optional clause in the new Statute have been slightly amended by omitting from Article 36, paragraph 2, the worlds *"or any of the classes"* in the passage of "in all or any of the classes of legal disputes." It seems, however, that in point of fact the said authors misunderstand Article. 36 paragraph 2, of the Statute, since the amendment of this Article is meant to say that States are no more free in their declarations of acceptance to pick and choose amongst the four enumerated classes of legal disputes listed in Article 36, paragraph 2, of the Statute. However, the said amendment did not alter the freedom to make reservations to the declarations of acceptance in the same way as it existed at the time of the Permanent Court of International Justice.[32]

The view about the non permissibility of reservations not mentioned in the Statute was revived a few years ago in the *Case concerning the Aerial Incident of 10 August 1999* (Pakistan v. India). Because of the dispute relating to the destruction of Pakistani aircraft, Pakistan filed an application against India on the basis of Artilce 36, paragraphs 1 and 2, of the Statute and of the declarations of acceptance by the two States. India responded by submitting preliminary objections, in which it invoked, *inter alia,* the Commonwealth reservation of its declaration of acceptance. Pakistan argued that no reservations other than those mentioned in the Statute may be attached to declarations under the optional clause. Limitations not included in the Statute–deemed to be "extra-statutory reservations"–exceed the conditions allowed for under Article 36, paragraph 3,

[30] Vulcan, C.: La clause facultative. XVIII *Acta Scandinavica Juris Gentium*, 1947–1948. 1, 42.

[31] Thévenaz, H.: La nouvelle Cour international de Justice. *Die Friedens-Warte,* 1945, 411.

[32] Cf. Waldock, C. H. M.: Decline of the Optional Clause. *The British Yearbook of International Law,* 1955–56. 249.

of the Statute. According to Pakistan the Commonwealth reservation is inapplicable and not opposable to Pakistan.[33]

With regard to extra-statutory reservations the Court stated that paragraph 3 of Article 36, had never been considered as an exhaustive enumeration of conditions under which States' optional clause declarations might be made. For this reason the Court dismissed the Pakistani argument that Commonwealth reservations were to be seen as "extra-statutory reservation" because it contravened Article 36, paragraph 3, of the Statute.[34]

On the basis of the foregoing it can be stated that the views limting the reservations to declarations may be regarded as isolated, the dominant position being that according to the generally accepted interpretation of the Statute it is an inalienable right of States to attach different reservations, limitations on or conditions to their declarations under the optional clause. As regards the relationship between the various reservations and the provisions of the Statute, Crawford comes to the conclusions that since Article 36, paragraph 3, suggest that no other conditions were intended, "(T)he process by which reservations came to be accepted is a striking case of interpretative development of Article 36 by subsequent practice...".[35]

The permissibility of reservations attached to the declarations of acceptance and the liberty to shape their contents are similarly confirmed by the rarity of objections by States against other States' declaration of acceptance or limitations contained therein. Such was the case, for instance, in the mid 1950s, when Sweden objected against the reservation of the Portuguese declaration of 19 December 1955 to the effect that Portugal may at any time remove any class of dispute from the operation of its declaration of acceptance.[36] That objection was of little effect, as is best evidenced by the fact that in the *Right of Passage case* the Court did not even pronounce on the Swedish objection to the reservation of

[33] *Case concerning the Aerial Incident of 10th August 1999.* Pleadings, Memorial of the Government of Pakistan on Jurisdiction, paras. D–E.

[34] *Case concerning the Aerial Incident of 10th August 1999.* Jurisdiction of the Court. Judgement of 21 June 2000. *ICJ Reports,* 2000. paras. 37, 38.

[35] Crawford, J.: The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court. *The British Yearbook of International Law,* 1979. 79.

[36] For the Swedish declaration see ICJ Pleadings *Right of Passage over Indian Territory,* Vol. I. 217. Sweden declared that, in view of the conditions included in the Portuguese declaration, Portugal had not in fact accepted the Court's jurisdiction in respect to any dispute or to any class of disputes. That condition nullifies the obligation which the terms of Article 36, paragraph 2, of the Statute seek to impose, expressing that the jurisdiction of the Court is 'ipso facto' compulsory.

the Portuguese declaration of acceptance, albeit it had examined the validity of the Portuguese declaration.

An objection by another declarant State to the reservation included in an other State's declaration of acceptance is to be found only in concrete disputes before the Court in which attempts are made to challenge in the form of preliminary objection the reservations invoked by the opponent party.

3. The Special Feature of Reservations to Declarations of Acceptance

The freedom to accept the Court's compulsory jurisdiction with limitations or reservations has been recognized not only by the literature of international, but also by the two International Courts. In disputes which involved reservations to declarations of acceptance the majority of judges accepted the particular condition or reservation and did not consider the question of permissibility; they had never denied the permissibility of reservations to declarations of acceptance, only analysing the compatibility of a given reservation with the Statute and the optional clause system.

As regards the permissibility of reservations, the position of the International Court of Justice is reflected most clearly in its statement made in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*:

> "Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations."[37]

The conditions or reservations to be found in declarations under the optional cluse differ from reservations made to multilateral treaties chiefly in that in the case of declarations of acceptance there is no text of a treaty agreed upon by the contracting parties, one which the State making the reservation wishes to depart from, to which it would be necessary to obtain the consent of the other parties to the treaty. So what we have here is not exclusion or modification the operation of certain provisions of the treaty, originally formulated jointly

[37] *Case concerning Military and Paramilitary Activities in and against Nicaragua.* Jurisdiction of the Court and Admissibility of the Application Judgement of 26 November 1984. *ICJ Reports,* 1984. 418.

with the other contracting parties.[38] As is shown by the practice of over eight decades, in making declarations under the optional clause States act in full freedom, deciding alone the scope of their declarations as well as the conditions on which they accept the Court's compulsory jurisdiction. In connection with declarations of acceptance there has arisen no rule to require any uniform text or similar content in any aspect. This was reaffirmed by the Court in the *Fisheries Jurisdiction Case* to the effect that "Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of compulsory jurisdiction of the Court."[39]

Another characteristic of limitations on, conditions or reservations to declarations of acceptance is that a limitation, condition or reservation–owing to the principle of reciprocity, which can be deemed to be a basic element of the optional clause system–operates to modify the commitments not only of the declarant State, but also of the other States party to the optional clause system, in any case where the Court's jurisdiction was based on optional clause declarations. In a given case the limitations, conditions or reservations included in the declaration of a party, following from the principle of reciprocity, the opponent party may equally be rely upon these limitations, conditions or reservations. All this carries in itself the element of uncertainty that a State party to the optional clause system cannot know in advance whether in a future dispute a limitation, condition or reservation included in the declaration of other State parties to the optional clause system may be of advantage or of disadvantage to it.

Thus the limitations, conditions or reservations offer a possibility to exclude some unforeseen–or perhaps very likely–disputes, a possibility what could be an eventual advantage or disadvantage both to the State formulating the limitation, condition or reservation and to the State or States having opposite

[38] In this context we have in mind acquiescence in reservations and eventual objections to reservations. At first sight (mainly if one is not fully aware of the characteristics of the optional clause) one might even raise the question whether Article 36, paras. 2 and 3, of the Statute, i.e. the optional clause, cannot be seen as a kind of „basic text" which States may exclude, modify, etc. by reservations to declarations of acceptance. Such an approach is mistaken by all means. Art. 36, paras. 2 and 3, of the Statute as the treaty provision which was adopted by the contracting parties and from which a State may depart by a reservation could be taken into consideration if the Statute prescribed the compulsory jurisdiction of the Court which States were allowed to „contracting out".

[39] *Fisheries Jurisdiction Case*. Jurisdiction of the Court. Judgment 4 December 1998. *ICJ Report*, 1998. 453.

interests in a later case, depending on the subject matter of concrete disputes. It appears that we may not be far from the truth in supposing that what might also be lurking behind the rather seldom objections by States party to the optional clause system to limitations, conditions or reservations is perhaps the belief also of other States party to the system that in the future it could be an advantage to themselves to exclude certain disputes from the scope of compulsory jurisdiction. It is of course rather difficult to provide an instance of all this, but it is easy to suppose that reservations excluding disputes concerning certain armed conflicts can be consigned to this category and that exclusion in advance of such disputes from the Court's jurisdiction will meet with a kind of tacit agreement of all States affected by the given armed conflict.

In illustration of the later "advantage" or "disadvantage" of a reservation by a party to the optional clause system to the other States party to the system we could cite various examples, but in reality the question of when a reservation in the declaration of a State will become of disadvantage or of advantage to another State party the optional clause system is subject to change from case to case. The latter is the case whenever the respondent State in its preliminary objection invokes the reservation in the declaration of acceptance by the applicant State and the objection is upholded by the Court. The best known among such cases is the *Case of Certain Norwegian Loans*, in which Norway as the respondent referred to, on the basis of reciprocity, the very controversial Connally reservation included in the French declaration of acceptance. The Court uphold the Norwegian objection and held that it had no jurisdiction.[40]

[40] See the Court's judgement on the preliminary objections: *Case of Certain Norwegian Loans* Judgement of 6 July 1957. *ICJ Reports* 1957. 9–28.

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Comments on the Origin of the Legis Actio Sacramento in Rem

Abstract. The legis actio sacramento in rem belongs to the most debated issues of specialised literature on Roman Law up to the present day. The literature on the subject would fill a whole library, only its approximative treatment would require a separate monography. When explaining the origins of the legis actio sacramento in rem one can distinguish several, more or less clearly isolated trends. The present study will regard the theory of oath and the theory of personal fight as the two most important. The fundamentally sacred character of the legis actio sacramento is emphasised by the theory of oath, according to which the principal aim of communal control could be the expiatio of the divinity retaliating the perjury, the sacramentum of the defeated party. This theory is also corroborated by the text of the vindicatio, appearing as the strictly formalised, religious-magical carmen. Although it is much older, the theory of personal fight is traced back to Jhering, and its essence is that in the beginning the parties actually fought against each other for the thing constituting the object of their controversy, but the community (the state), in order to preserve internal peace, brought the fight under its own control. Therefore, the fight, in the form of the legis actio sacramento in rem, as it is known today was enacted only symbolically, by employing the rod (festuca) instead of the spear (hasta). The aim of the present study is merely to highlight a possibility–based mainly on the primary sources and partly on the findings of the literature on the subject–which will not consider the motifs of sacrality and private fight contradictory in the structure of the legis actio sacramento in rem but will mingle them as organically complementing components.

Keywords: legis actio sacramento in rem, vindicatio, hasta, festuca, carmen

The present study wishes to highlight the following aspects of the description of Gaius.[1] The sacred character of the *legis actio* procedure is proved by the

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[1] Gai. *inst.* 4, 16. Cf. Földi, A.–Hamza, G.: *A római jog története és institúciói* (History and institutions of Roman Law). Budapest, 2005[10]. 167; Zlinszky, J.: Gedanken zur legis actio sacramento in rem. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 106 (1989) 107. sqq.; Wieacker, F.: Ius. Die Entstehung einer archaischen Rechtsordnung. In: *Rechtswissenschaft und Rechtsentwicklung.* Göttingen, 1980. 33. skk.; Kaser, M.: Über "relatives Eigentum" im altrömischen Recht. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 102 (1985) 1. sqq.; Horvát, M.: Deux phases du procès romain. In: *Mél. H. Lévy-Bruhl.* Paris

almost neurotic adherence to the words to be recited,[2] the same phenomenon is also exemplified by Pliny's account of the *dedicatio* of Ops Opifera's temple. (I) Traces of private fight and arbitrary action are shown by the origins of the expression of *vindicatio* as well as by the rod, used in the procedure instead of a spear. All the more so, as Gaius also explains this with the fact that the Romans considered truly their own the goods taken from the enemy, i.e. obtained by fight. Besides the connection between the *iudicium centumvirale* and the *hasta,* the close interconnection of the spear and the cult of Mars also deserves special attention, as the hasta was also carrying a very important semantic load (II) The structure of the *ius fetiale*, regulating the law of war and of peace in the archaic age, a typical example of the intertwining of peaceful and martial elements, and the *rerum repetitio*. as well as the *clarigatio* show remarkable parallel with the *legis sacramento in rem.* (III) In Plautus's comedy, *Casina,* the right to dispose over the protagonist slave girl is decided by way of actual fight, followed by divine judgement. This procedure also shows remarkable similarities with the *vindicatio* mentioned by Gaius. (IV)

I. It is sufficiently well known that the *legis actio sacramento* is strongly text-centred because–as Gaius himself emphasizes–the one who had mispronounced even one word of the text, lost the case.[3] In Roman thinking, the belief in the reality constituting character of the spoken word was of utmost importance.[4] (It is also very important that for the Romans, the concept of *Fate,* the *fatum*, determining human life, originally meant the (divine) word, the declared divine decision, thus fate came into being by the expression in words of the decision of higher powers.[5]) "*The reason is the firm belief of the Romans in the numinous power of the uttered word, their conviction that being was ultimately identical*

1959. 163. sqq.; Kaser, M.: *Das römische Privatrecht I–II.* München 1971–1975. I. 20. 22; Staszków, M.: "Vim dicere" im altrömischen Prozeß. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 80 (1963) 85. sqq.; Jhering, R.: *Der Geist des römischen Rechts.* Leipzig, 1880–1891. 114. 150. 163; Lévy-Bruhl, H.: Le simulacre combat dans le "Sacramentum in rem". In: *Studi in onore di P. Bonfante.* Milano, 1930. III. 83. sqq.; Kaser 1971–1975. I. 20.

[2] Köves-Zulauf, Th.: *Bevezetés a római vallás és monda történetébe* (Introduction to the history of Roman Religion and Myth). Budapest, 1995. 249.

[3] Gai. *inst.* 4, 11. 30.

[4] The importance of the sacral elements is pointed out by Kaser, M.: *Das altrömische ius.* Göttingen, 1949. 309. sqq.

[5] See Pötscher, W.: Der römische fatum–Begriff und Verwendung. In: *Hellas und Rom.* Hildesheim, 1988. 490. sqq.

with uttered being, complete reality was only reality expressed in words."[6] Let us consider an example from the sphere of religious law (the *dedicatio* was part of the *ius publicum.*) for the case when the validity of the sacred-judicial act did not depend only on the precise order of the words to be uttered but also on the exact pronuciation of each sound.

Pliny Maior mentions that Ops Opifera's temple was consecrated by the *pontifex maximus* Metellus, but because of his impediments of speech he had to struggle for several months until he was able to pronounce the words of the *dedicatio.*[7] The historical background of the story is succintly the following: Some time between 123 and 104 BC a new–the fourth–temple was erected for the godess Ops Opfiera,–it cannot be excluded but it seems scarcely probable that her temple on the Capitolium was renovated–and this had to be consecrated by the *pontifex maximus* L. Caecilius Metellus Delmaticus, about whose carreer it is only known that he occupied the office of *pontifex maximus* in 114 BC.[8] Pliny's text mentions Metellus's articulatory difficulties, which do not seem to bear much relevance from a historical point of view, yet from the religious aspect it highlights a cardinal point in Roman *religio*, namely, the requirement "*that the words to be spoken should follow a pre-determined, precisely ordered, accurate pattern."*[9] Perfect physical integrity was an essential condition for the fulfilment of clerical office in Roman religion,[10] just as in the case of several other religions as well,[11] which does not seem striking, as this requirement was observed in the case of sacrificial animals,[12] as well as the official participants of the sacrifices.[13] The question may arise how it was possible for Metellus to act as *pontifex maximus*, as he is the only *pontifex* whose congenital disabilty is known.[14] On the one hand, the increasing rationality of the age–as a result of

[6] Köves-Zulauf: *Reden und Schweigen. op. cit.* 312; Köves-Zulauf: *Bevezetés a római vallás és monda történetébe. op. cit.* 207.

[7] Plin. *nat.* 11, 174. *Metellum pontificem adeo inexplanatae* (sc. linguae) *fuisse accipimus, ut multis mensibus tortus credatur, dum mediatur in dedicanda aede Opi Opiferae dicere.*

[8] About the different presumtions of the year of the dedication see Wissowa G.: *Religion und Kultus der Römer.* München, 1912. 203; Latte, K.: *Römische Religionsgeschichte.* München, 1976. 73; Broughton, T. R. S.: *The Magistratures of the Roman Republic.* New York, 1951/1952. 1960. 532.

[9] Köves-Zulauf: *Bevezetés a római vallás és monda történetébe. op. cit.* 71.

[10] Wissowa: *op. cit.* 491.

[11] Plat. *leg.* 6, 759c; Lev. 21, 17. sqq.

[12] Sen. *contr.* 4, 2.

[13] Plin. *nat.* 7, 105.

[14] Cf. Köves-Zulauf: *Reden und Schweigen. op. cit.* 76.

which certain religious prescriptions were not taken so seriously, or were somehow evaded–might have played an important role in L. Caecilius Metellus Delmaticus's becoming *pontifex*,[15] on the other hand, the other important reason might have been the fact that the texts that had to be recited by the Roman priesthood were previously-determined, thus even the pontifex afflicted with severe articulatory problems could memorize them with long and troublesome rehearsal.[16] Naturally, this would not have been possible in the case of a religion based on spontaneous religious discourse, free preaching, and prophetic prayer.[17]

It is likely that the text of the *dedicatio* contained the name of the godess Ops Opifera, which probably constituted double challenge for the *pontifex*'s cumbrous tongue *(inexplanata lingua)*: the pronunciation of the alliterating name was most likely not an easy task for a person with speech impediments, who was possibly stuttering as well. In addition, the exact naming of the godess was particularly important in the course of the *dedicatio*, given the fact that Ops Opifera was one of the deities of sowing.[18] (The importance of the godess Ops was never questionable for the Romans because–as her name also shows[19]–was related to richness, more precisely to the richness of the harvest, Ops was the incarnation of the rich yield of land, the helpful feature of Mother Earth.[20] Naturally, according to the minutious, hair splitting character of Roman religion, several different divine aspects of the earth's were differentiated: it was generally venerated as Tellus, in its life augmenting aspect as Ceres, and in its harvest yielding effect as Ops.[21] However, Roman religion distinguished even between different aspects of Ops, as it was usual to connect different so called *Sondergottheiten* to chronologically consecutive elements of different acts and events.[22] On August 25 they celebrated Ops Consiva, the godess who performed *the gathering of the harvest*, two days earlier, on August 23 they celebrated Ops Opifera,[23] from which it can be clearly inferred that by the

[15] Latte: *op. cit.* 276.

[16] Latte: *op. cit.* 198. 392; Wissowa: *op. cit.* 397; Dumézil, G.: *La religion romaine archaïque.* Paris, 1966. 53. sqq.

[17] Köves-Zulauf: *Reden und Schweigen. op. cit.* 77.

[18] *Ibid.* 78.

[19] Cf. Walde, A.–Hofmann, J. B.: *Lateinisches etymologisches Wörterbuch I–II.* Heidelberg, 1954 II. 205. sq.

[20] Radke, G.: *Die Götter Altitaliens.* Münster, 1965. 238. sqq.

[21] Köves-Zulauf: *Bevezetés a római vallás és monda történetébe. op. cit.* 76.

[22] Latte: *op. cit.* 51. sqq.; Radke: *op. cit.* 23. sqq.

[23] Radke: *op. cit.* 239.

name Ops Opifera–its second particle being related to the *verbum "ferre"*– *"the godess bringing the richness of harvest"* should be understood.[24] The Volcanalia was also celebrated on August 23, and its logical connection with the celebration of Ops Opifera becomes clear if one considers that the grain not yet gathered in the granary is the most exposed to the danger of fire and thus it is the most in need of Ops Opifera's help against Vulcanus.[25]) Today it is impossible to clarify in every detail why the Romans thought the naming of the deities of sowing to be particularly dangereous, but the importance of the godess Ops becomes evident from the fact that during the research for Rome's secret protective deities–the name was kept secret precisely to prevent the *evocatio* by the enemy–she was also a possible candidate to have fulfilled this function.[26]

What conclusion can be drawn from all these regarding the present inquiry? The words of the *vindicatio* of the *legis actio sacramento in rem*, developed for real estates, are mentioned as *carmen* by Cicero as well.[27] Inferring from the various meanings of the word *carmen*, the words of the *legis actio sacramento in rem* qualified as magical, numinous, legal texts.[28]

II. The *in rem actiones* are called *vindicationes* by Gaius,[29] which harmonizes with the terminology of the *legis actio sacramento in rem*, and the *in iure cessio*, as well as the *adoptio*, the *vindicare in libertatem* and the *vindicare hereditatem*.[30] From the etymological attempts at defining the origin of the expressions

[24] Köves-Zulauf: *Bevezetés a római vallás és monda történetébe. op. cit.* 77; Köves-Zulauf: *Reden und Schweigen. op. cit.* 79.

[25] Latte: *op. cit.* 73. 129; Köves-Zulauf: *Reden und Schweigen. op. cit.* 79.

[26] Macr. *Sat.* 3, 9, 3–4. *Deum in cuius tutela urbs Roma est ... ignotum alii Iovem crediderunt, alii Lunam, sunt qui Ageronam, ... alii autem quorum fides mihi videtur firmior Opem Consivam esse dixerunt.*

[27] Cic. *Mur.* 26. Ehhez lásd *Cicero Négy védőbeszéd*. Szeged, 2004. 85. 122.

[28] Szádeczky-Kardoss S.–Tegyey I.: *Szöveggyűjtemény a régi római irodalomból* (Textbook from the ancient Roman Literature). Debrecen, 1998. 19. sqq. (Quoted among others Ov. *trist.* 4, 1, 1–14; Tib. 2, 6, 12–26; Porphyr. *ad Hor. epist.* 1, 1, 62; Hor. *ars* 417; Plaut. *Trin.* 349–352; Hor. *epist.* 2, 1, 134–155; Macr. *Sat.* 5, 20, 17–18; Gell. 4, 9, 1–2; Varro *ling.* 6, 21; Plin. *nat.* 27, 12, 131; Quint. *inst.* 1, 6, 40; Varro *ling.* 7, 27; Fest. 325; Cic. *div.* 1, 1, 114–115; Fest. 325; Cic. *div.* 1, 1, 114–115; Paul. Fest. 160; Cic. *Brut.* 19, 75; Liv. 1, 32, 5–14; 10, 38, 2–13.

[29] Gai. *inst.* 4, 5.

[30] Gai. *inst.* 4, 16–17; 2, 24; 1, 134; Paul. D. 10, 4, 12 pr.; Gai. *inst.* 2, 120. Cf. Düll, R.: Vom vindex zum iudex. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 54 (1934) 105.

"vindex", *"vindicatio"*, *"vindicta"* the one proposed by Varro,[31] emphasizing the characteristic of force, *"vim dicere"* and relating the *verbum* *"dicere"* to the core **deik* (see also *deiknyó, deiknymi*) seems the most plausible, even if this cannot be undoubtedly demonstrated with modern linguistic evidence.[32] 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*.[33] (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.[34]) When trying to understand the structure of *vindicatio*, Varro's traditionally Roman etymology is of utmost importance, because it demonstrates the most clearly how the Romans themselves experienced and how they subsequently interpreted the most basic one of all the procedures termed as *vindicatio*, the *legis sacramento in rem.*[35]

It can be rightly assumed that in the beginning–and probably later on as well–the spear as weapon was nothing else than a long, sharp rod made of hard wood, and hardened in fire.[36] If the *hasta* was the weapon with which in the course of the fights they could win loot, recognition, and hence power, it is no wonder that shortly it became the symbol of power.[37] This is also shown by Verrius Festus's definition: *"hasta summa armorum et imperii est"*[38] and mentioning the *imperium*, especially in connection with the spear, one must

[31] Varro *ling.* 6, 60.

[32] Cf. Walde–Hofmann: *op. cit. II.* 793. sq.

[33] Gonda, J.: *ΔΕΙΚΝΥΜΙ: Semantische Studie over den Indo-Germanische Wortel DEIK.* Paris, 1929. 224–232; Benveniste, E.: *Le vocabulaire des institutions indo-européennes.* Paris, 1969. II. 107–110; Gagarin, M.: "Dikē" in the "Works and Days". *Classical Philology* 68 (1973) 82.

[34] Palmer, L. R.: *The Indo-European Origins of Greek Justice.* Oxford, 1950. 157. sqq.

[35] Nótári, T.: Festuca autem utebantur quasi hastae loco. *AUB* 51 (2004) 133. sqq.

[36] Cic. *Verr.* 4, 125; Plin. *nat.* 16, 65; Hdt. 7, 71; Tac. *ann.* 2, 14; Prop. 4, 1, 28; Amm. 31, 7, 12.

[37] Waele, F. J. M. de: *The Magic Staff or Rod in Graeco-Italian Antiquity.* Gent, 1927. 172.

[38] Fest. 55, 3.

not forget about its magico-religious character, belonging to the sacred sphere.[39] It is not by chance that the expression *subhastatio* means–and this is also mentioned by Gaius[40]–the selling of loot, especially the selling of captives,[41] obtained from the enemy by way of armed fight,and later meaning any kind of auction in general.[42] When presenting the institution of *decemvri stlitibus iudicandis*, Pomponius uses the term *hastae praeesse*,[43] which could not mean anything else but the leading of *iudicium centumvirale*. However, the *iudicium centumvirale* came into being only one hundred years after the date assumed by Pomponius (242-227 BC),[44] thus the historical credibility of Pomponius's report becomes doubtful, but it can be safely stated that only a *magistratus cum imperio* was entitled to decide in the question of *legitimum dominium*.[45] The insignia of the *iudicium centumvirale*,[46] founded in the 2nd century BC was the so-called *hasta centumviralis*. By the end of the republic the presidency of this court of law was fulfilled by a *proquestor*, due to the engagement of *praetors*.[47] Augustus appointed again a *praetor* as supervisor at the head of the *iudicium centumvirale*.[48] Novellius Torquatus Atticus was the first *praetor hastarius* or *praetor ad hastam* known by name. With this disposition, Augustus probably did not instaurate a new rule but revived an older one.[49] If the court was sitting in different parts, the man, chosen by the *praetor hastarius* from among the *decemvirii* to preside the court *ad hoc*, was using his own spear in the *iudicium*,[50] this fact being corroborated by Quintilian's report of *duae*

[39] See Pötscher, W.: 'Numen' und 'numen Augusti'. In: *Hellas und Rom.* Hildesheim, Olms, 1988. 462; Wagenvoort, H.: Wesenszüge altrömischer Religion. In: *Aufstieg und Niedergang der römischen Welt.* Berlin–New York, 1972. I. 2. 371. sq.; Nótári, T.: On Some Aspects of the Roman Concept of Authority. *Acta Juridica Hungarica* 2005. 95. sqq.

[40] Gai. *inst.* 4, 16. *quod maxime sua esse credebant quae ex hostibus cepissent.*

[41] Fest. 55, 9. *Et captivi sub eadem veneunt.*; 90, 19. *Hastae subicebant ea, quae publice venundabant, quia signum praecipuum est hasta.*

[42] C. 10, 3, 1. 2. 5. 6; Liv. 2, 14, 1–4; Dion. Hal. 5, 34, 4; Val. Max. 3, 2, 2; Cic. *off.* 2, 27. 83; *Phil.* 2, 64. 103; Varro *rust.* 2, 10, 4; Sen. *suas.* 6, 3. Vö. Alföldi, A.: Hasta–Summa Imperii. The Spear as Embodiment of Sovereignty in Rome. *American Journal of Archeology* 63 (1959) 3. 8; Waele: *op. cit.* 172.

[43] Pomp. D. 1, 2, 2, 29.

[44] Mommsen, Th.: *Römisches Staatsrecht I–III.* Berlin 1887–1888. I. 275.

[45] Alföldi: *op. cit.* 9.

[46] Cf. Mommsen: *op. cit.* II. 225.

[47] Suet. *Aug.* 36, 1; Stat. 4, 4, 41.

[48] Mommsen: *op. cit.* II. 225; Alföldi: *op. cit.* 9.

[49] CIL 6, 1365, 13; 8, 22721, 5; ILS 950; Mon. Ancyr. 8, 5.

[50] Alföldi: *op. cit.* 10.

hastae in the case when the *iudicium centumvirale* was functioning divided into two parts.[51] The *iudicium centumvirale*, judging cases of inheritance under the supervision of the *praetor hastarius* was usually sitting in four sections in the *basilica Iulia*.[52]

In Servius's commentary of Vergil's Aeneid the description of the following ceremony can be found: "Is qui belli susceperat curam, sacrarium Martis ingressus primo ancilia commovebat, post hastam simulacri ipsius, dicens: 'Mars vigila!'"[53] The picture of the deity could not be too old, because the Romans did not represent the image of their gods in the beginning,[54] and Servius's explanation goes back to Varro, just as Plutarch's similar remark:[55] "en de té régia dory kathidrymenon Area prosagoeyen."[56] Seemingly, Varro gets into contradiction with the tradition, which has knowledge of several spears in Mars's sacrarium. These must have been the spears of the salius priests, which were kept in the sacrarium Martis, together with the shields.[57] The plural of shields is not surprising because–as it becomes evident from the Aitologian myth explaining the institution of the salii–Numa Pompilius ordered the manufacturing of another eleven copies of the ancile descending from the sky, in order to prevent the stealing of the original one. During their processions the salii were carrying the ancile in their left and were beating it with a spear-like rod.[58] The form of these spears was not identical with the form of those that were generaly known and actually used for fighting in the Classical Age but they preserved–just like the shields of the salii–their archaic shape: They were so-called hasta pura, made exclusively of wood without any iron, and their prodigium was shown by their movement without any human agency in the sacrarium.[59]

[51] Quint. *inst.* 5, 2, 1; 11, 1, 78.

[52] Plin. *epist.* 5, 9, 1–2. 5; 6, 33, 2–5; Quint. *inst.* 12, 5, 6.

[53] Serv. *ad Verg. Aen.* 8, 3.

[54] August. *civ.* 4, 31; Plut. *Numa* 8; Latte: *op. cit.* 150; Herter, H.: Zum bildlosen Kultus der Alten. *Rheinisches Museum für Philologie* 74 (1925) 164. sqq.

[55] Norden, E.: *Aus altrömischen Priesterbüchern.* Leipzig 1939. 173. sqq.

[56] Plut. *Rom.* 29, 1.

[57] Gell. 4, 6, 1–2; Wissowa: *op. cit.* 556.

[58] Plut. *Numa* 13, 7; Dion. Hal. 2, 70.

[59] Serv. *ad Verg. Aen.* 6, 760; Liv. 40, 19, 2. *pontifices hastas motas nuntiare*; *Obseq.* 6. (60.) *hasta Martis motae*; *Obseq.* 19. (78.) *vasto incendio Romae cum regia quoque ureretur sacrarium et ex duabus altera laurus ex mediis ignibus inviolatae steterunt*; *Obseq.* 36. (96.) *hastae Martis in regia motae*; *Obseq.* 44. (104.) *hastae Martiae in regia sua sponte motae*; *Obseq.* 50. (110.) *hastae Martis regia motae.*

Nevertheless, the spears of the *salii* must be distinguished from Mars's spear, which was–as they were venerating Mars's presence in it[60]–surrounded by a cult that was due to a deity,[61] as the veneration of gods (e.g. Iuppiter, Lapis, Terminus) in some material form was usual for the Romans, which can be explained by the concept of the unity of person-authority.[62] (The *Person-Bereichdenken*, the *person-authority* way of thinking was a special way of experiencing the world for the man of antiquity, in the course of which he experienced the material reality, object, process, or state as such, and, at the same time, he experienced it as divinity as well. The thing and the divinity is often designated with the same word, and sometimes it is considerably difficult to decide whether in a particular case *themis* or *Themis*, *fortuna* or *Fortuna*, *terminus* or *Terminus* should be written. Naturally, either solution is chosen, the other component is tacitly part of the concept and should be taken into account as well.[63] Designation with the same word seems to suggest juxtaposition but in fact it means the unity of the person and his/her function, the sphere of authority represented by him/her, in which alternatively one or the other aspect comes to the fore.[64]) Iustinius in his *Epitoma Historiarum Pompei Trogi* mentions that, in the beginning, the spear was surrounded by a divine cult.[65] Servius, based on Varro, reports that at the beginning of war, after the moving of the ancilia, the celebrating priest also moved the hasta, as the image of the deity (*simulacrum ipsius*) and in the course of this he awoke Mars with the appeal *"Mars vigilia!"* and by this, if we concieve Mars as a *unity of person-authority*, he awoke War itself.[66] There is no need of further explication to see the manaistic, numinous aspect recognized by Wagenvoort in this religious act.[67] The derivation of Quirinus's name, meaning *"spear"* from the word of

[60] Dumézil, G.: *L'héritage indo-européen à Rome.* Paris, 1949. 60.

[61] Arnob. 6, 11. *(coluisse) pro Marte Romanos hastam, Varronis ut indicant Musae.*

[62] Wissowa: *op. cit.* 144; Latte: *op. cit.* 114. sqq.; Scholz, U. W.: *Studien zum altitalischen und altrömischen Marskult und Marsmythos.* Heidelberg, 1970. 29; Pötscher: 457. sq.

[63] Cf. Pötscher, W.: Ares. *Gymnasium* 66 (1959) 4. sqq.

[64] Pöscher, W.: Das Person-Bereichdenken in der frühgriechischen Periode. *Wiener Studien* 72 (1959) 24.

[65] Iustin. 43, 3, 3. *Nam ab origine rerum pro diis immortalibus veteres hastas coluere.*

[66] Serv. *ad Verg. Aen.* 8, 3. *Est autem sacrorum: nam is qui belli susceperat curam, sacrarium Martis ingressus primo ancilia commovebat, post hastam simulacri ipsius, dicens "Mars vigila".*

[67] Wagenvoort: 352. sqq.

Sabin origin *quiris-curis* can be found in several *auctores*,[68] and Iuno's name, Quiritis is also explained this way.[69] It is not by chance that Thormann appositely translates the name *"Quirites"* of the Roman citizens with the expression *"Speermänner"*.[70]

Hence it becomes clear that Roman thinking connected somehow the concept of the force inherent in the spear, the *numen* both with Mars and with Quirinus, but the exact definition of this connection is encumbered by the fact that the existing sources expound on this numinuous force only in the case of *hasta Martis*.[71] The question arises why they were using a rod , the *festuca* instead of the spear meaning the *iustum dominium,* in the course of the symbolic fight of the *legis actio sacramento in rem.* According to Van der Brink the *festuca* and the *hasta* are parts of two completely different symbolic systems.[72] He considers the spear to be an Indo-European symbol of power,[73] whereas he regards the rod as part of the Mediterranean culture.[74] At the same time, he disregards the fact that at the time when these symbols were formed, the differences between the spear and the rod most probably had not occurred yet, as both were made of wood, the only minor differences could appear in size or as the result of the fact that the rod used as a weapon had been hardened in fire.[75] The fact that in the ceremony of the *vindicatio* the *festuca* stood for, i.e. represented the *hasta* can be explained by the disposition which from the beginning attempted to restrict the use of the spear within the *pomerium* and to confine it to the sphere of the most necessary rites.[76]

III. Comparing the *ius fetiale* and the *ius privatum* several valuable parallels can be drawn with regard to the structure of the *clarigatio*, the *rerum repetitio*,

[68] Ov. *fast.* 2, 475. sqq.; Marc. *Sat.* 1, 9, 16; Dion. Hal. 2, 48, 2–4; Plut. *Rom.* 29, 1.

[69] Fest. 43, 5. *Curitim Iunonem appellabant, quia eandem ferre hastam putabant.*; 55, 6. *Iunonis Curitis ... quae ita appellabatur a ferenda hasta, quae lingua Sabinorum curis dicitur.*

[70] Thormann, K. F.: *Der doppelte Ursprung der mancipatio, ein Beitrag zur Erforschung des frührömischen Rechtes unter Mitberücksichtigung des Nexum.* München, 1943. 32. 80. sqq.

[71] Alföldi: *op. cit.* 19.

[72] Brink, H. v. d.: Staff laying. In: *The Charm of Legal History.* Amsterdam, 1974. 68.

[73] Cf. Neufeld, E.: *The Hittite Laws.* London, 1951.

[74] Brink: *op. cit.* 70. sqq.; 77.

[75] Waele: *op. cit.* 172.

[76] Alföldi: *op. cit.* 4.

and the *legis actio sacramento.*[77] The norms with a powerfully religious character of the *ius fetiale* show close connection with several other Roman legal institutions, all the more so because for the man of the age it is difficult to imagine a bond with more binding power than the oath, including self malediction as well.[78] (According to Dahlheim, due to its strong superstitious-religious determination the *ius fetiale* lacks any kind of moral background.[79] However, his view can be contested because legal formalism and legal ethics are not mutually exclusive components.[80]) In the archaic age, the interstatal relationships of Rome were governed by a body of twenty priests, called the *fetiales.*[81] Their tasks included the contracting of alliances, the *foedus,* the establishment of the conditions of armistices, and the declaration of war, given the fact that the war could only qualify as *bellum pium ac iustum* if it was declared and started according to the rules of the *ius fetiale.*[82] (It is interesting that for the Romans the basic principle of the invulnerability of the envoys was indisputable. Whereas in the case of the Greeks the division of the institution of the *keryx,* enjoying sacred protection and the *presbeis,* invulnerable as a result of a political agreement took place very early, in Rome the *fetialis* and later the other envoys–even if they did not belong to the *fetiales*[83]–enjoyed sacred protection, even in time of war.[84])

The *foedus,*–etymologically related to the expression *fides*[85]–the Roman statal contract implemented observing the required formalities,[86] as opposed to

[77] Donatuti, G.: La "clarigatio" o "rerum repetitio" e l'instituto paralello dell' antica procedura civile romana. *Iura* 6 (1955) 31. sqq.; Volterra, E.: L'instituto della "clarigatio" e l'antica procedura delle "legis actiones". In: *Scritti Carnelutti.* Padova, 1950. 251. sqq.

[78] Ziegler, K.–H.: Das Völkerrecht der römischen Republik. In: *Aufstieg und Niedergang der römischen Welt* I. 2. 78; Pólay, E.: *Differenzierung der Gesellschaftsnormen im antiken Rom.* Budapest, 1964. 100. sqq.

[79] Dahlheim, W.: *Struktur und Entwicklung des römischen Völkerrechts im dritten und zweiten Jahrhundert v. Chr.* München, 1968. 173.

[80] Ziegler: *op. cit.* 79.

[81] Földi–Hamza: *op. cit.* 65; Mommsen: *op. cit.* II. 675; Samter: Fetiales. *RE* VII. 2. 2260. sqq.; Wissowa: *op. cit.* 551; Latte: *op. cit.* 121. sqq.

[82] Cic. *leg.* 2, 21; Dion. Hal. 2, 72, 4; Cic. *off.* 1, 36; rep. 2, 31; 3, 35; Varro *ling.* 5, 86. Ziegler: *op. cit.* 100. sqq.

[83] Cf. Marci. D. 1, 8, 8, 1. *Sanctum autem dictum est a sagminibus: sunt autem sagmina quaedam herba, quas legati populi Romani ferre solent, ne quis eos violaret, sicut legati Graecorum ferunt ea quae vocantur cerycia.*

[84] Liv. 38, 42, 7; Pomp. D. 50, 7, 18.

[85] Walde–Hofmann: *op. cit. I.* 494; Latte: *op. cit.* 126. sqq.

the *hospitium*,[87] the *amicitia*,[88] the *societas*,[89] and the *pax* does not signify the content of the contract but its form, and its most important element is the ceremonial oath made by the representative of the *populus Romanus*.[90] The ceremony of the *foedus* is presented by Livy. According to him the priest, chosen from among the *fetiales*, who is consecrated *pater patratus* by reciting the texts selected for the occasion and being touched with a bunch of sacred grass (*sagmina*) takes the oath after reading out the text of the contract.[91] In the oath he calls Iuppiter, the *pater patratus* of the people making contract with him, and the people themselves to witness that the contract that has been read does not contain any falsity, and that the Roman people will not deviate from this first, and if they did–and here follows the self malediction–then he asks Iuppiter to come down on the Roman people the way he is just knocking down the sacrificial pig. Moreover, he should strike even more severely, as he is more powerful than the priest. Then he stabbed the sacrificial animal.[92] Festus recounts a somewhat different formula, according to which the *pater patratus*, after knocking down the pig with a stone, asks Iuppiter to throw him out of his wealth as he is throwing away the stone if he proceeded falsely, but he entreats the god to spare his city.[93] Polybos calls Rome's first contract with Carthago an agreement *per Iovem lapidem,*[94] Cicero ranks the *per Iovem lapidem* oath formula to the *ius civile*.[95]

Discussing the *ius fetiale* it should be pointed out that the Romans were the first to interpret war as a legal fact and they created the concept of *bellum*

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[86] Mommsen*: op. cit.* I. 246. sqq.; K. Neumann: Foedus. *RE* VI. 2. 2818. sqq.; Heuss, A.: *Abschluß und Beurkundung des griechischen und römischen Staatsvertrages.* Klio 27 (1934) 166. skk.; Frezza, P.: Le forme federative e la struttura dei rapporti internazionali nell'antico diritto romano. *Studia et documenta historiae et iuris* 4 (1938) 363. sqq.

[87] About the *hospitium* see Leonhard, P.: Hospitium. *RE* VIII. 2. 2493. sqq.; Frezza: *op. cit.* 397. sqq.

[88] About the *amicita* see Heuss, A.: *Die völkerrechtlichen Grundlagen der römischen Außenpolitik in republikanischer Zeit.* Klio Beiheft 31. Leipzig, 1933. 12. sqq.

[89] See Dahlheim: *op. cit.*163. sqq.; Kienast, D.: Entstehung und Aufbau des römischen Reiches. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 85 (1968) 334. sqq.

[90] Ziegler: *op. cit.* 90.

[91] Liv. 1, 24, 4–7.

[92] Liv. 1, 24, 7–9.

[93] Fest. 239.

[94] Polyb. 3, 25, 6. sqq.

[95] Cic. *fam.* 7, 12, 2. Cf. Latte: *op. cit.* 122. sq.

iustum, influential up to the present day.[96] Not all armed conflicts counted as war, *bellum* could only take place between peoples (*populi*), only the enemy possessing an organized state counted as *hostis.* In accordance with this, Cicero can state that only the oath given to the enemy obliges,the one given to robbers does not.[97] We can depart from Livy's description in the case of the declaration of war as well. On the border of that people's land from which he demands satisfaction (*rerum repetitio*, or *clarigatio*[98]) the *pater patratus* declares that he presents his demands as an envoy of the Roman people, observing the divine law, and he calls Iuppiter, the borders (*fines*) and the divine law (*fas*) to witness that if he demanded the delivery of the mentioned people or things unrightfully, then Jupiter should not allow him to return to his country. He recites this at the crossing of the border, and with slight alterations to the first person he encounters, and again, when he enters the town, and finally on the main square.[99] If they do not deliver the things asked by him within thirty-three days–Dionysius Halicarnassensis mentions an interval of thirty days[100]–, after calling Iuppiter, Ianus Quirinius, and all the gods witness, he declares that he did not receive what he demanded, and that on returning to Rome, he wishes to deliberate about how they could take revenge. This means that he declares the possibility of war (*testatio*, or *denuntiatio belli*).[101] Arriving in Rome, the envoy presented the case to the Fathers and if the majority decided for *purum piumque duellum*, the *pater patratus* took an iron tipped or fire-hardened spear (*hastam ferratam aut praeustam sanguineam*) to the enemy's border, and there, making reference to the unrightfulness of the refusal of his demand, he declared war and threw the spear onto the enemy's territory.[102] (Thus the direct *causa* of the war was the enemy people's unlawful behaviour, the fact that they did not

[96] Cf. Cic. *leg.* 3, 9. *duella iusta iuste gerunto;* Liv. 1, 32, 12. *purum piumque duellum;* Lammert, F.: Kriegsrecht. *RE Suppl.* VI. 1351. sqq.; Ziegler: *op. cit.* 101.

[97] Cic. *Phil.* 4, 14; *off.* 3, 107. sq.; Ulp. D. 49, 15, 24.

[98] Plin. *nat.* 22, 3, 5; Serv. *ad Verg. Aen.* 9, 52; 10, 14; Quint. *inst.* 7, 3, 13.

[99] Liv. 1, 32, 6–8.

[100] Dion. Hal. 2, 72, 8.

[101] Liv. 1, 32, 9–10; Cf. Ogilvie, R. M.: *A Commentary on Livy.* Oxford 1965. 131; Bernhöft, F.: *Staat und Recht in der römischen Königszeit im Verhältnis zu verwandten Rechten.* Amsterdam, 1968. 221. sq.; Kaser: *Das altrömische ius. op. cit.* 22; Haffter, H.: Geistige Grundlagen römischer Kriegführung und Außenpolitik. In: *Römische Politik und Römische Politiker.* Heidelberg, 1967. 23.

[102] Liv. 1, 32, 11–14.

deliver the things or people demanded by the Romans.[103]) Naturally, there was no need of such declaration of war if the enemy invaded Roman territory, in this case they could immediately and unconditionally begin the counter attack, so the declaration of war implemented by the *fetiales* had any significance only in the case of offensive warfare, initiated by the Romans. The archaic age certainly knew the institution of personal revenge, but the official declaration of war was only employed if the war was waged by the entire community, the *populus*, against another people, which was clearly distinguished from armed conflict between different groups of the aristocracy.[104] In the course of its expansion Rome did not always have the opportunity to keep this ritual, therefore, the characteristically Roman formal conservativism chose the following fiction: The *pater patratus* threw the spear onto a plot of land declared enemy territory near Bellona's temple and the entire ceremony was performed with relation to this, but the demands towards the enemy were presented by the *legati* of the *senatus*, and they were the ones to declare war.[105] (Sometimes they sent the spear to the people on whom they wanted to declare war.[106]) However, the fetiales's ritual of the declaration of war considerably contributed to the observation of the requirement that the war had to possess some kind of *iusta causa*, and it is not by chance that Cicero, formulating the theory of the just war under the influence of Stoic philosophy, connects the *aequitas belli* with the *ius fetiale*.[107]

The *hasta ferrata aut praeusta sanguinea*, meaning iron tipped or fire hardened spear, mentioned by Livy,[108] also deserves attention. At the same time, it is not known when the iron-tipped spear was substituted for, or when it accompanied the wooden spear hardened in fire, as The Iron Age goes back to the turn of the 8th and 9th century BC. in Italy. It can be assumed though, that in ritual usage the iron-tipped spear could only take the place of the wooden one when it came to be exclusively used in everyday life.[109] The expression *sanguinea*

[103] Albert, S.: De vetere iure Romano, de lege duodecim tabularum atque de iure fetiali. *Vox Latina* 34 (1998) 218.

[104] Ziegler: *op. cit.* 103.

[105] Francusci, P. de: Appunti e considerazioni intorno alla "columna bellica". *Atti della Pontificia academia romana di archeologia. Ser. III. Rendiconti* 27. 1951–1954. 1899. sqq.; Dahlheim: *op. cit.* 175. sqq.

[106] Cf. Fest. 90. *Carthaginienses cum bellum vellent, Romam hastam miserunt.*

[107] Cic. *off.* 1, 36; Hausmaninger, H.: "Bellum iustum" und "iusta causa belli" im älteren römischen Recht. *Österreichische Zeitschrift für öffentliches Recht* 11 (1961) 341. sqq.

[108] Liv. 1, 32, 12.

[109] Waele: *op. cit.* 173. sq.

is particularly problematic: The word itself can be translated as *consecrated in blood* or *coloured with blood.* However, if it is taken for the denomination of the wooden material, it can mean the branch of the cornel tree, the *sanguineae virgae*, which, being hard wood, constituted a perfectly suitable raw material for the spear.[110] Ammianus Marcellinus mentions in connection with the *fetiales's* spear that besmearing it with blood played an important role in the course of its manufacturing.[111] The spear of the *ius sacrum* made of cornel wood counted as *arbor felix*,[112] but the spear used for the declaration of war was *hasta impura*, i.e. *arbor infelix*, dedicated to the forces of the underworld.[113] Thus, whether the *fetiales's* spear was coloured with real blood, or made of blood coloured cornel wood, the original *hasta praeusta sanguinea* was later changed for *hasta ferrata sanguine infecta*.[114] The *fetialis* ritually predicts the outcome of war at its very beginning because by symbolically taking the enemy territory into possession with the *hasta impura*, dedicated to the gods of the underworld, he delivers the enemy, the *hostis impius*, bereaft of the reason for its existence, to the forces of destruction.[115] (In the light of this, the role of the *evocatio*, performed by the Romans before the attack, by which they intended to lure to Rome the gods of the enemy doomed to destruction becomes perfectly clear.[116])

The strongly text-centered nature of the *ius fetiale* and the *legis actio sacramento* is sufficiently well-known, we know that whoever missed even one word of the text, lost the case.[117] Although in the case of the *ius fetiale* we have no *expressis verbis* knowledge of such consequences, it can be rightly assumed that the Romans did not tolerate even the slightest deviation from the text because this would have destroyed the effect of the *carmen*, hence it would have endangered the result of the *bellum iustum*, fought with divine help.[118] The oath is an indispensable part of the *ius fetiale*. On the one hand the self malediction of the *pater patratus* on the occasion that he presented unrightful demands in the name of the Roman people, on the other hand the calling the gods to witness the lawful procedure of the Romans and the unlawful

[110] Macr. *Sat.* 3, 20, 3; Plin. *nat.* 16, 176; 19, 180; 24, 73. Cf. Waele: *op. cit.* 174.
[111] Amm. 19, 2, 6.
[112] Macr. *Sat.* 3, 20, 2.
[113] Scholz: *op. cit.*32.
[114] Scholz: *op. cit.* 32.
[115] Latte: *op. cit.* 122; Scholz: *op. cit.* 32.
[116] Latte: *op. cit.* 125. About this ritual act see Basanoff, V.: *Evocatio.* Paris 1947.
[117] Gai. *inst.* 4, 11. 30.
[118] Albert: *op. cit.* 220.

procedure of the enemy. In the case of the *legis actio* the *sacramentum* corresponds to this oath.[119] The oath-like character of the *sacramentum* is clearly shown by the original meaning of the word itself,[120] at the same time, it also incorporates the circumstance that the statement of the party taking the oath–e.g. the plaintiff–is true, and accordingly, the statement of his opponent is false. However, if in the end it were proved that the claim of the plaintiff does not stand, then it becomes evident that he commited perjury, i.e. he was performed his own *devotio*.[121] (Kaser also suspects that in the beginning the *sacramentum* was connected to the divine judgement, but in his view this cannot be sufficiently documented for the period from which written sources exist.[122] It is still a fact that the character of divine judgement can be traced–by way of analogy–also in this part of the *legis actio sacramento*. References to the role played by the oath in the trial can be found not only in literary sources, but in traces, in later legal documents as well.[123]) It seems a further parallel that both the *rerum repetitio* and the *legis actio sacramento* is originally aimed at regaining the things unlawfully posessed by the opposing party in a peaceful manner, placing arbitrariness and fight under the control of the state, thus limiting their scope and intensity.[124] At the same time it is a clear difference that whereas in the case of the *legis actio sacramento* the parties accept the control and decision of a judge recognized by both of them, in the case of the *ius fetiale*, this institution is absent. This is demonstrated by the fact that in the so-called international affairs they could not agree on the competence of legal court–this might be the cause of the absence of the *apud iudicem* stage of the *ius fetiale* procedure–, it can be rightly assumed though that the Romans found the instance entitled to decide in the conflict of two nations exactly in the higher powers, who were so often called to witness.[125]

The *ius fetiale* is a clearly religious system of norms and procedures, as this is shown by the constant mentioning of the persons and gods acting in it. Nevertheless, the *legis actio sacramento*, considered to be an institution of the *ius privatum* shows close connection with the *ius sacrum*: In the beginning the *legis actio* was performed in front of the *rex*, who was present, both in his

[119] Kaser: *Das altrömische ius. op. cit.* 21.
[120] Walde–Hofmann: *op. cit. II.* 459. sqq.; Kaser: *Das altrömische ius. op. cit.* 18.
[121] Albert: *op. cit.* 220.
[122] Kaser, M.: *Das römische Zivilprozeßrecht.* München, 1966. 62.
[123] Verg. *Aen.* 8, 262. sqq.; Ulp. D. 4, 3, 21.; Ulp. D. 47, 52, 27.
[124] Kaser: *Das altrömische ius. op. cit.* 22.
[125] Albert: *op. cit.* 222.

person and his legitimacy, as a representative of the sphere of the sacred. Then the *in iure* stage of the trial took place in front of the *magistratus*, then, *in concreto*, it took place in front of the *praetor*, who from the point of his jurisdictional responsibilities, was an inheritor of the *rex*.[126] The oath, stricly observing the words of the text, was also addressed to the gods, which substantiates the assumption that the *legis actio* was closely connected to the *ius sacrum*.[127] (Certain parallels can be detected between the *ius fetiale* and the Twelve Table Law,[128] for example the debtor had thirty days to satisfy the demand of the creditor if he admitted his indebtedness, or if the case was settled by legal decision, just like the *pater patratus* had to wait with the *denuntiatio belli* for thirty days after he had announced his demands, according to Dionyssius Halicarnassesensis.[129] The reason of both decrees was to facilitate the finding of a peaceful solution of the conflict within this interval. Just like the relevant loci of the Twelve Table Law order the giving into *noxa* of the person causing damage,[130] the demands of the *ius fetiale* also contain the extradition of the person commiting a deed injurious to Rome.[131]) The same intention, meant to restrict the uncontrollable arbitrary enforcement of private demands between the citizens of a state, or between different nations and states, trying to prevent the state of *bellum omnium contra omnes* by placing the solving of the conflict under some kind of commonly accepted higher instance, might have stood at the origins of both the *ius fetiale* and the *legis actio sacramento*.[132]

IV. It is sufficiently well known that in Homer Zeus decides certain armed conflicts with the help of his scales[133] by way of the so-called *psykhostasia*,

[126] Földi–Hamza: *op. cit.* 18; Meyer, E.: *Römischer Staat und Staatsgedanke*. Zürich–Stuttgart, 1964. 38. 117; Bleicken, J.: *Die Verfassung der römischen Republik*. Paderborn 1975. 76. sq.

[127] Cf. Noailles, P.: *Du Droit sacré au Droit civil*. Paris, 1949. 18. sqq.

[128] Donatuti: *op. cit.* 31. sqq.; Hausmaninger: *op. cit.* 338; Bernhöft: *op. cit.* 221. sqq.; Albert: *op. cit.* 224.

[129] *XII tab.* 3, 1; Dion. Hal. 2, 72, 8.

[130] *XII tab.* 8, 6. (Ulp. D. 9, 1, 1 pr.); 12, 2b (Gai. *inst.* 4, 75–76.) About these loci see Földi: *op. cit.* 103. sqq.

[131] *Das altrömische ius. op. cit.* 185. Cf. Liv. 8, 39, 14; 9, 8, 6; 9, 10, 2. sqq.; Cic. *Caecin.* 98; *De orat.* 1, 181; 2, 137; *off.* 3, 108.

[132] Kaser: *Das römische Zivilprozeßrecht.* 19; Kaser: *Das altrömische ius. op. cit.* 15.

[133] *Il.* 8, 69. sqq.; 16, 657. sqq.; 19, 223. sqq.; 22, 209–213.

and *kerostasia*[134]–this scene can be found with minor modifications in Virgil as well[135]–and it is also known that in certain cases the combatants decide by lot who should start the fight, thus asking for the help of the gods.[136] Naturally, the drawing of lots by *oraculum* was known by the Romans as well.[137] Most often they practiced the version in which the wooden tickets of the persons taking part in the draw were placed in an urn, filled with water, the *sitella*, which was bellied but had a narrow neck, and after reciting certain magic words and shaking the urn, they drew conclusions regarding the divine will from the sinking or the floating on the surface of the *sortes*, of which only one could remain above due to the narrow neck of the urn.[138] A similar procedure can be found in Plautus's comedy, entitled *Casina*, this being all the more significant as Plautus, though he often worked with Greek samples, had to adapt the scenes of his comedies to Roman thinking and everyday life, otherwise he could not have expected to be succesful. In *Casina* not merely a common *oraculum* is presented but the decision by single combat–leading to the employment of actual violence–of a legal conflict with the help of *oraculum*. This procedure shows a special mixture of the *oraculum* based on divine decision and the archaic *vindicatio*, requiring the employment of *vis*, in that it makes steps towards the repression of violence by way of the *oraculum*, based on the decision of divine forces.[139]

The situation in *Casina* is the following: The Athenian Cleostrata, wife of Lysidamus acquired and brought up the slave girl Casina out of her own fortune. Contradiction arises in connection with the right to dispose over Casina. On the one hand, Lysidamus wants to aquire her for himself and his slave, Olympio, on the other hand, Cleostrata also claims the girl for herself and her slave, Chalinus. On behalf of the husband the *vilicus*, Olympio, on behalf of the wife, the *armiger* Chalinus take part in the actual dispute.[140] In

[134] See Wüst, E.: Die Seelenwägung in Ägypten und Griechenland. *Archiv für Religionswissenschaft* 36 (1939) 166. sqq.; Dietrich, B. C.: The Judgement of Zeus. *Rheinisches Museum* (1964) 103. sqq.; Pötscher, W.: Schicksalswägungen. *Kairos* 15 (1973) 61. sqq.; Pötscher, W.: Moira, Themis und timé im homerischen Denken. *Wiener Studien* 73 (1960) 15. sqq.

[135] Verg. *Aen.* 12, 725–727.

[136] *Il.* 316. sqq.; 7, 170. sqq.

[137] Cf. Cic. *inv.* 1, 18.

[138] Cf. Cic. *nat.* 1, 106; *Corn. fr.* 1, 13. 14; Liv. 25, 3. 1. sqq.

[139] Düll, R.: Zur Frage des Gottesurteils im vorgeschichtlichen römischen Zivilstreit. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 58 (1938) 19. sqq.

[140] Plaut. *Cas.* 47. sqq.

the course of the dispute physical violence takes place between the slaves representing the opposing husband and wife, at the same time, the *oraculum* preceeding actual fight also begins. The two *sortes* are placed into the *sitella* and the actual fight is simultaneous with the ceremony. Chalinus is defeated in the *oraculum*, Olympio and his master are the winners, and the dispute is decided in favour of Cleostrata by the employment of a trick only in the second part of the play.[141]

At the beginning of the procedure Cleostrata complains that her husband restricts her in her freedom to dispose over her slave, constituting her own property,[142] to which her neighbour, Myrrhina reminds her of the rule of Roman matrimonial law, according to which the husband has the right to dispose over his wife's entire property.[143] In the dispute Lysidamus tries to convince his wife to yield to him, but Cleostrata sticks to her claim that she is entitled to provide for and dispose over her slave.[144] The married couple agree to entrust two slaves with the fight over Casina, but both do this, hoping in secret that they can force each other's slaves to renounce at Casina.[145] The two slaves appear, and Lysidamus tells Chalinus that he promised Cassina to his slave, Olympio, to which Chalinus responds that Cleostrata promised the girl to him.[146] Lysidamus offers to eliberate Chalinus if he renounces at Casina, but the slave does not accept.[147] Lysidamus calls his wife and orders Chalinus to bring a *sitella* full of water and the sortes belonging to it, and anounces that if the negotiations do not yield any result he will entrust the *oraculum* with the decision.[148] Meanwhile Cleostrata tries to dissuade Olympio from clinging to Cassina, but he says that he would not change his mind even at Iuppiter's request.[149] There is nothing left to do but turning to the *sortio*, but the *oraculum*, in which the will of the gods concerning the issue is manifested cannot dispense with vis, the actual fight.[150] When Chalinus appears with the *sitella* and the sortes, Lysidamus announces that the fight must be fought observing the formal requirements of

[141] Düll: *op. cit.* 20. sq.
[142] Plaut. *Cas.* 149. 189. sq. 193. sqq.
[143] Cf. Földi–Hamza: *op. cit.* 256. sqq.
[144] Plaut. *Cas.* 248. sqq. 260. sq.
[145] Plaut. *Cas.* 269. sqq.
[146] Plaut. *Cas.* 288. 289.
[147] Plaut. *Cas.* 289. sqq. 293. sqq.
[148] Plaut. *Cas.* 295. 298.
[149] Plaut. *Cas.* 323.
[150] Plaut. *Cas.* 342. sqq. 346.

the procedure, and that he himself, wants to supervise it.[151] However, he makes a final attempt at persuading Cleostrata, but she categorically refuses.[152] So the ceremony begins, and the fact that everything is performed strictly in accordance with the rules receives special emphasis.[153] The *sortes* are marked with inscriptions and they check that there is no other *sors* already in the urn, as well as the fact that the two balls are made of the same wood, as the winner of the *oraculum* will be the one whose *sors* will remain above in the urn.[154] Then the urn is placed in front of Cleostrata, her task being to shake it and to draw out the sors.[155] The two participants of the *oraculum*, Olympio and Chalinus pray to the gods to help their case and they accurse the adversary.[156] After the prayers Lysidamus calls on the parties to begin the actual combat, he wishes Olympio good luck, and so does his wife to Chalinus. Olympio asks Lysidamus whether he should hit Chalinus with his fist or with his open palm, to which his master replies that he should proceed the way he wants. Then Olympio, calling in help Iuppiter slaps Chalinus in the face, while Chalinus, calling in help Iuno, hits Olympio with his fist.[157] After the outright violence, Cleostrata has to draw the sors remaning above in the urn, and the parties are asked to cease fighting.[158] Cleostrata draws out Olympio's *sors* because that one was above, and announces that Chalinus is the loser, and Lysidamus announces

[151] Plaut. *Cas.* 352. 357. 363.

[152] Plaut. *Cas.* 364. sq. 370. sqq. 373.

[153] Plaut. *Cas.* 375. (Lys.) *Optumum atque aequissimum istud esse iure iudico.*

[154] Plaut. *Cas.* 378. 380. 384. sqq.

[155] Plaut. *Cas.* 387. 395.

[156] Plaut. *Cas.* 389. sqq. (Ol.) *Taceo: deos quaeso*–(Chal.) *Ut quidem tu hodie canem et furcam feras.* / (Ol.) *Mihi ut sortio eveniat*–(Chal.) *Ut quidem hercle pedibus pendeas.* / (Ol.) *At tu ut oculos emungare ex capite per nasum tuos.* (Chal.) *Quid times? Paratum oportet esse iam laqueum tibi.* / (Ol.) *Periisti.* 396. (Chal.) *Deos quaeso, ut tua sors ex sitella effugerit.*

[157] Plaut. *Cas.* 401. sqq. (Lys.) *Hoc age sis, Olympio.* (Ol.) *Si hic litteratus me sinat.* / (Lys.) *Quod bonum atque fortunatum mihi sit.* (Ol.) *Ita vero, et mihi.* / (Chal.) *non.* (Ol.) *Immo hercle.* (Chal.) *Immo me hercle.* (Cleost.) *Hic. vincet, tu vives miser.* / (Lys.) *Percide os tu illi hodie. Age, ecquid fit? Ne obiexis manum.* / (Ol.) *Compressan palma an porrecta ferio?* (Lys.) *Age ut vis.* (Ol.) *Em tibi.* / (Cleost.) *Quid tibi istunc tactio est?* (Ol.) *Quia Iuppiter iussit meus.* / (Cleost.) *Feri palma, ut ille, rursum.* (Ol.) *Perii, pugnis caedor, Iuppiter.* / (Lys.) *Quid tibi tactio hunc fuit?* (Chal.) *Quia iussit haec Iuno mea.* / (Lys.) *Patiundum est, siquidem me vivo mea uxor imperium exhibet.* / (Cleost.) *Tam huic loqui licere oportet quam isti.* (Ol.) *Cur omen mihi / vituperat?* (Lys.) *Malo, Chaline, tibi cavendum censeo.* / (Chal.) *Temperi, postquam oppugnatum est os.*

[158] Plaut. *Cas.* 412.

that the gods supported Olympio, fighting on his behalf. Olympio considers his victory to be a reward for his own, and for his ancestors' *pietas*.[159] Thus the case was settled with Casina having to marry Olympio, while Cleostrata has to make preparations for the ceremonial feast, which she begins, having accepted the decision of the *oraculum*.[160]

As it becomes evident from the prologue of the play, Plautus modelled his comedy on Diphilus's play, Kleroumenoi, and–as it is clearly shown by its title–the Greek play is also centred around a kind of sortio, a drawing or casting of lots, which is not in the least surprising taking into account that the oracula involving drawing of lots constituted an integral part of Greek religious thinking and religious practice.[161] Plautus is anyway a master of intermingling Greek elements with Roman everyday life, customs, religion and law, and he explains in the prologue those elements of his play which could be strange for the Roman audience. So he does with the motif of the slaves' "marriage",[162] yet he does not consider it necessary to add any explanations to the settling the contradiction arising about the right to dispose over a slave by oraculum and fight, he is content to mention the perfect righteousness and legality of the procedure.[163] (The typically Roman character is corroborated by the reference to the decree of the Twelve Table Law, the repudium.[164]) The fight of the Horatii and the Curiatii, described by Livy can be mentioned as a parallel to the single combat fought under ceremonial circumstances, as well as the form of the interstatal contracts, in the course of which they call Iuppiter in help and also as witness, the actual fight being signified by the expression manum conserere.[165] The act of manum conserere can also be encountered in Cicero's and Gellius's descriptions of the vindicatio of plots of land. From the comparison of these sources it becomes evident that the employment of the vis,

[159] Plaut. *Cas*. 417. sq. (Cleost.) *Victus es, Chaline*. (Lys.) *Cum nos di iuvere, Olympio, / gaudeo*. (Ol.) *Pietate factum est mea atque maiorum meum.*

[160] Plaut. *Cas*. 427. sq. 419.

[161] Plaut. *Cas*. 31. sqq. Cf. Düll: *op. cit.* 27.

[162] Plaut. *Cas*. 68. sqq. About this topic see Pólay, E.: Rabszolgák "házassága" az ókori Rómában ("Marriage" of Salves in Ancient Rome). *Acta Universitatis Szegediensis* 34 (1984) 9. sqq.

[163] Plaut. *Cas*. 375. *Optumum atque aequissimum istud esse iure iudico*. Cf. Hägerström, A.: *Der römische Obligationsbegriff I*. Uppsala, 1927. 572.

[164] Plaut. *Cas*. 207. sq. Cf. *XII tab*. 4, 3; Földi–Hamza: *op. cit.* 255.

[165] Liv. 1, 24, 7. 25, 5. *Consertis deinde manibus, cum iam non motus tantum corporum agitatioque anceps telorum armorumque, sed volnera quoque et sanguis spectaculo essent ...*

the actual–later symbolic–violence constituted a substantial part of the legis actio sacramento.[166]

The ritual described by Plautus must have constituted a certain intermediary stage between the personal fight and the *vindicatio*, as it is known today because in this case the parties agree on the rules of the settlement of the conflict, and they accept the control of a third person. The rules to be observed are mainly religious in character, and seem to be suitable to impede boundless and unrestricted violence. Nevertheless, the *vis* is unquestionably part of the procedure, but the winner in the actual fight is decided by a higher, transcendental power, thus the fight receives the character of ordeal.[167] The conditions of the *vindicatio* in *Casina* are given: The right to dispose over the slave girl can be regarded as a kind of property issue, yet the opposing parties–as taking into account the rules of comedy it would not be advisable to put on stage the man and wife, Lysidamus and Cleostrata using violence against each other–are substituted by their slaves in the procedure. However, the fight is always concerning the rights and interests of their owners.[168] First the husband announces his claim for the right to dispose over Casina, then, in response the wife does the same.[169] Then–after trying in vain to persuade the opponent's slave to renounce at their plans concerning Casina–the couple agree that the decision in the dispute over the right of disposal should be reached in a procedure acceptable for both of them, and they agree to accept the decision as obligatory even if it happened to be unfavourable for them.[170] The accepted procedure is the *oraculum*, calling in help the *sortio* as well, which also included actual fight, as it is clearly shown by the expressions *"necessumst vorsis gladiis"*,[171] *"conlatis signis depugnarier"*[172] and *"ire obviam"*.[173] To this extent the procedure is analogous with the *vindicatio* described by Gaius, as the empolyment of *vis*–in the beginning actual, later symbolic–played an important role in this procedure as well.[174] The command

[166] Cic. *Mur.* 26; Gell. 20,10, 7–9. Cf. Thür, G.: Vindicatio und deductio im frührömischen Grundstückstreit. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 94 (1977) 296. sqq.

[167] Düll: *op. cit.* 29.

[168] Düll: *op. cit.* 30.

[169] Plaut. *Cas.* 193. 252. sq. 190. 193. sqq. 261.

[170] Plaut. *Cas.* 269. sqq.

[171] Plaut. *Cas.* 344.

[172] Plaut. *Cas.* 352.

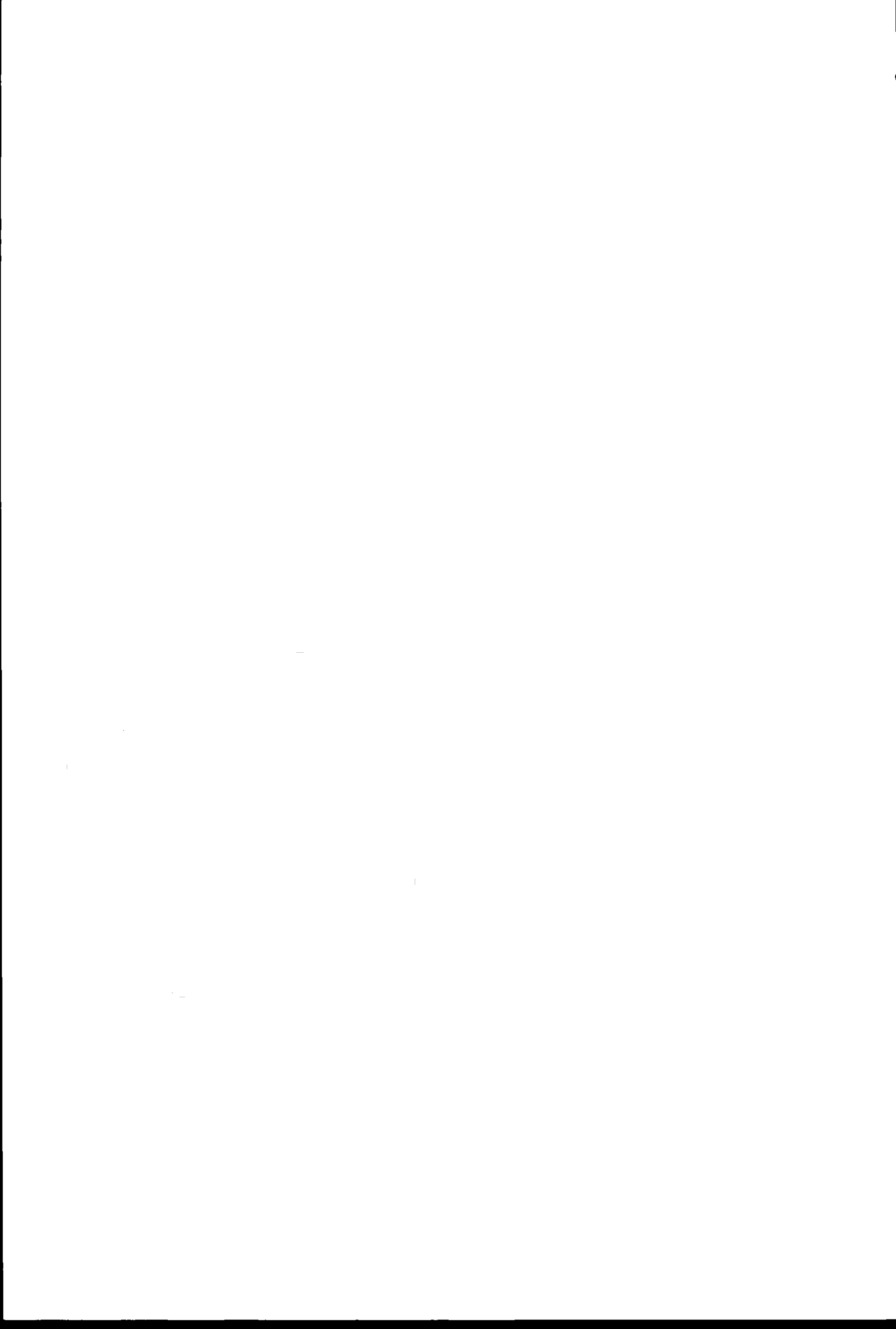
[173] Plaut. *Cas.* 357.

[174] Düll: *op. cit.* 31.

"*age*" calls for the beginning of the fight,[175] which ends with the victory of one of the parties, the defeated one is regarded *victus*, or even *mortuus*.[176] The actual fight–armed, as mentioned by the sources but bare handed in practice[177]–is an essential part of the *vindicatio*, but the dispute is not decided by the fight itself, but by the divine judgement, the *oraculum*, serving as the frame or background of the fight, somehow involving it into the mechanism of decision. Numerous parallels can be observed between the *vindicatio* in Plautus and the *legis actio sacramento in rem*, known from Gaius's *Institutiones*. The parties fight with the same weapons, and they recite the *verba sollemnia* which calls the divinity in help including an oath as well, together with the symbolic enactment of violence with the help of the *festuca*.[178]

At the end of this–considering the significance of the issue–brief study, not intended to be exhaustive, only wishing to highlight some aspects and associations, the following conclusions can be drawn: In our view, the opposing theories searching for the origin of the *legis actio sacramento in rem* either in personal fight or in the religious sphere can be made to augment each other concluding in the same direction, thus being integrated into unified theory. The sacred element (by which not only the religious world picture naming divinities is understood, but also the magic thinking operating with numinuous forces) can be clearly traced both in the requirement of the verbatim recital of the oath, the *sacramentum* and the *carmen*. The motif of the fight appears both in the etymology of the word *vindicatio* and in the employment of the spear. However, it is precisely the *hasta* that carries an religious extra semantic load in Roman imagination, (this becomes evident both from its role played in Mars's cult as well as in the declaration of war constituting part of the *ius sacrum*) which cannot be disregarded in the case of archaic civil law trial. Adapting to the rules of the genre, Plautus presents a quasi-property trial, the result of which is decided by restricted and controlled personal fight, employing the drawing of lots, thus calling for divine judgement. Based on all these it can be rightly assumed that originally the *ordalium*, fought with weapons, conducted the *legis actio sacramento in rem* to its form known today.

[175] Plaut. *Cas.* 401. 405. 412.
[176] Plaut. *Cas.* 407. 427.
[177] Plaut. *Cas.* 344. 352. 405.
[178] Düll: *op. cit.* 33. sq.



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Criminal Justice and Ethnic Data Collection in Hungary[1]

Abstract. The paper analyzes ethnic data collection pertaining to criminal justice in Hungary. It shows that Hungary's approach to resist ethnic data collection by law enforcement authorities is not a good policy and it causes severe constitutional problems in other, non-criminal legal circumstances, where ethnic data is used in the context of additional rights and affirmative protection provided for ethno-national minorities. The paper follows a twofold analysis. First, it sets forth general problems relating to ethnic data collection, including a brief analysis of a uniquely Hungarian constitutional institution, the minority self-government structure. The focus of scrutiny then shifts to the criminal justice system, in particular the analysis of policing of racially motivated crime, and the question of police ethnic profiling.

Keywords: Ethnic data collection, criminal justice, minorities, minority self-governments, "ethno-corruption", racially motivated crime, ethnic profiling, police, stop and search.

Introduction

This paper will analyze ethnic data collection pertaining to criminal justice in Hungary. In most projects scrutinizing ethnic data collection practices, there is always a hidden suggestion that ethnic classification by law enforcement authorities inevitably invokes suspicion about ethnic profiling or disparate treatment based on ethnic identity. This project will not be an exception to this. The paper will show that although Hungary's approach to *resist* ethnic data collection by law enforcement authorities seems superficially appealing, in fact, it is not a good policy. It will be demonstrated that Hungary is one of the (many) countries in which extensive legal restrictions on the collection of non-anonymous data concerning ethnic, national or religious identity have prompted law enforcement authorities to simply deny that ethnicity is of significance in their actions. This, however, is no guarantee that there are no misuses of police

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power or that ethnic profiling does not exist. The only effect of such restrictive policies is that claims relating to indirect discrimination become enormously difficult to prove. The paper will also show that in Hungary, such a restrictive approach to ethno-national data classification also causes severe constitutional problems in other, non-criminal legal circumstances, where ethnic data is used in the context of additional rights and affirmative protection provided for ethno-national minorities.

Traditionally, within Hungary, law enforcement methods based on ethnic selection have affected the Roma minority rather than minute other ethnic or racial communities. As we shall see, the authorities have virtually unlimited discretion when it comes to stops and searches, and as a result, the possibility for misuse of power remains unhindered.

The paper will therefore follow a twofold analysis. First, it will set forth general problems relating to the above described approach to ethnic data collection. This will include a brief analysis of some controversies and challenges to a uniquely Hungarian constitutional institution, the minority self-government structure. The focus of scrutiny then shifts to the criminal justice system, about which the paper will show that the denial of ethnic data collection is not a good policy. This thesis will be supported by two examples: first, the analysis of policing of racially motivated crime, and second, the question of police ethnic profiling. In reference to the first question, it will be argued that law enforcement agents, as well as prosecutors and courts, are very reluctant to recognize racial motivation in violent and non-violent crimes, and will only qualify such criminal activity as nuisance, assault or mischief. Following this, by turning to a more detailed analysis of ethnic profiling, the paper will first describe the actual procedure involved in police ethnic data collection. The paper will conclude by restating that prohibiting the official recognition and collection of data on ethnicity (that is nevertheless present and taken into consideration) by criminal justice authorities is a potentially ethnically discriminatory practice.

When Is a Minority a Minority?

Target groups

In the Hungarian legal and political jargon the terms "ethnic" and "national" minorities (and features) are used instead of "racial". Although there are thirteen recognized ethnic and national minorities in Hungary, racial profiling

and racial (ethno-national) conflict predominantly refer to the treatment of a single visible minority, the Roma. The number of immigrants and foreigners with non-European phenotypes is also increasing in recent years, producing a new victim group for racial profiling. Recent immigration however, is still of relatively small scale and mainly transitory.[2] In fact, immigrants make up only about 1,5 percent of the Hungarian population and approximately two third are ethnic Hungarians from coming from the neighboring states.

Although profiling and discrimination in the criminal justice system may exist against Asian, Muslim or other immigrant population, nevertheless, the severity of the disparate treatment of the Roma is exponentially greater. Due to the legal ambiguity of ethno-national classification (see below), the size of the Roma population is hard to establish. Census and academic estimates range between 200 000 and 600 000.[3]

Group affiliation

Data collection aside, ethno-national affiliation in itself is a controversial, ardently debated topic in Hungary. Article 68 (1) of the Constitution states: national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State. National and ethnic minorities are specifically protected under the Act on the Rights of National and Ethnic Minorities.[4] The Act does not, however, define the term 'ethnic' or 'national minority'. As a result of political negotiations, for example Jews are not included among national and ethnic minorities for the purposes of the Act, a fact which, however, will not prevent them from being covered by the Race Equality Directive[5] and general domestic anti-discrimination legislation.[6]

[2] 2003 UNHCR Statistical Yearbook Country Data Sheet–Hungary. http://www.unhcr.ch/cgi-bin/texis/vtx/country?iso=hun

[3] Census data is inaccurate because many Roma are reluctant to identify themselves as such. Some improvement is noticeable: whereas in the 1991 census 142 683 persons declared themselves Roma, in 2001 this number increased to 190 046. Minority organizations put this number somewhere between 400 000 and 500 000. The most reliable number was provided by a survey in 1993/1994 estimating 456 000. See UNDP Avoiding the Dependency Trap. Bratislava 2002

[4] Act No. 77 of 1993.

[5] Directive 2000/43 EC, Official Journal of the European Communities 2000, L 180/22.

[6] Farkas, L.: The Monkey that does not see, *Roma Rights Quarterly*, 2004. No. 2. rhttp://www.errc.org/cikk.php?cikk=1940

The 1993 Act defines national and ethnic minorities as groups which have been present in the territory of Hungary for over 100 years and „*(§ 1.) constitute a numerical minority within the population of the country, whose members hold Hungarian citizenship and differ from the rest of the population in terms of their own tongue, cultures and traditions, and who prove to be aware of the cohesion, national or ethnic, which is to aim at preserving all these and at articulating and safeguarding the interests of their respective historically developed communities.*" According to the Act, these minorities are: Bulgarian, Roma (Gypsy), Greek, Croat, Polish, German, Armenian, Roman, Ruthenian, Serb, Slovak, Slovene, and Ukrainian; and in order to register a new minority group, a popular initiative signed by 1000 citizens has to be submitted to the Speaker of the Parliament. The Act also provides for the (fundamental) right of self identification and lays down specific protections for minorities' members, including the prohibition of any policy that *"persecutes a national or ethnic minority or any of its members because of their national status, makes their living conditions more difficult, or prevents them from exercising their rights"*.

Without going into an in-depth analysis of the Hungarian statutory model, two controversies–procedural as well as material–need to be pointed out. Both material requirements (100-year presence and 1000 signatures as a special popular initiative) for qualifying as an ethnic or national minority seem problematic. The Act, besides defining the two group constituting requirements, also contains an enumeration of the thirteen minority groups that are recognized by the Act, which means that the Parliament will actually need to pass a formal amendment to these provisions if a new group would qualify. The House (being sovereign) however, is not obliged to vote affirmatively on the question, which is in sharp contradiction with the otherwise clearly defined requirements.[7]

Another set of issues concern the question of is who is to verify or question whether the 100-year requirement has been fulfilled, and when is the clock supposed to start ticking. When will the Chinese minority (a considerable population since the political transition) be entitled to seek recognition? What about the Palestinians, who may claim some 600 hundred years of presence if „Ismaelite" merchants are considered?[8]

[7] A number of Parliamentary and Constitutional Court decisions have been passed on petitions of various ethno-national groups, like the Jews, Aegean Macedons, Russians, the Bunyevac, or Huns seeking recognition.

[8] Both groups have estimated numbers of 10 000. Meanwhile some doubt that certain recognized minorities (such as the Ruthenian for example) have fulfilled the statutory numerical requirements. (The same doubts were raised on that of the 100-year presence of

As a background note, it is important to stress that post-1989 Hungarian minority-politics cannot be understood outside the context of the ethnic Hungarian Diaspora. (Following the Treaty of Trianon in 1920 two-third of Hungary's historic territory (with a corresponding population) had been annexed to the neighboring state. Since then, but especially after the 1989 political transition, Diaspora politics has been a dominant factor in Hungarian foreign and domestic politics.) We can even say that besides classical commitments, one of the primary reasons behind constitutional motivations for providing and recognizing minority rights had been Article 6 (3) of the constitution, which declares that "the Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary." Commentators[9] claim that the creation of the above described homogenous legislation for national and ethnic minorities may help promoting rights of ethnic Hungarians in the neighboring countries; it cannot, however, provide an effective institutional framework to deal with the specific and robust Roma-problem. Also, this monolithic minority category is inefficient in serving the needs of all thirteen official minority groups in Hungary, which substantially differ in size and consequent claims and aspirations. Also, critics point out[10] that the European accession and subsequent changes in the constitutional and socio-political climate will bring challenges that the anachronistic, pre-accession minded Diaspora-targeting law cannot cope with. For example, the appearance of European or other migrant workers and immigrants will bring challenges that the existing legal framework may not be able to handle. Newly arriving groups will easily outnumber small traditional national minorities (such as the Armenian and Ruthenian), while the current legal framework does not have clear guidelines as to how new groups can seek official recognition.

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the Greeks.) The legislator is of course free to recognize any group as a national or ethic minority (even lacking the general conditions), yet the statutory language setting forth the requirements therefore seems absolute and general, and is thus somewhat misleading.

[9] See for example, Pap A. L.: Minority Rights and Diaspora Claims: Collision and Interdependence. In: *The Status Law Syndrome: Post-Communist Nation-Building or Post-Modern Citizenship?* Hokkaido University, Sapporo, 2005. (forthcoming).

[10] See for example, Pap A. L.: *Csatlakozás és csalatkozás. A kisebbségi törvény módosításának kihívásai és a kormány modellje* (Accession and Disillusionment: Challenges Facing the Government's Model for Amending the Act on Ethnic and National Minorities). http://www.nfh.hu/index2.htm?p=2&t=2&i=2967

Individual affiliation

The other, even more controversial element of the Hungarian framework relates to the lack of satisfying legal guarantees regarding individuals' minority affiliation. Hungarian law allows for the handling of data on racial and ethnic origin only with the consent of the person concerned.[11] This gives rise to what is commonly known as "ethno-business" or "ethno-corruption", that is, the utilization and misusage of remedial measures for private means that are contrary to the legislators' intentions.

In this model, the exercise of minority rights is not dependent on minimal affiliation requirements. For example, Stephen Deets documents how school officials pressure parents of 'Hungarian' students to declare their children 'German': „according to Hungarian government statistics, in 1998, almost 45 000 primary school students were enrolled in German-minority programs, which, by the latest census, is about 8000 more than the number of ethnic Germans who are even in Hungary."[12]

Hungary also established a relatively potent form of autonomous minority institution, the 'minority self-government' structure (bodies that co-exist with local municipal administration), and the decision to vote at these elections was left solely to the political culture and conscience of the majority. Thus, in Hungary, citizens, regardless of their ethnic origin, could vote for minority self-government candidates. This enabled members of the majority to take advantage of the various remedial measures. For example, the wife of the mayor of Jászladány–a village notorious for segregating Roma primary school children from non-Roma–held an elected office in the local Roma minority self-government. Likewise, non-Romani parents can claim that they are Romani in order to conceal racial segregation.[13]

Hungarian minority representatives repeatedly claim that the fact that some candidates ran as 'Gypsies' in one election and then later as Germans in the following term (which is permitted by both the law and the ideal of multiple

[11] This of course does not prohibit the anonymous collection of census data. In general, Articles 2(2) and 3(2) of Act No. 63 of 1992 on the protection of personal data and the publicity of public data (Data protection Act).

[12] Deets S. Reconsidering East European Minority Policy: Liberal Theory and European Norms. *East European Politics and Society* 16 (2002).

[13] For a detailed case description see Roma Rights 2003. 107–108. In the summer of 2003 the Roma Press Center's fact finding revealed that at one point non-Romani parents signed a petition in which they too claimed to be Romani.

identity-formation) proves the flourishing of local ethno-business.[14] Similarly, both the President of the National Romanian Minority Self-Government[15] in Hungary and the (Romanian) Secretary for Romanians Living Outside Romania[16] found it worrisome that the 2002 local elections brought an increasing number of candidates for Romanian minority self governments, while the number of those identifying themselves as Romanian in the national census is decreasing.[17] In their view, the answer lies in the fact that "Gypsies" and Hungarian immigrants who moved from Romania are running as Romanians. In order to demonstrate the fallacies of the legal framework, some Roma politicians publicly decided to run under different labels (in most of the reported 17 cases, Slovakian). Also, there are several municipalities where (according to the national census) nobody identified herself as a member of any minority group, yet numerous minority candidates were registered.[18]

Though there are no exact data on the number of minorities of Hungary, based on the number of votes cast at minority–self-government elections it can be safely claimed that a significant number of citizens, who are not members of any minority, voted for minority candidates.[19] (At the 2001 census, 139 763 persons, that is 1,37% of the population, claimed to have a minority language as their mother tongue–the census made it possible for everyone to mark maximum three languages. Three answers could be given concerning nationality affiliation as well–318 391 persons acknowledged belonging to some minority, constituting 3,12% of the population. In light of this evidence, it is interesting to note that 1 777 299 person in the first election in 1990 and 2 657 722 persons in the second one in 1994 cast their vote for some minority candidate.)

[14] See the minority-ombudsman's annual parliamentary reports or an interview with Antal Heizler, President of the Office for National and Ethnic Minorities, Népszabadság (the leading Hungarian daily), 2002. 07. 24.

[15] The President did not predict that more then 7 out of the 17 local self-governments running in the 2002 elections in Budapest (and some 30 out of the 48 registered nationally) would be "authentic Romanian". Out of the 13 local Romanian minority self-governments operating between 1998 and 2002, he estimated that only three have "real Romanian blood" running in their veins. See the summary of an interview with Kreszta Trajan, Népszabadság, 2002. 08. 21.

[16] See the statement of Doru Vasile Ionescu in Népszabadság, 2002. 08. 15.

[17] Only five signatures are needed for the registration of a minority self-government. (For which subsequently everybody, including members of the 'majority', may vote.)

[18] See Népszabadság, 2002. 08. 15.

[19] Majtényi, B.: Minority Rights in Hungary and the Situation of the Roma. *Acta Juridica Hungarica* 45 (2004) 131–148.

The examples of loopholes in the legal regime sometimes result in complete absurdity. In order to express their admiration of German football for example, a small village's entire football-team registered as German minority-candidates for the elections.[20]

It should also be noted that the question of ethno-national identity has been the focus of other socio-political debates, such as the Hungarian status law, a framework legislation that provides for schemes of rights and preferences available for ethnic Hungarians living in Diaspora. During the drafting of this law,[21] an ardent domestic political debate[22] arose from the various legislative approaches in identifying who would be considered Hungarian (for the purposes of the law.) In fact, the contradiction between the basic liberal tenet of the free choice of identity and the desire to reduce (the legal) options for both politically and financially undesirable misusage was perhaps the most controversial aspect of the law.

In June 2005 the Hungarian Parliament passed[23] a comprehensive amendment to the Minorities Act. The legislation made it a point to set forth a plan for institutional reorganization of the minority-protection mechanisms. At the same time, combating the aforementioned ethno-corruption, it introduced a somewhat controversial registration procedure for those who decide to take advantage of the various privileges and additional rights set forth by the minority law. In order to ensure that only members of the given minority can vote and be elected to minority self-government, the law redefines the meaning of Article 68. par. (4) of the Hungarian Constitution which stipulates that national and ethnic minorities have the right to establish minority self-governments. The Act thus departs from the preexisting dedication to the free choice

[20] Interview with Mr. Heizler. Id.

[21] Act 67 of 2001.

[22] Two of the three opposition parties in parliament have severely criticized the text, claiming first of all that the government is significantly underestimating the cost of the law. The Socialist party estimated that as many as one million people would be taking advantage of the health care benefit, which alone could cost around 15 billion Forints ($50 million), and the annual price of the proposed legislation would actually add up to around 60 billion Forints. Additional concerns were raised regarding the labor market's capacity to deal with the estimated additional 700 000 legal laborers. Opposition liberals expressed grave misgivings about the overall conception behind the law, claiming that the intricate web of preferences and benefits (most of which would be available in Hungary) does not support staying but in fact encourages immigration.

[23] The President vetoed the legislation and the Constitutional Court struck down some of its provisions.

of identity and by eliminating the explicit provision allowing for the recognition of multiple identity, sets forth legal requirements for minority political participation. According to the new legislation,[24] both the right to vote for and to run as candidates at the minority elections would require the registration.[25] The first minority self-government elections under the new regulations will be held in autumn 2006.

Having described general issues relating to ethno-national identity, let us now turn to the question of ethnic data collection.

Ethnicity and Data Collection

As mentioned previously, data protection laws in Hungary, in particular Articles 2(2) and 3(2) of Act No. 63 of 1992 prohibit the handling of sensitive data, such as ethnic origin, without the concerned person's explicit permission. Sometimes practice in this area appears to be quite illogical. For example, officials claim that the recording of racial violence victims would run against statutory provisions, even though the Criminal Code acknowledges certain racially motivated crimes,[26] such as "violence against members of national, ethnic or racial minorities and religious groups" or "incitement against community", all of which presuppose membership in the given (racially or ethno-nationally defined) community. Although on the national level, the existence of such statistics is mostly denied, ethnic data is collected by many institutions–for administering minority self government elections, affirmative action quotas, minority scholarships, etc.[27] For some procedures set forth by the Minorities Act (seeking minority self-government elections or minority language education, registering first names that are not included in the official Hungarian register, etc.) one needs to make a formal declaration regarding ethno-national affiliation in order to be eligible for the measures or preferences.

[24] Act CXIV. of 2005.

[25] See for example Minelres News, Office for National and Ethnic Minorities, Budapest, Hungary, Selection of news on national and ethnic minorities in Hungary, March 2004, http://lists.delfi.lv/pipermail/minelres/2004-March/date.html.

[26] The Hungarian Criminal Code (Act IV. of 1978) criminalizes four types of behavior that may fall under the racially motivated category. These are: genocide (Article 155), apartheid (Article 157), violence against members of national, ethnic or racial minorities and religious groups (Article 174/B) and incitement against community (Article 269).

[27] For more, see Farkas: *op. cit.*

It should also be stressed that the anonymous collection of data relating to one's perceived ethnic origin for research purposes is not explicitly prohibited by the Data Protection Act, since it defines sensitive data as one that relates to racial origin, national and ethnic minority affiliation–not perceived racial origin. For example, the Hungarian Helsinki Committee's research into discrimination against Roma defendants in the criminal justice system (see below) was too based on perceived ethnic origin.

This leads us to the central question within ethno-national data collection (and similarly, within racial profiling and discrimination): whether group identity should be based on self-identification, or on perception.[28] As Lilla Farkas (2004)[29] claims,

> "Perceived ethnic origin and self-identity are rather different notions, the former being an objective category, and the latter a subjective one. Neither can be established with indisputable certainty, as there will always be, for example, Roma who bear less visible signs of their ethnicity. On the same token, persons identified by the majority as being Roma may deny affiliation with this ethnic group on account of having lost cultural and language links with the group.."

Curiously, the case law pertaining to penalizing 'violence against a member of an ethnic group',[30] suggests that Hungarian criminal law recognizes the difference between self-identification and perceived ethnic origin and attaches the same criminal liability to violence committed on either ground. As Hungarian judges seem to understand now, a plaintiff who does not profess herself in court as belonging to the Romani minority, can at the same time claim that he was discriminated on the ground of her perceived ethnic origin. It is in fact the perception of Romani ethnicity and not self-identification that establishes the ground of discrimination.[31]

In general, as Farkas (2004) points out, with Hungarian law allowing for the handling of data on racial and ethnic origin only with the consent of the person concerned, the effect is a severe impediment on the prospect of litigation

[28] Two major camps fight in social sciences, those in favor of self-identity, such as János Ladányi and those in favor of perception, such as Gábor Havas, István Kemény and Gábor Kertesi. Farkas: *op. cit.*

[29] *Id.*

[30] Article 174/B of Act 4 of 1978 on the Criminal Code.

[31] See Farkas: *op. cit.*

against indirect discrimination or institutional racism.[32] Furthermore, as mentioned above, the law gave rise to what is commonly known as "ethno-business" or "ethno-corruption", especially in relation to participation in minority elections and election of minority self-governments. Finally, the law diminishes hopes to devise or implement positive action programs. As the European Commission against Racism and Intolerance (ECRI) reported in 1999: "while acknowledging the fact that the collection and utilization of data on ethnic origin is restricted in Hungary for valid reasons, ECRI is concerned that the lack of reliable information about the situation of various minority groups living in the country makes evaluation of the extent of possible discrimination against them or the effect of the actions intended to fight such discrimination difficult."[33]

The two aforementioned Acts (on minority rights and data protection) created two specialized Commissioners to insure that data protection, informational privacy and access to public data, as well as minorities' rights are respected. The two ombudsmen play a crucial role in framing a workable racial profiling policy and safeguarding the handling of ethnicity-related data.

Criminal Justice and Ethnic Data

Having demonstrated the controversial nature of the Hungarian legislative approach to ethnic data collection in general, in the following sections, the paper will scrutinize its consequences with respect to criminal justice. Criminal investigation and law enforcement practices provide another source of evidence for proving that the denial to recognize ethnicity in a system which nevertheless (formally, or informally) takes it into consideration is not a good policy. This thesis will be supported by two examples: first, the analysis of policing and indicting racially motivated crime, and second, the question of police ethnic profiling. In reference to the first question, the paper will argue that law

[32] Under Article 19(1) b, of Act No. 125 of 2003 on equal treatment and the promotion of equal opportunities the plaintiff must establish his ethnic origin in order for the burden of proof to be reversed. In any case, under Article 8 protection is based on ethnicity, thus he must clear this issue when bringing a case. In cases of indirect discrimination not only the ethnicity of the plaintiff(s) but also of the comparator(s) must be established. The latter may prove an insurmountable task.

[33] Second report on Hungary, Adopted on 18 June 1999 made public on 21 March 2000, Para. 26. http://www.coe.int/T/E/human_rights/Ecri/5-Archives/1-ECRI's_work/5-CBC_Second_reports/Hungary_CBC_2.asp

enforcement agents, as well as prosecutors and courts, are very reluctant to recognize racial motivation in violent and non-violent crimes.

Ethnic data and race crimes

Notwithstanding the sweetest sounding constitutional and statutory languages on equal treatment, free choice of identity and the protection of sensitive data, it is always the discriminatory practice of the majority that will actually provide a practical definition for ethnic affiliation. Thus when it comes to the maltreatment of members of various ethnic groups, no difficulties in definitions arises for the discriminating party. Such conceptual ambiguities will only worsen the protections provided for the victimized group. Consider for example the case of racially motivated crimes.

The Hungarian Criminal Code (Act IV. of 1978) criminalizes four types of behavior that may fall under the racially motivated category. (Racial motivation is implied in the wording of the law.) These are: genocide (Article 155), apartheid (Article 157), violence against members of national, ethnic or racial minorities and religious groups (Article 174/B) and incitement against community (Article 269). Nevertheless, it is safe to say that the first two never, and the latter two only very rarely occur in official statistics.

For example, in the past five years, no investigation was initiated in relation of apartheid or genocide, whereas the statistics for Article 269 and 174/B are as follows:[34]

Table 1. shows the statistics for investigations and charges brought under "violence against a member of a national, ethnic, racial or religious group" (Penal Code, Article 174/B) offences.

year	cases identified	offenders identified	charges brought
2001	12	9	9
2002	5	5	5
2003	11	9	8
2004	7	6	5
2005	7	3	2

[34] Information provided by Chief Prosecutor's Office to the Hungarian NFP.

Table 2. shows the statistics for investigations and charges brought under "incitement against community" (Penal Code Article 269) offences.

year	cases identified	offenders identified	charges brought
2000	5	1	1
2001	10	12	11
2002	13	11	11
2003	14	11	11
2004	17	1	1
2005	4	1	1

This should by no means imply that racial crimes and violence are non-existent in Hungary, but rather that law enforcement agents, as well as prosecutors and courts, are very reluctant to recognize racial motivation in violent and non-violent crimes committed against Roma and other minority victims. Although officers and officials habitually claim that it is because of the lack of clear legislative guidelines for the establishment of racial motivation that most of such instances will only qualify as nuisance, assault or mischief. On the other hand, many politicians and experts argue that criminal legislation in force could easily allow for a less narrow, more minority-friendly interpretation.

In Hungary, in line with the legally articulated declaration to refrain from any kind of involuntary official classification of ethnicity, no specific legally binding instructions exist for the determination of racially motivated criminal activity. Thus, law enforcement officers, who are the prime decision-makers as to the legal classification of a given offense will follow the easier way, and become very reluctant to classify incidents, conflicts as racially motivated. Although it will always be the law-school-graduate prosecutor who will decide on what grounds to indict the defendant, she will usually follow the police's determination on the nature of the criminal offense in question. As for the police, officers claim that in determining whether an offense is racially motivated, they take notice of an internal guidance issued by the Attorney General that directs prosecutors when considering and qualifying the indictment. This means that the only legal guidance is an internal policy guide, which, needless to say, would not stand very strong against constitutional challenges. The outcome is clear: in order to avoid making an uncomfortable and (given the widespread anti-Roma or xenophobic sentiments in Hungarian society) unpopular decision, and lacking any legally binding guidance, we

see a very strong reluctance to recognize racial motivation in violent criminal behavior.

As noted above, this practice also seems quite illogical at times, for example in the case of race crime victims. Referring to data protection regulations, official statistics have no reliable data on the ethnicity of race crime victims, either, which is entirely absurd, given that the existence of racially motivated crimes logically presupposes membership in the given (racially or ethno-nationally defined) community. Other evidence for demonstrating that such a narrow interpretation of a facially minority-friendly principle is actually contrary to the victimized groups' interest, is that the above mentioned criminal statistics operate with a homogenous victim category, and statistics will not contain figures broken up into the various protected categories (racial, national, ethnic, religious groups). This will make it very difficult for minority representatives or advocacy groups to demonstrate their case.

Police Profiling and Ethnic Data

In this section, the paper turns to the assessment of ethnic profiling in police work. Scrutiny of ethnic bias in policing and criminal justice should ideally include all of the following: stops and searches, detaining, arrest, criminal procedure, charging, sentencing, disparity in police brutality, access to counsel, law enforcement public employment, ineffective legal remedies, expulsion and immigrant treatment. Due to spatial limitations, the analysis of all these issues is not possible in this article. Consequently, this last part will only cover ethno-national data processing in police stop and search, and within that framework, vehicle stop and search procedures in particular. The paper's aim is to provide an overview of what type of ethno-national (racial) data is and may be collected in Hungary, how and where it is stored, and who has access to it.

This section is based on a field research that was commissioned in 2004 by the Hungarian Helsinki Committee and the Open Society Justice Initiative.[35] The research is part of a comparative study that involves a number of countries and focuses on 'Addressing Racial Profiling and Discrimination in Policing'.

[35] See http://www.justiceinitiative.org

Stop and search powers

According to the Hungarian legal framework, the police may stop anyone at any time and ask questions it deems necessary.[36] The vacuous language of Article 29 of the Act on Police[37] gives full authorization for the police to stop and ask for identification 'anyone, whose identity needs to be established.' If need comes, because the individual is not willing to cooperate or her identity cannot be sufficiently established, she may be searched,[38] can be arrested[39] and be held for eight hours, which, if the process has not been successful, can be prolonged for an additional four hours by the chief of the local police unit. Should this (maximum 12 hour) arrest not be sufficient, another type of detention[40] ("public order detention") may be ordered, which (including the time spent in arrest) may take as long as twenty-four hours. For these stop and search procedures no suspicion whatsoever is needed, no probable cause standards are set forth and unsuccessful identification itself may lead to up to 24 hours of detention. Apart from arrests or detentions, the police are under no obligation to provide an explanation–the only exception being when the individual herself requests such information.[41] The Constitutional Court ruled on several challenges to these provisions,[42] and has been consistently dismissing petitioners' claims, despite dissents pointing to the disproportionate length of the detention and the lack of motivation for speedy police procedures involving detainees who are being held without having committed anything illegal.

Another form of stop and search competences comes up in the context of vehicle control. According to Article 44 of the Police Act, the police may at any time check the legality of vehicle operation and possession. The police may therefore randomly stop and check vehicle ownership documents, certificates for appropriate carbon-dioxide emission, motorway passes, they may check the first-aid kit (a required accessory for all vehicles), the insurance contract leaflet of the vehicle, or the condition of the windshield wiper. Critics[43] have

[36] Article 32. of the Police Act.
[37] Act 34. of 1994.
[38] Article 29.
[39] Article 33.
[40] Article 38.
[41] Articles 29 and 33.
[42] Decisions No. 9/2004. and 65/2003.
[43] See for example, Pap, A. L.: "Street Police Corruption–A Post-communist State of the Art", Kokkalis Program on Southeastern and East-Central Europe, Kennedy School of

argued that it raises constitutional concerns that a significant part of this type of control is actually of an administrative nature and should not be performed by the police forces. For instance, in the case of a company car, checking the authorization from the manager is not a matter of policing per se, but serves social security, tax, and administrative purposes instead.

Police competences raise another problematic point: the issue of reasonable suspicion and probable cause standards. According to the Act on Criminal Procedure[44] probable cause is needed for the initiation a criminal procedure; still, an arrest or the above mentioned "public order detention" does not qualify as such. As a result, apart from failure of proper identification, a "simple" suspicion (the probability of criminal offence does not exceed 50 percent) also suffices for these coercive measures.[45] Although the legislator never cared to explain what these standards are supposed to mean, the Constitutional Court upheld the law,[46] precisely on the ground that these measures do not amount to criminal procedure and the detained (whose cooperation is crucial in these procedures) does not qualify as a defendant under criminal procedures.

Data processing[47]

Turning to the question of actual data processing, based to the field work that had been carried under the auspices of the above mentioned research project, it may be established that police data collection and reporting is done on two levels: paper forms filled out on the spot and the Robocop 2000, an integrated computerized system that is only accessible in the police office. Apart from

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Government, Harvard University, http://www.ksg.harvard.edu/kokkalis/GSW3/Andras_Laszo.pdf

[44] Act 19 of 1998.

[45] Article 33.

[46] Decision no. 65/2003.

[47] This subsection is based on informal interviews and consultations with the following: Captain Tibor Jármy, Ministry of Interior; Szilveszter Póczik, Senior Associate, OKRI, National Institute of Criminology; István Vavró, Department Head, Ministry of Justice; Ferencné Horváth, Attorney General's Office; Klára Csányi, Department Head, Ministry of Interior; István Lóczy, Department Head, Ministry of Interior; Major Szabolcs Szovics, Budapest Police; Captain László Inárcsi, Department Head, Mezokovesd Police; Captain Nagy Zsolt, Department Head, Sátoraljaújhely Police; Liutenant Colonel Zoltán Klima, Department Head, National Police; Gábor Tarján, Associate Professor, Police Academy, Budapest; Colonel Mihály Szabó, Director, National Police; Colonel Tivadar Dormán, Department Head, National Police; Major Eva Ecet, Ministry of Interior.

sporadic usage of computerized vehicle recognition systems (by mostly specialized units) in-car computers or other handheld computer devices are unknown to Hungarian police officers, thus communication mostly is done via radio with the dispatcher.[48]

The first type of data gathering is done on the spot, during stops and searches. In theory, officers would have to report and register every performed activity, regardless of whether they will actually initiate any further criminal or other procedures. The somewhat dubious language of Article 32 of the Internal Minister's Decree on Police Conduct[49] sets forth that the police officer has to fill out a registration form (a so called "RK" form–none of the interviewed officers knew what the abbreviation stood for) in case of identifying someone, and also if further procedures or other circumstances deem it necessary. Data gathering thus may be extended to other people, such as passengers of the vehicle. Presumably, the mandatory registration of all police stops and activities serves internal activity-reporting purposes. From the informal interviews I made, I gathered that (although not always) in most cases, the forms are filled out even in case nothing extraordinary or illegal has been detected.

The form, filled out on the spot by the officer, contains the following data: name; date of birth; mother's maiden name; address; ID card number, expiration date; place, time and reason of stopping; description of the activity that the police action follows; name, rank of the officer. In case of vehicle control: license plate number, type of vehicle, vehicle registration document number, expiration date, owner's name, address. If offenders are being fined on the spot, there is no need to fill out the form, penalty-documentations suffice. The actual form is somewhat anachronistic, bearing a strong reminiscence to communist totalitarianism; it contains several questions that are no longer being asked, such as marital status, number of children, workplace, monthly salary.

The second type of data processing takes the form of a national computerized database, the integrated Robocop[50] (Robotzsaru) 2000. According to a National Police Chief's Order,[51] all relevant data in criminal proceedings need to be

[48] Interestingly, the data protection ombudsman expressed concerns about the transmitting of sensitive, personal data via the radio, because it sometimes enables unwarranted bystanders to overhear information that should not be disclosed. Therefore the police promised to take due care of the situation...

[49] 3/1995 (III.1.) BM rendelet (Decree of the Internal Minister).

[50] The program actually bears an image from the 1987 motion picture Robocop.

[51] Orders of the Chief of the National Police (Orfk intézkedés) 22/2000 (XII 29) and 1/2003 (II. 12).

registered in the database. In Article 5/b, the relevant data category is defined to include all data pertaining to stops, searches, arrests, reports, complaints and denunciations. This means that all data registered in the "RK" forms will be entered into the Robocop and the forms will be destroyed.

As mentioned above, no police registry contains any ethno-national or racial data per se. In official use, such as press releases for example, even if the victim or a witness would claim that the offender was, say, Roma, the formal suspect description will not use any ethno-national signifiers. The overwhelming majority of police officers I informally interviewed claimed that there is no ethnic data at all in any of the police registries. The commissioned research however proves this to be not entirely the case. There are two ways ethno-national or racial data may be processed in police documents: within testimonies by victim defendant or witness, and in the aforementioned Robocop informational network. Curiously, while most high-ranking ministerial officials denied it, field officers and detectives admitted that in case the victim, a witness, or the offender/defendant in his/her testimony or report will claim someone to be, say, Roma, and if they insist on this statement to appear in the records, such data will be a registered and filed as part of the case documentation (and similarly to all important statements, will be attached to the case-file and entered into the Robocop.)

Therefore if the victim were to state that the offender was "presumably Roma", it would actually be part of the case files. Some officials were of the opinion that this would only be the case if the person herself had claimed that she was a member of the minority. It has been the researchers' overall opinion that, although in informal communication anti-Roma racism is almost universal within the force, officers are quite uncomfortable using ethno-racial classification in any form of formal communication, be it verbal (such as orders given by the superiors) or written and (out of fear from political attacks) will tiptoe around it and use a (presumably) politically correct meta-language instead. In sum, officers are unlikely to ask direct questions pertaining to ethnicity, and as far as the records are concerned, may even try to persuade witnesses and victims to avoid using, say, the term 'Roma'.

The other way ethno-racial data may appear in police registries is even more intriguing. The aforementioned Robocop is not only an integrated database, but it is also the basis for a unified police-prosecutorial statistical database. This is a DOS-based computer program where all information is being stored. Most of the data is entered through a code-system, thus the officers and the detectives are only selecting among pre-established options. The registry has chapters on the offense and the offender. The database provides a thorough

analysis of the case and the suspects/defendants and also has a detailed listing of causal factors which are divided into "objective" and "subjective" ones.[52] "Objective factors" would include "covering for other criminal offenses", "problems in the family or school", "low income", "dropping out from school", "alcoholic or criminal family background", etc. "Subjective factors" may include "lack of driving experience", "tiredness", "emotional distress", "criminal past", "bad influence from peers", "antisocial attitudes" and somewhat anachronistic concepts like "bad media influence", "selfishness" or "seize the day-attitude".[53]

The database has a similarly detailed method for describing the appearance of the suspect/defendant. In the codebook we find a set of personal characteristics like the form and size of the ears and the teeth, "hollow cheeks", "raspy voice", "tattoos", "meeting eyebrows", "deformity and maiming". Among these identifiers I came across two types that contained ethno-racial references. The first type I found among the set of options provided for describing facial skin and complexion (among others like "blotchy or pockmarked face"): "Roma-looking", "Creole", and "Arabic, Negro,[54] Asian" (*sic*). Also, among the options provided for "accents or dialects" I found the following categories: "with a Roma accent" "wailing (*sic*) like a Roma".[55]

These ethno-racial classifications are made by the officer/detective, thus in the overwhelming majority of cases, the classification is not based on self-identification, but on an outsider's perception. Ironically, one of the officers I interviewed said that he would actually let the defendant/suspect decide how she would be categorized: 'Roma' or 'Creole'. As mentioned above, all these factors are listed and the officer can only choose from the pre-established options and will only type in the appropriate code number. It is important to point out that the officers do not have to fill out all the questions; it is entirely up to their discretion. Furthermore, at the end of each section, there is an "other" category, where (unlike the previous ones) the officer can type in whatever she may consider relevant. In theory, this could even include victims' or witnesses' statement regarding the offender's ethnicity. In general, it is safe

[52] Section 39 of the database is now eliminated; it used to contain the explicit question whether or not the defendant/suspect is Roma.

[53] Officers are very reluctant to find a crime to be racially motivated, even though they could do so (see above).

[54] In the Hungarian socio-linguistic context the term "Negro" is not necessarily pejorative. (Legislators, drafters and webmasters of such a database on the other hand should have been aware of the international context...)

[55] In Hungarian: "cigányosan sápítozva".

to say, that such a scenario is quite unlikely – partly due to the aforementioned uneasiness about dealing with ethno-racial data in official communications and also in part because of the fact that this would mean additional work. As I gathered from the interviews, officers do not like to waste their time thoroughly filling out the causal factors section. Access to data depends on the status and position of the officers, as well as their standing (level and degree of involvement) in the procedure. One may have the impression, that it is only due to the lack of sophistication of the IT-system that ethno-national data is not easily accessible or connected to other data.

Data processing and ethnic profiling

Intriguing as findings within the previous section were, the consequences are dubious. As we have seen, data processing is hardly existent in the procedures of the Hungarian police. It would however be an incorrect conclusion to draw that consequently no ethnic profiling or discrimination exists in the criminal justice system. In fact, academic estimates and NGO reports suggest the contrary. Since 1994, maltreatment of the Roma has been widely documented by human rights NGOs such as the Legal Defence Bureau for National and Ethnic Minorities (NEKI), the Hungarian Helsinki Committee (HHC) and the Romani Civil Rights Foundation (RPA). The Parliamentary Commissioner for National and Ethnic Minorities has on numerous occasions called attention to discriminatory police actions towards the Roma.[56]

In 2002–2003, the Hungarian Helsinki Committee carried out research on discrimination against Roma in the criminal justice system, finding deep-running traces of racial profiling by the police within Roma communities. By scrutinizing court files, the research focused on how perpetrators were initially detected by the authorities. The findings of the survey appeared to be fully in line with similar Anglo-American studies that analyze discrimination in the criminal justice procedure against visible minorities. The researchers found that Roma offenders and suspects were significantly more likely to have been

[56] For example, in his 2000 report the Minorities Commissioner observed that the high level of discretion allowed in actions such as house searches may easily allow for ethnic discrimination. In 1999, he reported a complaint filed by a teacher who alleged that his Roma students were discriminated in the course of a stop for ID checks. 2004 saw the first victory of the Hungarian human rights movement engaged in defense of Roma rights before the European Court of Human Rights. For the first time since Hungary ratified the Convention, in the Balogh judgment, the Court found a violation of Article 3.

identified via police stops and searches, whereas in the case of non-minority suspects, other investigatory methods–particularly being caught in the act–were the dominant causes that lead to the suspects' capture.[57]

Another empirical comparative research,[58] conducted on behalf of the Open Society Justice Initiative (OSJI) between 2005 and 2006 indicated that in Hungary the Roma are discriminated against in the context of stops and searches by the police, especially in the practice of stopping pedestrians.[59] There is strong statistical evidence that Roma are subject to pedestrian stops more often than non-Roma.[60]

Circumstantial evidence from other stages of the criminal procedure also indicates the likeliness of ethnic profiling. According to the 2001 EUMAP report[61] "research indicates that Roma are more likely than non-Roma to be reprimanded in pre-trial detention or ill-treated by the police,[62] and tend not to have legal representation during investigation". ECRI has expressed concern

[57] See Farkas: *op. cit.*

[58] See Pap, A. L.–Simonovits, B.–Balogi, A.–Vargha, L.: Research Report for Hungary, Results from the research project "A Comparative Study of Stop and Search Practices in Bulgaria, Hungary and Spain", Budapest, 2006.

[59] The research was aimed at examining stop and search procedures by the police. In Hungary, the empirical data collection had four parts: A questionnaire-based public opinion poll targeting a representative group within the Hungarian population; a total of six focus group discussions in Budapest, Miskolc and Pécs, with people–Roma as well as non-Roma–who have experienced stop and search; a total of 20 community interviews in Budapest, Miskolc and Pécs, with people–Roma as well as non-Roma–who have experienced stop and search and a total of 80 interviews in Budapest, Miskolc and Pécs, with officers who conduct stop and search.

[60] The research results are based on a survey series conducted during September, 2005 which shows that over the past year, 23% of the Hungarian adult population was stopped by the police. Among the Roma respondents 57 percent were stopped as pedestrians, at entertainment venues or some sort of event (a concert, say). By contrast, among non-Roma respondents only 22 percent were stopped at such locations..

[61] EUMAP Monitoring the EU Accession Process: Minority Protection. OSI EU Accession Monitoring Program 2001. 241.

[62] Hungarian Helsinki Committee and OSI-COLPI, Punished Before Sentence, Budapest, 1997. See also UN Committee Against Torture, Conclusions and recommendations concerning Hungary 's third periodic report, November 1998: "The Committee is also concerned about the persistent reports that [...]a disproportionate number of detainees and/or prisoners serving their sentences are Roma."

"at evidence that severe problems in the administration of justice exist as regards discrimination against members of the Roma/Gypsy community [...]".[63]

Policing and minority-awareness

In general, racial (ethno-national) awareness in policing is not identified in the context of minority victimization, but rather as a task to reduce Roma-associated criminality. At best, the context of racial (ethno-national) awareness is focused on cultural conflict and equal protection rather than 'race crime. In other words, the important issue in the eyes of police leadership is how to prepare the police force for dealing with the higher criminality rate and cultural specificity of the Roma minority. To put it bluntly, ethnicity is dominantly seen as a problem arising in connection with the offenders and not the victims. Nevertheless, police training encompasses racism in general and racism as a specialized police issue. Anti-discrimination and conflict resolution courses and training are thus incorporated into all levels of police education, which, since 1999 also includes courses in Roma (cultural) studies. We also see a number of special programs promoting Roma presence within the force. There are some (mostly unsuccessful) recruiting programs for the police in Roma high schools, and a number of affirmative action provisions are available for Roma working in the police force. The police also developed nationwide scholarship programs as well as Police Academy entrance examination preparation programs for prospective Roma students.

The police also have a reasonably well developed network of cooperation with NGOs and minority organizations. Human rights organizations operate legal clinics and legal aid programs, and the police organize and participate in training programs in affiliation with civil organizations. Following a 1999 formal agreement between the National Roma Minority Self Government and the National Police, formal and informal connections have been established between local, regional and national level police and Roma minority self governments.

A network of outreach officers and specialized liaisons operate at all levels of police administration, and police leadership annually monitors these networks. Outreach officers and Roma policy-coordinators organize training, crime prevention forums, and sports events (i.e. Roma-Police football games). Although minority self governments are active partners at the level of official declarations, commentators claim that in terms of practical co-operation or

[63] ECRI (2000) 5, para. 14.

conflict-resolution, these political bodies are not always fully capable of "representing" the community. In terms of actual policing practice, there are no racial profiling policies *per se*, but there is an official commitment on behalf of police leadership for providing strict scrutiny to all reports regarding anti-Roma discrimination within the force. The Chief of the national police receives an annual report on these cases.

Conclusion

The foregoing has been an attempt to show one aspect of the legal and social context (the long-standing challenges and sensitivities) of ethnic data generation and collection. It is my conviction that the core question in the Hungarian saga of ethnic profiling and ill-treatment in criminal justice lies in determining under what conditions and with what kind of (external or self-identified) definitions the legal framework should operate. In other words, what serves the minority's interests?

Two contradicting conclusions can be drawn: a modest and a daring one. As for the first, we may confidently state that the Hungarian legislator did not err in providing a narrow framework for ethnic data processing, as whatever the reasons for ethnic profiling and police ill-treatment may be, it is certainly not related to ethno-national data collection. The second conclusion may be that it is (at least partly) due to the lack of applicable tools for measurement that ethnic discrimination may flourish. In other words, maybe it is also due to the superficially satisfying legislative framework for ethnic data collection that indirect and direct discrimination in policing can exist.

The question is far from easy to answer. In fact, it leads us to perplexing long-unresolved dilemmas. The establishment and practical application of legal definitions to complex and abstract human behavioral phenomena is a fundamental and crucial point in the legal hermeneutic process. It is important to note that many legal concepts–such as life or family–are by nature ambiguous; yet when there is legislative and legal interest in providing (legally comprehensible) definitions the legal system is always successful in the creation of some form of conceptualizing. We therefore find workable legal definitions for such complex and otherwise controversial concepts as the beginning of life, or the life of the fetus in relation of inheriting, or family for tax, and civil legal purposes.

The peculiarity of legal conceptualizing lies in the fact that seemingly neutral legal concepts can easily be instruments of social conflict and tools for

discrimination. For example, a narrow definition of physical disability or mental retardation (phrased in the value-neutral language of medicine) can seriously limit the scope of application of equal opportunity or affirmative action measures,[64] excluding thereby certain groups from its application.[65] Similarly, throughout the world, one of the terrains of homosexual anti-discrimination legislative lobbying is to loosen up the generic (civil) legal concept of marriage to include same sex partnerships. (Attempts are made at widening the traditional legal marriage-definition, which conceptually requires members to be of the opposite sex.) Ethnic and racial identities are textbook examples for collective representations of socially constructed particular communities. In traditional societies, socially relevant identities (such as class) are usually rigid and unchangeable; it was not until post-feudal, modern, open societies, that there was room left for the individual's free choice of identity and redefined strategic behavior. In fact (at least in theory), in contemporary open societies the denial of free choice of identity equals the non-recognition of the individual as a source of constitutionally protected value, constituting a violation of human dignity.[66]

There are, however, numerous theoretical and practical problems regarding the legal-administrative assessment of ethnic identification. The first inherent contradiction is that while it is membership in an ethnic or racial group that serves as a basis for constitutional protection, it is always the individual who is to be entitled to the special legal regime, benefits or preferential treatment. The practical consequence of administrative-legal attempts to resolve this situation is that the individual's group affiliation is defined either too loosely and ambiguously, or too rigidly. Legislators and the courts are facing at least two types of serious and inherent problems when dealing with affiliation-issues.

The first practical problem of "ethnic cheating" arises in the context of ethnic-racial affiliation being too liberally regulated, or not regulated at all. So the lack of legal and administrative guarantees and restrictions open the

[64] Throughout the world, in budget debates there is substantial disagreement about trying to define the medical boundaries of the "disabled group." The issues can be as mundane as why the blind may receive a special state aid while others do not, or why specific social security preferences and benefits do not cover people with diabetes, or nephritis, etc.

[65] For a discussion on whether infertility should be considered a "disability" for the purposes of the Americans with Disabilities Act, for example, see Sato Sh.: A little bit disabled: Infertility and the Americans with Disabilities Act. *New York University Journal of Legislative and Public Policy*, Vol. 5 No 1. (2001–2002).

[66] For a detailed analysis, see Eisgruber, Ch. L.: The Constitutional Value of Assimilation, 96 *Columbia La Review* (1996) 87.

possibilities for intentional misusage of measures, policies, or preferences intended for a specific group only. The question arises: what can the state do with the individual's arbitrary, random, or even declared malevolent choice of identity when he or she is seeking preferential treatment? As a matter of law and legal remedies, even if one openly admits to a fraudulent cause for utilizing minority preferences (such as enrolling under minority quotas to educational institutions), there is no legal, political, or even moral basis for questioning such self-identity classification.

The second affiliation-dilemma that law enforcement and legislators need to face is the following phenomenon: notwithstanding constitutional and statutory languages on equal treatment and free choice of identity, it is always the discriminatory practice of the majority that actually provides for de facto usage of affiliation-definition. Thus when it comes to the maltreatment of members of various ethnic groups, no serious definitional or recognition difficulties arise for the discriminating party. Just as (despite the Census Office's multiracial affiliation recognition) a racially profiling American policeman is untroubled by identifying minority drivers, a racist East European restaurant waiter has no qualms about spotting a Roma customer and denying service to her. When it comes to discrimination or ethnic hostility, it is always the daily practice of the majority that will define membership in the discrete and insular minority group.

As for practical solutions, the legislator has basically three options: *a)* adopting a formal, in a way exclusive, and to some extent inevitably rigid classification, usually accompanied by some form of registration; or b) accepting the liberal standpoint and leaving ethnic-affiliation selection to the inner, personal and moral decision of the individual; and c) independent of the above two, when it better serves the interest of the underprivileged, victimized group make all its best effort to refer to the perceived, external classification as a rule of thumb.

As mentioned above, underlying this project there are two key dilemmas. The first one regards the question of how ethnicity should be assessed, for example, if we were to advocate that the police start compiling ethnic statistics regarding their patrolling activities: should they make records about perceived or self-claimed identity? The second fundamental question relates to the question of which general data privacy policy serves better the interests of the underprivileged and discriminated minority. That is, whether or not we should encourage a braver and more sincere policy on ethnic data generation or, whether we should instead continue to handle ethnicity as a taboo and see our goal as giving publicity to the potential dangers of allowing law enforcement

agencies to collect any kind of ethno-racial data. Bearing in mind Justice Harry Blackmun's separate opinion in the cornerstone American affirmative action case Bakke:[67] „To get beyond racism, we must take account of race ... and ... to treat some persons equally, we must ... treat them differently".

[67] Regents of University of California v. Bakke, (438 US 265, 1978).

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The Legal and Criminalistic Aspects of Secret Data and Information Collection

1. The typology of secret data and information collection

Bearing in mind current national, European and global crime rates as well as the globalizing tendencies of organized crime, we can state for certain that the traditional, open methods of investigation are not efficient for successful criminal prosecution. Against conspired criminal networks working with wide-scale distribution of work, using significant human and material resources, one can step up successfully only with secret methods of covering, and an extensive spectrum of human and technical devices. The detailed criminal tactical and criminal technical methodology of these devices and strategies is defined by criminalistics. Criminal procedure law provides the legal framework.

Act XIX of 1998 on Criminal Procedures (hereinafter the Criminal Procedures Law, CPL), form-fitted to Rule of Law requirements, includes the regulations for secret data and information collection. This is a novelty in Hungary, as there had been no such directions in the criminal procedure codes. The investigating authorities used to act on the basis of secret, internal commands even though their operation affected fundamental rights. The breakthrough came with Act X of the year 1990 (already annulled by Act CXXV of 1995), which–at the dawn of the political transition–was the first to regulate secret service operations. This was followed by Act XXXIV of 1994 on the Police, Act C of 1995 on Customs law, customs procedures, and customs administration, Act CXXV of 1995 on National Security Services, and Act XXXII of 1997, on the Border Guard Services, and finally the recent modification of the law on prosecutor's office, which gave a detailed authorization for secret information collection,. (Altogether, at present there are four agencies performing investiga-

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tive tasks, including the prosecutor's office, five secret services, and the interior investigation division of the police–all entitled to collect secret information.)

Nowadays, two methods can be distinguished in a well-confined manner, namely:

- secret collection of information (memo-technically SECOLLINF), and
- secret obtainment of data (memo-technically SEOBTDAT).

Their differences can be summed up in the following table:

The taxonomic distribution of secret means and methods		
Secret collection of information		Secret obtainment of data
Requiring an authorisation from a judge or the Minister of Justice	No judicial warrant required	Requiring a court order
Can last until the investigation is ordered	Before and after the investigation is ordered (even during the investigation!)	Only after the investigation is ordered, until showing the documents
– secret search and technical recording of private apartments – surveillance and recording of private apartments – getting acquainted with and recording mail (K-check) – getting acquainted with and technically recording long-distance communications – getting acquainted with and applying the data of Internet or other computer correspondence	– the use of an informer, undercover operation (+ prosecutor's permit to person cooperating) – information collection by scouting or undercover investigator (+ prosecutor's permission) – checking data – issuing a cover document or establishing a cover organisation – surveillance of persons, premises, buildings, other objects, land and vehicles, as well as recording sound and picture – application of traps – sample shopping – infiltration into conspiracy networks	– technical surveillance of private apartments – mail – telecommunication data – data forwarded by means of computer systems

	– controlled shipping – victim role play by a policeman – establishment of information systems – tapping in addition to the cases which require a permission, recording of data discovered with technical devices – collection of information from communication devices and other data storage devices which require an official permit (+prosecutor's permission)	

First, let us review those specific secret data collection (SEOBTDAT) activities which belong under the auspices of the CPL [*a)-b)-c)* of Paragraph (1) of Section 200]. This means the following:

a) surveillance and recording of events taking place in private apartments by means of technical devices,

b) getting acquainted with the contents of letters, other postal matters, as well as communications forwarded by means of telephone cable or other communication systems, and the recording of these by means of technical devices,

c) getting acquainted with and applying data forwarded and stored by computer systems.

In the first category, the investigating authority surveys and records the events taking place in the private apartment by means of video(cameras) and listening devices ("bugs", "sound guns") secretly installed in the interior space, or used from the outside. In the second category, the "blocking" of communi-cation devices takes place, which includes the "tapping" of faxes, telegrams, and all kinds of telephones (hard wire, mobile, etc.), the–to use an old phrase–ferreting out and recording of data which will be used as evidence later. Finally, the third group contains the secret checking and disclosure of computer data, e-mails, internet data, and connections.

As they affect basic human rights (e.g. the privacy of residence or private secrets), they can only be applied with a number of restrictions, such as:

a) the existence of general basic requirements,

b) for a specific goal,

c) in relation of special crimes and special circumstances,

d) against particular individuals,
e) within time constraints,
f) according to strict formal requirements, with a judicial warrant.

Ad a) The application of SEOBTDAT has three general, basic requirements:
- necessity (there are sufficient grounds to assume that the obtainment of the evidence is hopeless in another way)
- proportionality
- the likeliness of the result.

The conditions are conjunctive: all of them need to exist for the application. If either one is absent, the secret means cannot be applied. Naturally, this only comes up at the point of approving the motion. because afterwards–provided that it was successful–it cannot be debated, the absence of any of these does not exclude or make the evidence obtained unlawful.

Ad b) Unlike the means, the aims are not very special, we could say they are general. It is not difficult to satisfy this restriction as we can list the same aims even in the case of open investigative acts;
- the establishment of the identity of the perpetrator,
- the establishment of the place of residence of the perpetrator,
- arresting the perpetrator,
- uncovering means of evidence.

Ad c) Secret devices can be applied only in relation to special (deliberate) criminal acts which pose an outstanding danger to society, or have special material or personal conditions. It is fair that the law [Paragraph (1) of Section 201] lists these;

The crimes or the attempt or the preparation for such crimes need to be
- *deliberate and to be punished with imprisonment of five years or more, furthermore*
- *related to crime spreading across the country borders,*
- *against a minor,*
- *committed serially or is performed through organised commission (including habitual commission, in conspiracy or criminal organisation as well),*
- *related to drugs or materials constituting drugs,*
- *related to forging banknotes or securities or*
- *committed while being armed.*

Ad d) The secret device cannot be applied against anybody, it can be used only in relation of a defined circle. The target person, as the criminalistics term goes, is constituted by the following:

- primarily the suspect (the comprehensive term "accused" cannot be applied here as the secret device can exist exclusively in the investigative phase of the criminal procedure)
- against the potential suspect (the person who can be suspected of the commission of the criminal act according to the data of the investigation so far but he has not been informed of this yet; that is, it can be applied in the event of the existence of the simple personal suspicion),
- it is possible against others as well, if there is information pertaining any criminal relationship with individuals of the previous two categories, or there are grounds to assume such a relationship (simple suspicion is enough for this, too).

Among "other individuals" it is a further order of limitation that the above-listed secret means can only be applied against a lawyer acting as defense counsel if there is well-founded suspicion of a criminal act against the counsel in connection with the case. This restriction–absolutely correctly–extends to the private residence, office, all the telephone lines, communication devices, postal and electronic correspondence, as well as all the mail of the attorney. Another restrictive institution that is meant to protect the client-attorney privacy is that this restriction extends to the consulting rooms of the police detention facilities and the penitentiary institutions (including the houses of correction).

As a marginal note, we would like to add that it is not necessary to use secret means in the consulting rooms of the police detention facilities which are separated with a glass-plexi wall, as the defense counsel and the accused usually need to almost shout with each other, but at least are forced to talk loudly, thus–violating thereby the defense's secret and intimacy–this can be heard within ear's reach.[1]

In connection with the tapping of the defense counsels' telephone lines, in the 1998 case of Kopp vs Switzerland the European Court of Human Rights (hereinafter ECHR).established the violation of Article 8 as the Swiss authorities violated the right to privacy and family life when they wiretapped the applicant's conversations in the attorney's office. (Bírósági Határozatok, hereinafter BH 1998/12. 955–957).

[1] For more see more in Fenyvesi, Cs.: *A védőügyvéd* (The Defense Counsel). Budapest–Pécs, 2002.

Ad e) The secret obtainment of data can only take place during the course of the investigation: it begins with the ordering of the investigation, and ends with the introduction of the documents of the investigation. Within this timeframe it can last for 90 days, with one extension for a maximum period of 180 days. With the exception of unpostponable cases (*periculum in mora*), a notice ordering investigation is needed, without which the motion for order cannot be formally accepted. In establishing the time of the introduction of the documents, it is the introduction of the documents to the first accused (if there are more than one) that is to be taken into consideration; it is the point until which the secret obtainment of data can be performed. If secret means had been used before the investigation was ordered, that could be performed lawfully only within the framework of secret collection of information (SECOLLINF). If, in the meanwhile, the investigation is ordered, the secret collection of information is kind of transformed, and only secret obtainment of data (SEOBTDAT) can be carried out according to the CPL [Paragraphs (3)–(4) of Section 200].

Ad f) The most important formal requirement is that the secret data collection can be authorised by the court, more precisely the investigator judge, upon the prosecutor's motion. In his motion, the prosecutor, as the master of the investigation (*dominus litis*) has to detail the following:

- the name of the prosecutorial body, the investigating authority,
- the date the investigation was ordered,
- the number of the case,
- if there is or has been secret information collection,, who performed it, what data has been obtained,
- the place of the planned performance of secret data collection, in the case of telephone tapping, the telephone number (either hard wire or mobile),
- the name and identification particulars of the person affected (the target person),
- the name of the means and methods,
- the starting and ending date of the planned period, with the hour and day indicated,
- the existence of the restricting conditions detailed under points *a)–b)–c)–d)–e)*,
- in case of an unpostponable (emergency) order, its reason and time,
- the documents providing grounds for the motion attached,
- upon a motion for extension the documents emerging since the earlier authorisation.

The investigating judge makes a decision about the motion within 72 hours. She/he may reject, fully or partially approve it. In case the motion is approved the judge defines what kind of secret means and methods can be used, against whom, between what time constraints [Paragraph (4) of Section 203].

In unpostponable (emergency) cases, not only the judge but also the prosecutor may order secret data collection for a period of 72 hours, however, the motion for authorisation is also to be put forward at the same time. If the court turns it down, there is no room for unpostponable order on the grounds of unchanged factual basis, and–as referred to earlier in connection with legal remedies–there lies no appeal.

If we take a look at the six restrictions listed above, we can see that apart from the first two *(a–b)* posing general specifications, the violation of the other four points *(c–d–e–f)* all make the data obtained thus unlawful (excluding it from the chain of evidence), thus they fall into the category of excluded evidence. We can conclude this, even though the law will not declare this expressis verbis in all cases.

2. The execution of secret obtainment of data, getting acquainted with and using its results

Secret data collection itself is carried out by the police and the special sub-units of the national security services, with whom–in ways specified in separate legal regulations–the telecommunication, postal, computer network service providers are obliged to cooperate with.

The prosecutor and the head of the investigating authority have several obligations in connection with secret data collection. On the one hand, he/she has to terminate secret data collection without delay if [Paragraph (3) of Section 204]

a) in the event of unpostponable order, the court rejected the motion,
b) it has fulfilled its objective determined in the permission or warrant,
c) the period of time determined in the permission or has lapsed,
d) the investigation has been terminated,
e) it is obvious that no result can be expected from its further application.

With respect to these, the law enumerates excluded evidence only in case of points *a)* and *e)*–in Paragraph (4) of Section 206–however, our opinion is that the unlawfulness prevails within the circle of all the obligations described here and below.

The same individuals also have an obligation to eliminate all data that has not importance for the goal, and data recorded in connection with individuals who are not involved in the case. An additional requirement in connection with the secret data obtained subsequently, not permitted by the judge, in an unpostponable manner, is that they are to be destroyed not within 8 days but without delay [Paragraph (4) of Section 204]. All these also belong to the category of excluded evidence.

Third, they have continuous data protection and confidentiality obligations, according to the regulations of the state secret and service secret law. Upon the request of the investigating judge authorizing secret obtainment of data, the prosecutor is obligated to present the data obtained so far. As a control of legality, she/he examines its application and should it be established that the terms of the permission have been transgressed, she/he may terminate it–with a final and binding resolution–and in the case of other violation law, may terminate the secret data collection [Paragraph (3) of Section 205].

Fourth, it is the obligation of the prosecutor to notify all parties affected by the secret data collection provided that no criminal procedure has been initiated against them and it would not endanger the success of the criminal procedure. The notification is to be made only if both conditions are satisfied. The measure often contested in the literature is a constitutional state requirement, while we can definitely expect that the person notified about the tapping of his phone will fear using the telephone all his life even though he might have only been "affected" by the case without committing or even planning anything unlawful. Thus we consider the application of the legal requirements acceptable only with very serious restrictions.

It is already the fifth obligation that the head of the prosecutorial or investigating authority is to draw up a signed report of the execution of the secret obtainment of data, which contains

- its progress,
- what means and methods were applied, for how long and where,
- who was affected by it,
- the place and time of the source of the data not destroyed
- the fact of the achievement of the goal, or the reason in case of its absence[Paragraph (5) of Section 204].

The report is unconditionally necessary for the prosecutor if she/he endeavors to use the result of secret data collection as documentary evidence in the open criminal procedure. Otherwise, it can be made evidence only if it cannot be replaced by anything else. In this case, by its application, the state secret nature of the data ceases, except if the data is a state secret regardless of the manner of

obtainment. In this case, the cancellation permission of the master of the state secret is also required.

The permission is to be attached to the documents of the investigation together with the motion for permission and the resolution of the court granting permission (the three documents) [Paragraphs (1)–(2) of Section 206].

Data obtained during the course of secret data collection, before ordering the investigation can also be made into chain of evidence if the master of the secret cancels the state secret classification and if it meets the general requirements listed under points *a–f*, and if the purpose of use is the same as the original goal of secret obtainment of data or secret collection of information [Paragraph (4) of Section 206].

Finally, here is a table about the comparison of (the execution) of secret collection of information requiring a permit (SECOLLINF) and secret data obtainment (SEOBTDAT) activity.

Secret collection of information		
	Secret collection of information (SECOLLINF)	**Secret obtainment of data** (SEOBTDAT)
Legal basis	– Police Act (XXXIV of year 1994) – State Security Services Act (CXXV of 1995) – Border Guard Act (XXXII of 1997) – Customs Law (C of – 1995) – Act on the public prosecutor (V of 1972)	CPL
Party ordering	Judge and Minister of Justice	Court (investigating judge)
Time of application	– before the investigation is ordered	– after the investigation is ordered – during the investigation – until the introduction of documents
Period of time of application	90 days that can be extended by 90 days	
Method, means	– secret search and technical recording of private residence – the surveillance and recording of a private residence	– the technical surveillance of a private residence – gathering and recording mail, telecommunication

	– mail (K-check) – gathering and digitally recording telecommunication messages – gathering and using the data of Internet or other computer technical correspondence	data, and data forwarded by computer systems
range of criminal acts	– Police Law Points a)-j) of Paragraph (3) and Paragraph (4) of Section 69 – National security interest as well	CPL Points a)-g) of Paragraph (1) of Section 201
Against whom (target person)	"potential accused"	the accused and persons in criminal relationship with the accused
General condition	Hopeless in other ways (necessary)	
		+ proportional (would propose disproportional difficulty in another way) + the result is rendered probable
Termination	Police Law Paragraph (1) of Section 73	CPL Paragraph (3) of Section 204
	the achievement of the goal the expiration of the deadline no result can be expected subsequently, the judge did not allow emergency	
	+ is unlawful for some reason	+ the investigation was terminated
Destruction of data	data without interest for the goal, and data recorded in connection with individuals not involved in the case	
Use as evidence	inclusion into report document and attachment to investigation documents	
Subsequent notification of the party affected	None	the prosecutor notifies the affected parties if no criminal procedure was launched against and is not endangering the success of the procedure

3. Secret collection of information not requiring a judge's permission

As mentioned above, to prevent, uncover, and interrupt criminal activity, to establish the identity of the perpetrator, to locate wanted criminals, to establish

their place of residence, and to obtain evidence, the police–within the constraints of Act XXXIV of 1994 on the police–can collect secret data.

During the criminal procedure, the data obtained during the course of secret information collection–which is possible–as well as the identity of the person cooperating with the police, the mere fact and technical details of information collection constitute a secret until used as means of evidence.

The aim of the application of the secret criminal-technical means is also criminal data collection, or we could say, criminal intelligence service. In a wider sense, criminal intelligence service is the information collection activity carried out under cover, in a hidden manner (conspiring), of an offensive nature, within the framework of means and methods defined by law.

In a narrower sense, criminal intelligence service is the integration of official police personnel in criminally significant positions, projects, areas, and regard to people in order to obtain data necessary for the investigation).

The types of secret information collection not requiring a judicial warrant:

a) the police may employ an informer or a fiduciary person,

b) may collect information undercover,

c) to cover the cooperating person, as well as to cover under cover operations can issue and use a cover document, can establish and maintain a cover business,

d) can survey persons who can be suspected of the commission of the criminal act as well as persons in relation with the above (so-called target persons), as well as the premises, buildings, and other projects, section of land or road, vehicles, events that can be associated with the criminal act, can collect information about it, and can record the findings with technical devices suitable for the recording of sound, picture, other signs or traces,

e) in order to uncover the perpetrator of a criminal act or in the interest of proving, is allowed to apply a trap–that does not cause damage or harm to one's health–can perform sample or fake or purchasing, may carry out controlled shipment, and can engage in victim role-play by a policeman,

f) may establish information systems,

g) apart from the cases requiring a permission, they can tap and record the findings with technical means (e.g. conversation in a park),

h) may collect information from telecommunication systems requiring official permissions and other data storage facilities.

The police can conclude secret cooperation agreements with natural persons or legal entities occurring in the above enumeration, as well as organisations

without a legal entity (in practise, most often with the informer), and can give material remuneration–even in foreign currency.

At the expense of its own budget the police can establish and maintain cover businesses indicated under point *c)* according to the legal regulations with respect to business entities or private enterprises..

A special combination of secret service devices is the so-called undercover agent and his activity. Due to its existence and human nature, it is considered a criminal tactical device rather, at the same time, as he is planning to uncover a criminal act as a flagrant *delict*, thus setting a "trap" to the real perpetrator, she/he is also in the role of an "*agent provocateur*". Nowadays, the provocateur is used mostly the fight against drug crimes. The reason the provocateur is needed in these cases is that drug-related criminal acts typically do not have a victim, there is no accuser at the police, no party filing a complaint. Thus the undercover agents pose as buyers, uncovering the drug dealers with test purchases.

Notwithstanding its use in criminalistics use, we would like to mention the theoretical, ethical and possible criminal law liability misgivings in connection with the provocateur. As we have pointed out earlier–in these cases the police practically sets a trap for the target person(s). They create a situation in which the target person thinks that the provocateur is an accomplice, that is the situation is, so to say, "ideal" for the commission of the crime. The classical example of the provocateur is the undercover policewoman who poses as a prostitute in the street, or an police officer posing as a drug dealer.

The main ethical problem in connection with the provocateur is posed by the possibility that the provocateur might even get the target person to commit a criminal act that he would not have committed by himself. In this case, the investigation did not uncover but create a criminal act, as the provocateur is able to directly influence the target person. The correct attitude is that the police should establish the situation favourable for the commission of the criminal act, but the decision needs to be made by the target person independently, without the influence of the provocateur.

4. Secret information collection requiring a judicial warrant

Secret information collection requiring a judicial warrant may have the following types:

a) searching a private residence in secret (secret house search), recording the findings by technical means,
b) surveying and recording the events taking place in a private residence with technical means,
c) reading letters, other mail, as well as the contents of communication forwarded by means of telephone wire or a telecommunication, and recording it that by means of technical devices (e.g. telephone tapping).

The police can use these special (so-called operative) means only during the persecution of crimes of outstanding dangerousness. If they
a) can be associated with international crime,
b) are aimed against an child,
c) are realized serially or by organized commission,
d) are related to drugs or materials constituting drugs,
e) are related to forging money or securities,
f) are realized by armed commission,
g) are of terrorist nature,
h) seriously disturb public safety.

5. Particular secret criminal technical devices for information collection

The different secret tapping, surveillance and search activities are carried out by the investigating authorities with special criminal technical devices as listed in the appendix of 135/1997. Government Decree 135/1997 (VII. 29.)
They are the following:
a) tapping devices;
b) secret visual surveillance devices;
c) secret entry devices;
d) other criminal technical devices.

ad a) Any electronic, mechanical or other device, method, "technology", or software can be a tapping device if used to access secret information without the knowledge of those taking part in the communication, provided that they possess one of the following features:

aa) It have been designed, or produced for the secret tapping, forwarding, or recording of direct speech, or or equipments that can be used for such purposes without significant transformation. Thus especially

- wall (contact) microphones and stethoscopes provided with electronic amplifiers
- tapping systems using laser or infra red radiation, or based on ultra sound principle,
- miniature transmitters that can be built in or may be remote controlled, and their special receivers,
- small-size transmitters built into different hiding devices or that can be hidden under clothing, the receivers and sound recording devices,
- miniature sound-recording devices with a recording capacity of over 10 hours,
- high-sensitivity parabola- and gun microphones,
- sub-miniature electret microphones and acoustic probes.

ab) Equipment that has been designed or produced for secret gathering, forwarding, or recording of data stored on digital or analogue information facilities and/or processing computers, computer or other devices, or information carriers used with them, or or equipments that can be used for such purposes without significant transformation.

*ac)*Equipment that has been designed or produced for secret tapping of telecommunication systems forwarding hard-line and/or wireless speech and non-speech information or equipments that can be used for such purposes without significant transformation..

ad b) Any optical, mechanical, electronic and other device or accessory, as well as a software operating these can be a secret visual surveillance devices, provided that it possesses one of the following features:

*ba)*Equipment that have been designed or produced for secret surveillance or recording , or for the forwarding and processing of the information obtained thereby, or equipments that can be used for such purposes without significant transformation. Thus especially:

– small-sized, high resolution and sensitivity CCD cameras and accessories,

– miniature cameras and accessories that can be hidden into hiding devices or under clothing,

– video sign forwarding devices operating in micro-wave range, and their receivers,

– video sign forwarding devices using the electric network, and their receivers,

– fibrescopes with small entry openings, and systems using glass fibre optics enabling secret surveillance, and adapters enabling connection to cameras or video cameras.

*bb)*Equipments that operate under restricted light conditions (i.e. do not require secondary lighting) and contain special photo-multiplying tubes or optical elements. Especially light-enhancing devices that can be used for night photography and video recording .

bc) Special night vision devices operating in infra red range.

ad c) Secret entry devices are mechanical, electronic, optical and software devices that have been produced for the purpose of secretly entering closed premises (enclosed area of land, building, vehicle, etc.), provided that they possess one of the following features:

– devices, "technologies" and accessories that aredesigned and produced for the replacement of the proper opening device of locks, padlocks, bolts, etc. operating on the basis of mechanical, electronic or other principles, for destructive and destruction-free opening,

– devices and software that is developed to penetrate electronic security systems.

ad d) Other secret service devices include:

*da)*coding or crypting devices,

*db)*communication systems that can be hidden under clothing, equipped with a wireless ear piece,

*dc)*miniature transmitters and special receivers that can be used for positioning.

In our opinion, the latter may have a play a significant role in combatting car thefts with the use of the so-called "beeper".[2]

The head of the investigating authority terminates the use of the special devices promptly if the its objective has been accomplished, if the time frame within the court order has been transgressed, if no result can be expected from its further application, or if the application ordered through preliminary emergency procedures was not authorised by the judicial authorities.

From all secret service expenses, probably, the largest amount is spent on Costs may reach, 15–20 billion EUR annually, primarily paid by the USA and Great Britain. It was revealed in 1999 that an American tapping system under the cover name "Echelon" was able to survey every civilian satellite, every undersea cable, as well as Internet mail and sound communication. The American secret

[2] For more see more Gremela, Z.: A titkos információgyűjtésről (About the secret collection of information). *Rendészeti Szemle,* 1993. No. 3.

service got as far as "convincing" the largest software manufacturers, Microsoft, Lotus, and Netscape to harmonize their export Internet products with American regulations. Namely, only to use coding that can be decoded and tapped without any particular effort.

As a closing idea

It is clear both from the above-described criminal procedural legal framework, and from the criminalistics arsenal–and within that, criminal-technical and tactical means–that the possibilities for secret data collection are given for professionals. From this point on the only question is who is going to operate them and with what efficiency.

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BOOK REVIEW

Lamm Vanda: **A Nemzetközi Bíróság kötelező joghatósági rendszere** [The Compulsory Jurisdiction of the International Court of Justice]. Közgazdasági és Jogi Könyvkiadó, Budapest, 2005. 331 p.[1]

Professor Vanda Lamm, Director of the Institute for Legal Studies of the Hungarian Academy of Sciences, has published her third book on the problems of international adjudication. The volume elaborates on the regime of compulsory jurisdiction of the Permanent Court of International Justice, which was set up in the wake of World War One, and of the United Nations International Court of Justice, which replaced the former after the second conflagration, by studying the practice of States, the decisions of the two Courts, and exploring and probing into the whole spectrum of the pertinent literature.

The peaceful relations among States means not simply the lack of the use force, as it would be equivalent to a continuous maintenance of the status quo. That is impossible, however, for the different economic and social processes result in an inevitable transformation of interstate relations. To achieve genuine peace, it is necessary to open up a possibility for peaceful change without upsetting the legally regulated system of relations between the States concerned, Under such circumstances paramount importance is attached to creating a delicate balance between the dynamics of change and the need for stability. This in turn is hardly conceivable without international legal disputes, the settlement of which calls for a relative equilibrium between subordination and superordination of States in respect to the settlement of a concrete conflict: small and large States may equally advance international legal arguments before an independent and impartial forum. Settlement of interstate disputes by international judicial fora, primarily the International Court of Justice, is therefore a matter of the utmost importance.

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[1] Earlier volumes by the author: *Az államok közötti viták rendezésének története* (History of the Settlement of Interstate Disputes). Budapest, Akadémiai Kiadó, 1990.; and *A Nemzetközi Bíróság ítéletei és tanácsadói véleményei 1945–1993* (Judgements and Advisory Opinions of the International Court of Justice 1945–1993). Budapest, Közgazdasági és Jogi Könyvkiadó, 1995.

However, as is also stated by Vanda Lamm, States are averse to having grave conflicts that affect the core and substance of their sovereignty submitted to an international judicial forum. What are the reasons for misgivings about independent and impartial fora? The first reason, well illustrated by Vanda Lamm, is the fact that surrender of control over decisions is understood by States to mean reducing their power, which, if that course is taken, becomes objective, incapable of being influenced and impossible to modify or to overbid. Since a judicial forum decides according to international law, it takes a dispute from the complex system of relations between the States parties, thereby failing to consider, e.g., the importance of economic relations between the two States, the foreign policy influences on them within an eventual common system of alliance, the effects exerted by the two prime ministers belonging to a common family of political parties, and so on. Moreover, a forum formally functioning as a court is bound to create a winner and a loser, which carries domestic policy risks. As against this, in the case of third-party involvement as another chief diplomatic way of conflict settlement beside negotiations, a great power playing such a middleman role may offer guarantees for bringing about a stable settlement and provide services for the parties to the dispute, which tend to compensate for any loss that may be associated with the agreement. All this is absent from a decision by an international judicial forum.

Accordingly, in contrast to domestic courts, the jurisdiction of international judicial fora is based on the express consent of the disputant States. Such was/is also consequently the case when the jurisdiction of the Permanent Court of International Justice was, or that of the United Nations International Court of Justice is, accepted. Under the optional clause contained in the Statute, States could or can, by making a unilateral declaration, recognize the jurisdiction of these two fora in respect of their disputes with other States having made such a declaration. The monograph discusses the optional clause as well as the special features, the theoretical and practical issues, and the procedural problems connected declarations accepting jurisdiction.

The first chapter sums up the history of international arbitration, with particular attention devoted to the ways and means of attaining compulsory international adjudication. At The Hague Second Peace Conference early in the 20th century it was believed possible to achieve compulsory international adjudication only in legal matters, and not in political issues, with even exceptions to be allowed to matters affecting the vital interests, the independence and the honour of States.

The second chapter discusses the history of the elaboration of the optional clause and its concept. The members of the 1920 Committee of Jurists entrusted

with drawing up the draft on the international judicial forum to be established gave different interpretations of Art. XIV of the Covenant of the League of Nations as to whether or not that Article provided for compulsory jurisdiction. The long-drawnout debate was concluded with the adoption of the Brazilian jurist Fernandez's proposal as embodied in Article 36, of the Statute of the Permanent Court of International Justice. Under this Article, States may declare that they accept the jurisdiction of the Court in all legal disputes concerning the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation, and the nature or extent of the reparation to be made for the breach of an international obligation. Such declarations may be made unconditionally or on condition of reciprocity, or for a certain time. Two and a half decades later, at the San Francisco Conference elaborating the Charter of the United Nations, the small and middle powers seemed inclined to establish compulsory international adjudication, but it was categorically refused by the United States and the Soviet Union. While effecting minor changes and spelling out functional continuity between the two Courts, the Conference took over the earlier wording of the optional clause for the new Court. The author points out that the system constituted by declarations of acceptance of compulsory jurisdiction has created a special kind of international adjudication in respect of States assuming the extra obligation, with the rules thereof actually evolved by over eight decades of State practice and by the decisions of the Courts.

The third chapter deals with the special features of declarations of acceptance, including questions like the freedom of States to make a declaration of acceptance, the operation of the autonomy of the will of the parties regarding the content of declarations, problems of collective declarations of acceptance, problems concerning the ratification and the deposit of declarations, and the continuing validity of declarations made during the interwar period. As is emphasized by Vanda Lamm, the two Courts prescribed no formalities for declarations of acceptance, which, however, must clearly show the clear intent to accept jurisdiction. Under the judicial practice, declarations must be deposited with the Secretary-General of the United Nations and are to enter into force on the day of deposit. The author stresses that insertion as suggested of an intervening period between the making and the entry into force of declarations of acceptance would not but encourage some States to try to evade the jurisdiction of the International Court of Justice by taking advantage of it for denouncing or modifying their own declaration. In addition, it would be difficult to answer the question of how long the reasonable time as suggested by the some authors would exactly be until entry into force. It may be added to

the author's latter statement that the International Court of Justice might, in its decisions, name the factors of reckoning the reasonable time and might specify, following the example of the European Court of Human Rights, the length of the period that obviously extends beyond that time. As has been graphically demonstrated by Vanda Lamm, in order for a declaration made in respect of the Permanent Court of International Justice to remain valid without any special act in respect of the United Nations International Court of Justice the latter's practice requires that at the time of accession to the Statute of the new Court the declaration should be valid and that the State concerned should have been continuously a party to the Statutes of both Courts.

The fact that States attach reservations to their declarations of acceptance, while at the same time excluding certain issues from the scope thereof, may appear surprising at first sight. In actuality, however, there is no cause for surprise, stresses the author, since States make use of that tool even in the case of declarations accepting the jurisdiction of arbitral tribunals. From the fourth chapter on the admissibility of reservations to declarations of acceptance it becomes clear that making reservations between the two World Wars was just as permissible as it has been after World War Two. Nevertheless, the post-1945 period has hardly seen any declaration of acceptance that contains no reservation. According to Vanda Lamm, the reasons can be summed up as follows. Practically every State is confronted with some international problem which it would not like to bring before the International Court of Justice. The advance of science and technology may give rise to new international disputes in respect of which States wish to preserve their right of disposal. Finally, it is the earlier decisions of the Court that lead to such a reservation, notably States wish to avoid similar situations by the use of that device. Considering that, on the basis of the principle of reciprocity, reservations may also be invoked by the opponent State and that other States may likewise deem it well advised to withdraw a particular issue from the scope of the Court's jurisdiction, few objections are raised to reservations, stresses the author.

As regards the classification of reservations, the study accepts the traditional division (ratione personae, ratione materiae, ratione temporis), while renewing it by introducing the classes of generally accepted and destructive reservations. The first class includes reservations that can be considered as accepted on the whole by the community of States, whereas reservations undermining the regime of the optional clause and rendering acceptance of the Court's compulsory jurisdiction illusory are consigned to the second class. As will, be treated in detail in the seventh and eighth chapters of this volume, the first class comprises reservations like those concerning, e.g., other means of peaceful settlement,

hostilities and armed conflicts, or objective domestic jurisdiction, and the other consists of reservations relating to subjective domestic jurisdiction (Conally) and multilateral treaties (Vandenberg). (I shall return to the question of classification at a later stage, after the review of the said chapters.)

The fifth chapter of the monograph examines the legal nature of the regime of the optional clause. In it, the author draws upon State practice and the Court's relevant decisions in proving that the system of declarations is not contractual in nature. Hence nor are such the relations between States party to the regime. The sixth chapter analyzes the operation of the principle of reciprocity with regard to declarations. For reciprocity to prevail, namely for suability to be ensured, States are required to make a declaration in respect to one and the same obligation, yet this does not entail the need to make identical declarations in all aspects, but a different wording will do just as well. In the Interhandel Case the International Court of Justice pointed up to the limits of reciprocity by stating that reciprocity does not entitle a State, namely the United States in the case at hand, to invoke a limitation which the other party, Switzerland, did not include in its own declaration of acceptance. On the other hand, the principle of reciprocity does not preclude, as the Court held in another cases, the possibility of the claiming State filing an application just a few days after the deposit of its declaration. Nevertheless, reciprocity does not apply to formal questions such as the duration and the entry into force of declarations. The author observes that reciprocity entails important consequences. The parties are in no position to know in the abstract the exact scope of The Court's jurisdiction on the basis of declarations of acceptance, because it depends on the line-up of claiming and defending States. Since reciprocity prevails in respect of reservations and limitations as well, this principle puts States that make such declarations on an equal footing with those that refrain from making reservations to or placing limitations on their declarations. A reservation may thus be pleaded even by the opponent party, so it may prove counterproductive as it is applied against the declarant State with a view to avoiding the action brought by that State.

The seventh chapter on the generally accepted reservations explores the entire range thereof along with the aforementioned reservations made with regard to other means of peaceful settlement of disputes, hostilities and armed conflicts, and objective domestic jurisdiction, discussing reservations relating to territorial sovereignty and environmental protection, referring to the existence or lack of close relations between States, and excluding the retroactive effect of declarations, and surprise applications. Among the less frequent reservations it deals with those affecting constitutional matters, linking the entry into force of a declaration to declarations by other States, relating to disputes about a specific

treaty or specific treaties, and excluding disputes with regard to foreign debts and liabilities.

The author notes that reservations relating to the means of peaceful settlement of disputes should not be confused with cases where the parties may not have recourse to the Court except after having conducted negotiations or having employed the conciliation procedure according to the provisions of the particular treaty. In the first case a dispute cannot be submitted to the Court on the ground of the inapplicability of the optional clause. As concerns reservations with regard to hostilities and armed conflicts, the author stresses that the more recent reservations of this type exclude disputes about acts of individual and collective self-defence and/ against aggression as well as about peace-keeping operations of international organizations. Drawing upon the literature on the subject, Vanda Lamm underscores the need for a thorough examination of whether or not a particular State was involved in the hostilities at the time of the events giving rise to the dispute and whether there is a direct or indirect causal relationship between the events and the dispute under consideration. The more recent reservations relating to territorial sovereignty tend to exclude from the scope of the Court's jurisdiction issues of marine areas and air-space along with border disputes. In connection with these two classes of cases it is worth observing that the related reservations are a clear indication that a large number of States are loath to have their major conflicts settled by decisions of a law-enforcing nature handed down by an objective, impartial forum.

The essence of reservations relating to objective domestic jurisdiction is that a State excludes from the scope of the Court's jurisdiction such matters which according to international law are belonging to national jurisdiction. The author asserts that if such a reservation is relied upon by a State in connection with a concrete mater, the Court has the right and the duty to decide up on that matter. Reservations intended to prevent surprise applications may be aimed at, inter alia, ruling out the possibility of filing an application against the particular State immediately upon the entry into forte of its declaration accepting the jurisdiction of the Court. In such instance the entry into forte of the declaration is suspended for a period of six or twelve months in general, the suspension opening up a possibility to denounce or to amend the declaration, too. The other type of related reservations is intended to prevent the Court considering a legal dispute in cases where a State has expressly made a declaration of acceptance for the purpose of submitting a particular matter to the Court. As is stated by Vanda Lamm, the question arises whether such a reservation is aimed at preventing the given matter from ever being brought before the Court or such aim is subject to proof.

As noted earlier, destructive reservations are discussed in the seventh chapter. The core and substance of a reservation relating to subjective domestic jurisdiction, which is associated with the name of the American senator Conally, is that the matters coming within domestic jurisdiction and excluded from the Court's jurisdiction are unilaterally determined by the declarant State itself. Operative for forty years, the original American formula has been adopted by a number of States, with minor changes in its wording in this particular case. The author points out that the literature on international law is unanimous in emphasizing the importance of good faith in the practice of making reservations. Since bad faith cannot be presumed, the principle of good faith can but provide a weak guarantee in respect of resorting to such reservations.

Similarly associated with the name of an American senator, Vandenberg,[2] is the type of reservation relating to multilateral treaties. The crucial point in the first version of this reservation is the requirement for the States concerned to agree in bringing a particular dispute before the Court. The United States reservation is vague as it fails to clearly enunciate whether all States involved in a dispute or all the contracting parties should be in agreement on having the dispute considered by the Court, asserts the author. At any rate, in the Case concerning Military and Para-Military Activities in and against Nicaragua, the United States opted for a narrower interpretation, while in its judgment the Court accepted it, holding that it had jurisdiction to identify the States involved in the dispute. The States following the American example have come to use another version of the formula which requires all States party to a given multilateral treaty to participate as parties in the proceedings. Furthermore, in dealing with this type of reservations, Vanda Lamm emphasizes that it is not clear what position will be taken by the rest of the States party to the multilateral treaty in question, especially since the position of the intervening State in the proceedings before the Court is almost equally unclarified. According to the second version of the Vandenberg reservation, in cases where the United States is a party to a multilateral treaty the US must expressly consent to the Court's jurisdiction, which enables it to block the proceedings unilaterally. By excluding the interpretation of multilateral treaties from the scope of the Court's jurisdiction the Vandenberg reservation has a particularly destructive effect on international adjudication, because, as is stressed by the author, similar disputes tend to arise in a considerable number of cases brought before the Court, let

[2] Vandenberg is known to have made the proposal on which the American Senate authorized the United States to participate in a military alliance, the North Atlantic Treaty Organization, in time of peace.

alone the fart, we may add, that nearly all important fields of international law are governed by multilateral treaties to which a large number of States are party.

Perhaps the most interesting, exposition of the subject is to be found in the part of the monograph dealing with the relationship between destructive reservations and the Statute of the Court. An invalid reservation is to carry implications for the declaration itself, which also becomes invalid, or else it would compel the given State to assume an extra obligation by reason of the fact that the State should accept the Court's jurisdiction without making a reservation. And those who criticized the International Court of Justice for having failed to take a position on the question of contestable reservations are but seemingly right, because acceptance of the validity of those reservations would have encouraged other States to make similar reservations and would have undermined the Court's own authority, as a pronouncement thereon would have been tantamount to the Court clearly acknowledging that its right to decide on the question of its jurisdiction had greatly narrowed in range. On the other hand, however, declaring the invalidity of such reservations would have operated to invalidate the declarations themselves, thereby the Court itself narrowing the scope of its jurisdiction, for in practice a particular State may happen not to invoke its destructive reservation in a given case.

Returning now to the question of classification of reservations, what is certain is that a reservation not belonging to the class of destructive ones does not mean its being constructive as it also implies a limit to the acceptance of jurisdiction. It is nevertheless undeniable that the reservations consigned by the author to the generally accepted category are less destructive with respect to the possibility to establish the Court's jurisdiction, the reason being that they were formulated with relative precision, so in this sense they have a limited effect, whereas the reservations relating to objective domestic jurisdiction preserve the Court's discretionary right. Thus, on the whole, they are less arbitrary and less questionable. At the same time, however, the reservations relating to hostilities and armed conflicts and territorial disputes are the most destructive possible if viewed in the context of the significance and actual role of international adjudication as a means of peaceful settlement of international disputes.

The ninth chapter of the monograph is concerned with the termination and modification of declarations accepting compulsory jurisdiction. The author emphasizes that once the proceedings before the Court have been instituted, termination or modification has no effect on the matter under consideration. Even declarations failing to provide for denunciation, i.e. made for an undefinited period, may be denounced, practically at any time. By contrast,

declarations made for a definite period and fixing no date for denunciation cannot be terminated except upon expiry of the period of notice.

The tenth chapter sums up the author's conclusions, while also discussing the prospects for acceptance of jurisdiction and the approach thereto of the permanent members of the Security Council.

The monograph is completed with useful annexes on the cases submitted to the two World Courts under the optional clause and on the declarations of acceptance.

It can be stated in summary that this monograph is an excellent work discussing fundamental, issues and covering a wealth of related material. Hopefully it will be available soon in English for a wider professional audience.

Gábor Kardos

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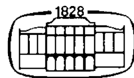

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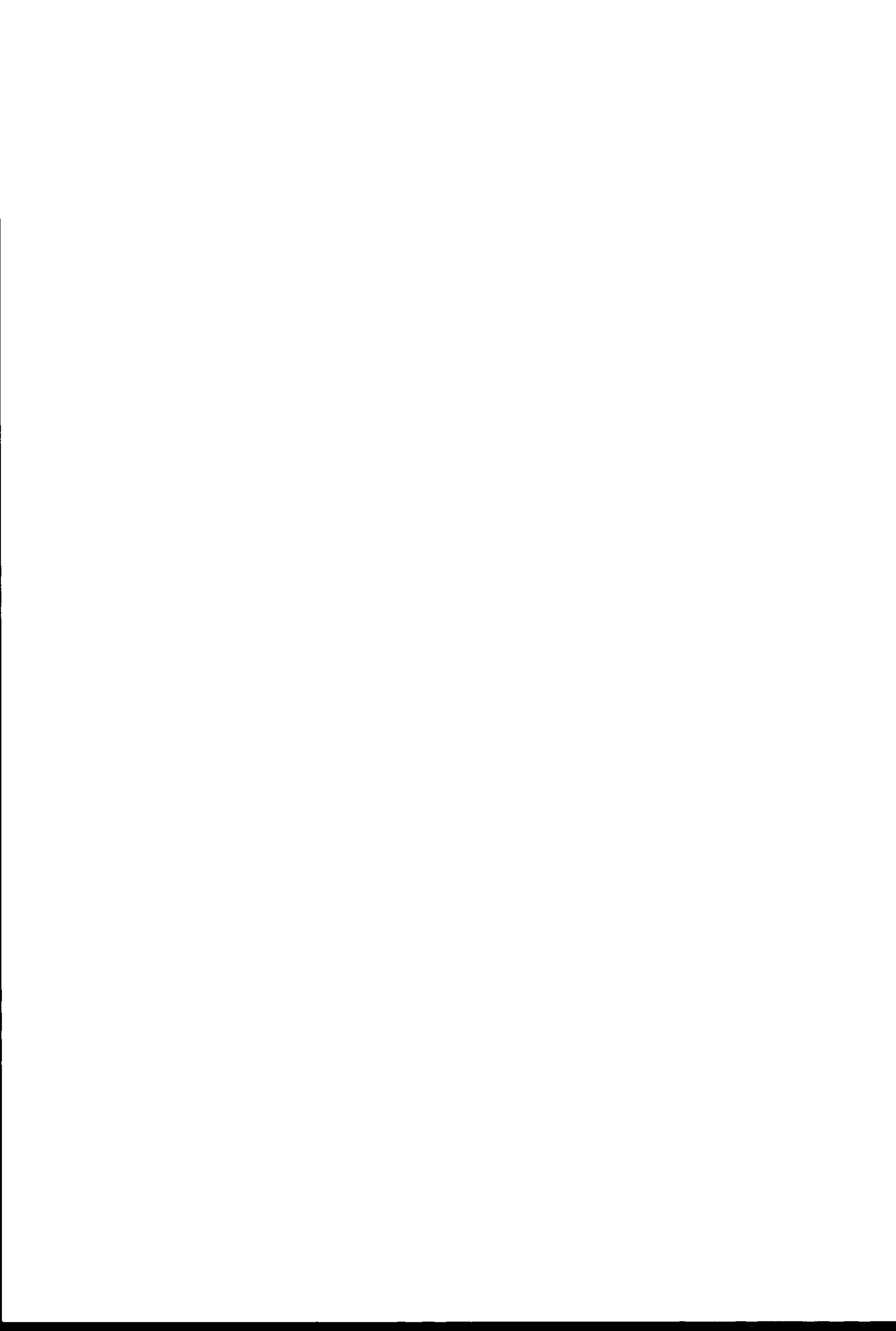

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ANDRÁS SAJÓ*

Transnational Networks and Constitutionalism

Abstract The concept of modern constitutionalism is intimately related to notions of state sovereignty. The actual influence of the constitution as a hierarchical tool of nation-state design remains a matter of dubious empirical validity. Today, among the conditions of intergovernmentalism and globalization, state centered constitutionalism is confronting governance by networks: both private domestic networks and networks of national governmental institutions are becoming decision-makers, which cannot be controlled within the concepts of state based constitutionalism. Notwithstanding these developments the above difficulties of constitutional social steering and determination of the public sphere have not resulted in the dethroning of the paradigm of state centered constitutional law in the constitutional law community. Such disregard runs the risk to turn constitutionalism into irrelevant speculation in an age of globalization. In the globalized world the most important decisions and events affecting society escape the control of the sovereign state operating on the principle of territoriality. In this paper I consider two structures of polycentric exercise of public power that are decisive for a new paradigm of constitutionalism. The first type of transnational network structure is primarily a network of private ordering with the participation of administrative bodies of the desaggregating state and private entities associated with the administrative entities (transboundary private networks). A second kind of transnational networks (transgovernmental networks) originates from supranational organizations that operate beyond the nation state. Transgovernmental networks take away traditional governmental functions and overwrite/replace the decisions of the state organs. The taking of state functions includes regulation, adjudication, enforcement, material and other services. The actions of the networks are beyond the control of the constitutionally designated authorities and follow principles, which are unrelated to the otherwise pertinent constitutional principles. The article considers the impact of international networks on the desaggregation of the constitutional state and the possibility of a new legitimation for transnational network-based governance.

Keywords: constitutionalism, state sovereignty, transgovernmental network, transnational network

The concept of modern constitutionalism is intimately related to notions of state sovereignty. The constitution is understood as a self-definition of the sovereign state: constitutionalism is the self-restriction of the state. In the concept of the

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state that is based on state sovereignty it is the constitution that shall determine the fundamental arrangements regarding the use of public power and the structure and organization of fundamental state institutions. Beginning with Hans Kelsen, the prevailing hierarchical understanding of the rule of law based state conceived the constitution as the fundamental or decisive element of the legal order. Today the constitution and constitutionalism–as a practice organized around the constitution–is presented in textbooks as the sum total and explicit formation and safeguard of the shared values of society, or at least the sum total of the values or practices that enable living together in the given state.

To what extent these expectations can be met was always a matter of serious doubt. The actual influence of the constitution as a hierarchical tool of state design remains a matter of empirical validity. One can always contest the assumption that the constitution pushes towards constitutionalism the most important organizations of the state.

The lack of sufficient empirical proof to the centrality of the constitution thesis has not endangered the legitimacy and therefore normativity of the constitution. Nevertheless, the growing importance of private organizations beyond the control of the public power created a serious challenge to the traditional perspective of constitutionalism. This challenge is made even more serious by transnational activities. Of course, constitutional law tried to extend its values to the private sphere in the form of state action and third party effect doctrines but most of the private power and transgovernmental phenomena remained under the radar of constitutional law.[1] This is quite stunning given that the dislocation challenges the role of the modern state constitution as "a central mechanism which enabled the recognition, coordination, assimilation and self-legitimation of the legal and political systems".[2]

Today, among the conditions of intergovernmentalism and globalization, state centered constitutionalism is confronting governance by networks: both private domestic networks and networks of national governmental institutions are becoming decision-makers, which cannot be controlled within the concepts

[1] See Walker, N.: The Idea of Constitutional Pluralism. *Modern Law Review* 65 (2002) 317–359, text accompanying note 89. The challenge to state-centered theories originates in the new institutional perception of the European Union. Integration is a "polity creating process in which authority and policy-making are shared across multiple levels of government–subnational, national and supranational." See Marks, G. et al.: European Integration from the 1980s: State-Centric v. Multiple-Level Governance. *Journal of Common Market Studies* 34 (1996) 341–378, 342. For a review of the debate see Craig, P.: The Community Political Order. *Indiana Journal of Global Legal Studies* 10 (2003) 79–124.

[2] Chalmers, D.: Post-Nationalism and the Quest for Constitutional Substitutes. *Journal of Law and Society* 27 (2000) 187–217, 179.

of state based constitutionalism. Arguably, transnationally networked private and governmental organizations become more and more decisive in the organization of social life and what used to be called the public sphere. Transgovernmental networks increasingly take over governmental decision-making. In the definition of "transgovernmental networks" I follow Kal Raustiala: "Transgovernmentality refers to the involvement of specialized domestic officials who directly interact with each other, often with minimal supervision by foreign ministries: They are 'networks' because this cooperation is based on loosely-structured, peer-to-peer ties developed through frequent interaction rather than formal negotiation. Thus defined, the phrase 'transgovernmental networks' captures a strikingly wide array of contemporary cooperation."[3] Note that although networks do have important power elements and do serve interstate and other (corporate) domination, the networks operate primarily as *epistemic communities*. This will be crucial in their indifference to constitutional considerations.

Even without the recent developments in transgovernmental networking, the centrality of constitutional law and its ability to steer social relations towards constitutional values has been very stressed. To some extent the limits to constitutional steering are built into the very concept of constitutionalism, namely in the various precepts and principles protecting private life. Traditional programs of constitutionalism, like the American one, were restricted to the sphere of governmental action. It is also obvious that irrespective the aspirations of constitutionalism to shape society and impose its own model of fairness and justice, the attempts to create a constitutional society remain somewhat futile because of the limited penetration of law into society.

In all forms of constitutionalism, irrespective of the assumptions constitutional law makes regarding its power to control other parts of the legal system, there is a principal assumption regarding a rather neat separation of the public and private spheres. It is the intent of constitutional law to determine the boundaries of these two spheres. The point is that the two spheres are subject to external normative boundary setting only to a limited extent. On the long run the constitutionally carved out divide has to take into consideration the social construction of these boundaries (see e.g. the case of abortion that was

[3] Raustiala, K.: The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law. *Virginia Journal of International Law* 43 (2002) 1–92, 5. Consider also Risse-Kappen, T.: *Cooperation Among Democracies: The European Influence on U.S. Foreign Policy.* Princeton, 1995. 38. (defining "transgovernmental coalitions" as "transboundary networks among subunits of national governments forming in the absence of central and authoritative national decisions").

gradually accepted to be a private matter). Moreover, the dynamics of shaping the public and private spheres has changed considerably in a world where globalizing private networks are increasingly capable to shape what remains in the public sphere. In particular, these networks are capable to replace the state law with their own system of norms. In many regards transnational governmental networks are also able to determine what is "private", enabling the self-regulation that they have sanctioned to remain beyond the reach of constitutional law and constitutionalism.

Notwithstanding these developments the above difficulties of constitutional social steering and determination of the public sphere have not resulted in the dethroning of the paradigm of state centered constitutional law in the constitutional law community. Such disregard runs the risk to turn constitutionalism into irrelevant speculation in an age of globalization. In the globalized world the most important decisions and events affecting society escape the control of the sovereign state operating on the principle of territoriality. Once the state looses control, there seems to be no social actor interested to impose values of constitutionalism into social ordering.

The transnational networks challenge the state's monopoly over the public sphere that is exercised through its administrative machinery. The state looses control over the sphere that it assigned to be under its supervision. This means that to the extent the state operated according to constitutional values this operations will cease to be decisive. The basic assumptions of constitutionalism embedded into the constitution become of questionable relevance.

Constitutional relations of the state were already under stress given the internationalization of many domestic relations. Moreover, the internationalization resulted in a change in the balance of powers, with increased powers granted to the executive. To a considerable extent the executive escapes the control of the other branches in the generation of international norms applicable to the state. Many areas of regulation that earlier were at least supervised by the legislative and judicial branches, are now presented as activities falling within foreign policy, a matter traditionally reserved to a great extent to the executive. The transnational networking contributes to a polycentric (non-state centered) exercise of public power (including the removal of the exercise of power from the public sphere). By polycentricity I mean that the state cannot decide alone in matters traditionally reserved to sovereign power, at least the decisions are consensual with other states and international organizations, or, the decisions emerge without the participation of traditional holders of state sovereignty.

In this paper I consider two structures of polycentric exercise of public power that are decisive for a new paradigm of constitutionalism. The first type

of transnational network structure is primarily a network of private ordering with the participation of administrative bodies of the desaggregating state and private entities associated with the administrative entities (hereinafter *trans-boundary private networks*). A second type of transnational networks originates from supranational organizations that operate beyond the nation state (like the European Union or the WHO; hereinafter *transgovernmental networks).* The participants of the transgovernmental network are components of the desaggregated state.

The first and primary form of transnational networks is modeled upon networks emerging in production and distribution in the corporate world. Nokia serves as a good example. Here the economic actors (owned by an unidentifiable international network of owners) turned into an international network. Other actors are related to the network in more loosely connected ways (suppliers, etc.). The identifiable ownership elements that are traditionally accessible to national regulators and domestic law more or less disappear or at least are too diffuse for successful control. The labor force to be regulated is to be found under a jurisdiction (or jurisdictions) that is different from the jurisdiction that seems to apply on grounds of ownership or incorporation. Management is not only international but also physically hard to locate. As to capital, especially when it comes to taxation, this is certainly located "else-where", in a hard to reach jurisdiction, or in permanent movement. Private networks are often enormous and exercise control over their member organi-zations, employees and partners in competition with the state. Given that the private power remains diffuse and hard to reach for the state, it is nearly impossible for constitutional values to penetrate the network that operates under its own 'constitution'. A private business network like Nokia operates according to its corporate ethics, internal professional standards, codes. These codes, or the communication community that exists on the basis of shared codes, keep the network together (see for example the strictly censorial and privacy disregarding private internet system). Many scholars are inclined to believe that such private ordering that follows market logic makes the efforts of state centered constitutional law irrelevant as the constitutional law is unable to penetrate the private constitutions.

While the above mentioned transboundary ownership networks slip out of the territorially and personally organized constitutional supervision, the trans-governmental networks directly challenge the state. These transgovernmental networks take away traditional governmental functions and overwrite/replace the decisions of the state organs. The taking of state functions includes regulation, adjudication, enforcement, material and other services. The transgovernmental networks are often based on public-private partnership with private actors

having the decisive say in the network.[4] (It should be added that in the process of reshaping the public-private divide hybrid organizations are created and this poses problems to public law partly unrelated to networking.)[5] In other instances the desaggregated national governmental bodies operate under the umbrella of international organizations but private actors may also participate in the network. The distinction is a matter of degree and the composition of the networks changes with increased private participation. A typical process in the making of the transgovernmental network is that first a traditional international organization is created that has decision-making powers under its constitutive treaty only with the consent of the participating states represented by governmental agents of the executive power acting on behalf of the sovereign state. Decisions are taken by state representatives perhaps on the basis of the preparatory work of an international secretariat. Any amendment to the constitutive treaty requires unanimity, in full respect of national sovereignty. Substantive decisions, however, are generally not made by the state representatives: in the specialized organizations it is the national professional bureaucracy that participates in the preparatory work. Here we notice the beginnings of transgovernmental networking. The professional bureaucrats of the state participating at the preparatory and decision-making sessions are contacting their peers in the other countries; their partners are not anymore their domestic superiors, other organs of their state, and even less the constitutional bodies that are supposed to control the professional bureaucracy. Perhaps the comitology system of the European Union is the best example of this trend. Here the national professional bureaucracies are appointing national members to subcommittees ad hoc or permanent mandate. The subcommittees very often create additional sub-sub committees where national members are appointed in their personal, private capacity. The national professional authority has no power to control the private experts who sit in the sub-sub committees (where most of the professional and policy-implementing work takes place). Moreover, international organizations, at least at the level of operative subcommittees increasingly invite private parties with full participatory rights in the deliberation. The International

[4] Aman, A. C. Jr.: Globalization, Democracy, and the Need for a New Administrative Law. *Indiana Journal of Global Legal Studies* 10 (2003) 109–137, 125.

[5] The divide is crucial as the "private" restricts the applicability of constitutional principles. Turning a sphere 'private' used to be a privilege of the public power. Obviously the transgovernmental networking and other phenomena of globalization radically curtail that power. For the consequences of the shift from public to private in terms of constitutional rights see e.g. Oliver, D.: The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act. *Public Law* 476 (2000) 481–486.

Telecommunications Union has panels where global telecommunication companies are present, and also provide expertise to governmental actors who lack sufficient expertise. In the case of the Basel Committee experts are provided by major banks, etc. Human rights intergovernmental organizations admit human rights NGOs to their decision-making bodies (which are often composed of government appointed but independent private experts). Of course, in all these cases the selection of the network participants follows its own, non-transparent and biased logic. Quite often the sub-sub-committees composed of independent experts are acting in their own capacity and not under the authority that is delegated to them by the national authority or the sub-committee for whom they are supposed to work (see in particular the Codex Alimentarius food safety decisions.)

The decisions and actions of these transnational networks raise constitutional issues. The decisions deprive constitutionally designated actors of their power to take sovereign decisions, even if the decision applicable in a given country formally originates from the constitutionally designated organ. The actions of the networks are beyond the control of the constitutionally designated authorities and follow principles, which are unrelated to the otherwise pertinent constitutional principles.

From a constitutional perspective the following constitutional questions emerge in relation to the above developments: Are these decisions legitimate? In particular, do they satisfy expectations of democratic participation, or democratic deliberation? If not so, do they offer alternative legitimation? Does this alternative legitimacy fit into traditional constitutional theory? In case the legitimation is incompatible with constitutional values does it make sense to talk about constitutionalism in a transnational, networks-operated world? After all, it is not evident that traditional constitutional values (rule of law, fairness, participatory decision-making, judicial review, political accountability, etc) are applicable to, or make sense in regard to transnational networks. If the operations of transnational networks present a challenge to constitutionalism, are there new devices to counter these trends? Is it possible to devise constitutional or international law schemes that will counter these trends providing for fairness, accountability, responsiveness in the use of public power increasingly dominated by transnational networks? Is such design feasible in an increasingly globalized world that, for reasons of efficiency, seems to favor increased networking?

Supranational and international organizations work under the assumption of state sovereignty. Even in the European Union the states are the masters of the Treaty. A sovereign state is generally taking into consideration the decisions adopted by the international organizations, but such decisions are in principle preconditioned on the consent of the sovereign state. Such consent as well as

the disregard of the international decision follow constitutionally determined patterns and values. The decisions or co-decisions are taken by constitutionally authorized domestic agents who are under constitutional and democratic control (at least at the black letter level). The development of the last twenty years shows that in the process of globalization *governance* is becoming more and more prominent to the detriment of government.[6] It is one of the characteristics of governance that instead of politically accountable government agencies private actors (including NGOs) exercise public authority, or at least have decisive influence on public determination.

The erosion ("hollowing out") of the sovereignty conscious state has its domestic foundations that, at least originally, were unrelated to globalization. As Karl-Heinz Ladeur has pointed out, the erosion of the nation state had to do with changes in the production processes and commercial dealings and were related to scientific uncertainty. Decision-making becomes a cooperative process. Norms are not prepackaged knowledge but a matter to be negotiated.[7] Private organizations may live in symbiosis with public entities or public entities are privatized. Whichever be the case private entities become the norm generators. The privately generated norms not only encompass spheres of life that otherwise might be public but are capable to impose their internal norms on those who enter into contact with the norm-generating entity. Further, the private codes become standards for the state regulators who quite often simply underwrite what was developed privately or even delegate authority to private code makers. Government as a transparent form of social control that it subject to political supervision and control in a democracy has little control over governance, including governance that occurs with the participation of public administration. At least this is the assumption of governance theorists, while the constitutional lawyer is little interested in these developments. For the constitutional lawyer the working hypothesis is that whatever is politically relevant for the public good is/shall be conceptually embraced in constitutional

[6] For an early recognition in the international context see some essays in James N. Rosenau, J. N.–Czempiel, E.-O. (eds.): *Governance without Government: Order and Change in World Politics.* Cambridge, 1992. See further Rhodes, R. A. W.: The New Governance: Governing without Government. *Political Studies* 44 (1996) 662–667. for a review of different meanings of governance. One of the definions that are in use reads: "Governance is about managing networks" at 658. In this article governance is primarily management *by* networks. Rhodes also points to the hollowing out of the state as the source of (domestic networks) governance. The hollowing out of the state results in reduced control over implementation.

[7] Cf. Ladeur, K. H.: Towards a Legal Theory of Supranationality–The Viability of the Network Concept. *European Law Journal.* 3 (1997) 33–54. at 34.

law. The background assumption is that in a modern democracy only a constitutionally viable policy is capable of long term political existence.

Governance exists in many forms. Increasingly governance is the result of (regulatory) networks. A closely related form of governance is the neo-corporatist one. Neo-corporatist governance is highly problematic for democratic constitutionalism. Neo-corporatist governance structures, like tripartite labor governance dealing with wage setting is often legally formalized. Governments may have important role in setting up such schemes and it is government regulation that determines the formal role for the participating parties.

The new development that makes governance networks so problematic for constitutional government is that by joining transnational networks domestic actors escape even the theoretical possibility of government control. Governance networks increasingly shape themselves and operate in the vacuum of the international setting where the sovereign nation state has limited access.

It is in this regard that the most visible leak to constitutional arrangements is noticeable. Independent national regulatory agencies, and to a lesser extent other non-political government branches like courts, have created their own networks with different degrees of competence. The forum that originally might have served simply as a venue for the exchange of ideas ('co-operation tourism') rapidly develops into a point of reference and authority. The network operates as international pressure group supporting its members against other branches of domestic power. At a next stage these networks will provide expertise to international organizations in charge of providing harmonized regulatory schemes, international law, or other cooperation. Finally, the network of independent agencies becomes a self-relying, recognized body that imposes its will on the participating states, and at the same time exempts the national regulator from state control in the sense that policies, professional standards, including conditions of work, and even dismissals are dependent upon the network and not on the political branches that are supposed to exercise a level of control that is compatible with the independence of the agency. In other words, the independent agencies through their network membership develop a new transnational network identity and change their point of reference from a national one to an international professional one.

The independent telecommunications regulatory agencies of the member states of the European Union offer a telling example of the process. In a number of EU member states there were no independent regulators. Traditionally telecommunications was an area of governmental regulation carried out partly in a ministerial department and partly by the Post Service that was a government service. It was only under the pressure of the EU directives that some member states abandoned this model. Interestingly the concerned ministerial departments

and postal services were resistant to this change that was the result of the decision of the political branch, i.e. the executive that did not share the institutional interests of its telecommunications bureaucracy and was ready to accept business pressure and general deregulatory ideology. However, shortly after the reorganization took place the independent regulatory agencies have created their informal network and started to coordinate their policies in order to come up with a unified professional position. This was more than welcome from Brussels as it offered a regulatory relief to the Commission generalists. The Commission readily accepted that the still informal network of the telecommunications regulators will take the initiative (in collaboration with industry that had its equivalent networks) in European telecommunications policy setting. As a result, the formation of telecommunications policy shifted from the national political executive to the national regulators, but not in their national agency capacity, but in their capacity of network members. Hence the policy was created as a network policy. The national regulatory agency became able to formulate its policies against its own national government relying on the network and claiming that the national government has no authority to intervene in the policy that was developed as an all-European policy. The European telecommunications policy is primarily developed by the network, and the Commission's role is primarily to transpose that policy into directives. In 2002 the new telecommunications directives further increased the national power of the national regulatory agency: the initiative came from the network members and served their interests *vis a vis* the national governments. The directives granted additional powers to the network within the Union *vis a vis* the political institutions of the Union. One may wonder how and why the national governments accepted such reduction of their constitutional power. They were advised to do so by their independent expert agencies, which had the strong self-interest in the emerging solution against the weak interest of other domestic players–all that in accordance with the logic of collective action. The new directives recognize the formal policy-making powers of the regulatory network.

The emergence of transgovernmental regulatory networks that desaggregate the state are the continuation of a trend related to the emergence of neutral institutions. I am not claiming that transgovernmental networking is primarily among neutral institutions. In fact we notice transgovernmental networking amongst all regulatory agencies. However, state desaggregation means that the regulatory agencies and public administration in general is becoming less and less dependent on the political branches, moreover this is legitimized. Regulators increasingly construe themselves (are designed as) neutral institutions in the

last thirty years.[8] Neutral institutions always had their constitutional problems, as the whole idea to have neutral institutions reflects mistrust in democratic politics and is also poses a challenge to traditional concepts of checks and balances as understood in a tripartite division of powers.

The modern state (as a network of organizations) pretends to be non-partisan or neutral in an increasing number of instances. Institutional arrangements are developed to make that claim credible.

The modern state is identified not only with representative institutions but also with administrative structures operated as public bureaucracies.[9] Public bureaucracies offer a degree of neutrality in the sense of not necessarily being politically partisan. However, the depoliticization of public administration remains incomplete. The social desire for a non-partisan state machinery can not be entirely satisfied through the establishment of a civil service. Rather, in order to further isolate some parts of the civil service from partisan politics, *neutral regulatory institutions* emerged early in the 20th century. (See the creation of federal and state agencies to regulate railroads and public utilities in the United States.) In complex societies, many traditional governmental functions were transferred to independent organizations, which were legitimated in terms of their professional expertise.[10] In principle, these neutral institutions are to a

[8] See the increasing number of independent regulators in utilities, media, banking, health etc. that are designed to operate in isolation from daily partisan politics.

[9] Impartial institutions (like courts, and constitutional courts in particular) also contribute to the neutralization of the state. Contrary to institutions like independent agencies, courts stand *above* identifiable contests. They are impartial in the sense that they don't follow independent professional policy goals other than that related to self-preservation. See Sajó A.: The Concepts of Neutrality and the State. In: Dworkin, R. et al. (eds.): *From Liberal Values to Democratic Transition*. New York–Budapest, 2003. 107–144.

U. S. independent agencies, such as the Federal Trade Commission, were originally designed to be exempt from *executive* control. See *Humphrey's Executor v. U.S.* 295 U.S. 602 (1935). This understanding differs markedly from the one voiced by the Council of Europe (below), which denies *legislative* oversight. Note further that the characterization of agencies as "executive" or "independent" is the result of ad hoc political decisions. Strauss, P. L.: The Place of Agencies in Government: Separation of Powers and the Fourth Branch. *Columbia Law Review* 84 (1984) 573–669.

[10] Broadcasting regulation by independent regulatory agencies exemplifies a relatively recent world-wide attempt to neutralize oversight of the communicative sphere. Here, various institutional solutions guarantee the independence of the regulated media and the neutral handling of broadcasting-related matters. This is done "officially" in order to avoid politicization or because the public interest cannot be served well in a partisan manner. The contemporary solutions range from quasi self-regulation by those concerned to regulation

great extent autonomous and independent of political bodies or democratic politics. The analysis of the actual institutions indicates how limited such independence and autonomy actually was. Nevertheless, they often have enough autonomy to remain independent from the political branches if they really wish to do so. Autonomous bodies may be biased but, in principle, are beyond partisan politics and, therefore, their rule-making and decisions are deemed to be neutral in the sense of non-political. This trend is rooted in the growth of *independent expert bodies*. Neutralization relies on a specific form of authority derived from the professionalism and expertise enabled by neutral institutional settings.

The transfer of decision-making to neutral public institutions remains problematic. Policy-making institutions that are insulated from the democratic process are not necessarily fully neutralized in the sense of being exempt from political influence, but, at least, they are insulated *vis-a-vis* the democratic process. Of course, such insulation may also allow elected officials, government bureaucracies and interest groups to exercise even *more* political influence than in a transparent democratic setting. Neutralization has very often been a way to protect particular groups by excluding contrary political influences. The design of insulated public institutions is, after all, left overwhelmingly to legislation that often follows a logic completely alien to institutional neutrality. The withdrawal of the state from certain public domains is often determined by major performance failures accompanied by successful resistance to government by the regulated. Quite often politicians seek to avoid responsibility, and independent agencies allow politicians to avoid responsibility. Note that most of the independent state agencies which were created to enhance credibility serve special interest groups and only indirectly the general public: it is the trust of these special interests that is at stake. (Central banks directly serve the financial community; the media regulatory agency is catering to broadcasters, etc.). The constitutional problem with transgovernmental networks of neutral institutions is that these problematic features become even more acute.

Even where professionalism prevails, neutrality may suffer from insularity. If insularity means non-interference it may result in a lack of social responsiveness. If the performance of the neutral institution follows the dictates of the internal self-interest of the organization, it will undermine trust in the institution, notwithstanding the formal fairness of its procedures. Moreover, these institutions tend to keep their decision-making process non-transparent.

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by non-governmental bodies as decision-makers, and to insulated independent governmental bodies.

What are the implications of these trends to the prevailing constitutional arrangement? The national executive power must reckon with the operations of transgovernmental networks, including the possibility of additional, non-government induced privatization and also with further desaggregation of the state in the sense that national governmental entities, and independent agencies and other elements of the 'neutral power' turn *against* the executive and become unreachable for the other branches. It follows that decisions that affect the general public are not generated in the public sphere as it is assumed in constitutional law. Given that governance follows from transgovernmental policies, it is highly questionable to what extent the legality of such measures can be controlled by organs of supervision. Beyond the problem resulting from the desaggregation of the state, private systems cause additional problems for constitutionalism. The social sphere of the constitutionally controlled is shrinking. It is not any more up to constitutional law to determine what pertains to the public domain, and, consequently what is subject to constitutional values. The problem is aggravated by practical difficulties: the shrinking state simply has no resources to patrol the vast territories of the private. The pluralism of the legal system undermines law itself.

National Parliaments loose legislative and supervisory powers. The executive gets new opportunities to bypass legislation by allowing transgovernmental networks to come up with legislative solutions. Legislation becomes less transparent. On the other hand the executive that creates opportunities to present its own politically unacceptable dreams as international dictates of expert compromise, looses control over its own professional bureaucracies. Finally, at least in Europe, the national administration of justice is loosing ground to international courts.[11] These international courts operate in a network with the national courts (undermining to some extent the traditional hierarchical structure of the domestic system) creating a form of transnational cooperative constitutionalism.

Obviously, network governance is not the end of politics in the sense that neutral institutions still enable domination that remains the goal and result of political games. One should keep in mind the advantages of transgovernmental networks before condemning the inevitable. After all, irrespective of deontological considerations that echo liberal constitutionalism, independent agencies,

[11] This is quite problematic for the sovereignty concerned, but not necessarily for the constitutionalism concerned, as the international courts, which are relieved of local political considerations and loyalties of the national courts, seem to contribute to constitutionalism, and national administration of justice to the extent it has to cooperate with the international instances seems to be liberated of parochial interests.

both at national and Union levels were created not only because of the advantages the regulatory network systems offered to interest groups politics. These professional, beyond-the-reach of-ordinary-politics networks are also devices of *quasi-constitutional pre-commitment.*[12] Such pre-commitments are crucial for the stability and sustainability of any constitutional system, particularly in democracies, where democracy, as Juan Linz has often stated, is about the non-perpetuation of the regime. Without such arm's length operating agencies the democratic welfare redistribution would have become unsustainable. Democratic politics is *too responsive* to short term constituency interests pushing the responsive welfare state to unsustainable largesse. It was for such reasons that regulation through independent agencies (and in a way the whole concept of neutral powers) emerged.[13] Independent agencies protect established interest groups against newcomers who would use parties through parliament and the executive; and protect these established interests against politically induced redistributive policies. The autonomous independent regulatory agencies are created in the name of the needs of the socio-economic regime (or the whole polity) to protect the regime against its own self-destructive mechanisms. The independent central bank is built to resist the welfarist inflationary policies of elected governments, etc.

[12] Moravcsik and Majone argue that states accept transfer of their power to networks as an act of irrevocable precommitment.

[13] For a study of the constitutional relevance of independent agencies and their networking, Sajó: *op. cit.*; Sajó A.: Neutral Institutions: Implications for Government Trustworthiness in East European Democracies. In: Kornai J.–Rose-Ackerman, S. (eds.): *Building a Trustworthy State in Post-Socialist Transition.* New York, 2004.; on networking in international relations Slaughter, A.-M.: Global Government Networks, Global Information Agencies, and Disaggregated Democracy. *Michigan Journal of International Law* 24 (2003) 1041–1075; on European networks Dehousse, R.: Regulation by Networks in the European Community: the Role of European Agencies. *Journal of European Public Policy* (1997) 246–261. In 2002 Majone found that although political compromise resulted in institutional designs with ambiguous responsibilities and uncertain competencies, "the issue of independent and credible European agencies is still very much alive". Majone, G.: Functional Interests: European Agencies. In: Peterson, J.–Shackleton, M. (eds.): *The Institutions of the European Union.* Oxford, 2002. 322.

Any discussion of democratic accountability in the network age should start from Slaughter's warning: "the impossibility of fully "reaggregating" the state in a tidy democratic package will ultimately require a much more sophisticated understanding of networks and the interaction of nodes in a network with each other, whether individual or institutional." *op. cit.* 1068.

Beyond their contribution to pre-commitment, the *relative* success of networks[14] may also indicate that traditional values represented in constitutionalism do not represent any more the shared political values of the community. Alternatively, the nation-state as a political community is loosing its attractiveness as people turn to communities that are offered by virtual and actual networks. Perhaps the efficiency based credibility of the network is more attractive than the norms and values of constitutionalism. After all, transgovernmental networks are more successful in knowledge management than traditional state bureaucracies. Besides "as public policy becomes increasingly influenced by global conditions, formal policy-making institutions – national legislatures, government agencies, and multilateral institutions, among others – often lack the scope, speed, and contacts to acquire and use crucial information needed to formulate effective policy."[15]

Constitutions are understood as taking "stock of the values that comprise the preferred forms of life of a given community (and are compatible with universal constitutional values)."[16] But perhaps the values with universal aspirations are not the preferred set for people inhabiting the networks. Instead of the normative validity based on value legitimacy there is a trend towards efficiency/interest maximization as a source of legitimacy: in this regard traditional rule of law bound constitutional solutions cannot compete with what the professional networks promise to achieve. Or, perhaps, global networks are successful because states cannot match the normative expectations of their own professed constitutionalism.[17] Perhaps the sovereign state is *not* the democratic

[14] Once again, transgovernmental networks emerge only in case there is a fundamental epistemic agreement among the participants and even in this case the network might run into the successful resistance of the nation-state. For an example of lack of value agreement and consequently little networking in the context of European privacy regulators, see Francesca Bignami, Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network, *Michigan Journal of International Law* 26 (2005) 807–868.

[15] Reinecke, W. H.: The Other World Wide Web: Global Policy Networks. *Foreign Policy* (1999–2000) 44–57. 45. For a recent critique of the deliberation within professional networks see Shapiro, M.: "Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E. U.? *IILJ Working Paper 2004/5*. Global Administrative Law Series. New York University Law School.

[16] Closa, C.: Deliberative Constitutional Politics and the Turn Towards a Norms-Based Legitimacy of the EU Constitution. *European Law Journal* 11 (2005) 411–431. at 419.

[17] On the performance deficit of constitutionalism see Grimm, D.: Die Zukunft der Verfassung. In: Preuss, U. K. (ed.): *Zum Begriff der Verfassung*. Frankfurt, 1994. 227.

expression of the political community. Or the political community is simply a marriage of convenience.

On the other hand it is not necessarily the case that all the above developments are contrary to values embedded in national constitutions. The network 'constitutions' do not replace or overwrite national constitutions. The content of the national constitution, however, changes. (This development is beyond the loss of relevance problem). The transgovernmental norms represent a different logic, mostly that of expert knowledge that disregards rule of law logic and follows efficiency considerations dictated by the bounded rationality of the professions. International courts, on the other hand, emphasize values that are perhaps not alien to constitutional values but have different accents.[18] Once again, I have to emphasize that the transgovernmental networks effect is countered in many instances. Network power is a function of the existing power of the nation state (i.e. it could not happen if the states were able to/interested in stopping these developments). It is not by accident that the Supreme Court of the United States is committed to a defense of the national constitution against internationalization.[19] But smaller, weaker states are/have to be more opportunistic. At least neo-realists suggest that a weak state would sign to the internationally developed normative expectations to ensure its existence (bandwagoning).[20]

Are these developments lamentable from a constitutionalist perspective? Certainly the lack of accountability and the democratic deficit (that cannot be undone by deliberative democracy of the select and invited network participants and token representatives of "society") makes one very unconfortable. Transgovernmental networks are even less concerned about human rights than judicially controlled traditional executice bureaucracies were.[21] After all, the democratic ideal requires "that politically responsible institutions should determine the direction of government policy."[22]

[18] See the tensions between the ECJ and national courts in matters of rule of law, where the ECJ is primarily concerned with the efficient application of a harmonized European legal system and is ready to read the requirements of the rule of law in that context. See *Alcan.*

[19] For a systematic attack on globalism from an Americanist perspective see John Bolton, Should We Take Global Governance Seriously? *Chicago Journal of International Law* 1 (2000) 205.

[20] Walt, S. M.: Alliances: Balancing and Bandwagoning. In: Art R.–Jervis, R. (eds.): *International Politics.* New York, 1992. 71.

[21] Bignami: *op. cit.* offers an empirical example: The administrative practice of the European privacy network... alters substantially the rights calculus. 810.

[22] Sandalow, T.: Racial Preferences in Higher Education: Political Responsibility and the Judicial Role. *University of Chicago Law Review* 42 (1975) 653–704, 695 and 700.

This is not to exclude the possibility of the evolution of a new constitutionalism that reflects network based operations. After all, transgovernmental networks prevent the concentration of power: in that regard they have a strong constitutional potential in times of cabinet dictatorship. Networks are by definition pluricentric. However, so far there is very little in the network world that would point towards the affirmation of traditional constitutional values of freedom. Moreover, professional considerations in networks make conflict of interest and rule of law considerations irrelevant or even unacceptable.

To end on an optimistic note: the network phenomena "are rooted in the information-technology revolution ... that simultaneously empowers individuals and groups [while] diminish[ing] traditional authority."[23] To the extent the empowerment element will prevail the concern with freedom will resurface. Although the transgovernmental networks raise issues of democratic deficit, it is not out of question that networks themselves will offer legitimate alternatives to the constitutionally and democratically problematic official government structure of the nation state. After all, there are important arguments in favor of transgovernmental networks: "the transgovernmental cooperation is a significant development in international law, but it is likely to bolster liberal internationalism as much–or more–than it will undermine or displace it."[24] Perhaps, alternative forms of control (supervision) and self-referential accountability might ease the challenge that traditional constitutional structures could not handle so far. After all, as Majone has pointed out, the credibility of the members of the network depends on each other's reputation, hence they will monitor each other–are in a way accountable to each other.[25] Besides, there are a number of forms of accountability that are not based on the political process.[26] These elements point to a socially acceptable transgovernmental governance that will *not* rely on constitutionalism.

Michelman finds these positions to be two distant or different positions. Michelman, F. I.: Terry Firma: Background Democracy and Constitutional Foundations. *Michigan Law Review* 99 (2001) 1827–1851, 1839.

[23] Slaughter, A.-M.: Government Networks: The Heart of the Liberal Democratic Order. In: Fox, G. H.– Roth, B. R. (eds.): *Democratic Governance And International Law.* Cambridge, 2000. 199, 200.

[24] Raustiala, *op. cit.*

[25] Majone, G.: The New European Agencies: Regulation by Information. *Journal of European Public Policy* 4 (1997) 262–275, 262, 272.

[26] See Keohane, R. O.: Governance in a Partially Globalized World. *American Political Science Review* 95 (2001) 1–13. at 9.

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The Third Act on Business Associations – Law Conceived in the Spirit of Deliberate Progress

Abstract. The study examines the new act on business associations passed in 2006. It concludes, that the general principles, the structure of the Hungarian corporate law have remained unchanged since 1988, however, because of the practical demands and the European legal harmonization requirements a new act on business associations was necessary. The new act introduced several entrepreneur-friendly legal institutions and carried out a significant deregulation as well.

Keywords: codification, company law, business associations, firmregistration

On 1st July, 2006, the new Act on Business Associations (hereinafter: ABA) took effect. It is by that time the third pertinent act framed in this field, since the first ABA was promulgated as Act VI of 1988, the second one was adopted as Act CXLIV of 1997, and finally, Act IV of 2006 was adopted as the third ABA.

1. A New Act in Its Form–Supplementary Law in Substance

Legislation concerning business associations in the recent 20 years has had a specific history in Hungary.

The first ABA was framed nearly two years before the political transformation, in a period, which was marked by an economic policy purported to introduce mixed economy in the framework of a liberal, albeit socialist political establishment, according to which, in line with the non-corporate "socialist sector", private business associations (Hungarian enterprises and joint ventures) would operate as a second sector, essentially in a similar manner to the current

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working of the economy in China and Vietnam.[1] However, due to minor amendments (under Act XIII of 1989 and Acts LIII, LIV and LV of 1992), the first ABA was still applicable, when, *in lieu of* the mere change of the economic model, political transformation ensued in the autumn of 1989, furthermore, it could adequately ground the operation both of partially privatised, formerly state-owned companies and of the formerly rudimentary small-scale enterprises (economic working communities (GMKs), entrepreneurial working teams (VGMKs), small-cooperatives, specialised groups) in prevailing forms of post-transformation business associations. The ABA of 1988 proved to be progressive in several branches of business law, as well, primarily *in re* the Company Act of 1989, the Competition Act of 1990, the Act on Securities, Act XLIX of 1991 on Bankruptcy Proceedings, Liquidation Proceedings and Voluntary Dissolution (hereinafter: ABP) and the Act on Accountancy. Owing to the adoption of the ABA, Hungary gained a remarkable competitive edge over neighbouring former socialist states. As the above demonstrate, fundamental law substantiating the newly evolving bourgeois market economy was drafted preceding the mid-nineties, which facilitated that more foreign working capital flowed into Hungary before 1995, than into other European former socialist states *en masse*.

As regards the second ABA, which took effect on 16th June, 1998, it was designed to prepare the entry of Hungary in the European Union. Accordingly, previous practical experience had been analysed, harmony with associated legal branches, primarily with law pertaining to capital markets and accountancy had been attained. Within the purview of Act XXXIX of 1995, systematic privatisation *en masse* had been in the main accomplished by 1997, consequently, private ownership became predominant in Hungarian proprietary structure, hence, the discrepancies of the first ABA deriving from the regulation of state ownership could be eliminated and the second ABA could be drafted to comply with its original purpose of constituting basic business law in support of the emerging system of modern capitalism. By 1997, the development of the technical and incorporate infrastructure of firmprocedure law accorded with that of the ABA, so far as Act CXLV of 1997 on Firmregistration (hereinafter: Firmregister Act) qualified as ancillary law of the ABA, wherefore, the rule pertaining to the obligation of *ex nunc* registration of companies, which had incurred numerous anomalies, could be annulled. As a matter of fact, the second ABA complied with most requirements posited by EU directives under

[1] On the process of drafting the first ABA, see, A tulajdonreformról a társasági törvény után (On the Reform of Ownership Following the Adoption of the Act on Business Associations). OKKFT, Budapest, 1989.

company law, therefore, no major amendment of company law was necessary upon the accession of Hungary to the EU.

The third ABA was adopted by Parliament in December, 2005, nevertheless, its full recognition as well as political culture required that it did not take effect preceding parliamentary elections. However, the basic principles, framework and structure of company law established within the scope of the first ABA in Hungary were not modified under the third ABA. This also results from the fact unparalleled in the history of the codification of Hungarian business law, i.e., each ABA was drafted by the same Codification Committee, last time joined by young colleagues headed by Gábor Gadó.[2] Basically, at the end of the 1980s, we elaborated the codification technique of protecting the integrity of the ABA from political influence so far as possible, therefore, we laid down that

- its annual amendment, which is customary *in re* law concerning the capital market and accountancy, shall be avoided,
- the revision of the ABA in re its institutions shall be accomplished every 6–10 years and the required amendments shall be introduced,
- such revision eventuating in drafting new law shall be optimally scheduled by the end of the third year of government sessions, since the least forthcoming amending drafts submitted to Parliament are expectable in that period,
- the new law shall be submitted for acceptance both by business federations and the government opposition, so that the contingently ensuing change of government does not incur the comprehensive amendment of the ABA. This modus operandi worked well both in 1998 and in 2006.

The revision of the ABA approximately every 8 years is also deemed inevitable, because

a) the company law of the EU is still developing, as it incessantly changes and its progress is cyclic. On the one hand, long-standing directives are amended (e.g., the amendment of Directive no. 2 on the Formation of Corporations and Assets is permanent) as well as new directives are framed (for instance, in trust law), on the other hand, supranational corporations regulated under Union law (e.g., European corporations may

[2] In all of the three cases, it was Tamás Sárközy (responsible for the general part) that headed the Codification Committee with the participation of members, such as György Wellmann [responsible for the chapters on unlimited partnerships (kkt.) and limited partnerships (bt.)], Gábor Komáromi [responsible for the chapters on limited liability companies (kft.)], Tamás Sándor [responsible for the chapter on companies limited by shares (rt.)] and János Kálmán.

be formed in Hungary) operate as competitors of companies regulated by domestic law,

b) the reach of technical development is significant, with respect to the gradual introduction of electronic company procedures, electronic exercise of members' rights, digitalisation of the operation of company organs,

c) the development of associated legal branches must be taken into account, such as competition law upon framing trust law, accountancy law upon the regulation of company assets, as well as requirements set forth under law concerning the capital market upon the codification of law concerning public limited companies,

d) finally, the periodical assessment of experience obtained in the course of the application of company law by attorneys, the Court of Registration and during judicial proceedings is necessary.

In view of the fact that both the second and the third ABAs are supplementary law in substance, the technical justification for drafting new law was required. Since it is not only lawyers, but also enterprises, tax advisors and auditors whose work is comprehensively and directly determined by the rules of the ABA, we assumed that the development of the ABA into a labyrinth of rules (such as the Act on the State Budget and the Act on Capital Markets are) had to be prevented. Consequently, the reformulation of the ABA had to be accomplished in terms of the revision of its institutions. The requirement of lucidity was further supported by the observance of the following rules:

a) The ABA shall be formulated in accordance with classical codification principles. Therefore, it is specified as a principal rule that an article may consist of a maximum of 6 paragraphs, a paragraph may consist of max. 3 sentences and the combined justification of max. 2 articles is permitted. The latter rule was breached in some cases as a result of ministerial harmonisation and parliamentary debate (see, Article 202 regulating the share register as a pertinent instance).

b) No enforcement decree issued by an organ of public administration may be appended to the ABA. (As an apparent exception, we must mention the government authorisation related to Company Law Advisory Bodies, which, however, does not affect the substance of company law.)

In the course of the codification process in 2005, the former textual scope of the ABA could be basically retained, in spite of the fact that the number of articles during the administrative harmonisation and parliamentary debate, marked by newly prevalent legislative vehemence, increased by approx. 10 p.c. Unfortunately, the objective of public administration to extend its scope of authority could also just partly be curtailed. Therefore, the scope of the activity of the Service of the Ministry of Justice Providing Information about Companies

and Assisting Electronic Firm Procedures (an appalling designation) (IM Cég-információs és Elektronikus Cégeljárásban Közreműködő Szolgálata) was considerably extended as per Para. (2) of Article 1 of Firmregistration Act (by, e.g., the provision of legal advisory service), furthermore, upon the motion made by an MP, in support of the work of the Ministry of Justice, a Company Law Advisory Body was established as per Article 332 of ABA, which may consist of as many as 100 members and renders expert opinions of "scholarly character" in three-member committees. The Advisory Body may contest the role of arbitration courts, which is a barely agreeable tendency. Over-meticulous regulation is more distinguishable in the Firmregistration Act, than in the ABA, albeit, excessive attentiveness to details results naturally from the character of procedural law.

The inherent objective of the third ABA to safeguard continuity is highlighted by the fact that its effect pertains merely to new business associations founded on deeds of association that were submitted to the Court of Registration subsequently to 1st July, 2006. Business associations that had submitted data for registration and operated before 1st July, 2006 may continue operation within the purview of the second ABA either until the first change effected in their data or until 1st September, 2007, the latest. Under the ABA of 1997, no ultimate deadline for adjustment was determined for associations, which incurred disturbances in practice. Nonetheless, business associations that operated upon the adoption of the third ABA have been guaranteed a period of nearly two years for adjustment. This, in case of the majority of associations, probably implies that they will adopt deeds of association (Memoranda and Articles of Association of Companies) that comply with the third ABA at ordinary general/members' meetings assembling in the spring of 2007. We cannot fail to mention that in re the third ABA, which stipulates very few cogent rules in comparison with the second ABA, adaptation in the majority of cases will implicate benefiting from the specified additional options and their introduction into the deeds of association of already operating companies. Associations that will fail to implement the new cogent rules of the third ABA by 1st September, 2007 will be coerced in the scope of legality supervision proceedings conducted by the Court of Registration either to institute a valid legal framework for their operation or to ultimately terminate operation under Article 81 of Company Act.

In order to demonstrate that no emergency to codify the third ABA obtained, we must point out that provisions incurring momentous changes in social-economic circumstances will take effect subsequently to 1st July, 2007, that is, one year later, than the date of taking effect of less consequential provisions. A relevant instance is the revocation of the regulation of non-profit companies

(kht.) under Act IV of 1959 on the Civil Code (hereinafter: Civil Code) and the concurrent introduction under the third ABA of the non-profit character as an option to pertain to all forms of business associations after 1st July, 2007. Non-profit companies (kht.) that will still operate at that date shall be permitted to continue operation for a further period of two years. A second instance is the omission of the regulation governing joint enterprises as a form of business associations under the third ABA, since no new joint ventures were established following 1990, whereas, the joint enterprises registered before the third ABA took effect (more, than 100 companies) would be permitted to continue operation in concert with the second ABA without time limitation. To conclude the array of instances, the termination of the employment of executive officials as such of unlimited partnerships (kkt.), limited partnerships (bt.) and limited liability companies (kft.) is prescribed within the purview of the third ABA, which in fact guarantees a provisional period of five years for compliance subsequently to its taking effect. We expect that the application of the third ABA will admit equal flexibility in practice.

With respect to terminology, the designation of various organs of business associations was in several cases simplified and unified under the third ABA. For instance, in re business unions, the term of members' meeting was introduced instead of the misleading term of the board of managers. As for the regulation of unlimited and limited partnerships (kkt. and bt.), the alternatively used "general meeting" and "members' meeting" were uniformly superseded by the term of "members' meeting", which serves to underline the emphatic vagueness concerning the main organ of the simplest forms of association as opposed to that of the Ltd. On condition that it is only in these formal respects that the deeds of association of unlimited partnerships and business unions depart from the new law, we can barely assume that explicit emendation will be deemed necessary (for instance, the substitution of the established term of general meeting by members' meeting). Scilicet, bureaucratic formalism should be duly avoided in company law, even if technical problems may arise in the trade register as a consequence.

2. The Relation of the ABA to Other Significant Regulations of Business Law

The reformulation of the ABA allowed the reconsideration of its relation to other regulations of basic business law.

a) In the course of re-codification, the Codification Committee intended to more systematically incorporate substantive provisions into the ABA and procedural provisions into the Company Act, thereby, to circumvent

repetitions and overlaps. Accordingly, the ABA includes merely general provisions pertaining to the legality supervision of business associations, since the detailed provisions are set forth in the Firmregistration Act, given that these are special proceedings conducted by the Court of Registration. The provisions specifying the reasons for the invalidity of deeds of association are basically formulated in the ABA, whereas, judicial contestation of the decision on company registration on grounds of the invalidity of deeds of association is admissible pursuant to Article 69 of Firmregistration Act on "action for the establishment of the nullity of company foundation". Nevertheless, in some cases, with regard to the objective of safeguarding the uniformity of regulation, the ABA also specifies rules of procedure (such as the rule of the judicial contestation of decisions adopted by business associations and the plea in expulsion), at the same time, the Firmregistration Act also includes substantive provisions pertaining to, e.g., the name of the company, the company seat and registered offices.

b) Interference with other legal branches could be avoided within the scope of the third ABA, for instance, the stipulations that guarantee tax allowances for foreign investors as well as tax-free and duty-free implementation of reorganisation were repealed, since these matters are already regulated under tax law. For political reasons, some exceptions had to be made, e.g., the stipulation that labour relations prevailing at business associations shall be regulated in accordance with the Labour Code was upheld under Article 8 of ABA, which, from a professional viewpoint, is an expressly redundant provision.

c) Its relation to the new, currently reformulated Civil Code became unambiguous. It is definite that the endeavour to integrate the ABA into the Civil Code was obstructed, since the uniformity and substantiveness of the ABA as a code must be retained even following the completion of the new draft Civil Code, in re firstly, company law constitutes a complex legal branch, secondly, its textual scope and technical character. To that effect, the specificity of company law is now adequately articulated under Para. (2) of Article 9 of ABA, according to which, although, the Civil Code constitutes secondary law substantiating the ABA, in cases related to business associations, the Civil Code shall be not literally, but "appropriately" applicable. As the Supreme Court reasonably ruled, according to the solution based on the principle of clausula rebus sic substantibus, Article 241 of the Civil Code shall not be applicable in case of deeds of association concluded for an indefinite period. Scilicet, Part 4 of the Civil Code on Contract Law is modelled

on bilateral barter agreements, whereas, deeds of association specifically establish multi-entity organisational liability.

As a matter of fact, the effect of company law on Part 2 on Entities of the currently formulated new Civil Code can be positively discerned.[3] Its constructive aspect is that several solutions of company law (e.g., pre-association posited as pre-legal entity or reorganisation by universal legal succession) that were met by reluctance on the part of experts of civil law back in 1988 are being abstracted under the new draft Civil Code. Its detrimental aspect, as to my view, is that the draft Civil Code adopts the institutions of company law in extraneous areas, as well. Namely, by reason of the recent radical curtailment of the permitted period for company registration, the import of pre-associations has also remarkably decreased in company law, therefore, the regulation of the formation of, e.g., "pre-foundations" under the new Civil Code seems even more problematic. In contrast with company law, in which considerable deregulation was effectuated under the third ABA, the Chapter of the draft Civil Code on Legal Entities (as an overextended counter-effect of former under-regulatedness) is incredibly over-regulated, so far as it completely unnecessarily introduces institutions of company law under provisions concerning ideal legal entities, such as the supervisory board and the auditor, which have gradually become discretionary in company law, as well.[4](4)

a) In the course of drafting the third ABA, we focused on the requirement of harmony with accountancy law, which was all the more deemed imperative, since EU company law directives abound in accountancy rules. To that effect, the observation of the terms of accountancy is more relevant under rules governing procedures of reorganisation, capital increase and reduction in the third ABA, than in its antecedents. Nonetheless, we intended to manifest that it is accountancy law that needs to be adjusted to basic solutions of company law, not vice versa. Therefore, when a business association is finally registered by the Court of Registration, the pre-association shall be finally and automatically established as a business association, i.e., the prescription of "a closing accountancy measure" is regarded as an excessively bureaucratic measure and to be abolished.

[3] The Chapter of the draft Civil Code on Entities has been introduced for professional debate by the Ministry of Justice on its home page.

[4] See, the critique by Sárközy T.: Alternatív javaslat „A jogi személyek általános szabályaira" (Alternative Proposal for "the General Regulation Pertaining to Legal Entities"), *Polgári Jogi Kodifikáció*, nos. 4–5/2005.

b) Upon the formulation of the Chapter on Companies Limited by Shares in the third ABA, its relation to the permanently evolving and incessantly amended Act of 2001 on Capital Markets (hereinafter: ACM) posed a dilemma. In my view, the ACM represents a peculiarly low quality regulation, its over-regulated and frequently self-contradictory provisions preclude its harmony with the third ABA, which would be a prerequisite of law-making despite the different approaches of the two legal areas. Consequently, we endeavoured to distinctly demarcate the scopes of the ABA and the ACM, to that effect, the scope of trust law under the ABA is restricted exclusively to the regulation of close companies limited by shares (zrt.) and limited liability companies (kft.), whereas, the rules of take-over procedures pertaining to public limited companies are specified under the ACM (redrafted incidentally with particular incoherence), even so, the contradictions in many cases couldn't be resolved without the violation of the rationale of company law. A recent "achievement" consists in the before-mentioned comprehensive amendment of the ACM under Act CLXXXVI of 2005 in December, 2005, which was followed by the latest amendment of the ACM under Act XXII of 2006 in January, 2006. The latter act contains an innovation unparalleled in the history of Hungarian law-making, scilicet, it stipulates under Para. (4) of Article 6 that Paras. (1)–(2) of Article 354 of the third ABA "shall not take effect".

3. Deliberate Progress from the Past to the Future

The third ABA took effect in a period, when the basic trends of the next decade (perhaps decades) were already relatively adumbrated, viz., the accentuation of the requirements entailed by globalisation and information society as well as the consolidation of European integration. We presumed that our principal assignments in this situation were, on the one hand, the sustenance of domestic traditions of company law, on the other hand, continued adjustment to the international development of company law by constant modernisation. In this respect, we had to take into account the following crucial factors.

The efforts of the European Union to create the unity of law, which per se accords with our objectives, by directives that concentrate on guaranteeing the uniformity of rules that govern primarily entities of the world of big business, that is, public limited companies, banks, insurance companies, investment funds, etc., also define the scope in which we need to consider the eventuality that supranational corporations founded in compliance with EU directives will

prevail over business associations founded on domestic law. Furthermore, Union law is more and more intensely overwhelming the national legislation of member states based on continental law with solutions originating in the Anglo-Saxon legal system, which has adverse effects and sometimes entails confusion in domestic law.[5] For instance, at the beginning of this decade, German legislation was also obliged to frame separate law on capital markets and to co-opt a take-over procedure modelled on the US pattern *in re* public limited companies. Consequently, German corporations tend to abandon German company law (therefore, a recent session of the Deutscher Juristentag was marked by bewilderment) and reorganise as European corporations, which admit the board system. Thereby, they can evade the most characteristic institution of modern German company law, that is, the so-called parity *Mitbestimmung* (equally shared decision-making), which implies equal participation by employees in supervisory boards.[6]

In view of the above, the Codification Committee relied on the following conclusions upon framing the third ABA:

a) Attempts at the trivialisation and homogenisation of traditional forms of small- and medium-scale business associations need to be resisted. For several years, approx. 8,000 unlimited partnerships [(kkt.) as a typical form of micro-enterprises], 120,000 limited partnerships [(bt.) as a form of small-scale enterprises] and 220,000 limited liability companies [(kft.) as a typical form of medium-scale associations] have operated agreeably on grounds of permissive regulation in substance and in effect.[7] The more positively contractual character of unlimited and limited partnerships was upheld and reinforced under the third ABA, while the efforts to declare these two forms of association legal entities were defied. The aspect of ltd.s constituted as associations of entities (e.g., the institution of several managers, but no board of managers is permitted), which distinguishes them from companies limited by shares, was maintained. Without doubt, the rules pertaining to close companies limited by shares

[5] See, e.g., Halbhuber, Limited Company statt GmbH? Europarechtlicher Rahmen und deutscher Widerstand (Limited Company in lieu of GmbH? EU Legal Framework and German Resistance)., Baden-Baden, 2001.

[6] Qualität und Preis am Markt für Gesellschaftsformen (Quality and Price on the Market for Business Associations). *Zeitschrift für Unternehmens und Gesellschaftsrecht*, no. 3/2004.

[7] Para. (1) of Article 9 of ABA established cogency in form as a principal rule, since the efforts to formulate the permissive regulation of unlimited and limited partnerships and ltd.s (kkt.–bt.–kft.) during codification failed. In effect, however, the third ABA advanced distinctly towards permissive regulation.

and ltd.s, respectively, show more correlation, but the rapprochement eventuated basically owing to the regulation of companies limited by shares (e.g., preference shares that secure the right of pre-emption).

b) It needs to be prospectively prevented that large-scale associations in Hungary relinquish the rule of domestic law and opt for Community law. Consequently, the third ABA, in an unprecedented manner in Hungarian company law, permits that the entities forming public corporations opt for the board system according to the model of Anglo-American integrate management in lieu of the German model of shared management. That integrate managing organ is designated as board of directors, which is distinguished from general management under the third ABA. That solution obviously benefits investors from the US, Britain and the Far-East, however, permission of the establishment of boards of directors for ltd.s and close companies limited by shares would have been an evident excess.

c) In accordance with the development of information technology, the third ABA allows to some extent both the exercise of members' rights and the operation of association organs, i.e., general meeting, management, supervisory boards via means of information technology, although, we must acknowledge that access to these facilities is not immediate reality for Hungarian entrepreneurs. The basic rules are stipulated under Article 20, nevertheless, the chapters on ltd.s, and particularly, on companies limited by shares prescribe several special rules that govern, e.g., holding general meetings via video-conferences. Simultaneously, the use of these modern facilities is safeguarded by the rule that it may not infringe either members' rights to equal protection of the law or equal opportunity for participation in business matters.

d) With respect to the purpose of modernisation, it was not only Anglo-Saxon/Anglo-American solutions that we took into consideration. In my view, a momentous according step consists in the co-optation under Chapter 5 of the regulation pertaining to trusts already well-established in the Hungarian business world, and consequently, to the acquisition agreement from German law.[8] The acquisition agreement is obviously not a typical element under civil law, its introduction was challenged both theoretically and functionally. Nevertheless, due to the institution of the acquisition agreement, the implementation of a uniform economic policy

[8] See Mielicke, J.: Konzern durch Beherrschungs und Ergebnisübernahmeverträge (Trusts via Acquisitions and Take-Over Agreements), *Zeitschrift für das gesamte Handels und Wirtschaftsrecht (ZHR)*, no. 4/2001.

will be considerably more refined, relations within the trust will become more perspicuous, the reasonable interests of the shareholders, creditors and the management of subsidiaries will be more defensible. As a matter of course, voluntary registration by trusts may not be immediately expected, therefore, the ABA can prove to be a progressive and programmatic statute, furthermore, the provisions of Article 64 of ABA governing effective trusts also admit the judicial enforcement of registration.

e) The consistent effectuation of the purpose of modernisation was not feasible for an economic and a legal reason in one area, that is, the distinction of corporations in terms of forms of operation. Firstly, economic policy-makers did not concur with the solution customary in Western Europe (which had not been included in the conception of the ABA, either), namely, that public limited companies would be peremptorily classified as companies quoted at the Stock Exchange. Scilicet, in this case, a corporation not quoted at the Stock Exchange would be automatically classified as a close company limited by shares. On condition that the public limited company is concurrently quoted, market self-adjustment could supersede a substantial range of legal regulations. Therefore, the regulation of corporate governance would not have been incorporated into the Section of the ABA pertaining to public limited companies, but, in concert with the German model, the issuance of an ethical code on corporate governance would have sufficed.[9] Secondly, as regards the legal reason, pursuant to the amendment of the ACM approximately one year before the adoption of the third ABA, the distinction of close and public corporations had been established in company law and in the Hungarian business world also to be denoted in the designation of corporations as abbreviations Zrt. and Nyrt., which is unfamiliar in Western-Europe and non-transplantable into English or German. This solution should have been interfered with under the third ABA within one year, which would have been evidently arguable from the point of view of legal policy.

f) The prima facie dogmatic solution of the separate designations of Zrt. and Nyrt. is based on the assumption that, if the scope of public limited companies does not coincide with the scope of quoted companies, EU directives concerning public limited companies will either govern all Hungarian corporations, or close companies limited by shares will have

[9] Ringleb, H. H.–Kremer, T.–Lutter, M.–Werder, A.: *Kommentar zum Deutschen Corporate Governance Kodex* (Commentary on the German Corporate Governance Code). Munich, 2005. 18–21.

to be distinctly differentiated from public limited companies. In an effort to effectuate the latter alternative, the law-maker stipulated under Para. (3) of Article 171 of ACM that close and public operation shall be denoted in the designation of the company. This solution, however, is obviously defective in my judgement, because, on the one hand, it would have sufficed to denote the form of operation in line with the designation, not in the designation of the company. Namely, in re the obligation set forth under Para. (1) of Article 4 of ABA, according to which the non-profit character of corporations shall be indicated in the designation of the company, the abbreviation of non-profit close corporations will be NpZrt. On the other hand, even if we intend to denote the form of operation in the designation, it would have amply sufficed to prescribe the denotation of Nyrt. for at most 100 corporations that operate publicly out of the approx. 4,000 corporations, since all other corporations would have been necessarily classified as close corporations. Whereas, in this status quo, we have imposed substantial costs and administrative burden on our corporations (e.g., new firm stamps, bank-papers, exchange of shares, etc.), which contradicts the basic objectives of legal regulation.

g) The indefinite differentiation of close companies limited by shares from public limited companies incurred a structural problem in law-making, viz., the structure of Chapter 10 of ABA on Corporations is excessively complicated. It is introduced by a General Section encompassing Articles 172–183, which is followed by detailed regulation that constitutes the principal rules under Articles 184–284 pertaining to close companies limited by shares, subsequently, the auxiliary and departing rules governing public limited companies are specified under Articles 285–315, and finally, corporate governance recommendations of the Budapest Stock Exchange concerning quoted public limited companies conclude Chapter 10. Obviously, the identification of the scope of quoted public limited companies with that of public limited companies would have eventuated considerably more undemanding and easily applicable regulation.

h) With respect to Union law, we may eventually establish that law-making in Hungary should not verbatim adopt EU directives (which equals mere adaptation by "translation"), but the recognition of the purpose of legal policy is imperative, which may facilitate its implementation by legal instruments inherent in the Hungarian legal system. Therefore, for instance, the unreasonable adaptation of EU directives governing public limited companies to unions of entities is inappropriate, however, that practice has prevailed in re, e.g., the invalidity of deeds association since

1991, that is, the effect of Directive no. 1 of 1968 on Harmonisation of Safeguards for Business Associations has been extended to irrelevant areas not designed by law-makers of the EU. Furthermore, the adoption of still non-effective EU norms as a manifestation of "pushing forward" is also deemed inappropriate, which, nevertheless, had ensued in terms of the limitation of one-entity associations under the second ABA, nullified under Para. (4) of Article 5 of the third ABA. Nonetheless, in the course of codification of the third ABA, the adoption of the more rigorous, currently drafted EU regulation pertaining to auditors was propounded (e.g., of the provision that auditors' contracts of agency shall not be renewed), however, we defied and the contingent later settlement has been referred to the competence of accountancy law.

4. A Pro-Entrepreneur Approach

The third ABA is marked by an approach that emphatically favours entrepreneurs with the exception of the elements specified under Point e) of Section 3 above. According to the standpoint of the Codification Committee,

a) if the interests of entrepreneurs, public administration, the Court of Registration or attorneys (notaries public) conflict, entrepreneurial interests shall be promoted,

b) the facilitation of more expeditious, inexpensive and simple formation of enterprises and of their operation shall be necessary.

c) For the purpose of the accomplishment of the objectives above, the third ABA substantially deregulates, i.e., crucially diminishes the administrative burden imposed on associated parties and extends the scope of permissive regulation via basic reinforcement of the autonomy of associated parties and the specification of a broad set of applicable options for organisation and operation. The third ABA is based on the assumption that nearly 18 years after the restitution of company law in Hungary, both company law and business culture are adequately refined to admit such "liberal" regulation and its flexible implementation.

In the following passages, we'll expose some instances of such pro-entrepreneur approach:

a) As to my point of view, the deregulation of the sphere of operation of business associations is particularly important. The third ABA sets forth the principle of the permission of all sorts of activities that are not prohibited or limited by law, even if the respective activity is not itemised in the sphere of activities. The business association shall be obligated to

indicate only one main activity in its sphere of activities, whereas, all other activities shall be included in the trade register at the specific according request of the association. This new regulation will basically change the proceedings of the tax authority.

b) Upon the advent of political transformation, it was justifiable to administratively limit the terms of the mandates of executive officials and the number of assumable executive positions, the limitation of which, however, is no longer required. Therefore, the limiting rule prescribing that one entity may concurrently fulfil executive positions at maximum three different associations was repealed under the third ABA. Whilst, the principal rule stipulating that appointments shall be valid for a definite, but at most for a five-year period was maintained as a permissive regulation. Therefore, deeds of association may permit that executive officials will be appointed for an indefinite period, in the case of which, mandates for indefinite periods may be conferred on supervisory board members, as well. At the same time and after much delay, the third ABA finally institutes the maxim of distinction between the legal relations of executive officials under company law (substantiated by the rules of contracts of agency under the Civil Code, albeit, such legal relations shall not be established by contracts of agency) and other potential employment of the concerned executive officials by the respective association. By the generalisation of the rule formerly pertaining merely to corporations, Para. (2) of Article 22 of ABA stipulates that the mandates of executive officials shall not be assumed in employment. Therefore, the legal consequences of mandates of executive officials governed by company law (the fulfilment of which may be either gratuitous or subject to consideration) shall be consistently differentiated from those of the potential employment of executive officials in other positions (e.g., in the director's position) at the specific association, which shall be unequivocally grounded on the Labour Code. Therefore, the general manager of a limited liability company may exclusively fulfil the position of managing director concurrently, on condition that the appointments are established on grounds of two separate scopes of legal relations. However, in view of the fact that the majority of ltd.s in Hungary have accommodated interwoven legal relations under company and labour law, this subtle regulation will merely govern legal relations established subsequently to 1st July, 2006. Whereas, the parties concerned shall be guaranteed a reasonable provisory period for the settlement of prevailing legal relations, since the legal relations of executive officials instituted

preceding 1st July, 2006 may be eventually upheld for a further period of five years.

c) Under the third ABA, the significant reinforcement of permissive regulation extends the scope of entrepreneurial liberties. Although, for technical reasons of drafting, the cogency of its rules was maintained by virtue of Para. (1) of Article 9, owing to the General Section and to the rules governing specific forms of business associations, the freedom of parties to depart from the majority of the rules of the ABA was considerably expanded. The last phrase of Para. (1) of Article 9 stipulates with general effect that, if the departure from the ABA consists in the co-optation of a solution not recognised under the ABA, it will be regarded permissible (which formerly in most cases had been reversely adjudicated by the Court of Registration), with the exception (a safeguarding general clause is inserted), if the respective solution contradicts a) the general purpose of company law, or, b) the objectives of the regulation pertaining to the respective form of association, or, c) infringes the basic principle of bona fide exercise of rights pursuant to the Civil Code. In re the specific forms of association, due to the formulation of rules per se, approx. 95 p.c. of the regulation concerning unlimited and limited partnerships (kkt.–bt.) is currently de facto permissive, whereas, more than 50 p.c. of the regulation of ltd.s (kft.) and nearly 50 p.c. of the regulation of close companies limited by shares are also permissive in my judgement. In this scope, the substantial enhancement of the permissiveness of the regulation of close corporations is peculiarly emphatic, considering that the form of operation of the overwhelming majority of corporations in Hungary is close. Accordingly, it is unprecedented in the regulation of corporations in Hungary that the optional establishment of the supervisory board is permitted [dependent on the respective claim of fifty per cent of the shareholders (nominal value rate) of the close corporation]. As to ltd.s, the establishment of supervisory boards is completely discretionary, in addition, the regulation of the institution of employee participation is permissive, as well. The rule that in case of associations with more than 200 full-time employees on an annual average, one-third the supervisory board members shall be appointed by the general/members' meeting upon the nomination of the works council was maintained, but the management of the association and the works council may conclude a deviating agreement. Which implies that in return for, e.g., pay-rise or the provision of social, etc. surplus services, the community of employees may renounce due participation rights. This may exclusively eventuate on a voluntary basis and in compensation,

since the enforcement of employer over-representation shall be expressly deemed ex parte abuse of rights and sanctioned.

d) The range of eligible management options for associated parties was considerably extended, which is most conspicuously instantiated under the rules governing corporations. As to close corporations, the application of the option of the German drei Ecken (triangular) system, which constitutes the principal rule, is an alternative to the jointly applicable institutions of one-entity management as per Article 247 and of the executive supervisory board, the power of which was expanded as per Article 37. As to public corporations, the German management system established in Hungary is simultaneously instituted with the optional Anglo-American integrate management system, furthermore, new organs, such as the auditing board are also introduced. The establishment of optional organs, such as advisory bodies and boards modelled on the German Beirat is admissible with general effect as per Para. (6) of Article 19.

e) The procedural auxiliary of the enhancement of permissiveness in substantive law consists in guaranteeing broader access to institutional and ad hoc arbitration courts in lieu of administrative courts for intent parties. Pursuant to Article 10 of ABA, the range of options for recourse to arbitration courts is extended in two respects. On the one hand, recourse to arbitration courts abroad is also secured for associations with exclusively Hungarian members, on the other hand, it is merely in re legal disputes between the association and the members that guaranteeing the opportunity for recourse to arbitration courts and the specification of one arbitration court in deeds of association shall be mandatory, whereas, irrespective of the before-mentioned criterion, for the settlement of disputes among members concerning the operation of the association, the members may resort to arbitration courts as well as may institute various arbitration courts.

5. Conflicts of Interests

Besides the protection of reasonable entrepreneurial interests, the third ABA purports to safeguard other interests, as well. Albeit, the business association is possessed primarily by its members, the proprietors, the enforcement of the interests of other parties must also be protected by law. To that effect, protection of the interests of the management is guaranteed by, e.g., the institution of exoneration pursuant to Para. (5) of Article 30. Furthermore, the former 10 p.c.

limit of the admission of collective minority protection was decreased to 5 p.c. pursuant to Para. (1) of Article 49, finally, the instruments of creditor protection were elucidated and circumscribed, for instance, *in re* the so-called company vacation, the scope of protection was extended to limited partners of limited partnerships (bt.) pursuant to Para. (3) of Article 50.

As a matter of course, protected interests may conflict. Consequently, in my judgement, Para. (3) of Article 30 adopted during parliamentary debate upon the motion of an MP is defective, since it makes an exception to the principal rule as per Para. (2) of Article 30, according to which executive officials of the association shall proceed with regard to the primacy of the interests of the association, by the prescription of the obligation of executive officials to observe the primacy of creditors' interests "subsequently to the supervention of the minatory situation of insolvency of the association". Scilicet, executive officials constitute an organ of the association and shall proceed upon the trust of the general/members' meeting, therefore, they shall promote members' interests. Whereas, creditors' interests are basically protected under the ABP and other law along with the ABA, which shall be obviously observed by executive officials. Apart from the bona fide adherence to legal regulations, which explicitly precludes resort to irresponsible hazardous solutions, whatsoever, executive officials may not further creditors' interests as opposed to the interests of the association. Furthermore, on condition that the association declares insolvency and the executive officials do not proceed with regard to the primacy of creditors' interests, Para. (3) of Article 30 also stipulates that separate law will lay down the liability of executive officials for creditors' interests. However, as to the regulation of limited liability companies, even the establishment of the secondary liability of members shall be exceptional, therefore, the specification that non-member officials shall accept responsibility *in lieu of* the association and the members is an overtly excessive rule in my view, an instance of the overreach of wrongful trading. The according law founding such responsibility was adopted pursuant to Article 33/A of Act VI of 2006 amending the ABP, which circumscribes the supervention of the minatory situation of insolvency, grounds for the presumption of the infringement of creditors' interests, classifies liabilities for damages as debts to creditors and defines the imputation of executive officials, etc. According to my view, that qualifies as an overbreadth of law-making. In this context, we must also refer to Article 50 of ABA, in terms of which the court may transfer liability to the members of the ltd. or the corporation, the scope of which, nevertheless, is inordinately extended both under the Company Act and the amendment of the ABP, whereas, the admission of the transfer of responsibility is extremely exceptional in international legal practice. Notwithstanding, the provisions

under Paras. (2)–(3) of Article 63 of ABP and Paras. (1)–(2) of Article 93 of Company Act unreasonably extend the scope of the transfer of responsibility. En passant, the Company Act is not assigned to supplement the substantive rules of the ABA, such as the prescription of a separate rule of the transfer of responsibility, provided that the remaining total debt of the terminated association exceeds 50 p.c. of its equity capital.

In view of the fact that the entrepreneur jeopardises its private property, the liberalisation of the regulation in this scope is justifiable. However, the case of *business associations operating with public funds* is assessed differently. The rigour of requirements *in re* associations operating with state (local government) participation with majority interest as well as *in re* public corporations operating with significant investment by natural entities must obviously not be mitigated, but affirmed as opposed to the general tendency of liberalisation. Additional requirements concerning associations operating in the public sector must be formulated fundamentally under the Act on the State Budget in a similar manner to the amendment of the before-mentioned law by the so-called Transparency Act of 2003. Undoubtedly, the requirements concerning the corporate governance of associations in public property will have to be radically emended under a new Act on the State Budget.

6. Streamlining and Economising Firmregistration Procedures – Functional Changes Concerning the Court of Registration

The necessary implications of the enforcement of a pro-entrepreneurial approach consist in the freedoms of *streamlined and economical formation* of business associations, *effectuation of required changes* in deeds of association and in the forms of association, contingent *termination* of associations without the violation of public interest, such as authoritativeness of the trade register, creditors' interests, etc.

As a matter of fact, streamlining the procedure of company registration and the introduction of electronic company procedures supervened before drafting the third ABA, wherefore, of course, the pertinent regulation was further amended. In this respect, the new rules pursuant to Para. (6) of Article 46 and Article 47 of Firmregistration Act are of fundamental importance, since the formerly differentiated registration of associations with investments by legal and non-legal entities was superseded, the term of registration was determined in a maximum of 15 working days as of submission of the respective claim and safeguards for the potential omission of the deadline were specified. As elements of basic streamlining, patterns of legal deeds of association were introduced

pursuant to Articles 48–49 of Firmregistration Act [four patterns, one for unlimited, one for limited partnerships and two patterns for (one-entity, multi-entity) ltd.s], in case of the application of which, the term of registration shall be restricted to 8 working days for submission of claims on paper and to 2 working days for electronic submission.

The specification of the freedom of expressly voluntary application of the patterns of legal deeds of association is notably unprecedented in domestic business law, therefore, it has been contested by several legal theorists, attorneys and registry judges. In my judgement, the application of the pattern is expedient for the simplest forms of association, since it crucially effects streamlining and no complex contractual procedure is required *in re* small-scale enterprises. Consequently, those who agree to the application of the simple patterns without changes will be facilitated to establish associations more expeditiously. Whereas, those who intend to establish more complex associations (e.g., with several managers and supervisory boards at ltd.s) will conclude deviating and individual deeds of association.

In my view, the patterns will also promote the economisation of the formation of small-scale enterprises in the long run, therefore, it is inappropriate to regard them as "awkward procedures". As a modus vivendi, mandatory endorsement by attorneys, which is unknown in Western Europe, was upheld, however, in the future, that requirement may be naturally cancelled *in re* deeds of association concluded according to patterns, and with the expansion of the market, attorneys' fees will evidently decrease, as well. Since the scale of contribution by the Court of Registration to the formation of associations on grounds of patterns is negligible, the respective fees will be soon and necessarily reduced by the Ministry of Finance. Furthermore, upon the following revision of the institutions of the ABA, the publication of the formation of these simple associations will be obviously deemed unnecessary, whence, the related costs may also be released. Eventually, the facilitation of the formation of associations is also furthered by the procedure of the reservation of the name of the company under Article 6 of Firmregistration Act, which specifies the freedom to reserve the name opted for by the associated parties for a period of 60 days.

Nevertheless, other company procedures have also been consequentially streamlined. In this context, we must refer to the simplification of the conclusion of deeds of association under Article 18 of ABA, which, e.g., authorises the management to effect minimal changes in deeds of association. Furthermore, by the definition of reorganisation as a change in the form of the association, the elements of the three-pillared structure of reorganisation, association and dissolution were more unequivocally distinguished under Article 67 of ABA. Again, the process of reorganisation was momentously streamlined under

Articles 71-72 of ABA, wherefore, in a basic case, a session of the chief organ may effectuate reorganisation as well as the scope of the obligation to draft a reorganisation plan was restricted, etc. In order to resolve former uncertainties, it is expressly stipulated that co-ordinate unions of legal entities may also reorganise as business associations, and, vice versa, then again, the dissolution agreement shall be concluded by members (not by the association) under Para. (3) of Article 84 of ABA.

In the scope of the regulation of the termination of business associations without legal successors, the procedural rules of final settlement were revoked under the ABP and introduced into the Firmregistration Act, which marks remarkable progress. Scilicet, final settlement is a procedure related to the termination of associations not substantiated by insolvency. Therefore, enactment of such separate regulation of final settlement will probably impel law-making to eventually frame up-to-date law pertaining to insolvency equivalent to the pertinent EU regulation, so that it can supersede the effective obsolete regulation of bankruptcy and liquidation proceedings. (Pursuant to Act VI of 2006, only a minor amendment of ABP was adopted.) In effect, final settlement was momentously differentiated under the new Firmregistration Act, wherefore, coerced and voluntary final settlements were distinguished and the scope of streamlined final settlement was extended.

Within the purview of the new Firmregistration Act, the procedures purporting to implement the termination of business associations are regulated (to some extent with reproachable "overindulgence") in a considerably more refined manner, than before. Accordingly, associations shall be formed by *ex nunc* registration with constitutive effect and cancelled in a similar manner from the trade register. The Court of Registration shall terminate, that is, dissolve business associations *ex officio*, *a)* if the association was finally liquidated by court, *b)* in proceedings directed at the termination of phony companies with head-quarters at unknown addresses as per Articles 89–93 of Firmregistration Act, *c)* on account of repeated, gross misdemeanors on the part of the association as per Article 84 of Firmregistration Act.

As the two latter-mentioned proceedings demonstrate, with the lapse of the boom of the formation of business associations and the establishment of the material and incorporate criteria of lawful and expeditious company procedures, the sphere of the activity of the Court of Registration has focused on the *legality supervision* of business associations, which is only partially designed to sanction, since it increasingly assumes *functions of advocacy and assistance*. The regulation of the procedure of legality supervision is more elaborate under Chapter 6 of Firmregistration Act, since it specifies new instruments of legality supervision, e.g., in parallel with by-law, the designation of supervisory trustees

ex officio is admissible as per Articles 82–83 of Firmregistration Act. Several peculiar procedures of legality supervision are further regulated under the Firmregistration Act, such as the appointment of an official receiver as per Article 85 as well as the enforcement of the deposition or publication of company reports as per Article 87. The settlement of the equivocal financial situation following the termination of the business association is promoted by the procedure of financial settlement introduced formerly and regulated as per Chapter 9 of Firmregistration Act.

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Exclusionary Price Abuses in the EU

(A developmental approach with regards to networks)

Abstract. The liberalization processes, which started in the 90's in Europe, opened up a new area for competition policy and competition scrutiny and enforcement. Both ex-ante regulation and competition policy are responsible for the consumer friendly implementation and advancement of the legislation related to the liberalization of certain public utilities. Every industry that has incumbents faces the problem of granting access to the facilities owned by the "big ones". Competition policy targets best achievable market conditions which provide the customers with the lowest prices and the market with most efficient behavior. In the long term this is only attainable with colorful market scene, vibrant conditions to operate and more options for the final customers to choose form. This, however, can be turned down by anti-competitive behavior of the participants that intends to eliminate competitors from the market. One of the various ways to achieve this is to use pricing methodologies which may straightforwardly result in forcing dependent market players to leave the playing field. Is there a way to control dominant undertakings' pricing methodologies? Can Article 82 of the EC Treaty be generalized? How did the European Court of Justice and the Commission formulate the practice towards these type of behaviors?

Keywords: European law, competition law, access pricing, network industries

I. What classifies as price abuse in the EU?[1]

Under EU Competition rules price abuses are explicitly mentioned in Article 82 of the EC Treaty:

> "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

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[1] See also: Motta, M.–de Streel, A.: Exploitative and Exclusionary Excessive Prices in EU Law 8th Annual EU Competition Workshop, (2003) Florence; and Tóth, T.: *Az európai Közösség versenyjoga* [Competition Law of the European Community]. JATEPress, Szeged, 2003. 115–116.

Such abuse may, in particular, consist of:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions"

For economists, the keystone of price discrimination is efficiency. Generally speaking, they define price discrimination as the supply of different units of commodity during the same time period at various price sets not directly corresponding to the supply costs. This involves the supply of both same amounts of units to different buyers at different prices–under the same supply costs–, as well as supplying the same buyer with the same amount of units at different prices when the price differentials are not allocated to the supply costs.[2]

II. Exclusionary and exploitative price abuse

The Article 82 of the EC Treaty provides for two types of price abuses. However, the general concept of price abuse–seeing the aim of the action–may refer to two different price abuses.

An excessive pricing practice may be *an exploitative abuse*, i.e. direct exploitation of market power. In this case, the dominant firm charges a price being too high to its being end-users or undertakings with which the dominant firm does not compete in the market. [3] This is of less relevance for the topic of this article.

On the other hand, an excessive price may constitute an *exclusionary abuse*, aiming to strengthen or maintain the market power of the dominant firm by putting rivals at disadvantage. In this case, the dominant firm in market sets the price of the input so high that the margin between wholesale and retail prices is insufficient for an efficient firm to profitably operate in the related market. This is a typical form of price abuse of upstream-downstream market relations.

A good majority of the cases on abuse of dominance have concerned exclusionary conduct by dominant firms, rather than behaviour directly exploitative of consumers. Exclusionary practices can be also indirectly exploitative of

[2] See also: Valgiurata, L.: Price discrimination under Article 86 of the EEC Treaty: the United Brands case. *International and Comparative Law Quarterly,* 31 (1982) 36–59.

[3] Motta–de Streel: *op. cit.* 1.

consumers, and, as explained by Vickers (2005), there is a view that no conduct is properly characterised as exclusionary unless it is ultimately exploitative.[4]

Many EU cases have dealt with pricing issues, which involved predatory pricing, selective price cuts, margin squeezes, and discounts as well as rebates.

The cited abuses are different in economic and legal nature. For the purpose of this article I will deal with exclusionary abuse concerning pricing issues, namely with excessive pricing, price squeeze and predatory pricing.[5]

III. Excessive pricing in the practice of the ECJ and the Commission[6]

It is not an easy task to define what excessive pricing means. What constitutes unfair pricing has caused a heated debate amongst policy makers and academics, as well as amongst judges.[7]

According to Joliet (1970), a given price is unfair when dominant firms have taken advantage of their dominant position to set prices significantly higher than those which would result from effective competition. Along with this, a price is excessive when significantly above the effective competitive level.[8]

Others (Evans *et* Padilla: 2005) approach the problem from a practical point of view, which may lead us closer to the real issues.

From a down-to-earth approach, the question is how competition policy authorities and courts could distinguish between workable competitive prices and overcharged high prices, i.e. where the limit is. The answers to these formal–and moreover practical–questions are of utmost importance since the actual effect on consumer welfare of regulatory interventions on the pricing policies of

[4] See in: Vickers, J.: Abuse of Market Power. *The Economic Journal*, 115 (2005) 246 *et seq.*

[5] Predatory pricing is regarded as variant of price squeeze in an upstream-downstream market structure, where the dominant firm uses extremely low prices at downstream level in order to eliminate competitors. I will not deal with predatory price in the classical sense when the firm being present on the retail market sets low prices for the ultimate costumers therefore fishing them from its other competitors.

[6] See also: Wish, R.: *Competition Law.* 5th edition, London, 2003. and Kalleugher J.–Sher, B.: Rebates revisited: Anti-Competitive effects and exclusionary abuse under Article 82. *European Competition Law Review*, 5. 263–285; and Vickers: *op. cit.*

[7] See also: Lang, J.T.–O'Donoghue, R.: Defining Legitimate Competition: How to clarify pricing abuses under Article 82 EC. 26 *Fordham International Law Journal* 83; and Fox, E. M.: What is harm to competition? Exclusionary Practices and Anticompetitive Effect, 70 *Antitrust Law Journal*, 2002. 371.

[8] Joliet, R.: *Monopolization and abuse of dominant position.* Liège, 1970.

dominant firms depends on the ability of competition policy authorities and courts to establish whether or not prices are excessive in practice.[9]

1. The first cases

The first case to deal with the sensitive issue of excessive pricing has been decided by the ECJ in 1975. In *General Motors* the Court–annulled the decision of the Commission on the facts–stated in point 12 of its decision that [it is possible to abuse the exclusive position of a firm by fixing prices and]

> "... such an abuse might lie, *inter alia*, in the imposition of a price which is excessive in relation to the economic value of the services provided, and which has the effect of curbing parallel imports by neutralizing the possibly more favourable level of prices applying in other sales areas in the Community, or by leading to unfair trade in the sense of Article 86 (2) a)".[10]

It is worth noting that already in this early decision the Court identifies the abuse of such pricing as being an interrelated dilemma between the excessive nature in relation to the economic value *and* the effect on parallel or unfair trade. In other words, mere excessive pricing with relation to the economic value of the service in question would not suffice the establishment of the abuse.

A year later, in the *United Brands* case, the ECJ went one step further and applied another mechanism.[11]

The Court observed that the UBC abused its dominant position on the banana market by partitioning the national markets and consequently by applying different prices in different countries, sometimes with a 100% difference, which actually had no relation to the economic value of the product.

It held that:

> "It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.

[9] Evans, D.–Padilla, J.: Excessive Prices: Using Economics to define Administrable legal rules. *Journal of Competition Law and Economics*, 1 (2005) 97–122.

[10] Case 26/75 *General Motors Continental NV v Commission of the European Communities*, European Court Reports (1975) 1367.

[11] Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, European Court Reports (1978) 0207.

In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product would be an abuse."[12]

While the Court turned down partially the decision of the Commission it pointed out that the lack of the appropriate cost-accounting system did not enable the Commission to sufficiently assess the real costs of UBC, and therefore the proper comparison had been the contrast of the prices on the territories where the undertaking was operating and where the bananas were sold.[13]

The Court therefore used the methodology to prove an excessive price in *United Brands* as follows:

„This excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its costs of production, which would disclose the amount of the profit margin (...).

...

Other ways may be devised and economic theorists have not failed to think up several of selecting the rules for determining whether the price of a product is unfair".[14]

Overall, the Court stated that in order to show that the prices are unfair the Commission has to prove that the compared prices are profitable and are different without just reasons.[15]

2. Progress in the practice of the Court–the eighties

Some years later the Commission fined *British Leyland* for the abuse of dominant position on the market of issuing national certificates of conformity because of excessive pricing, which were aimed to curb parallel imports of certain cars from other Member States.[16]

The Court of Justice upheld the Commission's decision considering that the costs did not relate to the service performed–rather, they reflected a simple

[12] *Ibid.* points 249–250.

[13] *Ibid.* points 251–254.

[14] *Ibid.* points 251–253.

[15] In this case, the Commission failed to do this, therefore the Court has decreased the fine.

[16] Commission Decision of 2 July 1984, *British Leyland*, Official Journal (1984) L 207/11.

administrative check–, and reiterated that the aim of such costs was to discourage imports from other Member States.[17] Moreover, the discriminatory prices for the issued certificate–more expensive for dealers than for private individuals–also represented that the sole reason for the charge was to discourage dealers from fierce competition by re-importing vehicles.

Consequently, the Court found that applicant was acting afoul of Article 82 (ex 86) specifically, by gravely restricting the opportunity for parallel trade.

The further filtered price and cost analysis of the Commission had been upheld by the Court in the *CICCE case.*[18] In its decision the ECJ upheld the Commission's decision that prices should not be compared in a generalized way but rather taken into account the different costs of different firms, even if they produce similar products due to the substantial variance of costs.[19]

In the *SACEM II case* the Court came to two important conclusions.[20] The first one concerns the X-efficiency, which is when the costs of an inflated firm are taken into account as opposed to the cost of a competitive firm with lacking monopoly power. In its judgment the Court declared that

> "... Where ... the staff of a management society is much larger than that of its counterparts in other Member States and, moreover, the proportion of receipts taken up by collection, administration and distribution expenses rather than by payments to copyright holders is considerably higher, the possibility cannot be ruled out that it is precisely the lack of competition on the market in question that accounts for the heavy burden of administration and hence the high level of royalties."[21]

The Court elaborated on the matter of market prices on different markets in the *Bodson case.*[22] In paragraph 31 of its decision the ECJ concluded that it is possible to make a comparison between prices charged by the undertaking that

[17] Case 226/84, *British Leyland Public Limited Company v Commission of the European Communities*, European Court Reports (1986), 3263, para. 28.

[18] Case 298/83, Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities, European Court Reports (1985) 1105.

[19] *Ibid.* para 24–25.

[20] Case 110/88, 241/88, 242/88, *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others*, European Court Reports (1989) 2811.

[21] *Op. cit.* Case 110/88, 241/88, 242/88, para 29.

[22] Case 30/87, *Corinne Bodson v SA Pompes funèbres des régions libérées*, European Court Reports (1988) 2479.

holds a dominant position and the prices of a competitive market where prices are defined according to the fierceness of the competition.

However, in the previously mentioned *SACEM II case* the other significant conclusion made by the Court was when answering the referring French court's question, it stated that–with the lacking requirement of the competitive market in the other Member State–the abuse of dominant position by a firm is indicated by charging higher prices in one Member State than in the other where the costs are compared on a consistent basis. And this also requires the dominant firm to prove opposite of this allegation.[23] Consequently, the geographical market comparison was applied as ancillary to the cost and price analysis by the both the Commission and the Court of Justice.[24]

Nevertheless, as Motta and de Streel point out (Motta *et* de Streel, 2003) it is likely that the investigating national authorities or the Commission would take into consideration the false national markets where all compared markets would be monopolised by different market players. This would, indeed, create a biased situation.

The differentiation of national markets or even sub-markets within one member state should be considered as not being the only difficulty when comparing several cost structures. As the ECJ held in the *CICCE* case, the variance of cost structures and methodologies for allocating costs are central too. It is hard to imagine that two different enterprises are using accidentally identical costing schemes.[25] Therefore when the responsible authority carries out an investigation it should focus on specific issues and in-depth economic cost examination. A statement whether the practice is anti-competitive should only follow a substantial and detailed enterprise-specific analysis.

[23] *Op. cit.* Case 110/88, 241/88, 242/88, para 25.

[24] The method of geographical comparison of prices had been applied by the Commission earlier in the 70's. In the *Deutsche Grammophon* case the ECJ stated that it is not necessarily an abuse if the market prices are different in various Member States, however it is a definite indicator of such abuse if these differences are not objectively justified. Case 78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, European Court Reports (1971) 487, para 19. See also: Case 24/67, *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm*, European Court Reports (1968) 55.

[25] It is also an indication if two firms are "accidentally" using exactly the same structure but differ in prices with regards to the same product. This may result in the founding of anticompetitive behavior but this is a different issue.

3. Sector specific regulation and price abuse

Pricing issues become more complex when there is a sector specific regulation that–at least to some extent–"ties the hands" of the market participants.

The first case to deal with the dubious relation between sector specific regulation and competition law with regards to pricing issues was the *Ahmed Saeed case.*[26] This was the initial case when the Commission and the ECJ has touched upon prices that were somehow indicated by sector specific regulation, in this case concerning air carriers. With regards to the relation of the two above, in paragraph 43 of the decision, the Court stated that

> "Certain interpretative criteria for assessing whether the rate employed is excessive may be inferred from Directive 87/601/EEC, which lays down the criteria to be followed by the aeronautical authorities for approving tariffs. It appears in particular from Article 3 of the directive that tariffs must be reasonably related to the *long-term fully allocated costs* of the air carrier, while taking into account the needs of consumers, the need for a satisfactory return on capital, the competitive market situation, including the fares of the other air carriers operating on the route, and the need to prevent dumping."

By this, the Court suggested that given the sector specific regulation, prices are indicated through the method of long-term fully allocated costs, and therefore if the undertaking is charging fees which are afoul of this accounting method they are reliable for both the breaching of the sector specific regulation and (ex) Article 86 (1) a).

However, it is not indicated in the decision what type of rule should be applied if there is no regulation specific to the industry. Also, it still remains an open question whether there is a possibility to use benchmarking methods from other sectors.

Generally, it is highly supported if there is an efficient regulatory scheme in the complementary markets via which non-discriminatory access is guaranteed to the targeted markets. The basis of this establishment should be an efficient and forward-looking price regime, where feasible.

[26] Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, European Court Reports (1989) 803.

4. Development in the practice of the Commission

A) Belgacom v. ITT Promedia

A positive outcome was reached in the *Belgacom* case,[27] referred to the Commission in a complaint for abuse of dominant position filed by ITT Promedia NV in 1995.

ITT Promedia NV, the Belgian subsidiary of ITT World Directories Company, accused Belgacom, the Belgian telecommunications operator, of charging discriminatory and excessive prices for access to data on subscribers to its voice telephony services. The company alleged *inter alia* that the conditions which Belgacom intended to apply for access to its subscriber data for publishing telephone directories were excessive and discriminatory and thus caught by Article 86 (now Article 82) of the EC Treaty.

Following a formal statement of objections issued by the Commission, Belgacom endeavoured to meet the Commission's concerns and submitted a business proposal regarding access to its subscriber data for publishers which has now culminated in the present settlement. In assessing Belgacom's proposal, the Commission's services were assisted by an expert consulting firm to verify the cost-oriented basis of the proposal.

Consequently, the Commission reached a settlement with Belgacom on the conditions under which publishers of telephone directories in Belgium had access to data regarding subscribers of Belgacom's voice telephone services (access to listing services). Following the settlement, directory publishers in Belgium were to be charged a price which was set in such a way that Belgacom could recover the costs it incurred in the collection, treatment and provision of the subscriber data required for publishing purposes, plus a reasonable profit margin.

The Commission considered that, insofar as publishers of directories were dependent on telecommunications operators, access to data should be non-discriminatory and based on prices calculated according to the operator's own costs.

[27] *Competition Policy Newsletter* 3 (1997) 13–14. Available on: http://europa.eu.int/comm/competition/publications/cpn/cpnv3n01.pdf, consulted on 14 February 2006. Also: Press release IP/97/292 of 11/04/1997, on: http://www.europa.eu.int/rapid/pressReleasesAction.do?reference=IP/97/292&format=HTML&aged=1&language=EN&guiLanguage=en, consulted on 14 February 2006.

This cost-oriented approach led to a very substantial reduction of more than 90% in the amount originally charged to telephone directory publishers and was declared to be applicable throughout the EU.

On the other hand, the Commission left level playing field open for further–mainly technical–developments, which could allegedly lead to alterations in applied pricing mechanisms.

B) Deutsche Telekom I.[28]

The Commission initiated proceedings against Deutsche Telekom AG (DT), the German telecommunications operator, following a complaint in 1996, made by a competitor against the conditions imposed on third parties for access to DT's infrastructures.

After DT had submitted a draft new contract offering network access to competitors, the Commission had a price survey carried out by an accountancy firm which demonstrated DT's inability to prove that its prices were cost-orientated and found the price level to be 100% higher than on comparable competitive markets.

The Commission emphasized that it did not wish to act as a price regulator, but as a result of the comparative market analysis, which showed that the prices of DT were exorbitant, DT was invited to adjust the tariffs it charged to real economic conditions so that they could not constitute an abuse of a dominant position–in terms of price-squeeze–under the relevant Article of the EC Treaty.

Thus, at long last, DT agreed to substantially lower its network access tariffs, in particular for providers of business services, by 38% for access to the local network and 78% for access to the long-distance network, and the Commission decided to terminate the proceedings.

C) Deutsche Telekom II.[29]

In January 1998, the Commission opened a procedure against DT on the basis that DT's fees for carrier-pre-selection and number portability were excessive, and hence, allegedly constituted an infringement of Article 82 of the EC Treaty.[30]

[28] XXVIIth Report on Competition Policy (1997), point 77. Available on: http://europe.eu.int/comm/competition/publications/broch97_en.pdf, consulted on 15 February 2006.

[29] Press release IP/98/430 of 13/05/98, on: http://www.europa.eu.int/rapid/pressReleasesAction.do?reference=IP/98/430&format=HTML&aged=1&language=EN&guiLanguage=en, consulted on 16 February 2006.

During the investigation period, the Commission sent out information requests to 35 telecommunication operators throughout Europe. In this request, the operators were asked to indicate their terms and conditions of carrier pre-selection and number portability, and notably the fees charged for such services. The analysis of the replies showed that the fees charged by incumbent operators in other Member States, as well as the ones submitted by various German alternative providers, were considerably lower than those of DT.

In April 1998, the German Regulatory Authority rejected DT's announced fees–which were already the corrected amounts–in the case of number portability for being too high; and parallel, the incumbent operator withdrew the requested fees for pre-selection.

As a result of the National Regulatory Authority's decision and the taking into consideration of the results of the information request's analysis, the European Commission terminated its inquiry into Deutsche Telekom's DT fees because it observed no reason for pursuing its own initiative procedure on the grounds of excessive pricing.

Following the decision, on the basis of DT's corrected request with new fees, the Commission decided to transfer the case to the German authorities for further examination of a possible abuse of dominant position by the incumbent.

D) Commission's investigation into international phone call prices[31]

The investigation concerning the charges for international phone calls paid to dominant operators in 1997 had been initiated by the Commission because charges for international calls were at the time generally higher than for making calls within a single member state.[32]

[30] The initiation of the proceedings was based on the incumbent's announcement of the proposed fees for the services concerned. The Commission considered that these fees may constitute a barrier to market entry for alternative operators in Germany, and consequently, could also serve as a negative example for other incumbent operators in Europe. Thus, it was important for the Commission to carry out and international comparison in this respect.

[31] Press release IP/97/1180 of 19/12/1997, on:
http://www.europa.eu.int/rapid/pressReleasesAction.do?reference=IP/97/1180&format=HTML&aged=1&language=EN&guiLanguage=en, and Press release IP/98/763 of 13/08/1998, on:http://www.europa.eu.int/rapid/pressReleasesAction.do?reference=IP/98/763&format=HTML&aged=1&language=EN&guiLanguage=en, and

[32] The proceedings started before the telecommunications markets were fully liberalised on 1 January 1998.

The investigation mainly concerned the so called accounting rates, which were originally set to cover the total cost of transporting the telephone call but–at the commencement of the proceedings–were no longer justified as technological development made it possible to make noticeable reduction in such costs.

At the time of the initiation of the investigation two sets of policies required that accounting rates charged by major European operators were cost-oriented: under competition rules, the prohibition of abuses of dominant positions Article 86 (now Article 82) of the EC Treaty; and respectively, under harmonisation rules, the so called "interconnection Directive" (based on Article 100A of the EC Treaty).[33]

Requests for information had been sent to all dominant telecommunication operators at the time in the EU in order to collect the information necessary to assess the competition aspects of the accounting rate arrangements.[34]

The investigation dealt with accounting rates, which is one of the ways for an operator to account for its customers' calls to another country, and focused more specifically on intra-Community calls.

Although liberalization of the EU telecoms markets allows other systems to be used, an important proportion of cross-border calls within the EU was at the time still forwarded through the traditional accounting rates system, based on bilateral agreements between operators.

Accounting rates had an important influence on the prices that users paid for international phone calls. The investigation did not focus on the end-user international prices, but it was indirectly relevant to these prices, since reductions in accounting rates should have led to substantial price reductions for consumers. A number of criteria were used in order to focus a second phase of procedures.

Where actual costs for international calls could not be provided, the criteria included the margin between the accounting rates applied and "interconnect +", defined *as national interconnection rates plus additional costs* specific to the international routes.

[33] Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), Official Journal L 199 of 26 July 1997. 0032–0052.

[34] At the time, in parallel, national telecommunications regulators were implementing the interconnection Directive, which required that the principles of cost orientation and non-discrimination were to be applied to both national interconnection and cross-border interconnection.

Tests were made both using the operators' interconnection rates on their domestic markets and using the EU "best practice" interconnection rates, in order to avoid discrimination against operators with lower interconnection rates.

IV. The first formal Commission decisions on price abuse in the telecom sector[35]

The leading Commission decisions with regards to abusive pricing behaviour emerged in the specific field of margin–i.e. also: price–squeeze. Before examining the first formal decisions and terminated procedures of the EC Commission concerning price squeeze, it is necessary to talk about the phenomenon in general.

1. Margin squeeze as an exclusionary abuse

A) Margin squeeze in general

Margin squeeze occurs when a vertically integrated dominant firm sets the wholesale price for an upstream product–available for downstream competitors–and the retail price for its final product such that the margin between them is disproportionately low, thereby anti-competitively squeezing rivals downstream or making it impossible for would-be competitors economically to enter the market.

This occurs also, when the retail-wholesale margin is zero, in other words the wholesale price is unduly high relative to the retail price or when the retail price is unduly low relative to the wholesale price. It can also be seen as akin to undue discrimination between self-supply and supply to others.[36]

In economic terms, anti-competitive price squeeze arises when a vertically integrated undertaking, with market power in the provision of an essential upstream input, prices it and/or its downstream product service, in such way and for a sufficiently long period of time to deny an equally or more efficient downstream rival a sufficient profit to remain in the market.[37]

For those vertically integrated firms who serve upstream access it is critical how wide the retail-wholesale margin is. As pointed out by Vickers (2005),

[35] See also in: R. Klotz et al.: The Commission decisions on price abuse in the telecommunications sector. *Competition Policy Newsletter* (2003) 8–13.

[36] See also in: Vickers: *op. cit.* 250–251.

[37] Crocioni, P.–Veljanovski, C.: Price Squeezes, Foreclosure and Competition Law: Principles and Guidelines. *Journal of Network Industries* 4 (2003) 30 *et seq.*

while too small a margin can squeeze out efficient rivals, too large a required margin would shelter inefficient rivals to the detriment of productive efficiency.

The other question is always whether there is a right benchmark by which to judge rivals efficiency. This is one of the hardest scales to determine in competition law.

B) Margin squeeze in the EU[38]

The definition of margin squeeze refers to situations in which a vertically-integrated–usually dominant–firm uses its control over an input supplied to downstream competitors to prevent them from making a profit on a downstream market in which the–usually dominant–firm is also present. The supplying firm could do this in several ways.

It could raise the input price to levels at which rivals could no longer sustain a profit downstream. Alternatively, it could engage predatory selling in the downstream market, while maintaining a profit overall through the sale of the upstream input. Finally, the dominant firm could raise the price of the upstream input and lower the price of the downstream retail product to create a margin between them at which a rival would not be profitable.[39]

Unless the dominant firm is actually discriminating in the prices charged to downstream rivals and its own integrated business the transfer charge that its downstream subsidiary pays to its upstream business should to be the same as the input charge paid by downstream competitors. This practice however, may already fit into the non-discriminatory derogations of Article 82.

1. The question of dominance

The first question arises with regards to the abuse of dominant position concerning this type of abuse when we want to define the firm's dominance.

Should there be dominance in both markets, or is it enough if the firm is dominant in the upstream market and uses the price squeeze to leverage dominance on the downstream market?

According to Article 82 of the EC Treaty, there is no need for dominance in both markets.

[38] See also: Geradin, D.–O'Donoghue: The Concurrent Application of Competition Law and Regulation: the case of margin squeeze abuses in the telecommunications sector. *Journal of Competition Law and Economics* 2 (2005) 355–425.

[39] See also: Geradin–O'Donoghue: *op. cit.* 357–358.

There are, however contradictory opinions (Bellamy and Child: 2001),[40] which conclude that double dominance is needed.

The ECJ has pointed out in its case law[41] that:

> "Price squeezing may be said to take place when an undertaking which is in a dominant position on the market for an unprocessed product and itself uses part of its production for the manufacture of a more processed product while at the same time selling off surplus unprocessed product on the market, sets the price at which it sells the unprocessed product at such level that those who purchase it do not have sufficient profit margin on the processing to remain competitive on the market for the processed product."

This concept is controversial for example because it does not deal with the duration of the price squeeze, however it is economically more acceptable and logical given that it is enough to have dominant position on one market rather than having market power equal to dominance on both because this position already creates an incentive for the dominant company to behave abusively by leveraging its power from one market to the other.

2. Legal price squeeze

On the other hand, not all types of price squeeze are prohibited under Article 82.

The essence of exclusionary abuse plays an important role when judging pricing behaviour hence competition on the merits is not at all afoul of competition rules. Only certain practice is contrary to EC competition rules and therefore is to be condemned, i.e. which aims at eliminating efficient competitors from the market or hinders would-be–but still, efficient–competitors from entering into the market.[42]

Such pricing can also be a rational business strategy, even if not in many cases.

For example, price squeeze would be acceptable under changing market conditions, where even firms with significant market power (i.e. it is stated in the framework of Electronic Communications) have to fight for costumers in

[40] Bellamy and Child (ed.: Roth P.): *European Community Law of Competition.* London, 2001, 730. Also, on the controversial issue of dominance, see: Kapitány, I.: Az európai bizottság kontra Microsoft ügy; avagy hátrány-e az előny? [The European Commission v. Microsoft Case. Is Advantage Disadvantageous?] *Jogtudományi Közlöny,* 2006/3. 91–108.

[41] Case T-5/97, *Industrie des Poudres Sphériques SA v Commission* (2000) European Court Reports II-3755., para 178, detailed later.

[42] See also: Crocioni–Veljanovski: *op. cit.* 31–35.

the new–regulatory–environment. A broader geographic and product or service market definition may also create fierce competitive environment when the dynamism of the market entails the companies to act in a different way.

2. Price squeeze in the practice of the ECJ

A) The *National Carbonising* case[43]

The National Carbonising Co. (NCC) purchased all its coal from the National Coal Board and competed downstream with the National Coal Board's subsidiary–National Smokeless Fuels Limited–in the supply of industrial and domestic hard coke to UK consumers. Coal has to be technically transformed in order to be sold as domestic or industrial hard coke. National Coal Board held a monopoly position in coal production and its subsidiary almost 90% of the downstream coke market. As a result of continuing increases in the cost of the supplied raw materials sourced from National Coal Board, the costs of production rose by a significant amount so that NCC would not have been able to operate economically on the basis of these pricing structures and sought interim relief.

The Commission's decision–the complaint was refused after the interim measures–does not enter into detail on the appropriate legal principles to be applied to a margin squeeze. It merely states that an upstream dominant firm supplying an essential input to rivals may "have an obligation to arrange its prices so as to allow a reasonably efficient manufacturer of the derivative a margin sufficient to enable it to survive in the long-term."[44]

The Commission held, at paragraph 14 of its decision, that:

> "... an undertaking which is in a dominant position as regards the production of a raw material (in this case coking coal) and therefore able to control its price to independent manufacturers of derivatives (in this case, coke) and which is itself producing the same derivatives in competition with these manufacturers, may abuse its dominant position if it acts in such a way as to eliminate the competition from these manufacturers in the market for derivatives. From this general principle the services of the Commission

[43] Commission Decision 76/185/ECSC of 29 October 1975, *National Carbonising*, Official Journal (1976) L 35/6.

[44] Geradin, D.–O'Donoghue: The Concurrent Application of Competition Law and Regulation: the case of margin squeeze abuses in the telecommunications sector. *GCLC Working Paper* (2005) 04/05, Bruges, 25.

deduced that the enterprise in a dominant position may have an obligation to arrange its prices so as to allow a reasonably efficient manufacturer of the derivatives a margin sufficient to enable it to survive in the long term."

B) The *British Sugar* case[45]

In the *British Sugar case*, British Sugar was found to have abused its dominant position by setting its retail and wholesale sugar prices so that the margin between the two was insufficient to reflect its own costs of transformation, i.e. the repackaging costs.[46]

According to the investigation of the Commission, British Sugar was found dominant in the upstream market for the supply of raw sugar in the UK. Derived sugar sold in the UK, which can only be produced from raw sugar, was defined as the relevant downstream market. British Sugar was vertically integrated competing in the downstream market for derived sugar with Napier Brown, which purchased raw sugar from British Sugar.

The EC Commission found that the difference between British Sugar's prices for derived sugar and the price it charged its competitor for raw sugar was insufficient for the latter to cover its own costs of transformation, consisting mainly of repackaging costs.

Therefore, the Commission concluded that British Sugar's pricing scheme was a price squeeze and so an abuse of its dominant position under Article 82 of the EC Treaty aimed at forcing Napier Brown to leave the downstream market.

C) The *Industrie des Poudres Sphériques* case[47]

In this case the Court of First Instance rejected the appeal by the complainant but at the same time laid down some important principles.

Industries des Poudres Sphériques (IPS) applied for the annulment of a 1996 Commission decision which rejected its request for a finding that an infringement of Article 82 EC had been committed by Pechiney Electrometallugie (PEM). PEM was the sole Community producer of primary calcium metal and also marketed broken calcium metal, which is a derivative of primary calcium metal. IPS and PEM were competitors in the derivative market for broken calcium metal.

[45] Commission decision 88/518/ECC of 18 July 1988, *Napier Brown-British Sugar*, Official Journal (1988) L 284/41.

[46] *Ibid.*, para 66.

[47] Case T-5/97, *op. cit.*

The applicant–IPS–alleged that PEM set the price of primary calcium metal oddly high, which in combination with the very low price for broken calcium metal, forced its competitors to sell at a loss if they were to remain in the market.

IPS claimed that that PEM's primary calcium metal offer gave rise to a margin squeeze.

The Court of First Instance (CFI) defined a margin squeeze as arising where a vertically-integrated dominant firm supplies input to rivals at prices "at such a level that those who purchase it do not have a sufficient profit margin on the processing to remain competitive on the market for the processed product."[48]

The CFI applied a single test for abuse, since it held that the upstream price would be abusive or the downstream price predatory if "an efficient competitor" could not compete on the basis of the dominant firm's pricing.[49] The CFI added that in the absence of an exclusionary margin squeeze, the way in which a dominant vertically-integrated undertaking decides its profit margin "is of no relevance to its effects on its competitors;"

The Court has also found that it is relevant to ask whether the dominant firm has the best price on the downstream market or whether prices are influenced by other factors and would allow competitors to charge higher prices.[50]

At the end, the Court of First Instance rejected the applicant's appeal– particularly because there were alternative means for IPS to purchase relevant raw material from China or Russia- and came to the conclusion that there was no margin squeeze.

As it was observed by the CFI the margin squeeze could occur in two ways: either in the form of predatory pricing in the downstream market or abusive pricing in the upstream market, but always taking the efficient competitor's ability to survive.[51]

3. Margin squeeze in the practice of the Commission

The first two formal prohibition decisions up to date, however, only came in the first half of 2003, when the Commission adopted its decisions pursuant to Article 82 of the EC Treaty regarding abusive pricing for the provisions of certain telecommunication services offered by two incumbents respectively in Germany and France.[52]

[48] Case T-5/9, para. 178., *op. cit.*
[49] Case T-5/97, para. 180., *op. cit.*
[50] Case T-5/97, para. 183 et seq., *op. cit.*
[51] Case T-5/97, para. 179., *op. cit.*
[52] *Wanadoo* and *Deutsche Telekom*. To be detailed.

These decisions represent in reality the first formal actions of the Commission resulting in condemning business behaviour as being afoul of the provisions of Article 82 of the EC Treaty ever since the British Telecommunications had been found to abuse its dominant position in 1982, still acting as a state monopoly.[53]

The decisions have generated a disagreement and academic debate not only because they concern a sector where the member states play a crucial role throughout the decision making process of the respective regulatory authorities, but also, because the industry is subject to ex ante regulation.

A) The *Deutsche Telekom* case[54]

Following several complaints starting already in 1999 by new entrants in the German fixed-line telecommunications market, in May 2003, the Commission adopted a decision denouncing the abusive behaviour of the German incumbent for its pricing strategy for local access to fix telephony network. According to the Commission decision this appeared in a margin squeeze when Deutsche Telekom (DT) charged higher prices for access to the local loop[55] at wholesale level for new entrants than it charged at retail level for its subscribers. On the basis of standard economic theory and the previous decision of the Commission[56] a clear anticompetitive attitude thus resulted in discouraged alternative suppliers, and consequently in less choice of telecom services and price variations for final consumers.

True, that local loop unbundling–as an obligation on the incumbent operators–was introduced at EU level by way of legislation only in 2000,[57] however, some

[53] Official Journal L 360, 21 of December 1982, 36.

[54] Commission Decision of 21 May 2003, *Deutsche Telekom*, Official Journal L 263/9. The decision was severely criticized by DT because of the price cap mechanisms and the super-regulatory pseudo functions of the EC Commission.

[55] The local loop is a critical strategic point in providing telecommunications services because this is the physical connection between the costumer's premises and the operator's local switch. Generally it appears in the form of pairs of copper wire. As a result of telecom being a network industry, it is highly unlikely for new service providers to build an entire network including local loops to be able to arrive at the consumer's premises. Therefore it is vital for the new entrants to have access to local loops at reasonable and non-discriminatory terms.

[56] Decision 88/518/EEC, *Napier Brown–British Sugar*, Official Journal L 284, 19. 10. 1988, 41, par. 66.

[57] Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop, *Official Journal* L 336, 04–08.

member states–such as Germany–have earlier introduced the aforesaid obligation. The Commission however, reached the conclusion that the regulatory framework is not the only tool available to solve competition problems in this area. Pricing, as one of the conditions of local loop unbundling is also subject to scrutiny under the EU competition rules.

The Commission found that the incumbent was active both on the upstream market for wholesale local loop access to competitors and on the downstream market for retail access services to end-customers. Given that both markets were closely linked to each other and there were no adequate alternatives for newcomers to enter to the market and the incumbent was the only provider with nation-wide network coverage, Deutsche Telekom was in dominant position on the upstream market of wholesale access, and given that Deutsche Telekom was present 95% on the retail market–even after the national obligation of unbundling was introduced in early 1998–it was also affirmed that the incumbent was also in dominant position on the downstream market.[58]

During the proceedings DT argued that the margin squeeze test could not have been applied because the wholesale charges are imposed by the German regulatory authority (RegTP). The incumbent was also pleading that any margin squeeze must be the result of excessive wholesale prices or predatory retail prices, or a combination of the two, and it must be legally possible to terminate the squeeze by modifying either of those prices, which was not the case here.

The Commission rejected this argument[59] and found an abusive margin squeeze, because the difference between DT's retail and wholesale prices was either negative or slightly positive, but insufficient to cover DT's product-specific cost of providing its own retail services, creating therefore a situation for new entrants when they would have no scope to compete with DT for fixed-line access to end-consumers.[60]

[58] The Commission compared upstream access to the local loops with a bundle of different types of retail offerings, namely analogue, ISDN and ADSL connections.

[59] The Commission argued, that in the present case–and also generally–the margin squeeze test can exist with regard to regulated tariffs. In these cases it has also to be shown that the undertaking subject to price regulation has the commercial freedom to avoid or terminate the margin squeeze on its own initiative. If the company has that freedom, the question if and how the prices are regulated ex ante is relevant only for the choice of the correct remedy to bring the margin squeeze to an end.

[60] In order to achieve a coherent comparison, the Commission used a weighted approach, taking into account the numbers of DT's customers for the different access types at retail level. The Commission thus compared the tariffs for wholesale access to the local loops

The Commission had also demonstrated that the abusive behavior was not imposed on the company by any way of public intervention, by setting out the scheme under which the incumbent operator could have managed the wholesale prices more entrant-friendly. The decision thus suggests that an increase–within the set-up price cap system–in retail charges, and a systematic parallel decrease in call charges would have created a better level playing field for new entrants.[61]

The Commission stated that via this abuse, DT was jeopardizing the objective of achieving EU-wide establishment of an internal market for telecommunications networks and services with undistorted competition.[62]

As a result of the decision the national regulator (RegTP) had decreased the wholesale fees by 20%, adopted a new price cap regime, and DT had increased its retail fees by 10%, but simultaneously, lodged an appeal at the Court of First Instance claiming that the Commission's price/cost analysis was misconceived in its methods and there is no restriction on competition.[63]

B) The *Wanadoo* case[64]

In its decision the Commission–concerning the retail charges of France Telecom's internet access subsidiary, Wanadoo–had not come to the conclusion that the case was a clear margin squeeze, however concluded that Wanadoo was charging predatory prices for its consumer broadband internet access services.[65]

In consistency with the case law of the ECJ,[66] referring to the current situation on the basis of the information collected during the examination of the companies, the Commission reached the following conclusion:

> "Broadly speaking a distinction can be made between three separate periods since the beginning of 2001: (i) from 1 January to 31 July 2001, Wanadoo Interactive was far from recovering the (adjusted) variable costs of the

with those for a number of different retail offerings–analogue, ISDN and ADSL connections–at the end of every year.

[61] DT had previously introduced several reductions in call charges.

[62] Commission Decision of 23 May 2003, *Official Journal* L 263/9, point 203.

[63] Pending case T-271/03. See: *Official Journal* C 264/29 of 1 November 2003.

[64] Commission Decision of 16 July 2003, *Wanadoo*, *Official Journal* L 075.

[65] The reason for the "easier" examination was that France Telecom and Wanadoo were not 100% vertically integrated rather had a close relation with France Telecom owning 70–72.2% of the subsidiary.

[66] Referring to: Case C-62/86, *Akzo Chemie v Commission* (1991) *European Court Reports* I-3359, paragraphs 71 and 72; Case C-333/94 P Tetra Pak v Commission (1996) *European Court Reports* I-5951, paragraph 41.

> services at issue; (ii) from 1 August 2001 to 15 October 2002, Wanadoo Interactive came close to satisfying the test applied by the Commission, but without ever actually doing so: Wanadoo did not recover its (adjusted) full costs; nor–although it did recover its (outturned) adjusted variable costs for part of the period–was it able before March 2002 to forecast the achievement of such recovery in advance; (iii) from 15 October 2002 onwards, Wanadoo Interactive clearly satisfied the cost recovery test applied by the Commission, both for full costs and for variable costs, even though its instantaneous revenue may have been lower than its accounting costs."[67]

There is an interesting point in the decision. The Commission makes note of the fact that there is no such economic theory that reduces the application of predatory pricing methods–i.e. the requirement of the under pricing of the average variable cost being *per se* abuse, and the under pricing of the average total cost but aiming at eliminating a competitor being also but not *per se* abusive–is not limited to mature markets or which are taken as emerging markets.[68]

> "To subordinate the application of the competition rules to a complete stabilization of the market would be to deprive the competition authorities of the power to act in time before the abuses established have exerted their full effect and the positions unduly acquired have thus been finally consolidated. It follows, on the contrary, from the case-law that it must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated, as the aim pursued by the Treaty, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors."[69]

This argument is twofold. It does not take into account that there is differentiation between mature and emerging markets.

Indeed, there could be a difference between a market sector where competition is developed and functioning, also, where more or less demand and supply define the prices for services or products and an emerging market where costs are to be recovered in the long run. There are different commercial tactics, which come forth when a market player wants to establish steady position and attempts to win as many costumers as possible in order to be able to be profitable in the long run.

[67] *Wanadoo*, point 257., *op. cit.*

[68] This was the case with *Wanadoo* with the high-speed internet access market.

[69] *Wanadoo*, point 301., *op. cit.*

It could therefore be stated that in the case of substantial upfront costs, which are recoverable over time a period of below-cost pricing is not necessarily exclusionary.

The same business plans and pricing tactics cannot be applied in a functioning market where conditions are set and the profitability is ideally only attainable by innovation and production efficiency.[70]

However, the argument of the Commission is well-based on the famous paper of Areeda and Turner[71] when the authors argue that a firm in dominant position does not have to practice the predatory pricing strategy in order to attract new costumers and draw consumers' attention to the product.[72] Therefore it is rather irrelevant whether the market at stake is mature or emerging.

The question is whether it is fortunate to try to specify market power–and therefore dominance–in an admittedly new market shortly after the opening up or competition authorities should wait until more stable environment is created but by doing so risking the exit of would-be efficient competitors from the market.

Conclusion

The clear solution for the issue of margin squeeze remains dubious.

This is so firstly because testing a price squeeze is extremely difficult. There has not been set a common EU-wide test that should be used when deciding upon behaviours allegedly applying price squeeze techniques. However, based on the decisions of the ECJ and the Commission it seems that the equally efficient competitor test–taking into account the dominant company's own cost–is more suitable than examining the competitors' costs. This seems to be a better solution because it leaves no ground for less efficient firms to enter or remain on the market.[73]

The second reason for this conclusion is that the assessment of future profitability and uncertainties in the game is vague. The best approach seems

[70] That is why there is difficulty to set up a clear legal test to ex ante define pricing strategies. The assessment of future probabilities is also complicated and debated.

[71] Areeda, P.–Turner, D.: Predatory Pricing and Related Practices under Section 2 of the Sherman Act. *Harvard Law Review* 88 (1975) 714.

[72] Wanadoo, point 311., *op. cit.*

[73] Standard economic sense suggests that if the dominant firm's downstream unit would be loss-making if it paid the wholesale prices charged to rivals, there is a margin squeeze; otherwise there is not.

to be the economics-based approach as it was used in the Wanadoo case by the Commission.

However, this involves the evaluation of predatory pricing being *per se* abuse of dominance or the need for anti-competitive effects of the pricing conduct to be qualified as exclusionary practice.

With regards to excessive pricing, it is fairly difficult to define the right benchmark. The differences in cost schemes and allocation are so many depending on the firms' will that there cannot be a general rule that is applicable in all sectors and all markets. The best way to tackle this problem is the in-depth economic analysis that serves the core of the legal reasoning, a more economic approach with eye for specificity and legal burdens.

The nature of such investigations develops the problem when the authorities responsible for carrying out the inspections are held back because of lack of capacity and human resource for such analysis.

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The German Anti-Discrimination Legislation with a Special Focus on Disability

Abstract. The present essay discusses the recently adopted Act on Anti-Discrimination and the current and future system of disability rights protection mechanisms in the Federal Republic of Germany.

Partly as a response to the atrocities of World War II, partly as a return to pre-war period, both East- and West-Germany adopted extensive disability-related protection mechanisms. The laws currently in force are following this tradition making the system of German disability rights one of the most progressive in Europe. Several pieces of legislation ensure rehabilitation and participation of disabled persons, moreover Germany's constitution has been amended, so that disability is included among the prohibited grounds of the clause on non-discrimination.

Most recently, Germany should have implemented the European Union's Framework Directive the scope of which extends to the prohibition of discrimination on grounds of disability in employment matters. Germany, traditionally so cautious about human rights issues, transposed the Directive with a two-year-delay. The paper scrutinizes the implementing national law and explores the reasons for its numerous failures and the way towards adoption. Various legal and constitutional issues, among others on third party effect, freedom and equality had been brought up in the debate around transposition that had not been addressed at the time the German disability-related laws had been adopted.

The study of these controversies around implementation of the EU Directive is a unique opportunity to shed some light on the underlying constitutional issues of anti-discrimination laws–not only in Germany, but in all Member States of the Union which implemented the Directive without any public, political or legal debates.

Keywords: disability, Germany, anti-discrimination, equality, third party effect, supremacy of EC law

In Germany political and religious considerations concerning the care for disabled persons can be traced back to the 15th century. The roots of contemporary German disability-related legislation are rooted in Bismarck's social security system and in the idea to protect war veterans. This post-war protection has been extended to more and more disabled persons until a general approach has been adopted: disability rights as we know them today, are guaranteed irrespectively of the

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cause of disability. During the horrors of World War II many disabled individuals became victims of the Nazi ideology. Partly as a response to these atrocities, partly as a return to pre-war period, both East- and West-Germany adopted extensive disability-related protection mechanisms. The laws now in force are following this tradition making the system of German disability rights one of the most progressive one in Europe. A single title of the Social Code is devoted to the rights of disabled persons,[1] while the general equality of disabled is ensured by a separate act.[2] The Basic Law, Germany's constitution has been amended, so that disability is included among the prohibited grounds of the clause on non-discrimination.[3] Most recently, Germany should have implemented the European Union's Framework Directive the scope of which extends to the prohibition of discrimination on grounds of disability in employment matters. After having scrutinized the German pieces of legislation, one can conclude that as to disability–and here I refer to disability only, and I am not dealing with other protected grounds listed in the EU piece of legislation, such as religion, belief, age or sexual orientation–the Directive has almost been implemented in its entirety. Nevertheless, it is worth looking at the implementing national bill and discuss its failure, since many legal and constitutional issues are brought up that had not been discussed at the time the German disability-related laws had been adopted. The study of the controversies may shed some light on the underlying constitutional issues–not only in Germany, but in all Member States of the Union which implemented the Directive without any public, political or legal debates.

The anti-discrimination law raises the same issue as the EU Directive: is it conceivable to regulate discriminations on the basis of the different characteristics in a single piece of legislation? The EU differentiates somewhat between the prohibited grounds, but the degree of protection came closer in recent years. The free movement rights presuppose that there is no differentiation whatsoever on grounds of nationality. Whereas previously gender seemed to follow nationality among the most protected characteristics, now race and ethnicity are said to replace the leading role of gender. At the bottom of the hierarchy are the characteristics listed in the Framework Directive, which only extends to

[1] Title IX of the Social Code (*Sozialgesetzbuch IX*) on the Rehabilitation and Participation of Disabled People entered into force on July 1, 2001.

[2] The Equal Opportunities for People with Disabilities Act (*Behindertengleichstellungsgesetz*) entered into force on May 1, 2002.

[3] Article 3 Section (3) has been amended by Sentence [2] in 1994: "Persons may not be discriminated against because of their disability."

employment matters. The German implementing legislation is comprehensive, since it incorporates the prohibited grounds listed in the diverse Directives. Since however the nature of discrimination based on different grounds are entirely different, the rules cannot take the different needs into account, they are necessarily general. Whereas for example differentiation on the basis of sexual orientation is in most of the cases a result of unjustified negative attitudes against gays and lesbians, discriminations on the basis of disability may serve a legitimate objective and might be permissible. As to disabled individuals, the German solution is beneficial, since the protection of disabled persons is detailed and tailor made in federal laws other than the anti-discrimination law.

The theoretical issues at the heart of the German debate touch the boundaries of the third party effect. The EU pieces of laws have been adopted without any further considerations on the horizontal effect of the Directive: it applies to both public and private entities, i.e. it is also applicable for relations between private persons. In the European Union states can either make difference in the implementing legislation, or the distinction to make is left to the judiciary. According to the German tradition justices decide on the horizontality of basic rights and also on equality. In the disability-related part of the Social Code, just like the draft implementing law the legislators decided on the matter by excluding the judiciary. The horizontality of basic rights is said to limit individual freedom, therefore the controversy whether equality and freedom are mutually exclusive will also be addressed.

The German legislation combines a substantive equality-based approach, both striving to achieve equality of opportunities, equality of result, and a social rights based approach. Social assistance however depends on the income, it can only be granted to the needy. In the current disability discourse there is less emphasis on social rights, which corresponds to the shift from the medical to the social model of disability. The medical model located the problem in the disabled individual, whereas the social "concept indicated the close connection between the limitation experienced by individuals with disabilities, the design and structure of their environments and the attitude of the general population."[4] Whereas the medical model calls for social benefits, the social concept intends to modify the environment and to integrate disabled persons, therefore the emphasis on the equality concept. Despite the claimed adherence to the social model, the medical model heavily influences the German legislation, especially

[4] *United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities.*

when it comes to the definition of disability and the determination of the degree of impairment.

In the following I will discuss the legal and political considerations behind the German law implementing the EU anti-discrimination Directives. In the first part of the paper I summarize the European imperatives in the filed of equality that are applicable to people living with disabilities; in the second and third parts I will give an insight into the German attempts to comply with the European imperatives. In the fourth part of the present essay I summarize the theoretical considerations that might have prevented the German law from being adopted, such as the consequences of a hierarchy of equality, the effects of *Drittwirkung*, and the underlying clashes between freedom and equality. In the fifth part of the paper I will address the legal consequences of non-implementation, whereas in the conclusion I engage in forcasting the future of the German anti-discrimination legislation.

1. European Imperatives

A Council Directive of 2004, one of 2002 and two Council Directives of 2000 address the issue of discrimination at EU level. Council Directive 2004/113/EC implemented the principle of equal treatment between men and women in the access to and supply of goods and services (hereinafter referred to as the "Gender Goods and Services Directive"), Directive 2002/73/EC amended Directive 76/207/EEC on equal pay for equal work for women and men in employment matters (hereinafter referred to as the "Gender Directive"). Council Directive 2000/43/EC of June 29, 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter referred to as the "Race Directive") and the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter referred to as the "Framework Directive") both deal with non-discrimination measures. The latter lists disability as a prohibited ground on the basis of which direct or indirect discrimination, instruction to discriminate or harassment are impermissible. All Member States should have implemented the Directive by May 1, 2004. As of September 2005 Germany and Luxemburg, furthermore Austria at regional level, and in respect of Finland, the Åland Islands failed to transpose the Directives.[5] The German government

[5] Cormack, J.–Bell, M.: *Developing Anti-Discrimination Law in Europe: The 25 EU Member States compared.* Belgium and the Netherlands, 2005. 13.

was striving to transpose the EU laws, however failed to adopt the Act which would have implemented the EU Directive's provisions. The German *Bundesländer*, which should also implement the law, are waiting for the federal legislator to act.

The EU Directives set the basic principles and the framework rules, and following from the nature of a Directive, set the objectives each Member State should achieve individually through implementation. The Directives leave wide discretion to the Member States as to transposition. Apart from non-implementation, several other kinds of national approaches can be traced. Some Member States incompletely transpose the Directives picking the elements they prefer and excluding those that are controversial in their society. Others copy the Directives word by word into their national law, which is problematic, since the details are deliberately left to the individual Member States by the EU Directives; failing to regulate these details leaves an unjustifiably wide responsibility to the courts in interpreting the vague provisions. Finally, there are states that went beyond the prerequisites of EU law and afforded greater protection to the covered groups than necessary according to the *acquis communautaire*.[6]

2. German Implementation

Towards the end of 2001 the parliamentary factions of SPD (German Social Democratic Party) and BÜNDNIS 90/DIE GRÜNEN (Green Party) drafted a law which would have implemented the gender-related and Race and the Framework Directives together in a comprehensive way. This corresponded to Point IX.10. of the Coalition Agreement of October 20, 1998.[7] In its first

[6] Mark Bell differentiates between five possible approaches on the side of Member States: non-implementation, incomplete implementation, incorrect implementation, paper implementation, and innovation and implementation. Presentation at a seminar conducted in the framework of the *Community Action Programme to Combat Discrimination: The Fight Against Discrimination: The Equal Treatment Directives of 2000*. Trier, 28–29 November 2005.

[7] "Die neue Bundesregierung will Minderheiten schützen und ihre Gleichberechtigung und gesellschaftliche Teilhabe erreichen. Niemand darf wegen seiner Behinderung, Herkunft, Hautfarbe, ethnischer Zugehörigkeit oder sexueller Orientierung als Schwuler oder Lesbe diskriminiert werden. Dazu werden wir ein Gesetz gegen Diskriminierung und zur Förderung der Gleichbehandlung (u.a. mit der Einführung des Rechtsinstituts der eingetragenen Lebenspartnerschaft mit Rechten und Pflichten) auf den Weg bringen. Die Empfehlungen des Europäischen Parlaments zur Gleichberechtigung von Lesben und Schwulen werden

official form, Herta Däubler-Gmelin, then Minister of Justice presented the draft law. The proposal was however much broader in scope than the EU Directives would have required. Comparing the scope of the Race and Framework Directives it becomes visible that the former is much broader. Sometimes this notion is referred to as the "hierarchy of equality".[8] In gender issues there are a great number of pieces of legislation to achieve equal treatment and an extensive case-law of the European Court of Justice is backing it up. As to race an ethnicity the scope of protection is still wide, however less broad than in case of sex. Finally the characteristics listed in the Framework Directive since the document's entry into force also enjoy some protection against discrimination, however the material scope of the law is narrower, and a number of explicit exceptions are granted. The EU Directives require implementation in the field of general contract law as regards discrimination on the basis of sex, race and ethnic origin. As to the other grounds, implementation is only necessary in employment and related fields, such as vocational training and education.

The result of a common implementation of the pieces of EU legislation was that the drafters elevated the level of protection as regards religion, belief, disability, age and sexual orientation regulated by the Framework Directive to contracts, to the supply of goods and services offered to the public, i.e. to the level of protection granted by the Race and Gender Directives, which are way beyond the scope of the former.

The first draft of the German law intended to insert a new subtitle, Subtitle 5 to Section 3 Title 1 BGB on the creation, subject matter and termination of contractual obligations [Articles 319 a)–e)]. Article 319 a) would have prohibited any discrimination based on race, ethnic origin, sex, religion or belief, sexual identity, age or disability in the conclusion, content or termination of a contract offered to the public concluded in the field of occupation, education or health-

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berücksichtigt." [„The new Federal Government wants to protect minorities and to achieve their equal rights and social participation. Nobody may be discriminated against on the basis of his or her disability, origin, skin color, ethnic origin or sexual orientation as gay or a lesbian. In addition we will draft a law against discrimination and for the promotion of equal treatment (among others with the introduction of the legal notion of registered life partnership that encompasses rights and obligations). The recommendations of the European Parliament regarding the equal rights of lesbians and gays will be considered."] http://www.datenschutz-berlin.de/doc/de/koalo/09.htm#ix10

[8] E.g. Waddington, L.: The new equality Directives – mixed blessings, in Costello, C.–Barry, E. (Eds.): *Equality in Diversity, The New Equality Directives*. Dublin, 2003. 39–54; Borillo, D.: *Lutter contre les discriminations*. Paris, 2003.

care. The prerequisite "offered to the public" means that the rule has to extend beyond private relations. With the Framework Directive in line, Articles 319 a) and 319 b) prohibited any direct or indirect discrimination, harassment or instruction to discriminate. Article 319 d) dealt with exclusively private relations (with the exception of labor law). It took account of the fact that the ban on discrimination cannot be as absolute as in case of public contracts. It allowed for the balancing of private interests to some extent, and as an exception allowed for discrimination in case of certain professions. An explicit exception referred to age and disability in case there was a genuine and determinative occupational requirement that prevented handicapped persons, or people under or above a certain age to take the job. Further, according to the draft discrimination did not occur, if there is a reasonable purpose (*sachlicher Grund*) for the differential treatment of persons having the listed characteristics. Such reasonable purposes relevant for disabled persons were especially the avoidance of dangers, prevention of damage or other purposes of comparable kind; the protection of privacy or personal security; if different treatment was designed to grant special advantages and an interest in the penetration of equal treatment was missing; and finally in case of private insurance companies' statistical risk evaluation (however, here potential pregnancy is excluded as a justifiable reason for differentiation). In line with the Framework Directive and similarly to Article 611 Section (1) BGB on the prohibition of gender-based discrimination in case of employment contracts, the new Article 319 c) allowed for the partial reversal of the burden of proof with the aim to enhance discriminated persons' chances to litigate a case. According to this provision the persons protected only had to make the facts which indicated that discrimination had occurred, plausible (*glaubhaft machen*). The other party to the case was to bear the burden of proving that his or her decision, action had been unrelated to the applicant's protected characteristic. The opponents of the modification argued that negative evidence, in this case the lack of discriminatory intentions, is very difficult to be proven.[9] Indeed, this criticism has been voiced in relation to the mentioned EU Directive as well. An employer has to use objective tests when interviewing applicants for a position, and he or she can only take the job-related characteristics into account. However, in order to prove at a possible later litigation that no discrimination occurred, employers first have to ask questions in writing, or record an oral interview and second, they must keep these documents and

[9] Ladeur, K.-H.: The German Proposal of an „Anti-Discrimination"-Law: Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann. *German Law Journal*, 2002.

records so as to be able to prove at a later point in time that a rejected applicant has not been discriminated against. This might be especially burdensome for smaller companies where the method of interviewing is rather informal, oral and where the recording and storing of data is problematic. It has also been pointed out that these procedural rules "only touch the stupid",[10] as it is fairly easy to overcome the provisions and to use more sophisticated filters for screening out disabled, if someone really intends to do so. It has been predicted that employers will find a way out from the legal obligations, and the whole legal system will be weakened by this forced dishonesty.[11] Again others reminded to the disadvantages in living under a permanent threat for being suspicious of discriminatory behavior. Once the fact of discrimination has been established, it may have two kinds of consequences according to Article 319 e). First, whenever relevant, the court may oblige the discriminator to refrain from such behavior in the future, and second the court may order the employer to treat the applicant in a non-discriminating manner and to undo the consequences of discrimination. (*Folgenbeseitigungsanspruch*) This can also lead to the modification of the employment contract. Should the employer already have concluded a contract with someone by the time the discrimination has been proven, this contract cannot be contested, but instead compensation can be asked.[12] The same rule applies in case of one-time occasions.[13] The new rules on granting the possibility for associations and other legal persons to represent discriminated individuals reflected Article 9 of the Framework Directive. Victims of discrimination could have assigned their claims for compensation to associations. These NGOs would have had the possibility to represent persons discriminated in court proceedings, where representation was allowed by persons other than attorneys. The procedural rules have partially repeated the wording of Article 63 SGB IX extending this rule to discrimination based on other grounds as well. A difference in the *Verbandsklagerecht* regulated by SGB IX and the proposed anti-discrimination act is that the latter allowed for representation of the discriminated person, even in lack of his or her authorization. It has been criticized as being a too far reaching position, driven by the "impulse to fulfill

[10] *Ibid.*

[11] Picker, E.: Anti-Discrimination as a Program of Private Law? *German Law Journal*, 2003. 778; Ladeur: *op. cit.* 9.

[12] The compensation requirement is also subject to many criticisms, because of the high possibility of abuse. See e.g. Picker: *op. cit.* 776.

[13] Vennemann, N.: The German Draft Legislation on the Prevention of Discrimination in the Private Sector. *German Law Journal*, 2002.

a German '*Übersoll*'",[14] however technically it is difficult to imagine a scenario where a legal person litigates against the injured party's will without his or her cooperation. In the rare cases when it happens however, associations should consider whether bringing a case to the court in the absence of the victim's wish would be beneficial or detrimental for him or her. As to discrimination based on disability, the SGB IX as *lex specialis* compared to the proposed anti-discrimination legislation, would prevail over the latter.

The bill has been redrafted several times until the Bundestag adopted it on June 17, 2005. The *Bundesrat* voted against the law on July 8, 2005 with the argument that the proposed act was unreasonably wide, and violated private autonomy.[15] The issue was promised to be brought up again in the new, 16th election period. The coalitions agreement between the SPD and CDU/CSU took the implementation of the anti-discrimination Directives for granted despite all disagreements.[16]

The initial draft has been changed both in structure and in content. Whereas the first version intended to amend the BGB, the later bill was drafted as a separate federal act initially named Act on Anti-discrimination [(*Gesetz zum Schutz vor Diskriminierung (Antidiskriminierungsgesetz, ADG)*].[17] In the last version of the bill the title has been changed to General Equal Treatment Act (*Allgemeine Gleichbehandlungsgesetz, AGG*). Finally, the act has been adopted in August, 2006. The aim of the law is to prevent or eliminate negative discrimination (*Benachteiligung*) on the basis of race, ethnic origin, sex, religion or belief, disability, age or sexual identity.[18] The German legislature adopted parallelly a separate law on anti-discrimination of soldiers. (*Gesetz zum Schutz der Soldatinnen und Soldaten vor Diskriminierung, SADG*)

In the meanwhile since the first steps of the implementation process, two more laws have been adopted by the EU legislators, so the recent versions of

[14] Picker: *op. cit.* 776.

[15] Unterrichtung durch den Bundesrat Gesetz zur Umsetzung europäischer Antidiskriminierungsrichtlinien: Anrufung des Vermittlungsausschusses – Drucksachen 15/4538, 15/5717.

[16] Die EU-Gleichbehandlungsrichtlinien werden in deutsches Recht umgesetzt. [The EU Equal Treatment Directives will be implemented into German law.] Point 2.3. of Title VII. The Agreement mentions the social laws in favor of disabled persons, their social participation and the need for the promotion of parasport. http://koalitionsvertrag.spd.de/servlet/PB/show/1645854/111105_Koalitionsvertrag.pdf

[17] *Gesetzentwurf Drucksache 15/4538 Deutscher Bundestag,* December 16, 2004. http://dip.bundestag.de/btd/15/045/1504538.pdf

[18] Article 1 AGG.

both the general anti-discrimination law and its twin sister, the law protecting soldiers transplant the Gender Goods and Services Directive, the Gender Directive, the Race Directive and the Framework Directive.

The scope of this general anti-discrimination law is, similarly to the previous one, much wider than the EU Directives would have required. It extends to employment in the broad sense of the word, i.e. including self employment, access to employment, promotion, benefits, work conditions, dismissal, vocational training, promotion, dismissal, educational training, employment advice, involvement in trade unions, etc.; social protection, social advantages, education, access to goods and services available to the public, including housing.[19] The law consists of different parts, separately regulating labor law,[20] and modifying contract law.[21]

As to employment it is to be noted that sheltered workshops are not included, the draft only refers to traditional labor relations. The definition of discrimination corresponds to the definitions in the Directives. Direct, indirect discrimination, harassment and instruction to discriminate are included. Exceptions that the EU Directives allow are also granted in the implementing law. Indirect discrimination does not occur in case of a different treatment, if objective reasons justify it. There is an express exception granted to religious organizations, where belief might be a determinative factor,[22] and special exceptions are allowed on the basis of age.[23] Once a violation occurred, the employer has to compensate for material and immaterial damages.[24] Similarly to the previous solution, these also have to be paid in case the person having been discriminated against also has a right to compensation in cases he would not have been employed even if discrimination had not occurred. As opposed to the first draft, victimization is only mentioned in labor relations, but not in reference to general civil law. It has been pointed out that this is not necessarily a detriment, since most cases of victimization seem to be covered by the general rules of contract law, and in some cases even criminal law protection is granted.[25]

[19] Article 2 Section (1) Points 1–8. AGG.
[20] *Abschnitt 2, Schutz der Beschäftigten vor Benachteiligung.*
[21] *Abschnitt 3, Schutz vor Benachteiligung im Zivilrechtsverkehr.*
[22] Article 9 AGG.
[23] Article 10 AGG.
[24] Article 15 AGG.
[25] Mahlmann, M.: Prospects of German Antidiscrimination Law. *Transnational Law and Contemporary Problems,* 2005. 1045.

The second part of the Act on general contract law invoked more criticisms. This is the field where German legislation went far beyond than what is required by EU law, which only obliges Member States to respect the principle of non-discrimination as regards sex, race and ethnic origin in this field. Nevertheless, the German legislator extended the protection to contract law to persons having other characteristics listed in the Framework Directive. However, this protection of persons having the protected characteristics only applies to such contracts that are typically concluded with a large number of partners in large number of cases of comparable nature (*Massengeschäfte*, mass businesses), and where the identity of the contractual partner is of minor importance.[26] This formulation seems to exclude the much debated topic of housing, unless a company or a private person is involved in the business of renting flats, apartments, houses or hotel rooms. To make it more explicit, due to the public outcry and the opposition from the legal profession concerning housing, a specific exception has been granted for cases where there is a special relation and trust between the parties. As to the grounds listed in the Framework Directive including disability this exception is permissible, however as to race and ethnic origin, the exception is clearly in violation of the Race Directive. The only provision that could save the German clause is in Recital 3 Race Directive stating that it is „also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out", however in the actual body of the law such reference cannot be found; according to Article 3 the Directive applies to "all persons, as regards both the public and private sectors, including public bodies". The EU legislator could have opted for inserting an exception into the provision on the scope of the Directive, if intended to do so, just like in the case of the Gender Goods and Services Directive, which is according to its Article 3 only applicable to persons providing goods and services available to the public, "and which are offered outside the area of private and family life." The drafters of the Race Directive in contrast did not grant any such exceptions in the actual body of the law, therefore the German law's respective provision seems to be in violation of the *acquis communautaire*. As it has been shown, it is also against common sense and basic morals, since strictly interpreted, it would allow for the hanging of a sign "Rooms for rent – except for Jews", if the person letting the room lived in the same house,[27] although it would certainly contradict the general clauses of the BGB.

[26] Article 20 AGG.
[27] Mahlmann: *op. cit.* 1045.

Partly as a result of compromise, a number of other exceptions are granted in the second and final version, too. First, contracts in the field of family law are exempted. Second, an objective reason may justify differentiation on the grounds of religion, belief, disability, age, sexual identity or sex.[28] Third, the prevention of dangers and damages may justify difference in treatment. Fourth, the protection of privacy or intimacy may be a ground for justifiable differentiation. Fifth, special advantages may be granted to groups of persons, if the interest to enforce equal treatment is lacking. Sixth, religious communities may attach importance to the belief of individuals. Seventh, insurance companies are exempted from the scope of the law as well, in case if the protected characteristic is a determining factor as to the subject of the contract and it is underpinned by statistical data. (However, just like in the first draft, pregnancy-related concerns cannot justify different treatment.)[29]

The procedural rules have not been amended as compared to the previous bill; they are taken over from the Directives. The Act expressly states that rules on the representation of disabled persons, i.e. Article 63 SGB IX are not effected.[30] A novelty is the establishment of the Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*) functioning at the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth.[31] The *Bundespräsident(in)* appoints the person directing the Agency at the suggestion of the federal government.[32] The Agency receives complaints, supports persons submitting complaints, assists counseling by other bodies, promotes mediation, takes measures of prevention, every four years reports to the federal government and the Bundestag and makes recommendations.[33] The Agency has to enter into dialogue with NGOs and other responsible bodies, and in order to promote this cooperation it has to create an advisory body of independent experts in the field.[34]

According to a later draft the unified anti-discrimination code would have been called "Act on the Implementation of European Directives for the Realization of the Principle of Equal Treatment" (*Gesetz zur Umsetzung europäischer*

[28] Article 21 of the bill.

[29] Article 21 Points 1–5. of the bill.

[30] Article 25 Section (5) of the bill; also see the explanatory note attached to the provision.

[31] Article 26 of the bill.

[32] Article 27 of the bill.

[33] Article 28 of the bill.

[34] Articles 30–31 of the bill.

Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung). In Article 1 one could have found the actual Act on the Protection against discrimination. (*Allgemeines Gleichbehandlungsgesetz*), Article 2 would have contained the Act on the Protection of Soldiers against Discrimination (*Gesetz zum Schutz der Soldatinnen und Soldaten vor Diskriminierungen*), Article 3 had modified a number of other laws and Article 4 disposed of the entry into force.

The final version came into being with the title General Equal Treatment Act (*Allgemeine Gleichbehandlungsgesetz, AGG*) and has been adopted simoultaneously with the separate law on anti-discrimination of soldiers. (*Gesetz zum Schutz der Soldatinnen und Soldaten vor Diskriminierung, SADG*) The legislator opted for the word "*Benachteiligung*" (disadvantaging) instead of "*Diskrimination*" (discrimination) in order to emphasize that not all kinds of different treatment are of a discriminatory character. The exemption of churches has been extended;[35] victims of discrimination can sue within three months from the point in time they got to know about the discrimination; the victim of discrimination cannot claim from the court that a contract shall be concluded with him or her (no *Kontrahierungszwang*); in contrast to the previous draft, victims cannot assign their pecuniary claims for damages to NGOs, and NGOs may not represent cases independently from the victim.

The first reading of the bill should have taken place on May 19, 2006, but it has been postponed to June, 2006. Finally, it has been adopted on 14 August 2006, and entered into force four days later.

3. Political Debate around Implementation

Previous comments and the heated debate indicated from early on that it will be difficult to reach a compromise. The draft law for the implementation of EU anti-discrimination provisions has been called an "attempt against the basics of the republic."[36] Volker Kauder, then CDU/CSU (Christian Democratic Union of Germany/Christian Social Union) federal faction whip formulated this objection even more explicitly: "Previously we have been told, it depends on the 'proper race'. Later, in the GDR the 'proper class' has been propagated, later

[35] Religious organizations irrespectively of their legal form and facilities associated with them may discriminate on the basis of religion. Article 9 of the new bill.

[36] "Anschlag auf die Grundzüge dieser Republikcc. Quoted from *Forum gegen Rassismus, Arbeitsgruppe Gleichbehandlung, Info-Brief Nr. 6* März 2005. Bundesministerium des Innern, Ref. IS 3.

it has been a matter of the proper skin color. 'And now we experience: one has to take the proper political stand'. Should this not help, an anti-discrimination law will be drafted."[37] Many others expressed their worries that the law "desires in its regulating furor, to replace the free individual with the 'good' one",[38] i.e. that government will be transformed into a moral enforcing agent suppressing liberty and diversity.[39]

In this particular case freedom of private employers, churches, landlords were confronted with the equality of those who are having one or more of the characteristics listed in the Directives. Private employers criticized the bill as one limiting private autonomy. Churches, particularly the Christian ones expressed their worries that they cannot exclude persons in the future who would contradict their teachings, if they had at the same time a protected characteristic.

Some voice bureaucratization concerns, saying that as a result of the reversal of the burden of proof, all sellers and service providers will have to store evidence to show that they have not discriminated against potential buyers, consumers. Other criticisms refer to the difficulties in differentiating between permissible and prohibited differentiations, the additional burden on the judiciary as a result of the flood of anti-discrimination cases, the irrational limitation of the market economy, and preference for certain minorities over family and children.

Mainly small- and middle-size companies voiced their worries about unnecessary bureaucratization, which is understandable since recording and storing evidence for a potential later case might be a disproportionate burden on them. Another reason for the silence of multinational companies is that most of them already adopted anti-discrimination programs following the international trend.

The forces favoring the law are lobby groups and entities of civil society pushing for the rights of women or disabled people. In the political arena the

[37] "Früher hätten die einen gesagt, es komme auf die 'richtige Rasse' an. Später in der DDR sei die 'richtige Klasse' propagiert worden, dann sei es um die richtige Hautfarbe gegangen. 'Und jetzt erleben wir: Es muss einer die korrekte politische Einstellung haben.' Wenn das nicht helfe, werde ein Antidiskriminierungsgesetz gemacht." *Forum gegen Rassismus, Arbeitsgruppe Gleichbehandlung, Info-Brief Nr. 6* März 2005. Bundesministerium des Innern, Ref. IS 5.

[38] Picker: *op. cit.* 784.

[39] E.g. Adomeit, K.: Diskriminierung – Inflation eines. Begriffs. *Neue juristische. Wochenschrift*, 2002. 1622–1623, Ladeur: *op. cit.*

drafters, i.e. the green party and the social democrats pushed for the adoption of the law. They emphasized that the ease of the burden of proof existed for 25 years in Article 611 a) BGB in relation to gender-based discrimination. They also stressed the responsibility of Germany as a Member State to implement the Directives that the Germans also voted in favor of.

It has also been pointed out that it was embarrassing to ask prospective Member States to comply with human rights and to adjust their legal systems according to the *acquis communautaire*, whereas a founding Member State does not respect its obligations under EC law in the filed of anti-discrimination.

According to some observers the reason for the failure of the Directives' implementation can be explained by the fact that civil society has not been loud enough, as NGOs traditionally pursuing strong lobbying activities in the field of human rights did not doubt that implementation will occur.[40]

4. Theoretical Debate around Implementation

4.1. Hierarchy of Equality

The German law implementing the four anti-discrimination-related EU Directives reject the hierarchy of equality that is typical for the *acquis communautaire*, i.e. the national law rejects the idea of the diverse levels of protection and the different scope of application of the anti-discrimination Directives.

The uniform domestic rules resulted in difficulties and prevented the implementing law from adoption for a long time. The protection of disability and other grounds in the Framework Directive have been elevated to the level of protection the Race Directive granted for race and ethnic origin. Apart from an eagerness and ambition of post-World-War-II Germany to be the leading Member State when it comes to the protection of human rights, there might be some constitutional considerations behind the common regulation.

According to a constitutional principle one cannot differentiate between the protected grounds laid down in Article 3 Section (3) Basic Law. Accordingly the legislator is obliged to find a common solution. Disability might however be an exception to this principle, since the Basic Law only prohibits negative differentiation of disabled persons, however does not mention the prohibition of favoring them, as in case of the other protected grounds.

[40] *Ibid.*

In spite of the constitutional obligation to treat all persons with any protected characteristic the same way and to grant them the same rights, laws do differ on a lower level, since equality of persons with certain characteristics need legislation of different nature than others. In order for the laws to be effective, the reasons for differentiation have to be identified, and they have to be overcome in suitable ways. Whereas it is almost impossible to find any possible scenario where direct age discrimination may be justified,[41] differentiation on the basis of disability might be legitimate in a number of cases, like the protection of consumers, fellow employees, just to mention a few.

The advantage of the absence of a hierarchy of equality is that the victim of discrimination does not have to search for his or her most protected characteristic to win a case. Human beings fall into different subgroups at the same time: they are men or women, hetero- or homosexuals, religious or non-religious persons, young or old, disabled or able-bodied and–minded. As Susanne Baer pointed out, everyone who has been discriminated against shall be able to make a case irrespectively of the grounds on the basis of which the victim has been disadvantaged.[42]

4.2. Drittwirkung

Based on Article 1 Section (3) Basic Law fundamental rights apply in the relation of the individual versus the state. As opposed to this verticality, *Drittwirkung*, or the third party effect doctrine would mean that the fundamental rights of a constitution, in this case the Basic Law are applicable in horizontal, i.e. private relations. A direct third party effect (*unmittelbare Drittwirkung*) has not been foreseen by the Basic Law. The arguments against it are manifold. First, denial of horizontal effect can be derived from the text of the above mentioned Article 1 Section (3), which expressly states that the Basic Law's fundamental rights "bind the legislature, the executive, and the judiciary as directly enforceable law." Second, as Hermann von Mangoldt, then representative of Parliament pointed out, the drafters of the Basic Law

[41] It is possible to think of many indirect age discrimination cases; for example when a certain physical strength is necessitated for the job, aged persons may be excluded; in contrast if the position requires experience, this may lead to the screening out of young applicants.

[42] Baer, S.: *Kultur am Sonntagmorgen: EU als Gesetzgeber, Antidiskriminierungsgesetzgebung und europäische Rechtskultur*, aired on radio Deutschlandfunk, at 9:30 a.m. on September 11, 2005. (Audio record on file with author.)

intended to guarantee basic rights in the classical sense, i.e. the founders of the constitution wanted to "regulate the relation between the individual and the state by setting limits to the exercise of state power, so that humans' dignity remains inviolable."[43] Third, following a systemic interpretation, one can find certain provision in the Basic Law that expressly extend to horizontal agreements, therefore one can conclude *a contrario* that in all cases there is no such extension in scope, the provision in question, i.e. the majority of fundamental rights does not apply in private relations.[44] Fourth, when engaging into a teleological interpretation, one cannot assume that the primary aim of the Basic Law is to limit the freedoms of private persons, which would be the result of a general direct third party effect.[45]

As it has been shown, vertical effect of fundamental rights is not subject to dispute, Article 3 Section (3) [2] Basic Law on the prohibition of discrimination based on disability is directly binding on the legislative, executive, and judicial powers. However it is also applicable in private relations, though to a limited extent. Although basic rights do not have a direct third party effect, they are applicable in private relations through the indirect (*mittelbare*) *Drittwirkung* doctrine.

The underlying idea behind the general applicability of rights can also be derived from the Basic Law itself. According to Article 1 Section (2) human rights are "the basis of every community, of peace and of justice in the world." The third party effect is also justified by the argument that in contemporary societies it is not only the state that may abuse power and restrict the rights of individuals, but employers, economic entities may also do so.[46] Therefore

[43] „Vielmehr sahen die Beteiligten ihre Aufgabe darin, die Grundrechte im Sinne der alten klassischen Grundrechte zu gestalten. [...] In den Grundrechten sollte also das Verhältnis des Einzelnen zum Staate geregelt werden, der Allmacht des Staates Schranken gesetzt werden, damit der Mensch in seiner Würde wieder anerkannt werde." Parlamentarischer Rat, Bonn 1948/49, Annex to the stenographic report of the May 9. 1949 session. *Written memorandum of Dr. von Mangoldt on Part I on Basic Rights*. Reproduced at http://www.gewaltenteilung.de/grundrechte.htm.

[44] Such as Article 9 Section (3) for example, banning private agreements impairing the right to form associations to safeguard and improve working and economic conditions.

[45] Pierroth, B.–Schlink, B.: *Grundrechte. Staatsrecht II.* Heidelberg, 2005. 44, Rn. 174–175.

[46] *Ibid.* 176.

private entities that may also stand in vertical power relation to individuals, shall not be exempted from basic rights scrutiny.[47]

The justification of the original fear behind the concept of vertical effect, i.e. that the state is likely to abuse power to the detriment of individuals, has also been called into question. Through social and economic rights the state has been burdened by positive obligations, and it has to provide appropriate procedures and resources for the realization of these rights. Freedom, as German scholar Ulrich Preuß put it "does not only imply *freedom from the state* but also requires institutional devices that allow the realization of *freedom through the state*."[48] (emphasis in original) As the vertical nature of private relations, such as those between employers and employees, and the state support systems show, the lines between horizontal and vertical *Drittwirkung* are blurred, especially in the German Federal Republic, where the constitution guarantees that Germany be a social state.[49]

The German Federal Constitutional Court dealt with the fundamental issue of third party effect in a very early case carving out the borders of free speech.[50] In the *Lüth* case the Court first emphasized the objective order of values in the Basic Law centering upon dignity and the free development of personality influencing all fields of law, be it public or private. The Court then rejected an unlimited horizontal application of fundamental rights in private relations propagated in earlier cases by the Federal Labor Court, but held that "[t]he legal content of basic rights as objective norms is developed within private law through the medium of the legal provisions directly applicable to this area of the law. [...] A dispute between private individuals concerning rights and duties emanating from provisions of private law–provisions influenced by the basic rights–remains substantively and procedurally a private law dispute [...] The influence of the scale of values of the basic rights affects particularly those provisions of private law that contain mandatory rules of law and thus form part of the *ordre public* [...] In bringing this influence to bear, the courts may invoke the general clauses which, like Article 826 of the Civil Code, refer to standards outside private law. "Good morals" is one such

[47] Sommeregger, G.: The Horizontalization of Equality, in Sajó, A.–Uitz, R. (Eds.): *The Constitution in Private Relations: Expanding Constitutionalism*, Utrecht, 2005. 41.

[48] Preuß, U.: The German *Drittwirkung* Doctrine, in Sajó–Uitz (Eds.): *op. cit.* 29.

[49] Article 20 Section (1) Basic Law: „The Federal Republic of Germany is a democratic and social federal state." This provision is even protected by the Article 79 Section (3), the eternity clause of the Basic Law, i.e. it cannot be amended.

[50] *Lüth Case*, 7 BVerfGE 198 (1958).

standard."[51] Ultimately courts, i.e. public institutions are deciding private disputes. The judicial power, together with the executive and the legislative, is directly bound by basic rights as declared by Article 1 Section (3) Basic Law. The German Federal Constitutional Court concluded that courts deciding on private law matters have to interpret civil law in line with fundamental rights.

Basic rights do not directly effect private relations, but certainly influence them. The rights contained in the Basic Law do not solve civil law disputes concretely, but find complete expression through the rules dominating the given branch of law.[52] Like basic rights in general, Article 3 (3) [2] also radiates through an indirect third party effect (*Drittwirkung*) into private relations through the civil law's general clauses (*Generalklauseln*).[53] These are contained among others in Article 826 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*)[54] and refer to the concept of good faith, public morals, public order (*sittenwidrige vorsätzliche Schädigung*). Courts interpret these clauses in light and in conformity with fundamental righs. According to their historical understanding, industrial societies set the conditions for freedom and equality, which presuppose a factual symmetry, according to which all persons have the same rights to act according to their interests and to enforce these.[55] This factual symmetry is today compromised by both the state and by private entities. The Basic Law itself establishes an imbalance when protecting property and the right to conclude contracts; further the legislative power is entitled to construct asymmetric relations, as long as privileges are not created and some persons are not placed in a helpless or defenseless situation.[56]

The notion of third party effect, *Drittwirkung*, is at the center of the German debate preventing the anti-discrimination law from being adopted. Many German legal scholars argue that there should be a differentiation between prosecution of discrimination in the public arena and intrusion into private relations. It has been contended that the new law extensively regulating the private sphere is unconstitutional, foreign to the liberal tradition of the BGB and against common sense.[57] Some see the enforcement of equality as the limitation of private

[51] Translation is cited from Kommers, D. P.: *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham and London, 1997. 363.

[52] Pierroth–Schlink: *op. cit.* 181.

[53] Heun, W. in Dreier, H. (ed.): *Grundgesetz, Vol. I*, Tübingen, 2000. Article 3. Rn. 123.

[54] See also Articles 138 on contracts *contra bonos mores* and 249 BGB on *Treu und Glauben*, i.e. *bona fide*.

[55] Heun: *op. cit.* Article 3. Rn. 139.

[56] Pierroth–Schlink: *op. cit.* 183.

[57] E.g. Ladeur: *op. cit.*

autonomy by curtailing the general liberty to choose.[58] They contend that autonomous choice, a possibility to distinguish without any justification or reasoning, according to one's irrational choice or taste, is the basis of private law, which has now been curtailed. Others see the law as the peak of a continuous development of German law since the World War II. They emphasize that the law does not intend to prohibit discriminatory thoughts, but only discriminatory actions.[59]

Whereas in the previous discussion of the notion of third party effect, I dealt with the role of the judiciary, anti-discrimination laws raise a different problem. It is the legislative power that prescribes the horizontal application of *Drittwirkung* obligatory. Therefore some writers differentiate between three kinds of horizontalities: direct horizontality, indirect third party effect, and *Drittwirkung* prescribed by the legislative.[60]

At the heart of the German debate on *Drittwirkung* is a provision of the Race Directive. According to Article 3 Section (1) h) „Within the limits of the powers conferred upon the Community, [the Race] Directive shall apply to all persons, as regards, both the public and private sectors, including public bodies, in relation to [...] access to and supply of goods and services which are available to the public, including housing." The reference to supply of goods and services offered to the public are missing from the Framework Directive. Nevertheless the German Act extends the protection of all protected groups having the characteristics listed in both the Race Directive and the Framework Directive to goods and services offered to the public and housing. It should also be noted at the same time that the interpretation of the term 'offered to the public' is left to the Member States. Of course not all offers to the public can be meant. A repeatedly invoked example is the newspaper advertisement listing the desired characteristics of the preferred future partner.[61] In such a personal issue legal prohibition of discrimination against persons with certain–

[58] Sommeregger, G.: The Horizontalization of Equality, in Sajó–Uitz (Eds.): *op. cit.* 46.

[59] Winkler, V.: The Planned German Anti-Discrimination Act: Legal Vandalism? A Response to Karl-Heinz Ladeur. *German Law Journal*, 2002. Winkler rejects all three assumption by Ladeur, i.e. that the draft was unconstitutional, against common sense and also opposes the deeply rooted belief that the BGB was liberal. He thinks its a myth since Gertrude Lübbe-Wolff first said so in her writing: *Die Grundrechte als Abwehrrechte*. Baden-Baden, 1988.

[60] Sommeregger: *op. cit.* 34.

[61] Schöbener, B.–Stork, F.: Anti-Diskriminierungsregelungen der Europäischen Union im Zivilrecht – zur Bedeutung der Vertragsfreiheit und des Rechts auf Privatleben, *Zeitschrift für Europarechtliche Studien*, 2004. 60.

even protected–characteristics would be contrary to common sense. It is a widely accepted principle that the more a law intrudes into the private sphere, the more flexible it should be towards arbitrary differential treatment.[62] In line with the principle, private and family relations are currently not covered. Recital 4 of the Race Directive reinforces that "[i]t is important to respect such fundamental rights and freedoms, including the right to freedom of association. It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context." Many contend however that contractual freedom in general, and not only in the very intimate sphere would be impaired and be against common sense, once screened though anti-discrimination laws.

4.3. Freedom versus Equality

There have been some attempts to compare the Directives to the common constitutional traditions of the Member States instead to submit them to national scrutiny. Affected rights of potentially discriminating persons, respected by the European Court of Justice (hereinafter referred to as: ECJ) have been identified. The two main rights are the right to property and contractual freedom, and the right to private life, privacy. Article 16 of the not yet binding Charter of Fundamental Rights, the case-law of the ECJ,[63] the right to conclude contracts as derived from Article 1 Protocol 1 ECHR on the right to property have been invoked in relation to the former. As to the latter aspect, Article 7 of the Charter of Fundamental Rights, the case-law of the ECJ[64] and Article 8 ECHR have been named. Authors arrived to the same conclusion that has also been reached in the evaluation of the Act on the basis of already existing national laws: elevation of equality cannot mean the reduction of freedom of others, since in a situation the law tries to prevent, the person having specific characteristics would be pushed out of the market. They would remain unprotected and would only have a formal declaration to a right to conclude contracts.[65] Furthermore it shall be borne in mind that the ECJ also protects equality as a general principle of law, not only freedom of contract and private life. Articles 20 and

[62] *Ibid.* 66.

[63] Advocate General Geelhoed in Case C-334/00 *Tacconi* [2002] ECR I-7357.

[64] Case C-62/90 *Commission v Germany* [1992] ECR I-2575; Case C-404/92 *X. v Commission* [1994] ECR I-4737.

[65] Schöbener–Stork: *op. cit.* 61.

21 of the Charter of Fundamental Rights on general equality and equality before the law, Articles 22–25 of the Charter on cultural rights, equality between men and women, rights of children, of the elderly, and of persons with disability, Article 13 EC Treaty, Article 14 ECHR, or Article 1 of Protocol 12 ECHR can be named. Elevated to this level, a collision of general principles of laws can be declared.

Freedom, mostly freedom of contract and equality are opposed also in the German debate.[66] This is an old controversy that comes up from time to time in Germany in many fields. As it has been pointed out in the framework of constitutional law, the political demand to ensure as wide societal freedom as possible collides with the wish to ensure as much equality as possible. Societal freedom is freedom of the strong, whereas societal equality is the equality of the weak. As opposed to the social constriction of the conflict, the constitutional protection of these two values peacefully cotton. The constitutional provisions protecting equality and freedom leave a wide margin of appreciation to the legislative power by only setting the borders.[67]

The legislative previously used to ensure equality before the law, equality in relation to the state and the individual, and equality in private relations through the general clauses of the BGB. It was up to the judge to fill the general clauses and interpret them in light of fundamental rights. Through the adoption of anti-discrimination legislation the room left to the judiciary shrank and the legislative determines–and takes political responsibility–for the moral choices the judiciary used to make. The judge may still enter into a kind of balancing, but the major outline of the equality approach in private relations is set by the legislative.

This solution is not entirely unknown to the German legal system. At a lower level of norms, the issue comes up in labor law around the employers' obligation to treat all workers equally (*arbeitsrechtliche Gleichbehandlungs-grundsatz*).[68] Whereas previously equal treatment has been justified by the community bonds between employer and employees, modern reasoning is closer to the roots of non-discrimination law. According to the more recent theory,

[66] Loenen, T.–Rodrigues, P. R. (Eds.): *Non-discrimination Law: Comparative Perspectives*. The Hague, 1999.

[67] Pierroth–Schlink: *op. cit.* 430.

[68] Schiek, D.: Torn between Arithmetic and Substantive Equality? Perspectives on Equality in German Labour Law. *The International Journal of Comparative Labour Law and Industrial Relations*, 2002. 153–154.; Schiek, D.: *Differenzierte Gerechtigkeit: Dis-kriminierungsschutz und Vertragsrecht*. Baden-Baden, 2000.

the contractual employment relationship is typically long-term, in many cases the parties conclude the contract for indefinite time. Since it is impossible to regulate all kinds of possible future disputes in a casuistic way, at least the basic principles have to be set. "If there is some collective order, it is held that this order must correspond to a standard of equality to be just."[69] It seems that this theory mirrors a social contract theory applying it to a smaller community.

As Susanne Baer showed it, "Whenever freedom is not seen in an isolated way, but in relation to other basic rights, one inevitably comes to the conclusion that no basic rights can grant empowerment for the discriminatory use of freedom. The unity of the constitution commands rather to make freedom in equality possible, as a realization of human dignity."[70] It should be admitted that freedom is only freedom of those who are treated equally.[71] Disabled, who have no chance to access buildings so as to participate at a job interview, just like foreigners not served in restaurants, or potential tenants with dark skin colors have solely theoretical, but no real freedom of contract. The full realization of equality understood this way is a costly means of realizing non-discrimination. As people are inherently different, equal freedom will never be achieved, but the starting points could be equalized. However, ensuring even this understanding of equality may be burdensome in two ways. First, the realization of equality in the access to goods and services may drive a seller out of the market, if majority customers punish him for his non-discriminating behavior. If however the principle of non-discrimination extends to all sellers and service providers, the racist/sexist/etc. consumers will have no chance to boycott non-discriminating companies.[72] Second, direct costs occur when it

[69] Schiek: Torn between Arithmetic and Substantive Equality? *op. cit.* 153–156.

[70] "Wer Freiheit nicht isoliert, sondern im Zusammenhang mit anderen Grundrechten denkt, kommt zwangsläufig zu dem Schluss, dass kein Grundrecht dazu ermächtigen kann, Freiheit diskriminierend zu nutzen. Die Einheit der Verfassung gebietet es vielmehr, Freiheit in Gleichheit als Verwirklichung der Menschenwürde zu ermöglichen." Baer, S.: 'Ende der Privatautonomie' oder grundrechtlich fundierte Rechtsetzung? Zur deutschen Debatte um Antidiskriminierungsrecht, *Zeitschrift für Rechtspolitik*, 2002. 290–294.

[71] Schöbener–Stork: *op. cit.* 61., also shared by Winkler in Winkler: *op. cit.* paragraph 10.

[72] At a different level, the equalization of starting points had also been considered at the beginning of European integration. Article 141 EC Treaty (ex Article 119) states the principle of equal pay for equal work irrespective of gender. This is the oldest non-discrimination principle of EC law, which has been inserted into the Treaty of Rome upon the initiation of the French. France feared that its laws on equal pay for men and women will put them at a competitive disadvantage. If however all member States comply with the

comes to accommodation, be it the accommodation of religion or disability. The issue of allocation of these costs among the state, private parties and the disabled persons themselves shall be addressed.

Coming back to the anti-discrimination legislation, the first version of the extensive law implementing the relevant EU Directives received many criticisms and resulted in harsh opposition. It has been argued on the theoretical level that freedom-based systems are necessarily inherently discriminatory, and exception to freedom can only be granted to this in case of serious grievances, like in case of contracts that are against the public order. This problem however is said to be solved through the general clauses of the BGB.[73]

The solution of the modified bill can be regarded as a compromise. Total prohibition of discrimination applies only for "mass businesses" ("*Massengeschäfte*"). A special issue dominating the discussion in Germany is whether landlords may discriminate when renting a flat or a room. Again a compromise has been reached. Whenever a house, flat or room is to be rented or sold where the owner him- or herself is also living, one cannot speak of an offer to the public. Renting a room to someone with whom the landlord will live together or selling a part of the seller's house if he or she is going to stay in the other part of the building involves a part of private life, where law cannot enter.[74]

Some referred to freedom of contract as follows from the free development of personality laid down in Article 2 Section (1) Basic Law. It is however contested whether national basic rights as laid down in the domestic constitution, serve as a proper test for the limits of implementation of an EU law.

5. Legal Consequences of Non-Implementation

The European Commission filed a suit with the ECJ against Germany for the non-implementation of the Race and Framework Directives. The ECJ declared in its decisions C-329/04 of April 28, 2005 and C-43/05 of February 23, 2006 that, by failing to adopt, within the prescribed period, the laws necessary to comply with the Race and Framework Directives, Germany has failed to fulfill its obligations under EC law.

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principle, France will not suffer such detriments. Barnard, C.: *EC Employment Law*, Oxford, 2000. 198.

[73] Picker: *op. cit.* 771–784, 782.

[74] Schöbener–Stork: *op. cit.* 77.

According to the principle of supremacy of EU law, the *acquis communautaire* has primacy over the national law of the Member States. The principle *„lex posterior derogat lege priori"* does not apply in case of a conflict between the *acquis* and national law, since it would undermine EU law. Although there is no Treaty reference to this principle,[75] the answer is clear, the primacy of EU law has been established by the early case-law of the European Court of Justice.[76] The ECJ reestablished the principle of supremacy of Community law, and held that the only court that can invalidate EU laws is the ECJ.[77] In relation to the non-implemented Directive the question emerges whether German courts or parties can rely directly on the Directives in lack of an implementing national law, i.e. whether a person who feels to have been discriminated against may invoke the Directive directly, if a Member State has not (or not fully) implemented it.

There are major differences as to the direct effect of Treaty provisions, Regulations and Directives. Whereas primary sources of Community law and Regulations can be relied on directly in national proceedings, the situation of Directives is more complicated. Following from the nature of the Directive, as opposed to Regulations and decisions, the EC Treaty in its Article 249 prescribes for national implementation of Directives. Directives are the main „instruments of harmonization"[78], they are binding as the result to be achieved, however the form and choice of methods to achieve the objective are left to Member States.

The criteria of direct effect of Directives has been established by the case-law of the ECJ. The first is a general rule: any part of the *acquis communautaire* can only be relied on directly, if it is clear, precise and unconditional.[79] Following from their nature, Directives are not that detailed and precise, often the ambiguous language is the result of a political compromise, and national peculiarities can be taken into account in the process of implementation. In the

[75] In the Constitutional Treaty of the European Union this question would be solved. Article I–10 Section (1) of the draft Treaty by codifying existing case-law provides that the "Constitution, and law made by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States".

[76] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 3, Case 6/64 *Costa v E.N.E.L.* [1964] ECR 1141.

[77] For further discussion about the supremacy doctrine, see Craig, P.–De Búrca, G.: *EU Law: Text, Cases, and Materials*, Oxford, 2003. 275–316.

[78] Craig–De Búrca: *op. cit.* 202.

[79] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 3, Case 6/64 *Costa v E.N.E.L.* [1964] ECR 1141.

lead case, Van Duyn, the ECJ held that Directives are binding, as to their *effet utile*, i.e. their useful effect.[80] In this way Member States have been precluded from relying on the non-implementation of a Directive in cases initiated according to them by individuals.

Second, in case of Directives, the date for implementation must have been passed. Nevertheless, according to the ECJ's settled case-law, during the period of implementation of a Directive, Member States must refrain from taking measures that are likely hamper the attainment of the result to be achieved by the Directive.

In the case Mangold[81] the ECJ held that in relation to the compliance with the Framework Directive that it was „the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired."

Third, Directives, unlike Treaty provisions and Regulations only have vertical direct effect, i.e. they can only be invoked against public entities. The reason for this limitation is that Directives are addressed to the Member States, which are required to implement them into national laws. Since private individuals do not participate or influence that process, it would be unjust to make them responsible for non-implementation of EU Directives. It should however be mentioned that the ECJ has been very generous with the determination of what entity amounts to a public body.[82] Furthermore, it established the principle of indirect effect. According to the Von Colson principle, domestic courts are obliged to interpret all national laws in the light of the Directives.[83]

Another way victims can make use of the Directive is to invoke the concept of state liability. In case the state's breach of EC law is sufficiently serious, pecuniary compensation can be claimed. The fact that someone asks for compensation does not preclude him or her from relying on the vertical direct effect at the same time. The test for state liability and damages has been phrased

[80] Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337.

[81] C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981. Reference for a preliminary ruling from the Labor Court of München.

[82] E.g. Case C-188/89 *A. Foster and Others v British Gas plc Office* [1990] ECR I-3313, where British Gas was regarded as a public entity due to state influence.

[83] Case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

in the in the Francovich case.[84] The ECJ first established a test for making Member States liable for failure to implement Directives and in later cases refined the requirements.

Recently the Berlin Labor Court in a decision of July 13, 2005[85] relied on the Framework Directive in the case of a disabled applicant who has been rejected by the Berlin police. She received a compensation amounting to a gross six-month-salary at the police. Although she satisfied all criteria necessary and prescribed for the job of supervising parking lots, she has not been employed solely because she had a disability the degree of which was 40%. Although the applicant suffered from serious neurodermitis, she could work previous to her application to the police without any difficulties, and she has not been sick for a single day for the last 8 years before she applied for the job. Since her disability did not reach 50%, and she has not been granted equal status to severely disabled persons, she was not covered by the respective provisions of the Social Code.[86] Since the police is a public, state employer, the Berlin court invoked directly the respective provisions of the Framework Directive.

6. Conclusion and Predictions on the Future of German Anti-Discrimination Legislation

A few days before the present essay has been submitted, the German legislator adopted the long-awaited the General Equal Treatment Act, the anti-discrimination law transposing the EU 's equality Directives. The delay in the adoption of the domestic law and the failures of the several drafts were subject to hot debates in the last more than two years.

Susanne Baer explains the failure of the previous anti-discrimination drfats pessimistically by the general attitude of the majority of German citizens. She explains the "dissonance of the Germans in the European orchestra"[87] with the racist and anti-Semitic attitude of most members of society. Indeed, as the Eurobarometer studies show,[88] Germans' resistance to multicultural society,

[84] Cases C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

[85] 86 Ca 24168/04, NZA-RR 2005, 608.

[86] Article 81 Section (2) SGB IX.

[87] Baer: *op. cit.*

[88] Coenders, M., Lubbers, M. and Scheeper, P.: Majorities' attitudes towards minorities in European Union Member States, Results from the Standard Eurobarometers 1997-2000-

opposition to civil rights, favoring the repatriation of migrants, is beyond the average. Both East and West-Germans' attitudes are the second or third most negative from among the pre-2004-enlargement Member States towards minorities, depending on the specific minority-related question.

I believe the reasons for the lengthy non-implementation of the EU anti-discrimination Directives are multi-layered. The question is not whether private autonomy may be limited or not, but the extent to which restriction is permitted is at stake.[89] Equality is a long adopted value by the German legal system and also by society. The principle of equality is not questioned, rather the version of substantive equality is searched that is reconcilable with market considerations. A growing tendency against minorities at societal level is one side of the coin, which is coupled by the fact that German legal theory and tradition extensively elaborated on the concept of third party effect and non-discrimination, so the German drafters took the law implementing the EU Directives seriously.

With a sincere discourse law can change social conceptions more efficiently. Those discriminating either maliciously or without ill will are not faced with these ideas first when the law sanctions them, but can actively participate in the debate and express, develop their views on the matter. Law shapes social constructions not only in the field of equality, but also contractual freedom would be unthinkable without the legally constructed concept of contract. Law has an effect on all citizens irrespectively of whether they know the relevant provisions of the BGB or not. Similarly, equality legislation may add to people's general understanding of non-discrimination. In this sense the debate that evolved around the implementing law is certainly beneficial.

In the German literature sexual orientation, and religion are often mentioned as problematic grounds for non-discrimination in private relation; in contrast disability discrimination and its profit-diminishing aspects are mentioned surprisingly rarely. The reason is most probably that the Framework Directive does not specify a number of concepts: For example the definition of disability, sanctions for non-compliance are left to the Member States.[90] Therefore the realization of disability rights mainly depends on the Member

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2003, *Report 2 for the European Monitoring Centre on Racism and Xenophobia*, Ref. no. 2003/04/01, http://eumc.eu.int/eumc/material/pub/eurobarometer/EB2005/Report-2.pdf

[89] This is in line with Winkler's remark on the Basic Law: „I cannot see that there is a virgin part of the Constitution in which any kind of unbound, immaculate freedom would rule." Winkler: *op. cit.* paragraph 8.

[90] The responsibility of Member States has been reinforced in the Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* of July 11, 2006 in effect leaving the definition of disability up to the Member States.

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States themselves. As it has been shown, the German government did not only intend to implement the EU pieces of law, but wanted to give a way broader protection to traditionally discriminated groups than the Directives prescribed. This approach although benevolent, had theoretical and practical mistakes. Theoretically, it did not take sufficiently account of the fact that there are different reasons behind discrimination of individuals with diverse characteristics that serve as the basis of protected grounds.[91] It is certainly problematic to regulate the different kinds of mental, physical, psychological impairments together in one instrument, but it is almost impossible to regulate disability together with race, ethnicity, age, sex, sexual orientation, religion and belief, if detailed rules are to be laid down.[92] Such a common regulation is only imaginable in the form of a single constitutional equality provision, or an EU Directive setting only the objectives and the framework for national legislation. These are sufficiently broad and vague rules for a joint regulation of the different kinds of protected grounds. However, once the details are to be set, it is more advisable to regulate them separately. The practical side of the problem is that a law giving an overbroad protection to persons with diverse characteristics can hardly enjoy the support of all parties adhering to different ideologies. The lack of political consensus led to the fall of the previous draft laws or at least to the Act's hibernation for years. The fact that Germany wanted "to be more 'European' than 'Europe'"[93] was not only detrimental to the persons belonging to the groups the anti-discrimination law intended to protect, but Germany was also in violation of EU law for more than two years. At a more positive note however the German legal philosophical and political controversy can serve as an example for Member States which either complied with EU laws without any further legal debate and civil dialogue or even worse, translated the Directives into their official languages and promulgated it in the form of a national piece of legislation.

[91] In the German context, three reasons have been differentiated and an economic case has been advocated for anti-discrimination rules in private law by Engert in: Engert, A.: Allied by Surprise? The Economic Case For an Anti-Discrimination Statute. *German Law Journal*, 2003.

[92] This view has also been shared by among others Mahlmann: *op. cit.* 1045.

[93] Picker: *op. cit.* 771–784, 775.

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The Reform of Hungarian Criminal Policy

1. Reforms in an International Context

The assertion made by Géza Dombóváry about Hungarian criminal policy in the twilight of the 19th century,[1] according to which a huge number of various conceptions prevail concerning the imperative reform of criminal policy,[2] obtains validly in our days, as well. However, it is valid not only in a Hungarian, but also in an international context that multifarious conceptions concerning a major and urgent reform of criminal policy persist.

In my judgement, in countries under the rule of common law, criminal policy is marked by the correlation of punitive purpose and iron fist policy with restitutive justice. In the United Kingdom, government has proclaimed the directive of "tough justice", but the necessity of the extension of the scope of protection for victims and witnesses and of the support of community justice in a broad scope is also emphatic. The institution of community justice is also promoted by the factor of cost reduction, furthermore, citizens' confidence can also be reinforced by the opportunity for participation in the administration of justice. According to the operative criminal policy, criminal justice focuses on the compensation of victims of criminal offences. Perpetrators, on the other hand, have to reckon with a powerful and effectual criminal justice system that will take firm action, resolve cases and impose just punishment on offenders. Leng claims that traditional British criminology aligns with a notion of criminality, according to which the lower classes are preying upon the more prosperous middle classes. Nonetheless, the new directive of "Tough on crime

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[1] Géza Dombóváry (1874–1938), lawyer and free-lance contributor to law journals, such as *Büntetőjog Tára* and *Jogtudományi Közlöny.*

[2] Dombóváry, G.: *Fenyítőeljárási és börtönügyi adalékok vármegyéinknek XIX. század-eleji gyakorlatából* (Excerpts on the Law of Criminal Procedure and Prisons from Early 19th Century Practices in Hungarian Counties). Budapest, 1931. 3.

and tough on the causes of crime" also recognises that it is in the main the lower classes who bear the burden of criminality as victims.[3] The strategic plan for the period preceding 2009 continues to lay great emphasis on fighting crime and antisocial behaviour, which is substantiated by the assumption that the population is living in fear. Therefore, it is a priority in the United Kingdom to convince law-abiding citizens that they are safe.[4] Accordingly, Act of 2000 on Local Governments stipulated the duty of local authorities to consult key stakeholders and elaborate community plans for the advancement and improvement of economic, social and environmental welfare in their areas and for contribution to sustainable development. Act of 1998 on Crime & Disorder set forth the imperative of co-operation of prisons and local governments so as to guarantee the safety of communities. Since its adoption in the summer of 1998, each local government in Britain has been obligated to elaborate and implement a strategy for the reduction of crime and disorder in the area within their boundaries.[5] Vivien Stern introduces a British project (from 2000 to 2004) under the title "Prisoners Working for the Benefit of Others". It had two main objectives, namely, to induce debate on the purposes of imprisonment and prisons and to generate practical changes in the functioning of prisons. These objectives were based on four tiers:

1. Promotion of new relations between prisons and communities,
2. Guaranteeing opportunities for prisoners to work for the benefit of others,
3. Raising the awareness of prisoners of the suffering of victims of criminal offences,
4. Establishment of new bases for conflict settlement in prisons.[6]

With respect to the US criminal justice system, according to Becket and Sasson, it is "a system of injustice".[7] The gross imbalance between high-level police operation and the excessive amounts of funds spent on the work of the police *vis-a-vis* the work overload of courts and their crippling lack of funding

[3] Leng, R.: The Reform of Criminal Jurisdiction in England in the 1990s, in: *Kriminálpolitika és büntető igazságszolgáltatás Nagy-Britanniában a '90-es években* (Criminal Policy and Justice in Great-Britain in the 1990s). Miskolc, 2000. 34–48.

[4] Administration of Justice, Rights and Democracy, DCA Strategies 2004–2009, Department of Constitutional Matters, www.dca.gov.uk/dept/strateg/dcastratch4.

[5] Establishment of Relations of Prisons and Local Governments, papers from a conference held in Middlesborough on 9th July, 2003.

[6] Stern, V.: *Prisons and their Communities: Testing a New Approach.* An Account of the Restorative Prisons Project, 2000–2004.

[7] Becket, K.–Sasson, Th.: The Politics of Injustice: Crime and Punishment in America. Thousand Oaks, CA:, 2000.

strikingly resembles a well-organised system of the disregard of justice.[8] Accordingly, as Wacquant asserts, the US criminal policy is currently offensive, which is considered by many the only way to fight crime.[9] As to more moderate views, the prevention of antisocial behaviour and fighting crime is not feasible via the "get tough" trend. The lower classes, expelled to the periphery of the labour market and forsaken by the welfare state, constitute the main targets of the policy of "zero tolerance", which, as a consequence, divides both experts and the general public. According to Katalin Gönczöl, a confidence crisis has shaken the foundations of the welfare state and of criminal policy,[10] the latter of which has ascended to the level of emotionally overheated great power politics.[11] The epoch of the welfare state is over, since it is withdrawing and yielding its role to the punitive state. Therefore, Katalin Gönczöl assumes that severe changes have ensued in US criminal policy. The justice system does not deal with the causes of crime, since it merely purports to punish offenders, compensate the innocent and protect the interests of law-abiding citizens.[12] Earlier, the "underclass" received aid, whereas now, the state strikes down on "criminal lower classes" with an iron fist. Nils Christie quotes Mauer by stating that, undoubtedly, the US has a high crime rate, whereas, research conducted in 2004 shows that despite falling crime rates, the number of the incarcerated is rising in the United States.[13] The latest figures also suggest that the recent increase in the number of the incarcerated is not due to a rise in the number of offences, but to the more stringent criminal policy of the past decade.[14]

Criminal policies in the Nordic countries are not unified. Nevertheless, according to Lahti, a "Scandinavian criminal policy" that demonstrates several common features is distinguishable. Several common criminal policy strategies (e.g., social and situational crime prevention, consideration of costs and benefits, sanctions policy) prevail in order to ensure the proper application of the

[8] Wacquant, L.: *A nyomor börtönei* (Prisons of Destitution). Budapest, 2001. 35.

[9] *Ibid.* 50.

[10] Gönczöl, K.: Szolgáltassunk igazságot! (Administration of Justice). In: Kovacsics Józsefné (ed.): *Egy élet az igazságügyi statisztika szolgálatában. Ünnepi kötet a 70 éves Varró István tiszteletére* (A Life in the Service of Judicial Statistics. Special Volume in Honour of István Varró at the Age of 70"). Budapest, 2006. 47–55.

[11] Gönczöl, K.: A nagypolitika rangjára emelkedett büntetőpolitika (Criminal Policy Ascending to the Level of Great Power Politics). *Kritika,* 2001. 12. 116–121.

[12] Wacquant: *op. cit.* 46.

[13] New Incarceration Figures: Rising Population Despite Falling Crime Rates. The Sentencing Project. www.sentencingproject.org.

[14] Nils, Ch.: *Büntetésipar* (The Industry of Punishment). Budapest, 2004. 110.

fundamental elements of Scandinavian criminal policy.[15] Anttila analyses the common requirements posited by Scandinavian criminal justice,[16] which involve that *a)* conditions in penal institutions should correspond to everyday social life to the largest possible extent, *b)* penalties must be enforced in such a manner that they do not needlessly encumber, but potentially promote the future reintegration of convicts into society, *c)* the period of imprisonment should be effectively utilised, *d)* disadvantages incurred by the deprivation from freedom must be precluded so far as possible.

Consequently, we can affirm that demands for the institution of a more unified or harmonised criminal policy on an international as well as on a European level persist. Alternative punitive sanctions tend to be instituted all over Europe. One of these is the flexible method of mediation, which is more customary in the area of problem-solving. Mediation is based on an intense and broad participation of the parties concerned in the criminal procedure. Owing to this method, the sense of responsibility of offenders may increase.[17]

Eventually, Vivien Stern claims that it is market society per se that tends to produce criminality. Stern argues that with globalisation, crime and punishment transgresses national borders. The rich retreat into communities behind expensive security systems, at the same time, the poor tend to fall prey to criminality and abuse by corrupt police. In parallel, an extended range of acts and an increasing proportion of the population are criminalised and imprisoned. She claims that the tendency of criminalisation and imprisonment does not eventuate more effective control of criminality and safer communities, furthermore, she expands on the manners of the criminalisation of the poor and of shaping social responses to crime by commercial interests.[18]

In Hungary, according to László Korinek, a growing "moral panic" prevails owing to the impact of the media and politics,[19] which tend to focus on winning eligible voters over to the cause of the party in government, and before long, in

[15] Lahti, R.: Towards a Rational and Human Criminal Policy–Trends in Scandinavian Theory of Penal Law. *Journal of Scandinavian Studies in Criminology and Crime Prevention*, Routledge, (1) 2000. 141–155.

[16] Anttila, I., *Criminal Justice and Trends in Criminal Policy*. In: *The Finnish Legal System* (ed.: Uotila, J.). Finnish Lawyers' Publishing Company Ltd., Helsinki, 1985. 232–242.

[17] The Ministerial Committee of the Council of Europe defined the basic principles of mediation under Protocol No. 19 of 1999.

[18] Stern, V.: *Crime and Punishment in a Market Society. How Just is the Criminal Justice System?*–Lecture at the British Institution of Human Rights, 9th February, 2006.

[19] Korinek, L.: A statement made at a conference organised by the Faculty of Political and Legal Sciences at the Eötvös Loránd University on April 8, 2006.

an effort to get messages through to voters, politicians will be using the Penal Code as a "message book".[20] As he established, the importance of safeguarding "security" becomes more emphatic, when the majority of society is overwhelmed with fear and anxiety.

2. Elements of Criminal Policy

The purpose of criminal policy is the circumscription of the *objects and manners of punishment*. The term of sanction (sanctio) originally denoted sanctification or consecration, i.e., response to human behaviour with different implications. Bona fide deeds are sanctioned with rewards, male fide behaviour with punishment.[21]

The conceptualisation of *individual responsibility* by the law-maker will determine the definition of the *objective of punishment*. In a determinist approach, the individual will forever bear the stigma of his/her determination to commit criminal offences for either genetic, biological, psychological or sociological reasons. If the individual is regarded as a determined offender, the state will respond with the elimination and isolation of the person. In this case, the individual shall bear no responsibility, since his/her acts are mechanically determined by external or internal factors. Whereas, the offender's responsibility is not established, he/she will not be relieved of responsibility, since society must be protected from determined offenders. According to this approach, offenders are in a difficult situation, since they have to endure the uncertainty of confinement for indefinite, but possibly very long periods. In a non-deterministic approach, the individual that resorted to unlawful action out of free will shall receive equitable punishment in direct proportion to the crime committed.

As Beccaria formulates, *penalties* are explicit instruments that prevent forceful and law-breaking individuals from immersing society into a primordial chaos. Accordingly, Carrara also claims that punishment is not designed to guarantee either the predominance of justice, or retaliation of the perpetrator, or compensation for damages of the aggrieved party, or the intimidation of citizens, or the correction of the offender. These may be (desirably) appurtenant with the

[20] Korinek, L.: quote from lecture.

[21] Angyal, P.: *A jogbölcselet alaptételei* (Maxims of Legal Theory). 5th Edition, Pécs, 1926. 94. Angyal defines sanctions (sanctio) as follows: Legal consequences of any human behaviour affecting the subject of that behaviour. Legal sanctioning by the state manifests itself in the regulation of the consequences of acts. Bona fide acts entail rewards, whereas, male fide acts entail punishment and compensation.

penalty, however, its imposition would still be imperative without any of these effects.[22] The objective of punishment consists basically in the restoration of law and order, since criminality eventuates in moral damage by reason of the disturbance of order. Therefore, punishment is assigned to redress such damages and restore order. As Carrara concludes, criminal law, which must be limited by justice, must be based on the protection of human rights.

Mátyás Vuchetich, author of the first Hungarian scholarly work on criminal law, asserted that the legal grounds for punishment consists in the stipulation of the threat of punishment. As he maintained, a counter-motive needs to be instituted *vis-a-vis* the intent to commit criminal offences. Since punishment can never be an objective per se, its immediate objective consists in the enforcement of the principle of "quo peccatum est ne peccatur", while, a more prospective objective is safeguarding law and order and the persistence of the state under the rule of law.[23]

While analysing *retaliatory measures*, István Bibó emphasised their emotional character. Retaliation, accomplished in the form of rational and strict legal procedures and institutions, is a legal consequence that originates in and releases resentment. Wherefore, we are unable to accept a punitive system based exclusively on practical defence, since such a system is deemed indifferent, extremely tolerant with criminality and void of sympathy for the resentment of the aggrieved party or community, which is a characteristic feature of all forms of institutional retribution.[24]

In recent theory, the assumption that criminal offences should not be necessarily followed by punishment has gained ground, whereas, the necessity of the enforcement of the principle of *equal opportunity* has been also emphatic. Tibor Király regards the *imperative of legality* as a theoretical parallel of equality before the law, which implies that citizens are guaranteed equal protection of the law and that all offenders shall receive equal and proportionate punishment for the crime committed. Despite the embracement of the principle of equal opportunity, the state sometimes renounces punishment for practical reasons, such as economisation on and adjournment of proceedings or for bare

[22] Carrara, F.: *A büntető jogtudomány programja* (The Program of the Science of Penal Law). Volumes 1–2., Budapest, 1878, Vol. 2, 74.

[23] Madarász, A.: *Vuchetich Mátyás*, in: *Büntetőjogász professzorok a Pázmány Egyetemen* (Professors of Criminal Law at the Pázmány University). Budapest, 1942. 24.

[24] Bibó, I.: *Etika és büntetőjog* (Ethics and Penal Law). (1938) In: Bibó, I.: *Válogatott Tanulmányok* (Selected Essays 1935–1944). Budapest, 1986. 161–182.

negligence.[25] Accordingly, Ákos Farkas maintains that the enforcement of the principle of equal opportunity seems to supersede the imperative of legality. Therefore, it is no longer evident that criminal offences must be followed by punishment. Criminal justice does not always impose proportionate penalties, sometimes it merely threatens with punishment.[26]

In point of principle, one major alternative of criminal policies obtains, viz., the options of *restrictive* and *restorative policies*. The first alternative is based on the assumption that the criminal justice system can rely on citizens' traditional respect for legality, therefore, conventional and strict penalties will be supported by the public. In return, the state provides guarantees for citizens that it will not tolerate the infringement of norms and it will resort to force in order to promote enforcement of the law. This improves the citizens' sense of security and supports the image of a powerful state, which may resort to preventive measures, criminal investigation and law-enforcement. Whereas, a drawback of the *restrictive* alternative consists in the difficulty to ensure timely responses to new developments. Furthermore, it hampers facing the fact that delinquents are part of the same society that the majority belongs to. Whereas, offenders do not receive assistance or models to follow concerning the appropriate manner of conflict settlement that meets the expectations of the majority of society, besides, they do not recognise reasons for being personally interested in showing due respect for the norms of the majority. As to the *restorative* alternative, it is based on the conception that criminality is a product of society, therefore, criminals are not responsible for the offences committed. Accordingly, upon the judgement of criminal offences, the circumstances facilitating that the individual followed norms deviating from those embraced by the state and the majority of society must be taken into consideration. The enforcement of that policy, however, requires active cooperation by society, which means that citizens must learn to apply important defence methods and instruments, which relieves considerably higher costs of external policing as well as the public's fears. Norms can be just partly enforced by administrative principles and mechanisms, since infringements of norms and their causes tend to have local characteristics. These can be effectively eliminated by local methods and instruments, furthermore, local achievements

[25] Király, T.: Bizonyítás a készülő büntetőeljárási kódexben (Evidence to the Currently Drafted Code of Penal Procedure). In: Domokos, A. (ed.): *Kriminológiai Közlemények* 54. Budapest, 1996. 90–103.

[26] Farkas, Á.: *A büntetőeljárás reformja és a bűnmegelőzés* (Reform of the Regulation of Criminal Procedure and Crime Prevention). In: *Büntetőpolitika, bűnmegelőzés* (Criminal Policy and Crime Prevention). Budapest, 1994. 9–29.

result in a sense of higher local security. A drawback of the *restorative* alternative is that a policy based on the unconditional protection of the individual can expect less support by the community, than conventional criminal policy. Then again, the enforcement of the instruments of national criminal policy is not always feasible on a local level. The co-ordination of various crime-prevention institutions can be far more difficult, than the institution of administrative control mechanisms. Besides, it may also result in the abandonment by the state of its key administrative tasks. In our days, advocates of community punishment and community policing are criticised as utopians.

Recently, the importance of *social control mechanisms* and the responsibilities of small communities have been subject to deliberation. As Károly Bárd articulated in the 1980s, the functioning of the justice system is impossible without social support and recognition. As we are aware, criminal justice functions as a minatory institution operated by the state, however, if it expects social recognition on a long term basis, it shall not content itself with the establishment of the enforcement apparatus, but it must function so as to facilitate that society supports the exercise of jurisdiction and assumes it as a social cause.[27]

3. Hungarian Criminal Policy in Retrospect

As early as a hundred years ago, József Trócsányi emphasised that all regulations, morality and the rule of law purport to promote social needs, whereas, their ultimate purpose is the sustenance and protection of social life. Adopted norms compel observance of the law, which is enforced by state administration *via* its "mechanical compulsive authority" (Jhering's term), whilst, society resorts to psychological pressure to impel moral behaviour.[28] Then again, in the early 20th century, Ákos Pauler criticised the legal system, including the system of criminal justice, for failing to create ideals. As he claimed, any correct law, i.e., ideal law is sanctioned by the demonstration of respect for human beings. Thus, by prescribing citizens to sustain culture, the state will also be constituted as a state founded on the rule of law pursuant to its purpose to be governed by law.[29]

[27] Bárd, K.: Társadalomtudományok és büntető igazságszolgáltatás (Social Sciences and Criminal Justice). In: Kerezsi, K. (ed.): *Kriminológiai Közlemények,* 26–27. Budapest, 1989. 5–19.

[28] Trócsányi, J.: *Erkölcstelen ügyletek* (Immoral Transactions), Budapest, 1909.

[29] Pauler, Á.: *Az ethikai megismerés természete* (The Nature of Ethical Knowledge). Budapest, 1907. 228.

In connection with correction by imprisonment, Eötvös and Lukács maintained that punishment is aimed at repression and correction. Lajos Kossuth wrote a pertinent editorial on 14th August, 1842, in which he urged Bertalan Szemere, the Interior Minister to substantiate punishment by imprisonment as a manner of correction. As Deák-Hertelendy formulated in his deputy report of 1840: "Punishment loses its objective of benefiting the common good, if it is imposed on offenders merely in retaliation, not as a corrective instrument, if prisons are mere places of suffering and no attention is paid to moral improvement. Neither the rigour of punishment, nor the certainty of its immediate imposition will suffice to reduce the number of criminal offences, because fear without stronger morality will not generate observance of the law in the general public." "Prisons have so far functioned as schools of criminality."[30]

Early emerging practical points of view are instantiated by Balla's contention, which demonstrates that arguments for equal opportunity and expedience were not first propounded in the second half of the 20th century. Balla suggested that the costs of building more modern prisons in order to provide more human accommodation for convicts could be easily covered by the establishment of lotteries. He claimed that "although, lotteries are decadent institutions, pure decency does not prevail in real life. Politics can be administered by decent instruments as long as these prove useful, however, it is beyond doubt that lotteries are not so detrimental morally as the horrendous damages, or, in fact, perils caused by currently functioning prisons."[31] This peculiar suggestion for prison reform may seem naive, however, pragmatic ideas proliferated in the late 1800s.

Gyula Wlassics, as an advocate, albeit, not an explicit disciple of the classic school, acknowledged the necessity of reforms. As he asserted, "whenever a new trend of criminal policy challenges the constitutional guarantees and their moral and legal foundations, we must defy."[32] For instance, he precludes the possibility that a criminal justice system may impose unspecified punishment, which he, however, deems admissible *in re* specific offences. With respect to first offenders, some conceptions emphasise that, in order to avoid social stigmatisation, even the reprimand of offenders should be avoided. An article by Dombóváry illustrates that this is by far not a new idea: "With regard to the

[30] Dombóváry, G.: *Fenyítő eljárás és büntetési rendszer Pest megyében a XIX. század első felében* (Punitive Procedures and the System of Punishment in Pest County in the First Half of the 19th Century). Budapest, 1906. 272.

[31] *See: ibid.* 278.

[32] Proniewicz, F.: *Wlassics Gyula.* In: *Büntetőjogász professzorok a Pázmány Egyetemen* (Professors of Criminal Law at the Pázmány University). Budapest, 1942, 88.

minor significance of the offence, the court will establish that the crime was committed, but will not impose punishment. With regard to valid mitigating circumstances, culpability is so slight that even the usual reprimanding procedure will be neglected." In this case, „the remission of punishment is grounded on lenience", which corresponds to the standpoint of most recent criminal law.

At the previous *fin de siécle*, Liszt was accused of abandoning the classic path of criminal law for the Romantic approach of criminal policy. Later, Finkey defended Liszt *vis-a-vis* his contemporary critics, by asserting that the revision of the practical elements of criminal law was also imperative.[33] While focusing on the required reform of the penal system in 1935, Finkey insisted on the institution of a purposeful criminal policy by maintaining that more severe penalties should be imposed on offenders who commit serious criminal offences, whereas, penalties *in re* lighter offences committed for pardonable reasons should be mitigated. The necessity of differentiation could hardly be formulated more matter-of-factly today.[34]

Currently, the reformulation of the Penal Code is in progress. With respect to the requirements posited by international criminal policy, the attainment of the substantiation of social peace, of the differentiation of the system of sanctions, of the enforcement of community punishment in the broadest possible scope is expected. If we compare the before-mentioned objectives with those of the turn of the 19th and 20th centuries, we can discern that the basic purposes of criminal policy are still the same, since specific objectives are recurrently reformulated upon the commencement and implementation of reform processes. The ultimate purpose of the current reform of Hungarian criminal policy may be assessed as the institution of a "fair and equitable" criminal justice system. Ferenc Irk, while elucidating the criminal policy of risk society in Hungary, concludes that changes need to be effected in criminal law, since, upon the examination of effective regulations, we can establish that those were framed to meet the demands of the 19th century and the first two-thirds of the 20th century. Whereas, a continuous change has marked the recent 25 years *in re* the priorities of judgement of dangerous social behaviour, this made no impact on criminal policy, even though Hungarian penal law looks back on an era of 150 years of successful adjustment of theoretical principles to practical require-

[33] Finkey, F.: *A XX. század büntetési rendszerének reformkérdései* (Reform Issues of the 20th Century Penal System). The General Meeting of the National Association of Judges and Prosecutors in Kaposvár on 15th September, 1935. Budapest, 30.

[34] *Ibid.* 31.

ments.[35] We can only affirm, it is unquestionable that an overwhelming demand for change prevails, which is also supported by a large number of publications. In prospect, we'll see, whether according incentives will finally effectuate a comprehensive reform, and particularly, whether ideas in concordance with the legal requirements of the 21st century will permeate the regulations of new Penal Code.

[35] Irk, F.: *A társadalmi–gazdasági változások és a bűnözés kapcsolata. A kockázat-társadalom kriminálpolitikája* (Connection between Social–Economic Changes and Criminality. The Criminal Policy of Risk Society). In: Irk, F. (ed.): *Globalizáció és kriminálpolitika* (Globalisation and Criminal Policy). Budapest, 2006. 36–48.

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Application of the Concept of Significant Market Power in Electronic Communications[1]

Summary notes of an international conference held December 1–2, 2005[2]

The concept of significant market power is of paramount importance in regulating electronic communications markets. The notion of significant market power (SMP) is almost equivalent to the competition law concept of dominance, however, SMP requires a more pro-active regulatory approach since its aim is not primarily to ex post deal with competitive restraints as general antitrust rules do, but to establish a competitive market from an originally monopolistic situation in a network based economy where competitive bottlenecks are characteristic. In order to achieve a competitive market an active and continuous regulatory contribution is needed in order to help to open up those bottlenecks for competition, until sustainable competition is achieved on the relevant market.

On December 1, 2005 some 80 experts and professionals from all over Europe gathered in the headquarters of the Hungarian Academy of Sciences for an international conference on Application of the concept of significant market power in electronic communications. The conference was organized by the Centre for Infocommunication Laws in the Institute of Legal Studies, Hungarian Academy of Sciences (CIL), in cooperation with two well known German research and consulting centres, the Wissenschaftliches Institut für Infrastruktur- und Kommunikationsdienste (WIK), and the Institut für Informations-, Telekommunikations-, und Medienrecht (ITM) of the Westfälische Wilhelms-University of Münster, Germany.

The conference aimed at providing a systematic overview of the various legal and economic issues regarding the application of significant market power (in the following SMP) concept introduced by the new EC framework

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[1] *Experiences, procedural questions and protection of rights in the new and the old Member States.*

[2] Budapest, Hungary, organised by the Centre for Infocommunications Law, Institute for Legal Studies, Hungarian Academy of Sciences.

on electronic communications, at both national and EU level, and the practical and theoretic implications of the results of the SMP designation in the new and old Member States and on the policy-making of the EU itself. Special attention was attributed to the first practical experiences with regard to SMP decisions of the National Regulatory Authorities and to the so called Article 7 procedure, the harmonization in the new Member States and selected problem areas, which can have an effect on the 2006 review of the electronic communications framework.

The topic of the conference has been subject to different research projects conducted by CIL in the last two years and the program and some presentations contains scientific results of the above research projects, too.

For an unprecedented two days, the participants from Hungary and other fifteen European countries enjoyed the rare opportunity of meeting and sharing information with each other about their experience and discussing the common goals of the EU regulation with regard to SMP. At the conference there were nineteen presentations in six sections. The invited lecturers came from respected international and national organisations and institutes from all over Europe. The organisers and the academic background provided a neutral environment and a unique opportunity where both the EU and governmental-regulatory experts, practicioners and leading academics could exchange their views on the practical and theoretic issues of SMP regulation.

Prof. Dr. Ákos Detrekői, president of the National Council for Communications and Information Technology opened the international conference on Thursday, 1 December. In his opening speech, besides the introduction of the venue and the conference topic to the participants he pointed out that the managing the problems of the SMP procedures is in the spotlight of the European regulation.

A keynote presentation by *Krisztina Rozgonyi*, Member of the Board of the National Communication Authority Hungary outlined the problems of the regulation in Hungary and the main challenges of the emerging new technologies in today's EU policies. She stated that according to the changes in the technology and the market of electronic communications, a new and open environment should be created by the regulators, but of course the rules of that market should suit a lot of criteria, which are mentioned in the concerning programs of the EU. After the opening lectures, the conference continued with the presentations in six sessions following each other. The themes of the sessions outlined the whole problem circle of the SMP concept.

The presentations in the first session had the objective to give an overview on SMP regulation in the European Union. It was opened by the presentation of Mr. *Anthony Shortall* from the European Commission, Directorate General

Information Society. Mr. Shortall, who is currently working on the review of SMP rules gave a very detailed overview of the SMP regime in the European Union. First, he talked about the regulatory framework and current issues of its application. The so called "Three step approach" (i.e the identification of relevant markets suspectible for ex ante regulation, assessment of effective competition, application of remedies) has great importance in regulation. The lecturer noted that during the application of the processes, the definition of markets, competition and dominance have great importance. The dominance is near to the monopoly level of market power. The different kinds of common regulations contain almost clearly the obligations and the applicable remedies of the national regulatory authorities related to the SMP–but an update process of the Access Framework was started at the end of 2005. The planned timetable of the possible discussions was already known in December, no results of them were publicized till this time. As Mr. Shortall stated, the update is needed because of the considerable changes at the relevant market. The declared national consultation and the public workshop offer a great place for representatives of the authorities to meet with the market operators.

This presentation was followed by the lecture of *Dr. Ulrich Stumpf*, deputy director of the WIK. He outlined the economic aspects of the SMP concept. According to the analysis of the market notifications, it could be stated that some controversies came up after the application of SMP concept. The process of the notification of markets takes a lot of time, especially for the smaller countries with smaller background. The notification of markets needs an exact definition of markets, which require a lot of information. Markets could be circumscribed by legal measures, by the different type of services, retail costumer groups and by the technologies used. All of the above mentioned facts should be considered during the NRA's notification. As Dr. Stumpf stated, market analysis should include the forward looking and the greenfield approach, too. There's a special kind of SMP, when joint dominance realizes. In case of SMP this special collective dominance is satisfied in relation to market for wholesale mobile access and call origination on public mobile telephony networks. The complexity of joint dominance requires the elaboration of specific tests by the NRAs for proper identification and analysis.

After a short coffee break the conference continued with a very interesting lecture of Mr. *Stefan Kramer* from the European Commission, DG Competition, Brussels. The theme of the lecture was the view of the Art. 7 Task Force on the result of market notifications. He illustrated the main aims and objectives of the of the Art. 7 procedure. According to the high number of received notifications, it can be stated, that it works in practice but not with the same efficiency in each Member State. He pointed out that during the last two years

the Commission had some key findings on the procedural issues. The cooperation between the National Regulatory Authorities and the National Communication Authorities sometimes has difficulties, which impact on the dynamism of the procedure. The veto decision was used only in a few cases. During the last two years it became clear that there are cases when the SMP analysis raises complex competition law issues, so a comprehensive approach is necessary. Mr. Kramer stated that a better targeted and consistent regulation is needed for the future. Probably, the ongoing public consultation regarding market review will bring important benefits.

The last theme of this session was the view of the European Regulators Group (ERG) with regard to applicable remedies. *Prof. Dr. Heinrich Otruba* talked in his lecture about the key findings of the common position of the ERG on the approach to appropriate remedies in the regulatory framework. In the presentation it was stated that the recent common rules and measures have many advantages, just as they give more competence for NRA's and allow flexible reaction to market conditions. The regulation of remedies is of great importance in order to create guidance for the authorities and certainty for the market operators. He also analysed the notifications received from the Member States, and the defined markets. The replies for these actions were quite soft as the Commission used veto only in four cases from the 303. This practice was also a reason for the update process which started with a call for public consultation in the end of 2005. The main changes will be in the clarification of the often used emerging market's definition, the charting of the new infrastructures, the removal of remedies and in the variation of remedies.

The second session was started at 2 p.m. with the presentation of *Anne Hombergs* from ITM, Germany. She was talking about the procedural rules concerning SMP. The regulation can be divided into three parts: the SMP could be defined in narrow sense, through flanking procedures and by general procedural rules. She detailed the market regulation procedure in the different kind of common papers. The so called flanking procedures contain the consolidation procedure, the veto procedure and the consultation procedure. During these acts the NRA's have high importance, but due to their high workload, to adopt the final decision takes a lot of time, which causes instability at the market.

Till that time the participants were able to listen to some lectures of the SMP concept and the relevant rules, but only a few words were spoken on the practical experiences of the procedure of Article 7. The expert of the German Bundesnetzagentur, *Dr. Annegret Groebel* presented a paper on the application of the SMP regulations in practice. She started her presentation with the review of the regulatory framework, its principles and role. After it the participants of

the conference heard a very deep study of the remedies process and some information on the form of consultation and consolidation in Germany. The notification of markets in Germany is close to the end. The proposed remedies were notified separately as the Bundesnetzagentur aims at monitoring the result of the consolidation procedure with regard to the notified markets before taking a decision on remedies. She also discussed the problems of the notification of different markets and the efficiency of the veto decision.

There is no debate that not only the rules and measures are important, but the regulators should also ensure the protection of rights. Both lecturers of the third session analysed the enforcement and protection of rights, but they emphasized two different aspects of the question. In his presentation *Prof. Robert Queck* vice director of the Research Centre for Computers and Law at the University of Namur (CRID) stated that the National Regulation Authorities (NRA) have a central role through the whole application process of the regulatory framework. The NRA's are mostly well adjusted to the system of the other national decision-making and executive organisations. There is no debate that as for the NRA's complex exercises the conditions for effective monitoring and proactive market regulation is a must. In the lack of these their functioning will not be appropriate. But one should not forget about the division of powers that Montesquieu prefers: the executive, legislative and judicial powers should be separated. The NRA's independence from both service providers and government has great importance as it guaranties the quality of the function. As sometimes there are high numbers of authorities concerned with electronic communication sector, Mr. Robert Queck outlined that it could cause problems in transparency and coordination. The role of NRA's should be analysed at a European level, as well, because there are a lot of common measures and rules which have influence on the national authorities. In the end, if we think about future amendments on regulation, we will have to consider both economic and social needs.

The last lecturer of the first day was *Christiane Seifert* from the Bundesnetzagentur (BneztA), the German regulator, she talked about the problems regarding protection of rights. In Article 4 of the framework directive stands that for an effective and appropriate mechanism for the review of the decisions of the NRA an independent appeal body should be created. To meet these demands, the function of the NRA's needs to be analysed at a European level–this statement is common with the former lecture. Ms. Seifert raised problems of the approach among NRA's decision, standpoint of Commission and the decision of the Court. The efficiency of the NRA's function is sometimes bottlenecked by the Commission's decisions, but for solving the emerged problems not just a sector-specific but a comprehensive amendment is needed.

After the interesting and crowded day the participants were invited to take place at a gala dinner in a good and well-known restaurant in the downtown of Budapest where they had time to discuss the former lectures in an informal environment.

The second day started with the session titled SMP assessment in Member States. In the first lecture *Prof. Szabolcs Koppányi*, managing researcher of CIL, talked about legal problems associated with the SMP assessment procedure in Hungary. He affirmed the importance of the independent functioning of NRA's but he also mentioned the problem of regulatory capture, which means that the interest of the electronic communication industry raise its influence on the regulatory authorities–but lobby activity appears at common level, too. As Mr. Koppányi stated there are cross-area problems: the different legal areas follow several principles even ones in conflict with each other. In some cases the legislation is well written, but the preconditions for effective implementation are missing in lack of cross-area solutions. The new Member States have much more problematic points at the harmonisation. The emergence of the regulatory framework is an issue of continuous development and the countries of the EU-15 had the opportunity to affect even the regulation process, in contrast to the new member states. Without the experience in the application of the European regulation, the NRA's in the new member states often lack liberalisation experience and are reluctant to confront with the Commission. The problem of passive attitude emerges when the NRA does not act. There is also a special methodology for market analysis used by the Hungarian NRA, as it does not possess the quality of normativity nor the quality of a regulatory decision. As a consequence, the whole concept and methodology of the market analysis procedure is not subject to judicial review, contrary to Art. 4 FWD.; neither does it deal extensively with remedies.

After a short debate the conference continued with the regulation of broadcasting market–the lecturer was *György Molnár-Bíró*, an expert of the CATV project at the NRA of Hungary. He outlined in his presentation the high fragmentation levels of the cable TV broadcasting market, therefore the regulation faces with issue of problems. In the last few years technology had changed a lot and new challenges appeared at the market. To date, digitalization is an everyday issue at this market, but as the switch to the new technology is expensive, it will be a long procedure. In Hungary, there are more than five hundred cable TV providers, most of them has regional dominance at the market of this broadcasting service. Now the regulation of the sector needs changes, the application of light touch regulation would be useful at this case. Mr. Molnár-Bíró raised the question as the service providers do not have the interest to change, who would make the first step?

The third lecture of the day was held by *Krisztián Kecsmár*, who is responsible for the implementation of the framework in Hungary at the European Commission, DG INFSO, Brussels. He gave a general overview on the implementation processes and problems of the EU Member States. After a short overview of the SMP regulation, he talked about the decisional practice of the European Commission (Commission). The Commission has various tools to affect market regulation like making statements at formal and informal decisions, detecting problems at transposition or application of the common rules, and launching infringement proceedings. Even some of the old member States face with difficulties at the transposition of the SMP rules because of the discrepancies at the national system. In Finland, the rigour and inflexible regulation led to infringement proceedings. Most of the Member States have problems with the notification of markets, although it is one of the main tasks of the national authorities. In the end, we should only hope that the future amendments of the common regulation would be more applicable in the Member States.

Through the *roundtable discussion* on the specific problems of EC harmonisation a lot of actual and practical problems emerged. Although the discussion was focused on the difficulties of the new Member States, the questions of the participants were mostly about the whole operation of the SMP regulations.

The organizers of the conference had respect for the fact that in a few years a new round of enlargement will be completed, and both Romania and Bulgaria will have to apply the acquis. The representative of the Romanian Communication Authority, *Vlad Cercel*, had the opportunity to report on the proceeding transformation and the emerging problems in the Romanian electronic communication sector. The Romanian government set up the Regulation Authority in 2002, after the adoption of New Regulatory Framework. At that time the Romtelecom had still dominance of the fixed line services, although a liberalisation process was started in 2001. The most increasing part of the electronic communication market is the provision of internet services. Mr. Cercel gave detailed overview of the application of the SMP concept in Romania: he stated the main criteria for determination the individual and collective significant market power and described the NRA's cooperation with the Competition Council. According to the national environment, the Article 7 procedure is not applied, and no decisions on SMP were made by courts. He also analysed in his presentation the national wholesale and relevant retail markets. In the last few years competition increased in all markets, new technologies become available in short time for the costumers. The elaboration of the new national regulation on electronic communications sector is in progress, and the main objective is to get closer to the harmonisation of the EU framework.

Mr. *Ioannis Constas* from the South Eastern Europe Telecommunications and Informatics Research Institute (INA) in Greece gave a more general overview of the case of the Balkan countries aiming to become a member of the EU. After the short introduction of the INA, he talked about the future enlargement procedures and the affected countries (Romania, Bulgaria, Croatia and Turkey). Although the governments in these countries have the will to adopt the EU's regulatory framework for electronic communications sector, they have problems through the realization. Some of the mentioned challenges are the following: strong protection of national markets, reduction of prices, free access to information for all citizens and to assure attractive environment for foreign investors. The lecturer analysed the states at the Balkan area from the viewpoint of SMP's legal basis, the applicable remedies and the operators. The main objectives for the further years in these countries are liberalisation of the markets, application of some EU measures, and adoption of a more effective national regulation. For the realisation they need real help from the EU Member States, as they can share experience and give proposes for the further steps.

The theme of the afternoon session was about the future of SMP regulation. Mr. *Alexandre de Streel* held a thought-provoking and impressive presentation on the new paradigm of SMP concept. The realization of the government's principles needed more time than expected, so till today only the technology neutrality and harmonisation of methods are successful. The evolution of technology and markets create new challenges in the sector: regulators should reflect convergence in their decisions and pay specific attention to retail services, the questions emerging infrastructure and the collision of IT firms using new technologies and the recent companies in the new market structure. The analysis of the regulatiory framework in the United States would bringv some new ideas and Europe could learn from the experience. At the other shore of the Atlantic, the progressive removal of regulation had started in 2003. Mr. de Streel made some proposals for the future European amendments. According to his opinion, the sector regulation should have more attention to structural markets, and try to give solutions for its problems. The market should analysed in segments, and the regulator should focus on the most problematic ones. The recent regulation is very complex, and it is hard to apply. Mr. de Streel recommended to adopt more transparent regulation, define the phenomena and emerging markets more distinctly, and a clearer set of objectives for the NRA's.

The program of the conference continued with another predictive lecture offering ideas for the future regulation. The title of the presentation of *Prof. Dr. Martin Cave* from Warwick Business School was 'New solutions with regards to remedies'. According to the current regulations, remedies should be

based at Article 8 of the regulatory framework. The NRA's have to consider a lot of interests: technological neutrality, pluralism, support of effective competition, non-discrimination and consumer protection. Today the EU regulations and the aforementioned list of interests leave only small place to act. The common law after the changes should be more appropriate to the real conditions and the decision makers should avoid overregulation. Now the SMP has great role in many sectors, there are both retail and wholesale remedies, and a deregulatory theory emerged. Prof. Cave supported that last direction of changes, however he pointed out that deregulation should be regulated as well.

Prof. Dr. Pierre Larouche, a well-known expert from the Tilburg University held a presentation on possible scenarios for institutional divide of competences in the future. The idea of deregulation could seem to be an exemplary way for future regulation. But as the regulation was the main objective for a long time, the decision makers and the authorities have only experience on that. Now, the regulatory framework is incongruous to the Lisbon strategy, which means that a comprehensive consideration is needed. After analyzing the SMP procedure written down at Article 14 to 16 in the framework directive Prof. Larouche stated that from the relationship between SMP and effective competition it emerges the possibility of giving more discretion to the NRA's, which probably will increase the amount of regulation. The current regulation obligates the NRA's to take control and notify wide range of markets. The reduction of the markets will help the NRA's to relieve the work pressure, and parallel to the offered change the need for regulation will become lower. Prof. Larouche also made a review of the procedure under Article 7 of the framework directive. The wide possibility of veto decrease the efficiency–the conditions of veto and the whole measure should not be abolished entirely but tightened. The third problematic point of the current regulation is the judicial review of the NRA's decisions. Thinking about the future of the sector's regulation, an issue of creating the European Telecommunications Agency rose up. There are debates on how wide competency should it have, and what will be its objectives.

Prof. Dr. Bernd Holznagel from ITM presented a paper on suggestions for the improvement of the procedural aspects concerning the SMP concept. He started his study with the review of the shortcomings of the SMP procedure. The efficiency would be increased with the use of time limits in the NRA's practice and at the elaboration of guidelines and market recommendations in the Commission. The current common regulations do not contain any restrictions for the length of the procedure, so sometimes it takes years, which cause uncertainty and decrease the growth of the sector. Now the Commission has the possibility to adopt measures which are binding to the national level, but the scope of these obligations are not laid down. The maintenance of the

national administrative background has great costs, which is disadvantageous for the smaller Member States. Prof. Holznagel emphasized the need to tighten the Article 7 procedures and to combine the consolidation procedure with exceptional procedure in the practice of NRA's.

The conference was closed by a roundtable discussion on the future opportunities for regulation. The participants had questions on the emergence of new retail services, the protection of the first mover at a market, on the leverage at the electronic communications sector, and relations to the Lisbon strategy.

According to my opinion the conference offered a deep overview of the SMP regulation in the European Union and experiences of the National Regulatory Authorities in the Member States. The conference was extremely productive on a number of levels, as the invited lecturers had respectable knowledge of the main theme of the event, and the international and national participants were able to make conversations with these experts and to realize new connections and problems.

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BOOK REVIEW

THOMAS G. WEISS–DAVID P. FORSYTHE–ROGER A. COATE:: **The United Nations and Changing World Politics,** 4th ed., Westwiew Press, Colorado–Oxford, 2004. lvi+373 p.

Our age, the post–post–Cold War era, seems to be the era of reevaluation from a number of aspects. Each branch of social sciences must reevaluate its concepts and insights, in harmony with the profound transformation of the social context. The emergence of globalization and its impetus on the traditional, mainly positivist and modern framework of assesment in social sciences has made it necessary to rethink all concepts, even though these concepts had already attained commonly shared and widely accepted interpretations. Additionally, the inner complexity of the phenomenon, authors mainly call globalization, has acutely raised the need for an interdisciplinary approach toward all contemporary problems. In these aspects, thus, different fields of social sciences had to cooperate effectively, in order to attain relevant achievements.

International public law regulating interstate relations had to face serious challenges during the last years. It is enough to mention Kosovo, Afghanistan and Iraq, or the 'human rights black hole' of Guantanamo, whereas the case of US administration with the International Criminal Court can also serve as an example. Obviously, the political heart of the interstate system lies in the United Nations, so its functioning has often been under severe and comprehensive criticism, as if the UN would be responsible for all the international problems by itself. Therefore, the analysis of the current tendencies of development concerning the UN has a vital interest for all researchers–i. e. international analysts, global economists, as well as international lawyers–who work with a certain aspects of international relations.

The authors of this book–Thomas G. Weiss, professor and director of the Ralph Bruce Institute for International Studies at the City University of New York; David P. Forsythe, university professor of political science at the University of Nebraska; and Roger A. Coate, professor of international organization at the University of South Carolina–endeavored to comprehensively analyze the role of the UN in the contemporary global scene. The authors' comprehensive work discusses all the core aspects of the UN's functioning in detail. They

made a grand effort to reevaluate some sensitive questions and widely shared commonplaces in the light of the current international, or rather global conditions. That is why it is anticipated that this book would prove to be interesting also for lawyers, this being the foremost reason for it being analyzed in further detail.

The volume consists of three major parts and each of them is devoted to a single broad topic. Part One discusses in detail the main problems of international peace and security through three chapters. The first chapter analyzes the historical place of United Nations within the efforts of the 20th century–the Hague conferences, the League of Nations–trying to regulate interstate relations. Following this historical introduction the authors present the theoretical background of international security affairs focusing on the theory of collective security, as well as on its legal bases laid down by the UN Charter.

The next chapter is dedicated to the diverse UN security efforts during the Cold War. The authors briefly analyze the case-studies of Palestine, Korea, Suez and the Congo, then they sketch the main outline of the 'traditional' paradigm of peacekeeping. According to the authors' position, five guiding principles can be formulated for all peacekeeping operations of this era: (i) consent is imperative before an operation begins, (ii) these operations need full support from the Security Council, (iii) participating countries need to provide troops and to accept risks, (iv) a clear and precise mandate is desirable, (v) peacekeeping units can use force only in self-defense and as a last resort. (p. 38–41.)

The new challenges that have arisen because of the end of the Cold War and the effects of the profound transformation of the whole international context are scrutinized in the third chapter of Part One. The authors often refer to the concept of humanitarian intervention, because it might become a new standard or a guideline for peacekeeping operations in place of the older, mostly interstate logic. This chapter reflects a quite realistic attitude toward peacekeeping, the authors argue that the "enthusiasm for UN helping hands must be tempered with the realities of UN operations." (p. 83.) In sum, UN security operations seemed to be far from the ideal solution in the majority of the cases.

September 11 and its consequences on global security are the topic of the last chapter. So far international law has not been able to adequately answer the challenges of global terrorism, because there is lack of consensus among member states about the *per se* definition of terrorism. From the UN's point of view the major problem of terrorism is its non-state nature, and because of this its handling seems to be quite difficult by an organization based on classical intergovernmental principles. Moreover, the emergence of the so-called Bush Doctrine that emphasizes a broad, from the aspect of international law unusual

notion of preemptive self-defense, has also not made much easier the settlement of the whole problem. Consequently the authors argue that it is indispensable to find a new balance of state sovereignty and need of multilateral conflict settlement in order to make the UN operations more effective and successful.

Part Two focuses on major issues related to human rights and humanitarian affairs. Its first chapter presents most of the major theoretical questions concerning human rights; it explores their historical origins including their different generations, it analyses their contribution to the system of international security, and it interprets the relevant articles of the UN Charter (Art. 1. and 55.), as well as lists all the human rights conventions until December 2002.

In the second chapter of Part Two the reader can find useful information about the whole UN human rights organizational structure. This complex system is comprised of a variety of offices and agencies that try to realize two types of strategies in general. Firstly, some of these bodies are engaged in supervising state policies in the light of human rights standards, while other bodies make efforts to promote, or to teach, new attitudes which might be beneficiary for the individuals. The authors analyze in detail, from the human rights perspective, the role of the Security Council, the General Assembly, the Office of the Secretary-General, the High Commissioner for Human Rights and the Human Rights Commission, while they only touch upon some supplementary bodies.

The last chapter of Part Two discusses some controversial problems of human rights protection. Inter alia the authors raise serious questions about the proliferation of human rights treaties and bodies or sub-bodies and their counterproductive effects (for instance, currently five different UN organs and many NGOs might be involved in torture issues). They analyze the influence of individual or coalitional state policies on human rights policies and they scrutinize the improving role of nongovernmental actors (NGOs). In sum they argue that states must learn that having a detailed transnational human rights system is an obvious advantage for them in our global age.

The last part of the book, Part Three, focuses on the global problems of development and the role of the UN in this process. In general, as the first chapter clarifies this broad problem, the promotion of social and economic development is a central issue of global security. It is obvious that the UN must attain a crucial role in the management of development problems due to its internationally comprehensive nature. Currently there is a consensus in the UN administration that human security endorsing the aim of sustainable development and respect for human rights, as the Millennium Summit pointed that out, is the highest priority on the tasklist of the UN. This chapter introduces

the historical formation of the concept of human security, and the cornerstones of this development process.

The next chapter, similarly to the relevant chapter of Part Two, firstly sketches the whole organizational structure responsible for the management of development issues. Neither this structure is too easy to survey, but the text guides the reader well into the world of development agencies. The second half of the chapter discusses the so called "Rio Process" and recent developments in this field. The authors emphasize that the sustainable human development model, forged out by the widely-known Human Development Reports, should be build on (i) a new partnership between state and market, (ii) new patterns of national and global governance and (iii) new forms of international cooperation. (p. 281.)

Lastly, in Part Three, the authors concentrate on the impact of globalization regarding development policies, as well as they present and evaluate the Millennium Goal Strategy. Quoting Kofi Annan's position, they suggest that the major challenge for the UN is to find alternative strategies how to use the opportunities of globalization in order to help people better cope with the negative effects of globalization. (p. 289.) The Millennium Development Goals and Targets are aiming at, for instance, the eradication of extreme poverty or the assuring of an environmental sustainability, that may help governments and peoples to focus on the most crucial problems of southern hemisphere. It can only be anticipated that these targets will be successful or at least partially realized by 2015. In sum, the UN must further enhance its development activities in order to help the process of adjusting to the qualitatively new global challenges.

The three parts presented briefly above constitute the marrow of the volume. However, the book contains additional parts, too, which might also be interesting. The reader can find an introduction and a conclusion within which the authors formulate additional theses and, in some cases, their opinions. The introduction specializes on such basic questions as the nature of state sovereignty, the relationship among sovereignty and intergovernmental organizations, the impetus of the new global context on the traditional interpretations of *raisons d'état* and the nature of UN politics. In the conclusion the authors formulate theses of conclusive nature using the prism of the volume, so they discuss the UN's role in the articulation of interests, rule making and rule enforcement in the global scene through the evaluation of the relevant aspects of security, human rights and development issues. Lastly, they examine the future of interstate cooperation in the system of 'global governance' which is mostly determined by the proliferation of nonstate actors in global politics, the shifting location of authority to transnational or sub-national levels and the

accelerated pace and intensity of economic and social interactions. (p. 341.) Taking a modest, not maximalist but not at all minimalist position in the evaluation of the UN's successes and failures one can state that the UN can play a serious role in the settlement of the problems of our 'post–post–Cold War era'.

Additionally, the volume includes very useful appendixes; Appendix A shows the whole UN system in a table, Appendix B lists the most relevant websites related to the UN's work and Appendix C comprises the Charter of the United Nations. The book also has a nine page long list of acronyms which might be life-saving for the reader when she/he nearly gets lost in the literary soup of UN organizations. It should also be mentioned that the whole volume contains numerous figures, tables and photos which make it much more easy to understand relationships and problems.

In the preface the authors discuss their aims in detail. One of their major aims is to capture the essence of the UN as a political organization and show its aspects, for instance, security questions or international public law, through these political lens. Furthermore, they define other aims, too; i. e. they want to stress the importance of history, and they prefer to avoid the majority of the theoretical debates of social sciences via a non-theoretical approach. According to the impressions of the reviewer these guiding principles were the best choices because by using them the authors avoided lots of intrinsic and structural problems. Skepticism in theories and emphasis on history when one discusses such a complex issue as the UN is in itself is indispensable, because reality is much richer than the theories can ever be. Only history can guide us adequately in these affairs. So, this history-oriented, non-theoretical approach is one the major advantages of the book. On the basis of these principles, the authors present such a comprehensive and comprehensible manual, that proves to be very useful for students, but is quite promising for researchers at the same time.

It must be recognized, that the authors, stemming mainly from the above presented epistemological conservativism, reflect a realist attitude toward the entire UN (in their words: "we are not card-carrying members of the UN fan club" p. xxiii). They accept that the outcome of UN policies depend essentially on the individual state foreign policies (p. 344.), and they point out the weaknesses of the UN system many times. So, they do not at all think that the UN is the best solution for all international problems, but as for now, there is no better way. So they represent that way of thought what was emphasized by Secretary-General Dag Hammarskjöld: "The purpose of the UN is not to get us to heaven but to save us from hell." (p. 345.) This statement is the key for understanding the whole attitude of the volume.

Lastly, the authors declare in the preface that their book has two purposes, first, it may be a coursebook for college courses on international organization and the United Nations, secondly, it might be supplemental reading for other fields of study, like, for instance, international law. (p. xxv.) The reviewer can easily affirm that the book adequately serves the second purpose. According to the opinion of the reviewer the volume has its own place on the bookshelves of all researchers whose studies touch upon, from any aspects, international relations.

Balázs Fekete

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VANDA LAMM*

The Multilateral Treaty Reservation Revisited

Abstract. In the State practice regarding the declarations of acceptance of the International Court's compulsory jurisdiction one can trace some disputed reservations containing proviso which undermine the obligation assumed regarding the Court's compulsory jurisdiction. One of the limitations is called reservation concerning multilateral treaty, otherwise known as the Vandenberg reservation or multilateral treaty reservation.

The article treats these reservations by examining their origin, contents and Court's jurisprudence on the matter.

According to the author the multilateral treaty reservations have destructive effect on the compulsory jurisdiction system, chiefly because the broad conception of interpretation of the "affected" States bars proceedings before the Court over disputes as to multilateral treaties concluded by a larger group of States, if not all the States party to the treaty are also parties in the proceedings before the Court. As for the other part of the reservation, that stipulation virtually invalidates the obligations assumed in declarations of acceptances, since it hampers the Court to deal with a dispute submitted to it unless the State making such a reservation in its declaration or, on the basis of reciprocity, the adverse party has agreed to the Court's jurisdiction. The adverse effect of the reservation is all the more so since the multilateral treaty reservations expressly concern disputes with regard to treaty interpretation, and considerable part of the cases brought before the Court concern precisely such disputes.

Keywords: multilateral treaty reservation, Vandenberg reservation, International Court of Justice, declarations of acceptance, optional clause

The more than eighty years of State practice and the jurisprudence of the two World Courts revealed that States, while accepting the compulsory jurisdiction of the International Court of Justice or its predecessors that of the Permanent Court of International Justice, join to their declarations of acceptance such reservations or limitations which raise the question whether the given State had made a real commitment toward the compulsory jurisdiction of the Court. In the literature of international law one of these limitations is called reservation concerning multilateral treaty, otherwise known as the Vandenberg reservation or multilateral treaty reservation, hereinafter for the sake of abbreviation we will use the term of "multilateral treaty reservation".

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1. Appearance of the reservation

The appearance of multilateral treaty reservation is linked up with the 1946 United States' declaration under the optional clause accepting the compulsory jurisdiction of the International Court of Justice.[1]

The origin of this limitation can be traced to the Memorandum which John Foster Dulles–head of the United States delegation to the United Nations General Assembly and later Foreign Secretary of State–sent to a subcommittee of the Foreign Affairs Committee of the s Senate on 10 July 1946. In his Memorandum Dulles explained that in case of disputes as to multilateral treaties it was possible that a matter at issue in the case might arise in relations not only between two States party to the given multilateral treaty and being in the case parties before the Court, but also between the other contracting parties to that treaty. In view of such matters it would be necessary to make clear that it was not compulsory to submit to the Court a dispute as to the given multilateral treaty solely on the ground that certain States party to the treaty were required to do so under the optional clause, the reason being that the other States party to the treaty had not undertaken to resort to the Court and thereby to become parties, so they were not bound by Article 94, of the Charter providing that each Member of the United Nations "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party".[2] It was on the basis of the Dulles Memorandum that on the proposal of Senator Vandenberg the Senate decided to also include in the United States declaration of acceptance the limitation that there should be excluded from the Court's compulsory jurisdiction

> "disputes arising under a multilateral treaty, unless (1) all Parties to the treaty affected by the decision are also Parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction".

[1] The United States of America was not a member of the optional clause system of the Permanent Court of International Justice. In 1946 the Washington Government the first time made a declaration under Article 36, paragraph 2 of the Statute.

[2] On the Dulles Memorandum compare and see Anand, R. P.: *The Compulsory Jurisdiction of the International Court of Justice*. New York, 1961. 220.; and Briggs, H. W.: Reservations to Acceptance of Compulsroy Jurisdiciton of the International Court of Justice. *Recueil des Cours*, 1958. 306–307. According to Briggs, Hudson called the Dulles Memorandum "a jumble of ideas".

It was characteristic of the Senators that, as is pointed out by Briggs, they had adopted the reservation without clarifying debate and without understanding its meaning and implications.[3]

According to Judge Ruda, Washington Government intended, by making that reservation, to avoid a situation in which it would be obliged to apply a multilateral treaty in certain way in line with the Court's judgement, while the other States party to the treaty and not participating in the proceedings remained free, to apply the treaty in different ways from that determined by the judgement of the Court, since according to Article 59, of the Statute the decision of the Court has no binding force except between the parties and in respect of the particular case.[4]

Relying on the related Senate documents, Maus writes that the Senators were not aware at the time of the reservation's modifying the jurisdiction already conferred to the Court and believed that by making that reservation they actually settled an issue.[5] However, the solution of the problem is out of the question, for the reservation is vague and, as will be seen later, lends itself to various interpretations.

For that matter, Kelsen asserts that the wording of the reservation was modelled on Article 62, paragraph 1, of the Statute, which refers to "an interest of a legal nature which may be affected by the decision in the case", having the meaning that all parties to the multilateral treaty which may be affected by the decision of the Court are also parties to the case before the Court.[6]

The example of the American declaration of acceptance was followed by other States, with certain variations of the reservation found in several declarations accepting compulsory jurisdiction.[7]

[3] Briggs: *op. cit.* 307.

[4] *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction of the Court and Admissibility of the Application), Judgement of 26 November 1984. Separate Opinion of Judge Ruda. *ICJ Reports,* 1984. 456.

[5] Maus, B.: *Les réserves dans les declarations d'acceptation de la jurisdiction obligatoire de la Cour internationale de Justice.* Genéve, 1959. 165.

[6] Kelsen, H.: *The Law of the United Nations.* London, 1951. 530.

[7] On this score see the declarations of acceptance by France (1947), India (1956), Liberia (1952), Malawi (1966), Mexico (1947), Pakistan (1948), The Philippines (1972), South Africa (1955) and The Sudan (1958).

2. The notion problem of "being affected"

The multilateral treaty reservation, given its uncertainty and vagueness, was criticized by numerous author in the literature on international law. What was most frequently written in criticism was that the reservation withdrew, at the will of the United States, a large fraction of legal disputes arising under multilateral treaties covered by the optional clause.[8]

The vagueness of the reservation is manifested chiefly in the first part of the limitation and is linked to the phrase "all Parties to the treaty affected by the decision are also Parties to the case before the Court". This passage raises two problems. The first concerns the question of who or what should be understood by the word "affected": all the parties to the treaty or the multilateral treaty?[9] If the reference is to the parties, an answer should be given to the question of when a party to the treaty is to be deemed "affected".[10] If, on the other hand, it is the treaty that is to be considered "affected", then '"affected" are, under the reservation, all parties to the treaty and hence all of them should participate in the proceedings before the Court. In other words, it is not clear whether the drafters of the Vandenberg reservation had in mind the participation in proceedings, over a dispute arising under a multilateral treaty, of all parties to that treaty or only of the parties affected by the dispute. This possibility of two different interpretations allows of a narrow and a broadly conception of the reservation, depending on whether the reference is to all parties to a multilateral treaty or only to the States affected by the dispute.

If the drafters of the reservation wanted to secure participation in the proceedings of all parties to a multilateral treaty, attainment of that aim is next to impossible in practice, since it would call for ensuring the presence of as many as 50 or 100 States before the Court, the examination of their written submissions, etc. This in turn would present a task almost impossible to perform, let alone the uncertainty surrounding the intention of all States party to the treaty to become parties to the case before the Court, for it may well be imagined that several contracting parties have no interest whatever in having the given dispute decided by the Court. All these aspects may combine to result in that a dispute as to, for instance, the United Nations Charter or some other major multilateral treaty will in fact never be dealt with by the Court.

[8] Waldock, C. H. M: Decline of the Optional Clause. *The British Year Book of International Law.* 1954. 275.

[9] Cf. Kelsen: *op. cit.* 530.

[10] Anand: *op. cit.* 222.

During; the 1970s the multilateral treaty reservations came to be formulated in clearer terms. Thus, for instance, the declarations of El Salvador (1973), India (1974) and The Philippines (1972) contain the literally uniform text "all parties to the treaty are parties to the case before the Court". ELL . In this way the said reservations make it unambiguously clear that all States party to the multilateral treaty are to participate in the proceedings before the Court, which is to say that the States mentioned above included in their respective declarations of acceptance the broad conception of the reservation. In connection with these reservations I should like to refer to a statement by Judge Sette-Camara in the *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States); he observed that the broad conception of the reservation might have rather far-reaching consequences and that such reservations would require the appearance before the Court all member States of the United Nations and of the Organization of American States, e.g., the Nicaragua Case, together with the original parties in the case.[11]

Judge Sir Robert Jennings, in his separete opinion delivered on the preliminary objections in that same case termed as bizarre the idea for as many as 20 to 30 States to participate in the proceedings, but, for all that, he considered that the declarant State was entitled to make such a reservation, the practical result is, that the Court had no jurisdiction in the absence of special agreement.[12] In his dissenting opinion joined to the judgement on the merits of the case the British Judge emphasised that, in spite of the difficulties connected with the reservation, the Court was under obligation to respect it and apply it.[13]

3. Problems concerning participation of third States in the proceedings

Those who are defending the Vandenberg reservation are usually arguing that this limitation serves to defend the interests of third States party to a given multilateral treaty. Such reasoning is not convincing because Articles 62, and 63, of the Statute expressly provide for safeguarding the interests of third States

[11] Cf. *Case concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits) Judgement of 27 June 1986. Separate Opinion of Judge Sette-Camara. *ICJ Reports*, 1986. 192.

[12] Cf. *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction of the Court and Admissibility of the Application), Judgement of 26 November 1984. Separate Opinion of Judge Sir Robert Jennings. *ICJ Reports*, 1984. 554.

[13] *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), Judgement of 27 June 1986. Dissenting Opinion of Judge Sir Robert Jennings. *ICJ Reports*, 1986. 529.

by entitling those States to intervene in the proceedings before the Court. Therefore, as is rightly stated by Verhoeven, the reservation defends the interests of only one State, that which has written the reservation into its declaration of acceptance.[14]

A closer look at multilateral treaty reservations leads us to make the point that in certain cases safeguarding of the interests of third States may prove all too strong an asset, since a State or States party to the multilateral treaty may happen to have no interest whatever in having a dispute regarding the interpretation or application of the treaty decided by the Court. On a broader conception of the Vandenberg reservation, the consent even of these States is required to proceedings before the Court, yet, under the reservation, these States are not obliged to participate in the proceedings, that is to say that they may refuse their participation. By so doing they undoubtedly defend their own interests, but, at the same time, they prejudice the interests of those States party to the treaty which, on the other hand, seek to have the dispute to be decided by the Court. At any rate, the reservation gives States a measure of manoeuvre to decide by themselves, despite their commitment undertaken in respect to the compulsory jurisdiction of the International Court of Justice and actually on a case-by-case basis, whether a particular legal dispute may be dealt with by the Court.

In exploring a solution to these problems arising out of the Vandenberg reservation Louis Sohn suggested that the reservation should be reworded[15] to exclude from compulsory jurisdiction "disputes relating to a multilateral treaty, unless all the parties to that treaty have agreed that any decision rendered in any such dispute between two or more of them will be *binding upon all of them* ..." (my emphasis–V. L.).[16] Lori Damrosch is critical of Sohn's suggestion, which she believes to have more disadvantages than advantages, and she raises the question of its compatibility with Article 94, of the United Nations Charter and Article 59, of the Court's Statute. The American professor is of the view that Sohn's proposal purports to derogate from the binding

[14] Cf. Verhoeven, J.: Le droit, le juge et la violence. *Revue général de droit international.* 1987. 1177.

[15] After the withdrawal in 1986 of the United States declaration of acceptance of 1946 experts of international law have written widely on what the new United States declaration of acceptance should contain, a draft of a new declaration prepared by Professor Louis Sohn.

[16] On Sohn's draft see Sohn, Louis B.: Compulsory Jurisdiction of the World Court and the United States Position: The Need to Improve the United States Declaration. In: Clark Arend, A. (ed.): *The United States and the Compulsory Jurisdiction of the International Court of Justice.* University Press of America, 1986. 3–28.

character of the Court's decisions in contentious cases, because the unanimous consent as mentioned in the proposal can hardly be expected to be given by States with no interest in a particular matter.[17] Damrosch also tries to remedy the problems caused by the reservation by suggesting a formula that would deny the United States consent to jurisdiction if the case "concern the interests of third States".[18]

Within the meaning of the Statute and the Rules of Court, intervention in the proceedings is the legal institution through which a third State may participate in contentious case before the Court in defence of its own interests. Without dwelling on questions of intervention in cases before the Court we can state that there exist in fact two ways of intervention, depending on whether intervention is based on Article 62, or Article 63, of the Statute.[19] Under Article 62, States are empowered to intervene in a case if they consider that a legal interest of theirs may be affected, in that case the State may submit a request to the Court to be permitted to intervene. The permission may be granted or refused, upon the decision of the Court, considering whether or not the intervening State's legal interests are affected by the proceedings instituted.

On the other hand, Article 63, covers precisely a case which involves the interpretation of a multilateral treaty before the Court and in which, along with the disputants, the other States party to the treaty are permitted to intervene.[20] Intervention under Article 63, thus accords to the States party to a multilateral treaty the right to intervene.

Participation by third States in the proceedings before the Court under the Vandenberg reservation has some similarities with intervention under Article 63. Nevertheless, there are significant differences between the two situations.

(a) According to the Vandenberg reservation proceedings before the Court cannot take place unless the other States party to a multilateral treaty also participate therein–and the question of whether those States are affected by the decision of the Court or they include all States party to the multilateral treaty

[17] Cf. Damrosch, Lori F.: Multilateral Disputes. In: Damrosch (ed.): *The International Court of Justice at a Crossroads.* New York, 1987. 398.

[18] *Ibid.* 399.

[19] On this score see Ruda, J. M.: Intervention before the International Court of Justice. In: Lowe, V.–Fitzmaurice, M. (ed.): *Fifty Years of the International Court of Justice.* Essays in honour of Sir Robert Jennings. Cambridge, 1996. 487–502.

[20] Article 63, reads as follows: "1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgement will be equally binding upon it".

is of no relevance here–, the reservation practically exercises some sort of pressure on these States to participate in the proceedings, because the Court cannot decide on the legal dispute without their presence. By contrast, in the case of intervention under Article 63, of the Statute, it is exclusively for the affected State to decide whether to make use of its right to intervene.

(b) Under the general rule governing intervention it is for the Court to decide on intervention, even in the case of intervention under Article 63, since the treaty to be interpreted is determined by the Court, whereas under the Vandenberg reservation the Court is actually left without discretion to decide on the participation in the proceedings of States other than the original parties, because the reservation makes it to some extent an obligation of the States affected to participate in the proceedings or else the proceedings before the Court cannot take place at all.

In connection with the Vandenberg reservation the question also arises of what will be the position in the proceeding of the other States party to the multilateral treaty. This is an open question, all the more so since the position in the proceedings of the intervening State is similarly awaiting full clarification.

It was in 1992, for the first time during the existence of the International Court of Justice, that the Court permitted a third State to intervene in the *Case concerning the Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras). Until this case the literature on international law was also rather uncertain about the position in the proceedings of the intervening State.[21] Precisely for that reason the Court, when it permitted to Nicaragua's intervention in the dispute between El Salvador and Honduras,[22] found it necessary to make certain statements concerning the status of the intervening State in the case.[23]

The Court held that the intervening State does not become a party to the proceedings and does not aquire the rights or become the subject of the obligations pertaining to parties under of the Statute, the Rules of Court, or general principles of procedural laws. At the same time, however, the intervening State is also vested with certain rights, such as the submission of a written statement and right to be heard.[24]

[21] Cf. Davi, A.: *L'intervento davanti alla Corte Internazionále di Giustizia*, Napoli, 1984. 209–215.

[22] For that matter, the case involved intervention under Article 62, of the Statue.

[23] *Case concerning the Land, Island and Maritime Frontier Dispute* (Application by Nicaragua for Permission to Intervene), Judgement of 13 September 1990. *ICJ Reports*, 1990, 135.

[24] *Ibid.* 1990. 135–136.

In respect to reservations concerning multilateral treaties this means that, on a broad conception of the reservation, for instance, all States party to multilateral treaty (which may number 30 or 40 or even more) should participate in proceedings over a particular case, all invested with the right to be heard by the Court! It needs no further explanation that this would not be a viable path in practice.

If, on the other hand, the intervening State being a non-party in the case, the Court's decision is not binding on it. In the *Case concerning the Land, Island and Maritime Frontier Dispute* this reasoning was also practically upheld by the *ad hoc* chamber, composed of members of the Court, in dwelling on the question of *res judicata* and Article 59, of the Statute.[25] In dealing with this matter Rosenne points out–along lines similar to the declaration, made by Judge Oda and attached to the judgement of 11 September 1992,[26]–that, since that case concerned a territorial dispute, the Court's judgement was binding not only on the parties, but is valid *erga omnes.* Precisely for this reason, the Israeli professor stated that it was difficult to understand why the chamber did not somehow written into the judgement Nicaragua's declaration, made at the time of submitting its request for intervention, that it would abide by the terms of the judgement.[27]

In respect of the Vandenberg reservation all this leads to the conclusion that if the Court should be seized on the basis of a multilateral treaty's compromissory clause and the States party to the treaty also wishing to participate in the proceedings before the Court under the terms of the Vandenberg reservation, it can be taken as very likely that, having regard to the judgement in the *Case concerning the Land, Island and Maritime Frontier Dispute*, these States would be considered by the Court as non-parties in the proceedings and would also not be bound by the judgement of the Court. It is not sure, of course, that in a dispute as to a multilateral treaty the Court would by analogy apply its legal practice with regard to intervention, while it is unlikely that under the Vandenberg reservation the Court would recognize for third States participating in a case more rights than it had conceded to the intervening State in the *Case concerning the Land, Island and Maritime Frontier Dispute.*

[25] *Case concerning the Land, Island and Maritime Frontier Dispute.* Judgement of 11 September 1992. *ICJ Reports,* 1992. 135.

[26] Cf. *Ibid.* Declaration of Judge Oda. 619–620.

[27] Rosenne, Sh.: *Intervention in the International Court of Justice.* Dordrecht, Boston, London, 1993. 155.

4. The question of consent to proceeding

The second part of multilateral treaty reservation, as contained in the United States declaration of acceptance and stipulating in fact an alternative condition, provides that in a dispute arising under a multilateral treaty the Court may not have jurisdiction "unless the United States of America specially agrees to jurisdiction". This practically means nothing else than that disputes as to multilateral treaties cannot be brought before the Court solely under the optional clause and that the consent of the State including the Vandenberg reservation in its declaration of acceptance–and, on the basis of reciprocity, that even of the adverse party–is required to proceedings in related matters.

Hudson asserts that this clause of the reservation shows a confusion of thought, for if the United States agrees to jurisdiction, it is virtually that consent which, functioning, as it were, as a special agreement, constitutes the basis for the Court's jurisdiction, and therefore the question does not even emerge of the application of the declaration of acceptance.[28] One can say that in respect of the reservation it is unclear whether the special consent of the United States practically replaces the declaration of acceptance and that lack of its consent entails disregard of the Court's compulsory jurisdiction in disputes arising under multilateral treaties. According to Waldock, the reservation practically operates to preclude the United States from being brought before the Court in a dispute as to a multilateral treaty unless the United States specifically consents to jurisdiction after the case has arisen.[29]

In respect of multilateral treaty reservation the question also arises of how reciprocity affects this limitation, especially that part of it which requires even a separate consent of the declarant State to the Court's jurisdiction, since according to the principle of reciprocity a reservation may be invoked by the opponent party as well. This entails that the reservation in a concrete case should be applied as if the party referring to it has also attached to the declaration of acceptance the clause that, in addition to the declaration accepting compulsory jurisdiction, its separate consent is required to the Court's jurisdiction over disputes arising under multilateral treaties. One can conclude that the reservations concerning multilateral treaties, in combination with the principle of reciprocity, nullify the obligations undertaken with regard to the Court's compulsory jurisdiction, not only of the States including such limitation in

[28] Hudson World Court–America's Declaration Accepting Jurisdiction. 32 A. B. A. Journal (1946) 836. Quoted by Anand: *op. cit.* 221.

[29] Waldock: *op. cit.* 274.

their declarations of acceptance, but in concrete cases the opponent party's commitment regarding compulsory jurisdiction as well.

5. The reservation in the practice of the Court

In the jurisprudence of the International Court of Justice the reservations concerning multilateral treaties were considered for the first time in the *Case concerning Military and Paramilitary Activities in and against Nicaragua.*[30]

In its memorandum presented in response to Nicaragua's application and in the course of the oral proceedings the United States advanced the point that Nicaragua had invoked in its application four multilateral treaties, the United Nations Charter, the Charter of the Organization of American States, the 1933 Montevideo Convention on Rights and Duties of States and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife. The Washington Government argued that since the dispute submitted to the Court "had arisen" under the treaties listed, the Court, under the Vandenberg reservation contained in the United States declaration of acceptance, may exercise jurisdiction only if all treaty parties affected by a prospective decision of the Court are also parties to the case. For its part, the American Government did name the said States (Costa Rica, El Salvador and Honduras) and maintained that if a single one of them was found by the Court to be "affected", the United States reservation was to come into play.[31]

In its judgement on the preliminary objections the Court itself acknowledged that the multilateral treaty reservation attached to the United States declaration of acceptance was vague and lent itself to two different interpretations: "It is not clear whether what are "affected", according to the terms of the proviso, are the treaties themselves or the parties to them".[32] So, in fact, the Court did nothing else than repeat the questions formulated in the literature of international law with respect to the reservation. Those questions were not, however, answered by the Court, and that for two reasons. First, because,

[30] On this aspects of Nicaragua case see: Alexandrov, Stanimir A.: *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice.* Dordrecht–Boston–London, 1995. 112–119.

[31] *Case concerning Military and Paramilitary Activities in and against Nicaragua.* ICJ Pleadings. vol. II. Cf. USA Counter-Memorial. Part III. 74–97.

[32] *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction of the Court and Admissibility of the Application), Judgement of 26 November 1984. *ICJ Reports,* 1984. 424.

according to the judgement, the reservation had been interpreted by the United States itself as applying only to States affected by the decision (i.e. Washington sought to apply the narrow conception of the reservation) and the three neighbouring States that might be affected had also been indicated by Washington.[33] Second, the Court found that the reservation concerning multilateral treaties did not affect its jurisdiction in that case, as Nicaragua invoked a number of principles customary and general international law, which have been enshrined in the text of the convention relied upon by Nicaragua. The Court emphasized:

> "The fact that the above mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions."[34]

By taking this view the Court actually escaped application in the concrete case the multilateral treaty reservation.

Over and above these points the Court's judgement covered the question of who vas to decide whether a State was or was not "affected", according to the terms of the proviso, by a future decision of the Court. The Court held that should a State consider itself affected by the decision, it would either file an application itself or would submit a request for intervention.

The Court could identify the States "affected" only when the general outline of judgement to be given become clear.[35] "Certainly the determination of the States 'affected' could not be left to the parties but must be made by the Court".[36] This line of the Court's reasoning is similar to that of Kelsen, who, shortly after the Vandenberg reservation had appeared, wrote that the question of which States were affected by a decision of the Court can be decided "only after the Court had assumed and exercised jurisdiction in the dispute concerned".[37]

[33] For that matter, the United States did not but merely mention the other possible construction of the reservation, namely that which required participation in the proceedings of all States party to the multilateral treaties indicated.

[34] *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction of the Court and Admissibility of the Application), Judgement of 26 November 1984. *ICJ Reports*, 1984. 424.

[35] *Ibid.* 425.

[36] *Ibid.*

[37] Kelsen: *op. cit.* 530.

The question of "affected" States was likewise considered by the Court in dealing with the merits of the case, namely in the context of the extent to which the Court's decision affected the rights of El Salvador and hence the Salvadorian State itself in the concrete case.[38] The United States did not participate in that phase of the proceedings, but the Court considered at length the United States' contention based on multilateral treaty reservation.[39] In connection with the Vandenberg reservation the Court stated that

> "... the reservation does not require, as a condition for the exclusion of a dispute from the jurisdiction of the Court, that a State party to the relevant treaty be 'adversely' or 'prejudicially' affected by the decision, even though this is clearly the case primary at view."[40]

In other words, application of the reservation does not require determining whether the State is unfavourably or otherwise "affected"; "the condition of the reservation is met if the State will necessarily be 'affected', in one way or the other".[41] The Court held that in the concrete case the multilateral treaty reservation operated as a bar to certain documents being invoked as multilateral treaties, but it did not in any way affect the consideration of Nicaragua's claims based on other sourcess international law.[42] That is to say according to the Court, it had jurisdiction under Article 36, paragraph 2, of the Statute to consider Nicaragua's claims based upon customary international law, but it should exclude from its jurisdiction of disputes "arising under" the United Nations and the Organization of American States Charters.[43] As for this finding,

[38] In that case Washington contended that by the American activities carried out in El Salvador and protested against by Nicaragua it had exercised the right of collective self-defence from a possible armed attack by Nicaragua and that collective self-defence was recognized by the Charter of the United Nations as well as by the Charter of the Organization of American States. Therefore the dispute under consideration had arisen under multilateral treaties, to which El Salvador was also a party along with the United States and Nicaragua. Cf. *Case concerning Military and Paramilitary Activities in and against Nicaragua.* ICJ Pleadings. vol. II. 86–91.

[39] On this score see the author's Gondolatok a Nemzetközi Biróság eljárásától való távolmaradásról (Reflections on the Non-appearance before the International Court of Justice). *Állam- és Jogtudomány,* 1982. 21–40.

[40] Cf. *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), Judgement of 27 June 1986. *ICJ Reports,* 1986. 37.

[41] *Ibid.*

[42] *Ibid.* 38.

[43] *Ibid.* 97.

Judge Oda, in his dissenting; opinion joined to the judgement, expressed the view that the Court should have proved, not that it can apply customary and general international law independently, but that Nicaragua's claims, had *not* arisen under these multilateral treaties" (the above-mentioned two multilateral treaties–V. L.).[44]

At any rate, the Court's decision on the merits of the Nicaragua Case similarly failed to answer several important questions relating to multilateral treaty reservations, and, as is pointed out by Briggs, the Court disregarded the fact that a reservation stipulating that "all States party to a multilateral treaty and affected by the decision shall also participate in the proceedings" has a destructive effect on international adjudication and is incompatible with the Statute of the Court. Instead, the Court stuck to the term "affected State" without thoroughly examining whether El Salvador's rights were affected by the case at all or what was meant by that term in the context of Article 59, of the Statute, which provides that the decision of the Court has no binding forte except between the parties and in respect of that particular case.[45] According to the well-known British expert, the Court was content to merely state that El Salvador was "affected", but it did not say the same in respect of Honduras, albeit that country was the base of the operations against Nicaragua.[46]

In recent years the other case before the International Court of Justice, the *Case concerning the Aerial Incident of 10 August 1999* (Pakistan v. India), similarly involved multilateral treaty reservations. In response to the Pakistan's application India filed preliminary objection invoking, *inter alia*, the fact that its declaration of acceptance of 1974 contains the multilateral treaty reservation, which bars Pakistan from invoking the Court's jurisdiction against India "concerning any dispute arising from the interpretation or application of a multilateral treaty, unless at the same time all the parties to such a treaty are also joined as parties to the case before the Court". India contended that the United Nations Charter, on which Pakistan founded its claims, belonged exactly to the category of multilateral treaties to which the reservation applied. Apart from this, India gave no consent to anything and signed with Pakistan no special agreement derogating from the content of the reservation.

The multilateral treaty reservation was not considered in the case since, as mentioned earlier, the Court based itself an the Commonwealth reservation

[44] *Ibid.* Dissenting Opinion of Judge Oda. 219.

[45] Briggs, H. W.: The International Court of Justice Lives up to its Name. *American Journal of International Law*, 1987. 81.

[46] *Ibid.*

joined to the Indian declaration of acceptance and found that it had no jurisdiction to entertain the application filed by the Islamic Republic of Pakistan.[47]

From the foregoing it becomes clear that the multilateral treaty reservations have destructive effect on the compulsory jurisdiction system, chiefly because the broad conception of interpretation of the "affected" States bars proceedings before the Court over disputes as to multilateral treaties concluded by a larger group of States. As for the other part of the reservation, the said stipulation virtually invalidates the obligations assumed in declarations of acceptances, since it hampers the Court to deal with a dispute submitted to it unless the State making such a reservation in its declaration or, on the basis of reciprocity, the adverse party has agreed to the Court's jurisdiction. All this is detrimental to judicial settlement of international disputes, all the more so since the multilateral treaty reservations expressly concern disputes with regard to treaty interpretation, and considerable part of the cases brought before the Court involves precisely such disputes.

6. The Vandenberg reservation and the Statute

With regard to the reservations to declarations of acceptance one can meet with views expressed both before the Court and in the literature of international law to the effect that this or that reservation is "incompatible with the Statute". References to incompatibility with the Statute appear to suggest that what we have are reservations to the Statute, although limitations to declarations of acceptance can in no way be considered as reservations to the Statute. Declarations of acceptance are unilateral acts with proviso freely made up by States. Yet, no matter how free States may be to introduce conditions for or limitations to their declarations of acceptance, these declarations may not contradict to the Statute and must be in line the UN Charter, the Statute and the Rules of Court. While in several cases the Court has more or less clarified the question of incompatibility of certain reservations with the Statute, it did not give answer to the question of compatibility with the Statute of the truly "problematical" reservations, namely, among others, the multilateral treaty reservations.

The question of compatibility with obligations under the Statute and the optional clause arises in connection with multilateral treaty reservations, both with the first part of the reservation on account of its vagueness, as has been discussed already, and with the second part thereof, which requires the decla-

[47] *Case concerning Aerial Incident of 10 August 1999* (Jurisdiction of the Court) Judgement of 21 June 2000. *ICJ Reports*, 2000. para. 46.

rant State's special consent to the jurisdiction of the Court. This part of the reservation is clearly contrary to the obligations under Article 36, paragraph 2, of the Statute and even to the spirit of the optional clause, namely that States declare to recognize "*ipso facto*" and without special agreement the jurisdiction of the Court.

Owing to the second part of the Vandenberg reservation the parties' declarations of acceptance become purposeless, the Court's compulsory jurisdiction cannot come into play in disputes as to multilateral treaties, and such disputes cannot be considered by the Court unless the State including this reservation in its declaration–and, on the basis of reciprocity, the opponent party–specially agree to submit the dispute to the Court.

By this part of the multilateral treaty reservation the declarant State takes back the compulsory jurisdiction which it conferred on the Court by its accession to the optional clause system. Practically such is the case with the automatic or subjective domestic reservations the so called Connally reservations as well. This is perhaps even more readily perceptible with multilateral treaty reservations than with subjective domestic jurisdiction reservations, for if in a legal dispute before the Court the State entitled decides not to invoke the subjective domestic jurisdiction reservation, the Court may go on with the proceedings without further consideration, as the application of the reservation is not automatic and parties should refer to it before the Court. In the case of multilateral treaty reservations the parties have no such "discretion" and, if one clings strictly to the wording of the reservation, the Court may not, in matters covered by the reservation, assume jurisdiction unless the parties specially agree thereto. Of course, multilateral treaty reservations may also happen not to be invoked, but in that event the Court's jurisdiction is practically founded not on the declaration of acceptance, since under the reservation joined to the declaration the Court could not deal with the particular matter in any way, but on the *forum prorogatum*, i.e. on the parties' consent to jurisdiction given in the process.

7. Has the invalidity of the reservation any effect on the declaration as a whole?

In connection with multilateral treaty reservations the question arises of whether these reservations are valid at all and whether the eventual invalidity thereof carries implications for the declaration of acceptance itself.

Both the views of the judges of the International Court of Justice and the position of the literature of international law are divided as to the extent to

which an invalid reservation affects the declaration of acceptance itself. On one view, invalidity bears upon the declaration of acceptance as a whole, whereas on the other view invalidity has no effect on the declaration itself.

The question of separability of an invalid clause from the rest of the declaration arise in connection with the reservations concerning multilateral treaties, but this set of problems has received much less attention than the subjective domestic jurisdiction reservations have. In the Nicaragua Case Judge Mosler asks whether the declaration of acceptance as a whole is affected by the invalidity of the reservation.[48] He, too, leaves this question unanswered, however, and the German Judge confines himself to stating that "If an affirmative conclusion were to be taken, its effect would be worse than to apply the reservation and to maintain the rest of the declaration".[49] In his separate opinion Judge Jennings dwells on whether the difficulties concerning the uncertainty of the exact meaning of the reservation do not render the whole reservation so vague that it can be discarded, which, however, leads on to the other question whether, since the reservation might be not severable from the declaration, it might render the entail American declaration of acceptance void.[50]

We, for our part, are of the view that the authors claiming that an invalid clause has no bearing on declarations of acceptance of compulsory jurisdiction or on the reservation itself and that, apart from the invalid part, the rest of the declaration of acceptance remains operative are not proved right. If a reservation or a clause attached to a declaration of acceptance is deemed non-existent, while the rest of the declaration is recognized as valid, the obligations of the declarant State are increasing without the consent thereof, which contradicts to the jurisprudence of the two International Courts, that jurisdiction exists only within the limits expressly accepted by the parties and that it should be interpreted in a narrow sense. This was expressed in the judgement of the Permanent Court of International Justice in the *Chorzów Factory Case* and reiterated by both Courts in several other cases, stating that "... the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it...".[51]

[48] *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction of the Court and Admissibility of the Application), Judgement of 26 November 1984. Separate Opinion of Judge Mosler. *ICJ Reports,* 1984. 469.

[49] *Ibid.*

[50] Separate Opinion of Judge Sir Robert Jennings. *Ibid.* 554–555.

[51] *German Interests in Polish Upper Silesia and the Factory and Chorzów.* Judgement (Jurisdiction), July 26, 1927. Hudson, M. O. (ed.): *World Court Reports,* 1920–1942. New York, 1972. vol. I. 610.

8. Effect of the Court's eventual, nullity decision

It would be primarily for the Court to decide the open questions concerning disputable reservations and their compatibility with the Statute. However, as the foregoing go to show clearly, in dealing with a variety of matters the Court has in fact avoided giving answers to these questions.

As mentioned already, the International Court of Justice did not decide upon the validity of the Vandenberg reservation. At the same time, however, the judgment delivered in the *Norwegian Loans* case (Norway v. France) suggests the conclusion that the Court recognized as valid an other also very disputed reservation, the subjective domestic jurisdiction reservations joined to French declaration of acceptance. In his separate opinion attached to the judgment in that case Judge Lauterpacht points out that an eventual decision of the Court holding that a declaration of acceptance including the above mentioned reservation would also have a bearing on the declarations by a number of States which have had no opportunity to express their view on the matter. According to the British judge, under Article 63, of the Statute the Court would have had to recognize the right of intervention for those States which had included the said reservation in their declarations. Since it failed to do so, the States concerned may take the position that by virtue of Article 59, of the Statute the Court's decision is limited to the present case and may reserve themselves the right to express their views on this question in an another occasion.[52]

Those who challenge the International Court of Justice for having failed to take a different stand on the question of the validity of reservations with rather disputable contents are undoubtedly right at first glance, but if one examines this problem more carefully and probes into it in light of the Court's possible findings on the matter, one must admit that the International Court of Justice was right to refrain from taking a definite stand on these delicate issues.

Had the Court decided that the multilateral treaty reservations or the subjective domestic jurisdiction reservations or the declarations containing such limitations were valid, it would obviously had exposed itself to sharp criticism on the one hand and would have undermined its own prestige and authority on the other. In addition, a definite stand of the International Court of Justice on clearly accepting as valid the contested reservations and the declarations accepting compulsory jurisdiction and containing such reservations would by

[52] *Case of Certain Norwegian Loans.* Judgment of July 6th, 1957. Separate Opinion of Sir Hersch Lauterpacht. *ICJ Reports,* 1957. 63–64.

all means have afforded for States a kind of "encouragement" to incorporate such limitations in their declarations of acceptance.

The other avenue open to the Court would have been a pronouncement on the invalidity of declarations accepting compulsory jurisdiction and containing disputed limitations to or reservations.

Abrogation in their entirety compulsory jurisdiction declarations containing subjective domestic jurisdiction reservations or multilateral treaty reservations would have resulted in the Court depriving such declarations of acceptance even of the small fraction of legal effect they have retained despite these reservations in respect to the compulsory jurisdiction of the International Court of Justice. Pronouncing the invalidity of declarations containing such reservations would have operated to rule out even the theoretical possibility of the Court's compulsory jurisdiction coming into play over matters not affected by the reservations or, should the parties still not invoke the said reservation for some reason, that of the Court deciding the legal dispute submitted to it.

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Theory and Practice in Law
On the Magical Role of Legal Technique

Abstract. Law is characterised by a fundamental gap between its social embeddedness and the apparently formal automatism it operates, which gap is basically bridged by the law's ultimate practicality under the guise of its mere logicity. This seeming contradiction is resolved by judicial decisions as responsible and responsive practical actions which are to result from the necessary conceptual transformation(s) of the law's wording in the course of its official application, which does involve a necessary jump in logical derivation. This is to say that on final analysis and in practical terms, law is what gets actualised through the actual uses of it. Black-box effect such as this is helped by the variety–and owing to the magical transforming effects–of legal techniques. Eventually, it is legal culture that provides a medium in which legal techniques can at all be selected and used. On a conceptual plane, one of the filters is offered by legal dogmatics. This very complex includes dialectics as well, for there is no motion without counter-motion, therefore, it is not realistic to pursue any human ambition without some safety valves inserted. Or, regarding, e.g., law, no homogenisation is feasible without some re-heterogenisation at the same time. Paradoxically speaking, while modern formal legal development went in the direction to mechanise the judge, the realisation was also made that law had ever been too serious an undertaking to be just left alone to the logification by some impersonally formalistic apparatus. Therefore, simultaneously with the very first act of formalisation, law has ever built in its scheme the possibility of de-formalisation as well. It is this complex understanding that was implied by Kelsen's successive rewriting his pure theory with changing shifts of emphasis. All could suggest is that the ultimate certainty is eventually nothing else than we ourselves. Or, in addition to the law itself (as conceptualized in the systemicity of a doctrine), social actions and authoritative acts under the label of law are also in a constant competition for defining what will eventually be acknowledged and also practiced as law.

Keywords: legal technique; doctrinal study of law; jump & transformation in law; (legal) homogeneity & (social) heterogeneity; filtering through/within legal culture; law as practical action

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"The *Sollen*, the form of norm of a hypothetical proposition is in most cases therefore not the component of the positivated legal order but the *a priori* normative-logical basic form of it."

(István Losonczy
A funkcionális fogalomalkotás lehetősége a jogtudományban
{The availability of functional concept-formation in jurisprudence}
[Budapest: Királyi Magyar Egyetemi Nyomda 1941], p. 65)

According to its classical understanding, *legal technique* covers the entire process from law-making to law-applying, in contrast with the simplification by some recent literary elaborations that would handle it as an instrumental know-how of legislation only. However, as so called law-making gets actualised through law-applying by gaining a definite meaning and primary significance in it, it is basically still the range of problems connected with law-applying that is at stake here. Or, we might say: there is something that is law, on the one hand, and there is something that is legal policy (denoting the entire mesh of social interconnections within which a country seeks to achieve something), on the other, and legal technique is meant to serve as a bridge between the two.

In our present-day understanding, on the final analysis *law* is a profession in the service of conceptualities framed in given ways and composition as wrapped into a rigidifying formality, characteristic of the law's modern formal ethos, with logicity and formalistic entrenchment as decisive features by now. That is, formal law builds around itself a system to be treated and referred to with a kind of geometrical ideality, and it demands a model of justification that is usually required only for drawing theoretical conclusions. Notwithstanding all this, in reality the judge is by far not an entity simply reducible to a logical automaton but a being permeated with all qualities and fullness of any human existence. So even if he is covered by the robe particular to his role, he keeps on irrevocably carrying all his further social roles as well. While attempting–in compliance with his professional expectations–to disregard everything falling beyond the competence defined for his profession, he is aware that he takes responsibility for his decision and thereby also for the way he is shaping living law, by putting his ethical ego to the test.

Perceiving the specificity of the function to be filled by law in the gap between the law's social embeddedness and apparently formal automatism, *George Lukács* described the process in a way that the judge has to face a genuine social conflict, communicated to him as a controversy also in a legal sense, that is, as the logical contradiction of opposing claims, supplied by the parties to the case. However, his profession is made a lawyerly craft or art exactly by his ability to find a sufficiently formulated solution in law that can

refine the controversy to an illusory and transcended conflict, solved in and by the law.[1]

And the question of what goes on meanwhile was described by the analytical attempt at reconstruction by *Alexander Peczenik* over the past decades,[2] summed up in the notions of "transformation" and "jump". Thereby, his doctrinal explanation turned into a self-contradiction, as in the wake of the classic debate between *Georges Kalinowski* and *Chaïm Perelman*, representing the positions of formalism and anti-formalism (which debate ended conclusively for me with the legal relevance and explanatory force of the latter),[3] he had opted for formalism, having declared inexorably the need that decisions be deducible, that is, logically unambiguously inferred. In result of his failure in this very issue, eventually he arrived at a self-critical (and in view of formalism, also self-annihilating) self-restriction, which he introduced exactly due to the notions of "transformation" and "jump", by proving the repeated forced interruption of any logical chain in legal reasoning. Otherwise speaking, that what has become an illusory and transcended conflict in the above sense out of the said controversy was regarded by him as the result of necessary *conceptual transformation(s)* which therefore involves a *jump in the logical derivation*–that is, a categorical evaluation (through reflecting the abstract normative patterns onto the fragmentary but qualified description of the facts of the case, taken out from a compound life situation), at the completion of which the judge may by now declare that the matter has become reassuringly clear for him to reach his

[1] Lukács Gy.: *A társadalmi lét ontológiájáról* I–III [The Ontology of Social Being]. Magvető, Budapest, 1976. as well as, from the author, *The Place of Law in Lukács' World Concept*, Budapest, 1985. 193 pp.

[2] Peczenik, A.: Non-equivalent Transformation and the Law. In: Peczenik, A.–Uusitalo, J. (eds.): *Reasoning on Legal Reasoning*. Vammala, 1979. 47–64., as well as, from the author: *Theory of the Judicial Process* The Establishment of Facts. Budapest, 1995. 249 pp.

[3] Namely, it was the purely theoretical philosopher *Perelman* who expressed as his astonishing opinion that it was enough of legal philosophers and it was also good time for lawyers to come and explain the process–just like the centipede of the story when he was asked how he could walk with hundred legs (and afterwards he could not take one single step just pondered how he could nevertheless walk)–, and we ourselves had to finally reconstruct from the lawyers' narratives what went on actually and how. At the end of all such reconstructions, legal technique would turn out to be capable of the world's most genuinely creative achievements. And finally, it was on such a basis that he could state that our European continental legal ideals were not just outdated but had nothing indeed to do with reality, as they only constituted the mere facade of a professional ideology with extremely creative acts going on behind the scene. In more details, cf., from the author: On the Socially Determined Nature of Legal Reasoning. *Logique et Analyse* (1973), Nos. 61–62, 21–78. and in: Perelman, C. (ed.): *Études de logique juridique* V, Bruxelles, 1973. 21–78.

judicial conviction so that he can already decide in the given way by rejecting any other alternative(s). Of course, from now on it is also visible that this endpoint does not any longer presume a creative act in a logical sense. Therefore, once the jump has taken place in the transformation, that what–so to speak–follows will from then on also derive obviously with logical formality and necessity.

The paradigmatic basis of such a multiple professional attitude is provided by the recognition that in both *language* and law, everything is ambivalent and nothing is compelling by itself. This is just the antipode of the foundational idea of *Imre Szabó*'s work on *The Interpretation of Legal Rules*,[4] written half a century ago as an emblematic epitome of socialist jurisprudence, according to which the law is given with a definite meaning from the outset and it is only in relation to this that interpretation may approve, extend or restrict a proposed meaning. But if everything is given from the beginning for those who apply it at any subsequent time, then legal technique, described as above, would generate something differing from what has been originally given. That is, within the perspective of normativism, the judge will necessarily misuse his authority if he extends or confines the law's vigour beyond or within its originally defined scope. On the other hand, in the theoretical perspective outlined above with a focus on legal technique, in reality there is nothing that could be given. It is only a materialisation, actualisation and implementation ongoing constantly that we can perceive. After all, there is nothing but *judicial event* in the course of which a decision is taken and something will be actualised by this decision.[5] Or, things get actualised through the *actual uses* of the law. And in this respect, legal technique indeed seems to be an all-embracing concept, used as good almost for all that may stand the judicial test through reconsiderations in appeal, until sealed by the legal force. If we ponder repeatedly, for instance, classical legal principles, then our interpretation can indeed so to speak freely be expanded or narrowed in function of the particular circumstances involved in the establishable facts of the case and therefore in a way

[4] From Szabó, I.: *A jogszabályok értelmezése* [Interpretation of Legal Rules]. Budapest, 1960. 618 pp. and *Interpretare a normelor juridice*. Bucureşti, 1964. 439 pp. and *Die theoretischen Fragen der Auslegung der Rechtsnormen*. Berlin, 1963. 20.

[5] This is what *Wróblewski* commented upon by stating that interpretation is either of a static or of a dynamic ideal. That is, the interpreter either constructs a conceptual world, by claiming that it testifies to the original meaning and then all we have to do is try to reconstruct it by all means, or we conceive of the responsible judicial profession as free, and formulate a task of adaptation for ourselves within it. Cf. Wróblewski, J.: The Problem of the Meaning of the Legal Norm. *Österreichische Zeitschrift für öffentliches Recht* 14 (1964) 3–4, especially 265 et seq.

scarcely influenced by abstract conceptual limitations but only judgeable exclusively on the plane of the actual and the concrete. In view of this, *Kálmán Kulcsár* had once good reason to assert in his legal sociology decades ago[6] that there is at all time an individual (albeit sociologically generalisable) *situation of law application:* we have to decide at any time within the boundaries of an in-itself complete and unlimited situation of legal argumentation and reasoning, in which also our moral, our idea of man and of course even our concept of the Divine may have a role–in addition to all other considerations. For it is an *open* situation at least in a sociological sense, in which thoughts and alternatives of solution are formed while finally, as represented by the individual judge (and in function of his sociologically describable hierarchical dependence and further circumstances) and eventually an entire lawyerly community will have something accepted or rejected (within the confines of the prevailing legal culture and its institutional operation).

In contrast to the view represented by, e.g., *Szabó* above or to the reifying conception of usual simplifications, in legal technique (operating law while actualising a meaning to it) there is no before or after. For that what is given from earlier cannot be but sheer potentiality [*dynamei*] as it can exclusively become something of an ontological existence in a *Lukács*ian sense through practical legal operation, that is, as operated by the applied legal technique. Consequently, it is from the outset two different media (and, through them, the intertwining of heterogeneous aspects) that are at stake and in play in law. There is a concentrated *form*, on the one hand, and a *practical action*, inseparable from everyday existence and driven by practical considerations, on the other–and these two media are being continuously amalgamated. That what will in its own way emerge out of this as the message of the law arises at any time exactly from this amalgamation.

It was *François Gény*, having revealed the moment of enchantment in specific legal operation with techniques that may render available almost anything and its opposite, who did the most for the description of the actually ongoing process in law at the turn of the 19th to 20th centuries. *Jean Dabin* was the first one of all to reconsider the issue in the subsequent decades.[7] *Dabin* had already raised awareness of the fact that there is some kind of a magical process taking

[6] Kulcsár K.: A szituáció jelentősége a jogalkalmazás folyamatában [The significance of the situation in the process of law-application]. *Állam- és Jogtudomány* XI (1968) 545–570.

[7] Gény, F.: *Science et Technique en droit privé positif* I–II. Paris, 1913–1930 and Dabin, J.: *La technique de l'élaboration du droit positif* spécialement du droit privé. Bruxelles–Paris, 1935.

place in law. For in fact, law is hardly more than a kind of an *open-ended mediation by pondering*. In such a complex, there is a properly formulated form we usually call 'law' but this is far from being the end-point. This is something that will have to transform into any given and definite message through the practical life of (the) law.

The conjecture and the figurative message of the circumstance that the law is not something to arrive at but something *wherefrom* the overall specific move starts (a "path" that "channels" argumentation and reasoning in law) denote just the beginning of the recognition that, in this case as well, there may also exist something as legal culture, as a perhaps even more comprehensive and decisive notion than legal technique is. For it is *legal culture* that provides for the medium in which legal techniques can at all be selected. For instance, two early decisions of the Hungarian Constitutional Court on compensation for the damages caused by the Communist regime and on facing the crimes of the totalitarian past dealt with basic dilemmas of (to be addressed in merit as a *sine qua non* prerequisite to) any genuine transition from Communist dictatorship. Yet, with its formalistic decision *a limine* rejecting those bills, actually the Court annihilated the original claims themselves, instead of contributing to their solution. One of the characteristics of such and similar decisions, practically eliminating the very chances of a fundamental socio-political transformation, was precisely that, by having been squeezed into the sublime robe of "constitutionality" with some formal allusions to the Constitution's wording on equality before the law in a Republic being based on the democratic rule of law, in fact the Court even declined to face the underlying social problem that should have been solved. Therefore, if and in so far as the activism of the Constitutional Court, relying on the in-advance awareness of the legal force of all those acts which it may have arrived at its free discretion without a compelling legal basis, was a fiasco in Hungarian history, we have to consider it the failure of the entire legal culture behind the applied legal techniques. Namely, our legal profession in general and our lawyerly elite in particular rejected indeed to assume those tasks of legal interpretation and legal technical operation (placing–by making use of legal principles, as the case might be–the law's formal regulation into deeper and broader contexts), which the legal professions of other nations, more sensitive towards their nations' fate and at least morally more responsible and responsive (e.g., in Germany or the Czech Republic), did in fact assume.[8]

[8] Cf., e.g., Varga, Cs. (ed.): *Coming to Terms with the Past under the Rule of Law* (The German and the Czech Models). Budapest, 1994. The obstinate sterility of the survival of the skills and work-patterns reminiscent of the age of socialist legality, that is,

As it became clear for me during the completion of one of my earlier papers (struggling with the dilemma of whether or not the law is reducible to a system of enactments[9]), *legal change* may have at least a dual path: it may take place either by a direct modification of the provisions concerned (this is classical legislation) or by re-shaping the hermeneutic medium of interpretation behind the rule. Or, legal change may be *direct* and *indirect*. In the latter case, reconditioning and altering the law's field of meaning, that is, the social conventionalisation that gives it a meaning, will bring about a practical modification of the message of the law. Of course, such a duality of feasible strategies may entail interactions, including crossing effects as well. For instance, the impact may be rather questionable when the acceptance of a regulation (to the reception of which the given society is by far not ready) is only due to force or a plot, lobbying or political blackmailing. In case of inflicting a regulation aimed at (e.g.) protecting national minorities merely by (external or internal) pressurising on an otherwise intolerant community, no success can be guaranteed by itself. A lasting change can scarcely be implemented in a legal culture once pushed into a difficult situation, if the whole society with its legal professionals will continue blocking any tolerance in the future. Meanwhile, reconsidering the range of problems underlying the present paper, a new feature can be added. Notably, an intention at strategically changing the message of the law (e.g., in the frame of modernisation through the law) may be provoked also by the long-term re-selection of legal techniques applied, without either formal modification of the rules or informal re-shifting of the social conventionalisation behind those rules. Accordingly, there is another indirect mode of changing or reforming the so-called living law.

To emphasise the decisive extent to which legal technique may shape the law's practical purport,[10] let me refer to *René Dekkers* who in his time arrived

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the practical ignorance of legal principles and the aversion to undertake democratic decision-making, responsible indeed–in brief, the lack of familiarity with, and of genuinely participatory experience in, the jurisprudential style developed since the end of WWII in Western Europe–,with the threat posed by this to the European Union through our EU-accession, is analysed by Kühn, Z.: Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement. *The American Journal of Comparative Law* LII (2004) 531–567.

[9] From the author: Is Law A System of Enactments? In: Peczenik, A.–Lindahl, L.–van Roermund, B. (eds.): *Theory of Legal Science.* Boston–Reidel, 1984. 175–182. and *Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 413–416.

[10] See, e.g., from the author: Technique and Doctrine in Law. *Iustum, Aequum, Salutare* II (2006) 3–4 {in print} & < www.univie.ac.at/RI/IRIS2004/Arbeitspapieren/Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc >.

at the conclusion that, properly speaking and on the final analysis, *legal conceivability* is mostly not a function of the law itself. For finding a solution conceivable in law or ensuring a path promising to lead to a given result in law scarcely means anything else than whether we are able rationally, through applying given legal techniques, to defend a certain standpoint better than others would another (or, in case of some pressing interests, we can defend it at all), with the logical demand for perfection which is usual in the given legal culture. Or, on the final analysis, what is at stake here is just justifying a given solution–with the exclusion of its rejection from the outset. Referring to historical examples, partial analyses in the multitude of various Western European and Anglo-American (etc.) practices (known to be used to setting legally high and sophisticated standards by the way) show such a diversity that we have to conclude: the least that legal conceivability demands is the limiting condition not to admit openly and with explicit textual formulation to be running against the text interpreted. And therewith the developments by *Hans Kelsen* on discretion and the moment of the legal force[11] present themselves in a new setting–namely, instead of logical consequence, the lack of procedural rejection, and, as a final criterion, instead of the positive statement of logical inclusivity, the negative inertial force of the fact that the decision in question has not been actually annulled or overruled, by being expelled from the circle of the accepted regime of law and order in the legal process.

As can be seen, the arsenal of legal techniques definitely grants lawyers discretionary power to conclude–precisely due to the inherent ambivalence of any text–that, on the final account and in bordering situations, that what the basic social conventions of a nation's culture consider important and vital enough to form a foundational component of its survival strategy will not be inconceivable *ab ovo* in most of the cases. This is what can be strikingly observed especially in times of crisis and above all in countries and epochs where and when a high-standard background culture of *self-defence* with the powerful representation of national interests has developed and is being persistently cared for; in particular contrast to the fatigue and the enervation, living aimlessly from day to day with no perspective and ability to do one's utmost for good causes, a condition that can unfortunately be seen in the life of our nation, exhausted by the after-1956 repression and the strange transition therefrom. For the examples of vital impulse with a determination to survive are numerous from the Czech Republic to Romania and to Ireland, or from

[11] Cf., e.g., from the author: A bécsi iskola [The school of Vienna]. In: Varga, Cs. (ed.): *Jogbölcselet XIX–XX. század: Előadások* [Lectures on legal philosophy in the 19th to 20th centuries]. Budapest, 1999. 24–32.

the State of Israel to the United States of America. To be clear, it is the use of techniques and the ability to react by adequately responding to challenges what I mean here and now, rather than whatever emotional relation, sympathy, or identification. After all, all this does not necessarily imply more than the issue whether a social substrate has ever developed, a substrate that is able to decide (without debates generating discord internally and the very impossibility of performance externally) what the nation wants at all, at least in strategic directions and on the most sensitive fields; whether a kind of mechanism has evolved to facilitate that basic expectations, even if unsaid, can be tacitly agreed upon; whether the societal background is structured in a way that some dominant will can be formulated at least on given fields, and if necessary, also asserted to prevail–even if through most diverse paths and by roundabout means but, all things considered, even defying obstacles if needed.[12] Based on the analysis of cases and from a certain historical perspective, all this is relevant as–in want of any other point of reference–we have to see that if properly significant interests are at stake as represented at proper levels, practically anything and also its opposite may have a chance of passing through the institutional test of legality in practice. And referring again to *Kelsen*'s wisdom in his theoretical reconstruction, this can be achieved by no means necessarily through any spectacularly flagrant defying of the law but just by building up those bridges of reasoning (based on scholarly comparative-historical analyses in depth and the lawyerly talent in analysis, argumentation and inventiveness) that may render the solution in question conceivable in the given culture under given circumstances.[13]

The primary lesson of all this may be summarised in that no matter how exciting and flexible our language is, in itself and as a mediator, it is not suitable for definition. By *legal technique,* in fact, we mean the standardised set of instruments of how to handle a certain language lawyerly. Rules may involve norms (norms themselves being nothing but projections of logic, logifying denominations). Whether we act as philosophers or as linguists or lawyers, we have to apply categories in distinction, in order to enter into an intelligible

[12] I attempted to clarify the components of such a favourable or unfavourable disposition through a comprehensive analysis in my opening lecture ['»Worthy of the fate, qualified for the challenge«: On the state of our intellect and scholarship' (in manuscript)] of a seminar for Hungarian history teachers in the Carpathian Basin, organised by the Rákóczi Association in the Benedictine Abbey of Pannonhalma during the summer of 2004.

[13] Which may have even led, e.g., to collective responsibility instituted with reference to a law having lost its effect yet still allegedly surviving, in heritage of an earlier mandate rule. See note 10.

communication at all. Looking methodologically behind what we commonly call law, we can scarcely claim more than: in the world of the intellectual construct called 'law', so-called norms, mediated by conceptualities defined in rules, offer certain sets with paths of, and menu-references in, procedures within the institutional process generated by the same law–together with all the ambivalences inherent in its linguistic mediation. But this is just the recognition that *Lukács* once thematised in his social ontology as the trap of mediation, witnessing to the *basic unity* that prevails nevertheless, despite the world's artificial fragmentation through its human intellectual representation. For language is a medium incessantly formed–with the law's and lawyers' language, too–, being unceasingly re-conditioned by each and every actor of the law's community in general and its dedicated professionals in particular, who actualise it while processing cases through its filter at any time.

According to our starting point, we all *speak a language* and *language does not label itself.* Any of us can say, for example, that now he enters the terrain of scholarship, by incorporating new conceptualities into this scholarship. Well, such an allegation may prove true (or verifiable) and false (or refutable) alike, as any of us may at any time expound in a meta-level reconstruction that the sequence of deduction has been false or that nothing but passions, uncontrollably visceral affections/aversions have been expressed in the guise of conceptuality, i.e., in a basically not conceptual language-use. Or, one can at all times identify a meta-system superior to all our linguistic communications, based on which new explanations may be formed about what has been told.

The language's not labelling itself does also involve the perspective of that, according to official expectations at least, the more differentiated the society we live in, the less the law-applier's distinctively individual personality will have a share in making his decision, and this is exactly the most decisive factor in the judge's performing his function–whether he still wears his powdered wig visibly or it is present only hidden in his professionally socialised subconscious. Within himself, the judge has to distinguish between his *individuality* and his *function defined for his legal quality.* Yet no matter how unambiguous this is at the level of theory or formalised ideology, we have to reckon with the fact that any such official expectation is hardly more than a normative *desideratum*, that is, the law's internal rule for its own game to be played (apart from the underlying social requirement which does not inevitably enforce itself). The duality inherent in this apparent antinomy is verified by sociological reality. Because insofar as the law is seen as a field of giving meanings, in shaping of which we all play a role (especially via our professionally competent lawyers), then whether we want it or not, the said field will necessarily be actually shaped by individual human beings through the filter of their own personalities. All

this entails the secondary effect (also described by *Lukács*) that shifts of emphasis and changes of context, maybe invisible in themselves, will inevitably emerge in the ontological process of our social actions, which may eventually add up to some decisive shift(s) of direction in the long run. That is, our professionalism, with our lawyerly ideology and skills in legal operation, will distinguish and homogenise us according to the requirements of the legal complex and to our understanding of the roles suited to it, on the one hand, but nevertheless, the unity and the individual expression of all these in our personalities and fullness of being are ontologically still inseparably all together present, on the other; and therefore, we can only try to separate *aspects differing in homogeneity* within the heterogeneity of such an *ontological unity of existence* for the sake of and within analytical purposes exclusively. The point under discussion may remind one of the stand taken by *Lukács* who, having pondered the tension between the sought-for unambiguity and actual ambiguity of language, characterised the development of civilisation and scientific thought over thousands of years as an implied fight for making language unambiguous, while basic objectives in practice are often realised in a hyperbolic way at the most. Notably, we usually set a goal and approach it as we can, yet, meanwhile, new divergences are inevitably getting introduced into the process–and the same is what happens to the judge as well.

Or, the judge's personality, his individual character, together with linguistic ambivalences pervading mediation in all its forms–all these leave their marks on every operation. What we claim here is that in every artificial human construction there is some kind of homogenisation which at the same time carries its counterpoint to it. For example, in our civilisatory efforts, we place the law and the range of social problems to be addressed as legal into a well-separated and thoroughly homogenised sphere, to which the legality of the law's domain can be directly applied already. Nevertheless, we still cannot tear the whole process from the heterogeneity of its human carrier, which will inevitably lead to its *overall definition by overall life conditions,* that is, by all the particularity of the historically given *hic et nunc.*

As we have seen, language does not label itself, and it would downright be unfit for it. And yet we all speak a language, apparently the same language in the same community. The legislator is to write (after having read), and the law-applier is to read (and then, also to write). More than a thousand years ago, in Iceland, the law was announced by the *lagsaga* [or *lögsögumadur*], reciting it standing on a rock. This may have been a practical gesture in itself, yet our present-day reconstruction may rightly regard it as something more: objectification, externalisation, rendering its factuality an independent act. It is such an objectification upon which, in our present-day complexity of modern formal

law, we have built a new professional aspiration, the so-called *doctrinal study of law* [*Rechtsdogmatik*], aimed at having a conceptual system formed out of what was told by the legislator and interpreted in authoritative practice. All this having been incorporated in our culture, today we presume almost by habit that, after the law was drafted by one of us as a governmental specialist, voted for by others of us as members of the parliament, commented on by yet another one of us as a jurisprudent, taken into account in legal transactions by others of us and, in the end, applied by the last of us as a judge in a conflict still arising between some former ones; well, we indisputably presume in our culture that all of us use conceptual instruments and, accordingly, understand texts and messages just in the way as conventionalised in our culture. Therefore, if any of us says "purposefulness", this has to mean what our commentary and standing practice understand as 'purposefulness'. Of course, the exchange in communication of social understandings and feedbacks is not coded in the text, and the speaker is mostly unaware of the complexity of layers behind a textual meaning, as he only spoke a language. Yet the meta-system of the language of conceptual reconstructions, superimposed upon language as used by us in our everyday life, asserts itself even in roundabout ways, assuming an in-depth and in-volume more comprehensive concept behind the actual language usage. It is this role in which the doctrinal study of law proves to be an unexcludable mediator.[14] And it is this context within the perspective of which we can state that legal technique, too, is unexcludably present anywhere where there is law with a practical use.

No need to add that the *doctrinal study of law* has its own *technique(s)*, too, of course. *Rudolf Jhering* and *Carl von Savigny* described already in the second half of 19th century that this technique suggests a basically theoretical model–like what is customarily used, for example, in theological dogmatics and similar fields of scholarship–, where exclusively the logical instruments of conceptual analysis (starting out from given texts) and conceptualisable evidences or axioms are utilised. Consequently, the analytical apparatus of the doctrinal study of law applies mostly classical types of logical operation,

[14] *Marx* and *Engels* may have rightly written in *The German Ideology* in the above sense that the Germans have once drowned their misery into scholarship, and what they failed to achieve through revolution they finally built up in theoretical doctrine. It is worth mentioning that a similar duality prevails in Anglo–American culture as well, but there this role is played by the judge's conscience. Therefore the genuine issue is to whom to allocate the power of the doctrine. For that what is a scholarly-made doctrinal study of law for us in the European continental (German) pattern is the practical construction from case to case for the Common Law. Cf., e.g., Atiyah, P. S.: *Pragmatism and Theory in English Law.* London, 1987.

including, above all, conceptual division and classification and, of course as assigned to these, deduction and induction. Notwithstanding this, that what has been told about the *magical transforming effect* of legal technique is built not on the primacy of logifying instruments but sees in law basically a technique of argumentation. According to this, the various forms of argumentation (with the help of which the judge, by considering various presumably feasible positions more or less relevant in one sense or another, gets closer to answering the dilemma of the applicability of various rules) appear as elements of the legal technique applied by him.

It was in an explication written on the function of law and its correlation to the function of codification three decades ago[15] that I came to realise that in socialism, the acknowledgement of rights only in function of their "proper" exercise as spirited by the Civil code had the same function as categorising a deed's being dangerous to society as the criterion of criminal offence had in the Penal code. However, my initial political indignation calmed down to silent melancholy later on, when I also realised that this is nothing more than quite commonly the jurisprudence based upon so called *clauses,* which is in fact the same age as legal culture. It is precisely the *Lukács*ian symptom already mentioned in connection with linguistic ambiguity that re-emerges here. Notably, in our civilisatory development, we are trying to limit discretion by the means of law, in order to prevent the judge's personality–along with included irrational factors as well as with factors ensuing from differing rationalities– from affecting the judicial discernment. At the same time, we incorporate clauses of immense generality into the system so that the judicial assessment, bound this way, can nevertheless be freed and the otherwise relevant legal provision put aside, if needed, in any unforeseeable border situation at any time. It is precisely this issue that *Ronald Dworkin* thoroughly discussed in his famous essay–"Is Law a System of Rules?"[16]–, having risen by today to be the paradigmatic cornerstone of Anglo-American legal thought. In his opinion, the challenge of creativity begins exactly when the judge, stepping out from his self-comforting everyday routine, finds that the judgeability of his case is hard and problematic and, as such, requires re-consideration. This is the culmination of the complex socio-legal determination of the judicial process, when the law-applier may identify a legal principle out from either the Roman law's common

[15] Cf., from the author: The Function of Law and Codification. In: *Anuario de Filosofia del Derecho* 7 Madrid, 1973–1974. 493–501. and *Acta Juridica Academiae Scientiarum Hungaricae* 16 (1974) 269–275.

[16] Dworkin, R. M.: Is Law a System of Rules? [1967], reprinted in his *The Philosophy of Law.* Oxford, 1979. 38–65.

heritage or domestic jurisprudential precedents, and once the latter's relevance is established, he will forbear from applying minutely elaborated sets of rules.[17] Of course, we may have distressing memories about the socialist use of the clause on the proper exercise of rights, for instance, when the political police was hard on retaliating upon the sociable gatherings of the banned elderly monks as an abuse of the right of assembly. However, it must not be forgotten that the simultaneous cult of clauses had, on principle, the same aim in Western Europe, namely, to foresee the unforeseeable. Otherwise speaking, there is neither legislator nor living legal culture without incorporating clauses according, of course, to the prevailing cultural patterns. Such were, for instance, the concepts of "common good", "public order" (etc.),[18] used in fields ranging from public administration to civil and criminal law in the West, which seem to have since the last decades lost their primacy unfortunately, on account of some false liberalisation and individualistic anarchism.[19]

Providing that we consider such resolutions problematic, we have to inevitably presume an ontology in which unidirectional definition is available on the field of social action. In comparison to such simplicism, *Lukács* himself proved to be far more differentiated. His explication into the opposite direction was built exactly on the presumption that there is no motion without *counter-motion*, therefore it is not realistic to pursue any human ambition without some *safety valves* inserted. Moreover, no *homogenisation* is feasible without some re-heterogenisation at the same time. Paradoxically speaking, while modern formal legal development went in the direction to mechanise the judge, the realisation was also made that law with its irrevocably ethical colour had ever been too serious an undertaking to be just left alone to logifying highbrows who would, as it were, process it with their impersonally formalistic apparatus. Therefore law has ever built in the scheme, simultaneously with the very first act of *formalisation,* the possibility of *de-formalisation* as well.

Well, *legal technique* is in itself quite an omnipotent and universal instrument which can be used by anyone for any purpose in any direction, on the one

[17] In this sense, we might as well say that the gap is in us at the most, that is, any problem that there may be is attributable to the applier of the law, because the legal order is perfect in the form it is done available to us. That is, the cause of problems may be that until now we have failed to activate it in the sufficient depth, exploiting its classical theoretical foundations.

[18] Cf., above all, Bolgár, V.: The Public Interest: A Jurisprudential and Comparative Overview of the Symposium on Fundamental Concepts of Public Law. *Journal of Public Law* 12 (1963) 13–52.

[19] Cf., e.g., from the author: Rule of Law–At the Crossroads of Challenges. *Iustum, Aequum, Salutare* [Budapest] I (2005) 73–88.

hand, yet, one that can exclusively be operated in (and according to feasibility criteria set by) a given legal culture, on the other. Consequently, there is one given *legal culture* inevitably destined for us to build that what will define the frames within which we can at all move, by offering us those paths in practice which will decide on the final account from what we may–by being encouraged to–conclude to what in fact. As to its genuine root-components, legal culture is, on the final analysis, an incessantly re-actualised progressing network of social conventions, within the womb of which certain skills, selected from among the huge many skills spread in the various civilisations, are utilised with a given intellectuality and according to a given ethos and a given goal-rationality. For instance, there is a logico-analytical culture–the cult of conceptual analysis spread over from Oxford as taken over from the field of philosophico-ethical investigations to law–in which our actions depend on one single formalistic consideration, in conclusion of some previously posited assumption, according to which even options of whether I may express a feeling of sympathy or when I am authorised to kill my foetus, my mother, and so on, will possibly be definable with a dry logic. Nonetheless, I hope it is still thinkable that we, as sound souls and worthily of our human quality, do not wish to rely in our actions on the logic of abstract conceptual extrapolations as substitutes for individual moral responsibility. For so many issues were thought to be proven on paper as inferred from theories throughout history, yet in sober societies and communities we do not act expectedly as automatons, exactly because we think in a more complex way, trusting our numerous human faculties and the many talents bestowed on us. And with all this we presuppose, at least as a potentiality, that our backgrounding human culture may also develop the arsenal of further finely chiselled instruments as well.

In addition, in a last analysis it is also obvious that it is the same legal culture having already produced the most strictly formulated rules to be applied on a mass scale that has also made rights a function of the proper exercise of rights and categorised the fact of being actually dangerous to society as one of the criteria for a deed to be qualified as a crime. Hence, unlawful acts were not due to clauses themselves provided for in socialism, either. For it is the same ruthless dictatorship that subordinated everything in every field, every way and under any circumstances to the political purposes of that central or local despotism (dominated basically by the personal intentions of individual party potentates) which also brutally totalised society. All things considered, it is exactly the use of so-called clauses as a legal technique that is accidental; but it is clearly inevitable on the level of social totality that where a homogenised sphere is built up also a safety valve has to be wedged in in order to ensure social heterogeneity to prevail, even if most exceptionally, in the very last

resort. Comparing societies and epochs, often a close parallel can be observed between a given *legal culture* and the use of some adequate culture of *legal technicalities*. Within this, it is of course tradition and the inherent urge of skills already practised that are to decide which particular instruments of legal technique will be finally recoursed to.

Almost this same duality (or jump into the opposite) manifests itself in our example referred to earlier, namely, in the Constitutional Court's decisions on compensation and facing with the criminal past of socialism during the political transformation in Hungary. For there is no–and has never been any–expressed constitutional provision[20] on the basis of which their adjudication would have not allowed a much more moderate decision or eventually even abstention from, or just the opposite of, the extreme decisions that were actually made. Remarkably enough, when the justices were giving official reasons, their justification was limited to sheer formalism. In doing so, they were drawing on the so-called "invisible constitution", that is, on one exclusively posited in their imagination. However, on expiry of their mandate–i.e., of the exclusively enforceable limit of their activity–, when they may have felt that the memory of their past activity and its assessment by the posterity were already at stake, their subsequent attempt at justification proved rather material. This is what we call acting by *double standards*. And so also was that when they declared to adopt the jurisprudence of the Strasbourg European Court for ruling henceforth (of course, again, without any authorisation, i.e., purely out of their own decision), our lawyerly community welcomed the news once "materially" and with enthusiastic applause, while at another time the same community only murmured that this was nothing but discretionary goal-rationality, that is, legally speaking, plain arbitrariness.[21] At times, therefore, it seems that we get

[20] Unless we think of the constitutional description of the Republic of Hungary defined as a "democratic state under the rule of law" (Article 2/1), where the *definiendum* can only indicate cultural ethos rather than codified ways and conditions. See, e.g., for the nature and variety of understandings of the key term, Fallon, R. H., Jr.: »The Rule of Law« as a Concept in Constitutional Discourse. *Columbia Law Review* 97 (1997) 1–56.

[21] I find it somewhat similarly frivolous to say now, for instance, that the Constitutional Court's past activism in its first decade may have been adequate to the conditions then but it would be no longer timely if it went on similarly later on. For the Constitution has not changed meanwhile, consequently the Constitutional Court's statutory mandate to adjudicate constitutionality has been the same from the beginning. And the mere fact that the Constitutional Court has no forum to be appealed against, wherefore each of its actions in procedure has from the outset had the seal of constitutional force on it, must not have entitled it to any acts at will. That is, we need to clarify also theoretically if an activism legally so unfounded by the wordings of the Constitution (but having so far-reaching social

enticed to adopt blind positivistic attitudes only to suddenly switch over into the charismatic contentuality of self-liberation.

We might add that, at the same time, all this involves the availability of a strategic change of law as mediated by modifying either the context and/or the legal technique as well. Because whether or not this was consciously foreplanned by the Constitutional Court's consideration, eventually the path actually taken had proven to be the strategically safest one, with an effect irreversible and irrevocable, as the Constitutional Court, by the same token, also accomplished the job of doctrinal conceptualisation when it formulated (in a way rather sophisticated) the grounds for its decisions in question. For, as known, the *"invisible constitution"* (if this may signify a sensible term at all) indicates a conceptually elaborated system behind the Constitution's textual wording, a kind of dogmatics rendered by constitutional force under the Constitutional Court's seal.[22] And it does so with an effect that, even if one or

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consequences at the same time) is just one of the feasible materialisations of the free discretion that can be resorted to optionally or, otherwise speaking, discretion is not verging on abuse only provided that it will not have reached to acting as legislative or even constituent power. Because exclusively the elimination of "unconstitutionality" can be understood by the test–or adjudication–of "constitutionality" in a literal sense, that is, according to the Constitution's provision in force at its execution. When Lord *Acton* summed up the experience of several millennia–saying that "power tends to corrupt and absolute power corrupts absolutely"–, he himself did not mean anything more than that law, especially in issues of a dramatic impact for the public, is by far not the automatic result of the possible lack of further formalistically posited delimitations.

For he was of the opinion that "Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or the certainty of corruption by authority. There is no worse heresy than that the office sanctifies the holder of it." Lord Acton's letter to Bishop Mandell Creighton on April 5, 1887, in his–Fears R. J. (ed.)–*Selected Writings* Essays in the Study and Writing History. Indianapolis, 1986. 383.

[22] As the president's concurrent opinion to the decision 23 of 31 October, 1990 holds, "the starting point is the totality of the Constitution. The Constitutional Court has to continue determining in its interpretations the principled bases of the Constitution and the rights laid down thereby and establishing a coherent system by means of its judgments, which as an »invisible Constitution« serves as a standard benchmark of constitutionality above the Constitution which is nowadays being amended in everyday political interest". Cf. Sólyom, L.: Introduction to the Decisions of the Constitutional Court of the Republic of Hungary. In: Sólyom, L.–Brunner, G. (eds.): *Constitutional Judiciary in a New Democracy* The Hungarian Constitutional Court. Ann Arbor, 2000. 41 et seq. Cf. also Sajó, A.: Reading the Invisible Constitution: Judicial Review in Hungary. *Oxford Legal Studies* 15

two decisions may be circumvented singularly in one way or another, surely a whole conceptually elaborated system cannot, because with such a step we would inevitably lose the guiding principle in any of our prospective interpretations.

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If we claim that in the realm of classical positivism, law is a reified entity with a completely ready-made set-up and with boundaries given from the outset for the outside world, and this (along with the appropriate lawyerly culture and professional deontology) also involves the expectation that the law can be applied deductively as processed through our lawyerly logic; but if, in the guise of theory, now we also declare that all this is nothing but a mode of parlance until it becomes actually present and applicable for the jurist exclusively through an established meaning assigned to it–well, then we do not necessarily tell more than what *Kelsen* did once. For this tempting intellectual dead-end was foreseen by his philosophical reconstruction already (and with a tension induced by its internal contradiction) when in the second half of his life he concluded that in a legal sense, there is no "murder" (and, consequently, no "lawfulness", no "constitutionality" and "unconstitutionality", that is, no whatever legal qualification) in and by itself. There are nothing but *procedural positions* within the realm of law. And if, by the force of any of these, the judge declares now that you are a murderer or a woman, then it will be completely indifferent in a legal sense what you actually did or what your gender is in reality. What will matter for law is exclusively the decision arrived at procedurally by the authority, which once will be sealed by the legal force, will from then on also be utterly indisputable–as long as the given legal order prevails. Well, my above explanation relieves somewhat the austerity of normativity. Namely, although in terms of this explanation, reification in law is only an appearance in epistemology, as exclusively *exchanges of meanings and attitudes conformed* to the latter are traceable in society ontologically; however, the latter still constitute a kind of continuum constantly moving and changing, shifted and re-shifted again in their tendencies with changing contexts, yet with elements built upon each other reliably; and thereby, they also will build into a kind of uninterrupted sequence of progress (irrespective of the fact that the law may suffer, as the case may be, no change in its objectified, textual form).

Simplifyingly expressed, traditional legal positivism is a position against natural law, emphasising that there is a worldly identifiable maker of the law,

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(1995) 253–267. and Füzér, K.: The Invisible Constitution: The Construction of Constitutional Reality in Hungary. *International Journal of Sociology* 26 (1997) 48–65.

as opposed to the classical natural law's stand that traces validity back to a source transcending this law. In the light of such a duality, my point is on the borderland, as it doubtlessly (and maybe also astonishingly) proclaims a kind of invisible democratisation. After all, although law has both a particular maker and a definite circle of addressees in the light of what has been said above, yet inevitably and incontestably *we are all there in the work of law*–that is, all we in society, even if represented, for the most part, by jurists (justices and lawyers) who practically apply the law. I would even add that it was rather ironical for me to expound this just during socialism in Hungary, as such an allegation does involve that there are limits even to despotism, for each and every addressee of the law actually takes part in one way or another in the processes of giving meanings to law and thereby making it–again: in one way or another–reconventionalised.

Nevertheless, our established culture of developing meanings in law may derive itself only from norms authoritatively issued. And this necessarily embodies the ontic process, sociologically describable as a fact, in terms of which society as a circle of addressees conventionalises it while acquiring it. The question arises whether this can be anything else or more than a kind of *Kelsen*-reinterpretation. Well, although *Kelsen*'s aim might have been quite the opposite,[23] by the further elaboration of his *Pure Theory of Law* he had actually relativised all the law's components, thrusting us back into a kind of uncertainty and sheer accidentality. Because he built up, with endless austerity, a pyramid-like theory of gradation [*Stufenbau*], offering a logified picture on the structure and operation of the whole set-up of law with inexorable consistency, excluding any contingency, on the one hand.[24] However, with the American publication in 1946 of the re-formulation of his work[25]–in which he elevated the moment of the legal force into a criterion set–, he had rendered all this relative, on the other. This way it has become clear that within the field of

[23] Because–as István Losonczy himself once noted it–, according to the law's "dogmas" [*A mulasztás* I: A mulasztási bűncselekmények okozatossága {The default, I: The causality of crimes of default} Pécs, 1937. 70], *Kelsen* built up "the doctrine of legal forms" [*A funkcionális fogalomalkotás lehetősége a jogtudományban* {The availability of functional concept formation in jurisprudence} (Királyi Magyar Egyetemi Nyomda, Budapest, 1941), p. 90], wherein he used the concept as "a law of sequence building", as a "sequence of functions propounded within a definite law" [*ibid.*, pp. 25 & 81, meaning by 'law' here the regularity established by sciences], albeit the "syncreteness of [legal] law is nothing but [...] the result of the particularity of such [scientific] laws that constitute the [legal] law" [*A mulasztás*, p. 73].

[24] Kelsen, H.: *Reine Rechtslehre*. Wien, 1934.

[25] Kelsen, H.: *General Theory of Law and State*. Cambridge, Mass., 1946.

discretion in which such a simultaneous application and making of the law takes place, in fact everything and also its opposite may occur. This is all the more so because the very question of what is application–i.e., what is that can be regarded, from a normatively higher level in hierarchy, as pre-defined for the lower level–can be exclusively answered from a procedural position entitled to official reconsideration or revision (as anything else can only be taken as a private opinion), and thus, any optional element or consideration, even if outside the law, may, in case it becomes legally final by the seal of a *res iudicata*, get incorporated forever into the law, despite its eventually random contents. Well, on the final account, it seems as if *Kelsen*'s entire oeuvre accentuated nothing but this: although the law has a logifiedly solid framework, built up laboriously and at the cost of great efforts, yet if anyone really wanted to take it into his hands, the structure would suddenly crash and just slip away like grains of sand.

In the spirit of the above, we usually say that, all things considered, law *defines itself*. However, this, examined closer, may turn out to be misleading, because we can exclusively speak of its (being incessantly in the course of) *getting defined*. For this is a process of self-generation in which a normative factor is given, with reference to which we may attempt to define its meaning for ourselves (in our positions as judges, attorneys, lawyers, etc.); at the same time our version of meaning is confronted with that of others, which communication of meanings eventually adds up to continuous re-conventionalisation. This understanding of the law is, on the final analysis, nothing but a social–institutional–*praxis* theory. It suggests that the ultimate certainty, starting out from which *Kelsen* would have tried to intellectually reconstruct the world of law with its structure and operation out of some elementary stones as experienced, is eventually nothing else than we ourselves.

As a matter of course, it was by the end of his life that *Kelsen* actually could arrive at what could serve for me already as a starting point. Namely, when as explanatory principles he introduced the moments of both legal force and efficacity (i.e., the factual acceptance of that it is exclusively an order by and large being already enforced about the validity of which we may speak sensibly at all), he actually already *concluded backwards from a social end-result* as a total result, and obtained by reduction that what he can now build up the law from. So, from the moment I started re-considering *Kelsen*'s theory of law-application,[26] I could recognise only this path as acceptable.

[26] From the author: Kelsen's Theory of Law-application: Evolution, Ambiguities, Open Questions. *Acta Juridica Hungarica* 36 (1994) 3–27.

Accordingly, the *closed-open system* that characterises the relation of what is inside and what is outside the law (with the movement inside the law) is itself nothing else but a *continuum*, displaying features of a particular autonomy only from an analytic point of view. We can define its foundation, outlines and contents basically only from the facts of practice as from the last empirical *donné* ['what is given', as once formulated by *Gény*] that we can reconstruct at all. It is this wherein the sense of excluding the availability of normative logical conclusions from law lies, as thereby we resolve all this in a feasible reconstruction from actual practice. For practice testifies both continuity and reliability. For jurisprudence as the living practice of law, characteristic of a country or of an epoch, can by and large certainly be described as a *sequence of consecutive steps* in harmonisation with and conformity to each other in the light of posterior reconstruction.[27]

If we asked again whether law defines itself and whether this is true in all respects both inside and outside the law, we might perhaps respond to the above by referring to the ideal picture of three intertwining circles.[28] According to this, there is a constant movement going on objectively in the total societal work of shaping the law. The components taking part in this movement, pressing against each other, are (1) the legally relevant attitudes in society, (2) the actual judicial decision-making practice, as well as (3) the posited law (with the law's doctrinal aspiration to define itself in *Rechtsdogmatik*). In the incessant whirl of the subsequent actions by the various actors in (1) social action, (2) legal action, and (3) the law, we can be assured of one circumstance at least: at last, it can always be described–at least posteriorly–which of them will prevail (if at all) in their struggle. In addition and on the last analysis, one of them may become predominant irrespectively of which specific legal doctrine is being enforced in the given society at a given time. That is, the process of their being pressed against one another with one of them becoming (relatively or absolutely) predominant is bound to take place anyway. And our repeated statement on that law eventually defines itself and that, in this *self-determination of getting defined* in the given situation, only the given (and not another) status (or qualification in and by the law) could arise as a result of the process, becomes understandable in this context.

[27] That is, with a given–subsequently certainly reconstructible–failure rate, the extent and pretensions of which are of course again indicative of the quality of the legal culture in question.

[28] First applied by the paper in note 3, as well as, also from the author: *Lectures on the Paradigms of Legal Thinking*. Budapest, 1999. 279. especially in para 6.1 on pp. 203 et seq.

The final conclusion, too, will conclude from this statement above, namely that an integration (with ensuring unification within the European Union or elsewhere) will not be effectuated in terms of cultures but in ones of rules and instruments–in case such a process will go on at all. And this is not a pious wishful agenda of legal policy but a value-free statement on probabilities based on the foregoing. Just as I cannot grasp law as such, only its meaning(s) as getting asserted in practice, in the same way we cannot do anything with legal culture at wish either (e.g., by targetedly shaping or integrating it with something else), because, as we have seen, legal culture, too, can only manifest itself in nothing but continuous givings of meaning, that is, in the actuality and succession of conventionalised meanings. Consequently, all we can integrate through human intervention (and with politics by deploying artificial instruments) is nothing else than kinds of objectivation we may have symbolically erected, in want of better means–for example, texts with their direct logical consequences involved.

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Locus Standi of Representative Groups in the Shadow of *Plaumann:* Limitations and Possible Solutions

Abstract. The purpose of this paper is to examine the state of the law in relation to the *locus standi* of representative groups at the Union level. The paper has a dual thematic task: the assessment of the degree in which representative groups and their standing to challenge the validity of legislative measures can be differentiated from the Plaumann criterion and the identification of strategies that can improve the chances of interest groups to challenge under Art. 230 EC. The thesis adopted in response states that regrettably the ECJ's interpretation of the requirement of individual concern has been applied to representative groups. After examining the jurisprudence in different areas and from the perspective of the arguments used by representative groups in order to bypass Plaumann, there does not seem to be any clear thematic or argumentative typology that influences the ECJ. The only important element that could make a difference is the existence of documented participation by the representative body that creates procedural rights. It is in this respect that the removal of the individual concern shadow can be achieved, namely through representative groups being effective at what they are designed to do: lobbying. Therefore, the key to strengthening the standing claim is enhanced and certified participation.

Keywords: locus standi, judicial review, representative groups, interest groups, participation, individual concern, environmental protection, effective judicial protection, action for annulment, Plaumann, UPA, European law, fundamental/human rights, legitimacy

1. Introduction

The cornerstone of every democratic polity is the adherence to the principle of the rule of law which entails the existence of legal mechanisms guaranteeing "not only that a court be able to deal with all the violations of legal rules but, in addition, that all injured parties be entitled to adjudication of their grievances".[1]

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[1] Scheingold, S.: *The Rule of Law in European Integration.* Connecticut, 1976. 41.

The redress of grievances is directly dependent on the existence of facilitative instruments for testing the procedural and substantive legality of measures adopted by the institutions of that legal order. An essential component of a system that provides for the challenge of measures is the capacity to bring actions (or locus standi) which acts as the gateway to judicial review proceedings.

In the context of the European Union (EU), the capacity of individuals to bring actions in order to challenge the validity of secondary Community law is formally guaranteed in Art. 230(4) EC. The assessment by commentators of the effectiveness of that provision in according standing to individual applicants,[2] places the European Court of Justice (ECJ) and the Court of First Instance (CFI) in an apologetic position.[3] The critical perspective against the jurisprudence of the ECJ on Art. 230 (4) EC, can be synopsised in the argument that the Court construed the requirement of individual concern, the main admissibility requirement for actions brought by individual applicants for the annulment of Community acts, too restrictively.[4] The criticism extends to the

[2] For a selection of accounts on standing see: Harding, C.: The Private Interest in Challenging Community Action. 5 (1980) *European Law Review,* 345; Harlow, C.: Towards a Theory of Access for the European Court of Justice. 12 (1992) *Yearbook of European Law,* 213; Craig, P.: Legality, Standing and Substantial Review in Community Law. 14 (1994) *Oxford Journal of Legal Studies,* 507; Rasmussen, H.: Why Is Article 173 Interpreted Against Private Plaintiffs? 5 (1980) *European Law Review,* 112; Arnull, A.: Private Applicants and the Action for Annulment under Article 173 of the EC Treaty. 32 (1995) *Common Market Law Review.* 7; Greaves, R.: *Locus Standi* under Article 173 EEC when Seeking Annulment of a Regulation. 11 (1986) *European Law Review,* 119; Neuwahl, N.: Article 173 Paragraph 4 EC: Past, Present and Possible Future. 21 (1996) *European Law Review,* 112; Arnull, A.: *The European Union and its Court of Justice.* Oxford, 1999. 21–69; Ward, A.: *Judicial Review and the Rights of Private Parties in EC Law.* Oxford, 2000. 202–287; Albors-Llorens, A.: *Private Parties in European Community Law. Challenging Community Measures.* Oxford, 1996.

[3] See the critical analysis in Usher, J. A.: Direct and Individual Concern-an Effective Remedy or a Conventional Solution? 28 (2003) *European Law Review,* 575; Albors-Llorens, A.: The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat? 62 (2003) *Cambridge Law Journal,* 72; Craig, P.: Standing, Rights, and the Structure of Legal Argument. 9 (2003) *European Public Law,* 493; Ragolle, F.: Access to Justice for Private Applicants in the Community Legal Order: recent (r)evolutions. 28 (2003) *European Law Review,* 90; Biernat, E.: The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community. *Harvard Jean Monnet Working Section No. 12/03,* http://www.jeanmonnetprogram.org/sections/03/031201.html

[4] Granger, M-P.: Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: Jégo-Quéré et Cie SA v Commission and Union de Pequeños Agricultores v Council. 66 (2003) *Modern Law Review,* 124.

point that the requirement of individual concern constitutes all but an intractable barrier for individual applicants to the extent that it transformed standing from a gateway to judicial review to a permanently close door.[5] In addition, there is also a discrepancy with the jurisprudence of the Court in other fields where the ECJ demonstrated a bold willingness to develop important constitutional principles.[6] The departure from the general strategy of expansion of the enforcement potential of European Community (EC) law when it came to standing, is surprising due to the fact that the Court seems to disregard the coexistence with the constitutional legal structures of the Member States that guaranty the existence of liberal legal mechanisms for challenging the validity of measures in their municipal systems.[7]

Unfortunately, the same restrictive approach has been applied to the standing of representative groups, irrespective of the fact that the Union has recently placed its emphasis on the promotion of participation of citizens in the decision-making process,[8] thus resulting to an inconsistency between policy goals of the EU and the approach of the ECJ to standing.[9] The idea of enhancing participation

[5] For similar views see: Enchelmaier, S.: No-One Slips Through the Net? Latest Developments, And Non-Developments, in the European Court of Justice's Jurisprudence on Art. 230(4) EC. *Working Paper 3*, <http://www.competitionlaw.ox.ac.uk/iecl/pdfs/working3enchelmaier.pdf>, 2; Kombos, C.: The Recent Case Law on Locus Standi of Private Applicants under Art. 230 (4) EC: A Missed Opportunity or A Velvet Revolution? *European Integration online Papers (EIoP)* 9 (2005) <http://eiop.or.at/eiop/pdf/2005-017.pdf>, 1.

[6] E.g. the development of State liability: Pekka, A.: Twelve Years of *Francovich* in the European Court of Justice: A Survey of the Case-law on the Interpretation of the Three Conditions of Liability. In: Moreira de Sousa, S.–Heusel, W. (eds.): *Enforcing Community law from Francovich to Köbler:* Twelve Years of the State Liability Principle. Cologne, 2004. 59.; Arnull, A.: Rights and Remedies: Restraint or Activism? In: Lonbay, J.–Biondi, A. (eds.): *Remedies for Breach of EC Law.* Sussex, 1997. 15.; Barav, A.: State Liability in Damages for Breach of Community Law in the National Courts. In: Barav, A.–Wyatt D. A. (eds.): *Yearbook of European Law 1996.* Oxford, 1997. 87.

[7] For the liberal stand of Member States on standing see, e.g., German law: *Bundesverwaltungsgericht 1.12.82 BverwGE 66, 307 (crab-fishermen case)*; Italian law: *TAR Lazio, 20. 1. 95, No 62 Foro Italiano 1995 II-460;* Belgian law: *Conseil d'État, Ville de Liége et Heze, 20. 9. 91, No 37.676;* French law: *Conseil d'État, 24. 6. 91, Soc Côte d'Azur, Lebon, 1110.*

[8] *Commission's White Paper on European Governance*, COM (2001) 428 *European Governance-A White Paper*, 27 July 2001; *Laeken Declaration on the Future of Europe*, December 2001, available <http://www.euconvention.be/static/LaekenDeclaration.asp>. For analysis see Armstrong, K.: Rediscovering Civil Society: The European Union and the White Paper on Governance. 8 (2002) *European Law Journal*, 102.

[9] Cygan, A.: Protecting the Interests of Civil Society in Community Decision-Making–The Limits of Article 230 EC, 52 (2003) *International Comparative Law Quarterly*, 995.

has inherent links with the operation of representative groups that exercise considerable influence at the pre-legislative level through the medium of lobbying practices.[10] The Commission's White Paper on European Governance[11] has, according to Curtin, accepted the significant role of representative groups in terms of their "dedication to the disinterested search for the public interest in society".[12] By a logical expansion of the preceding reasoning, it can be argued that there is no compelling reason for limiting the quest for promotion of the public interest to the drafting stage of legislation. Cygan has supported this approach by suggesting that "representation and protection of citizens' interests requires *ex post* judicial protection in circumstances where the legislative measure breaches fundamental rights or if its application infringes principles of procedural propriety".[13] Therefore, it would be paradoxical to insist on the functional and democratic utility of representative groups, while simultaneously denying any effective standing rights for challenging legislative measures. Needless to say, that paradox has become the norm in the sphere of EU law.

As a corollary, the purpose of this paper is twofold: to offer a descriptive analysis of the development and state of the law in relation to *locus standi* of individuals and representative groups and to examine the possible alternatives that could be utilized for sidestepping the hurdles created by the jurisprudence of the ECJ and CFI in relation to representative groups. The working hypothesis applied states that the state of the law is unduly restrictive and economically unrealistic and is likely to remain such because of the recent rulings of the ECJ that were effectively reaffirmed and codified by the Draft Treaty Establishing a Constitution for Europe.[14] The alternatives that could be used include the

[10] On the role of interest groups see: Mazey, S.–Richardson, J.: Interest Groups and the Brussels Bureaucracy. In: Hayward, J.–Menon, A. (eds.): *Governing Europe.* Oxford, 2003. 208.; Bouwen, P.: Corporate Lobbying in the EU: the Logic of Access. 9 (2002) *Journal of European Public Policy,* 365; Eising, R.: Interest Groups and the European Union. In: Cini, M. (eds.): *European Union Politics.* Oxford, 2003. 192.

[11] *Op. cit., note 8.* Note that the relationship of the Commission with interest groups has a long history as evident from Commission of the European Communities, *An Open and Structured Dialogue Between the Commission and Special Interest Groups,* Brussels, 1992, CEC: SEC (92) 2272 final, 2 December 1992; Commission of the European Communities and Council of the European Communities, *Communication from the Commission on Promoting The Role of Voluntary Organisations and Foundations in Europe,* COM (97) 241 final. Luxembourg, Office for Official Publications of the European Communities, 1997.

[12] Curtin, D.: *Postnational Democracy: The European Union in Search of a Political Philosophy.* The Hague, 1997. 90.

[13] Cygan: *op. cit.,* 995.

[14] Available <http://europa.eu/constitution/futurum/constitution/index_en.htm>

agency analogy that refers to the collective challenging through pressure groups[15] and the enhanced participation at the drafting level that would aim at creating procedural rights of challenge that would be enforceable on the basis of legitimate expectations. The preceding proposals apply primarily to representative groups but could function as the bridge for relaxing standing requirements in general or more realistically for expanding the scope of exceptions to *Plaumann*.

In terms of terminological completeness, it must be clarified that the denomination 'representative groups' is a generic term encompassing a plethora of different types of groups. Those cover a broad thematic spectrum ranging from pressure groups for specific interests (e.g. environmental groups), representative groups of sections of the economy (e.g. industrialists) and of workers (trade unions). The nature of each representative group impacts on the approach that the ECJ and the CFI adopt as will be shown *infra*, with the stringent approach reserved for environmental groups and for bodies that base their claims on fundamental human rights. At the other side of the continuum, there are those bodies that can establish participatory rights flowing from procedural grounds. The other term used by this paper is 'surrogate actions' that refers to actions that are intentionally brought by groups in instances where an individual applicant would fail due to the *Plaumann* criteria.

In structural terms, the paper is divided in three sections: the necessary sketching of the existing state of the law, the approach of the ECJ and the CFI towards different types of representative groups and the assessment of different strategies that could potentially reverse the unsatisfactory legal framework.

2. *Locus standi* under Art. 230 EC: the Plaumann shadow

Art. 230 EC establishes a trichotomy between different types of applicants seeking to challenge the validity of acts of the institutions, alas without distinguishing between forms of measures,[16] thus covering both legislative and administrative acts of the Community institutions.[17] Moreover, Art. 230 EC

[15] For an excellent introductory analysis see Douglas-Scott, S.: *Constitutional Jurisprudence of the European Union*. London, 2002. 363–368.

[16] Albors-Llorens, A.: *Private Parties in European Community Law. Challenging Community Measures*. Oxford, 1996. 4, 6.

[17] *Ibid.*, 5. For the comparison with national systems see Fromont. M.: L'influence du Droit français et du Droit allemande sur les Conditions de Recevabilité du Recours en Annulation devant la Cour de Justice des Communautés Européennes. 2 (1966) *Revue Trimestrielle de Droit Européenne*, 47.

draws a rigid distinction between legal entities based on the identity of the applicant,[18] therefore establishing a typological approach whereby there are privileged, semi-privileged and non-privileged applicants. These classes have in common only the general conditions of Art. 230 (1) EC, namely the act must be an act of an EC Institution[19] that produces legal effects,[20] and the challenge must be brought within the two-month time limit.[21] On this basis, Art. 230 EC adopts an approach of selective *actio popularis* in the sense privileged applicants have automatic standing to challenge measures adopted by the Institutions,[22] while the semi-privileged class can take action against other institutions only for the purpose of protecting their prerogative powers.[23]

[18] Hartley, T.: *The Foundations of EC Law.* Oxford, 1998. 349–350.

[19] Institutions whose acts are excluded by Art. 230 (1) are the European Council, COREPER and the Council when acting under intergovernmental powers: Case T-584/93, *Roujansky v. European Council,* [1994] European Court Reports, II-585; Case C-25/94, *Commission v. Council (FAO),* [1996] European Court Reports, I-1469; Cases C-181, 248/91, *Parliament v. Council and Commission (Aid to Bangladesh),* [1993] European Court Reports, I-3685.

[20] A relevant concept is to be found in the landmark decision in Case 22/70, *ERTA,* [1971] European Court Reports, 263: the list of acts that can be reviewed in *Art. 249 EC* is not exhaustive and other acts that are *sui generis* in nature can be reviewed, provided that they have legal effects. See also Case 60/81, *IBM v. Commission,* [1981] European Court Reports, 2639, Case T-3/93, *Air France v. Commission,* [1994] European Court Reports, II-121. See also the recent decision in Case C-131/03 P, *Reynolds Tobacco and Others v Commission,* Official Journal 2003 C124/10, delivered on 12th September 2006.

[21] Starts from the moment that the measure in question is published or from the moment that the applicant is notified: Case 156/77, *Commission v Belgium,* [1978] European Court Reports, 1881; Cases 10 & 18/68, *Eridania v Commission,* [1969] European Court Reports, 459; Case C-195/91 P, *Bayer AG v Commission,* [1994] European Court Reports, I-5619.

[22] Privileged applicants: Member States, Commission, Council and after the Treaty of Nice the European Parliament. On the gradual change to the standing rights of the EP see C-302/87, *European Parliament v. Council (Comitology),* [1988] European Court Reports, 5615, Case C-70/88 *European Parliament v. Council (Chernobyl),* [1990] European Court Reports, I-2041. For comment see Weiler, J.: Pride and Prejudice–*Parliament v. Council.* 14 (1989) *European Law Review,* 334.; Bebr, G.: The Standing of the EP in the Community system of Legal Remedies: A Thorny Jurisprudential Development. (1990) 10 *YBEL* 171.

[23] Semi-privileged: ECB and the Court of Auditors. See Craig, P.: EMU, the European Central Bank and Judicial Review. In: Beaumont–Walker (eds.): *Legal Framework of the Single Currency.* Oxford, 1999. 112.

Any natural or legal person can challenge the validity of a measure on the basis of Art. 230 (4) EC, provided that the measure is one described as within the scope of the provision and that the dual requirement of 'direct and individual concern' is satisfied. Direct concern is an unproblematic test of causation whereby the applicant needs to show that he is affected by the contested measure and that there is no discretionary implementing measure breaking the chain.[24] In terms of individual concern when challenging decisions addressed to a third party, it was held in the landmark decision in *Plaumann v. Commission*[25] that a claimant is individually concerned if the decision in question "affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually".[26] Therefore, the Court construed the individual concern requirement as a two-part test requiring that the claimant is *differentiated* from all other persons and that by reasons of those distinguishing features the claimant is *singed out* as the original addressee of the decision.

In *Plaumann* the application of the test to the specific facts made the test even more narrow and demanding and in effect created a third requirement. The Court ruled that the claimant is affected by the decision because he was an importer of clementines but could not be singled out in the same way as the original addressee as *in the future* any individual could enter in the practice of the specific commercial activity. It becomes therefore clear that the ECJ introduced an additional test in terms of the *singled out* requirement by requiring that the claimant has to satisfy the dual test not only at the present but also show that the same would apply in the future.

The 'future element' represents a constraint that renders the individual concern requirement almost impossible to satisfy since the Court starts from the premise that at any moment in the future any individual could decide and enter the specific commercial circle. Clearly, that is an argument that in effect ignores fundamental principles of economic activity according to which the entry into

[24] Case 62/70, *Bock v. Commission,* [1971] European Court Reports, 897.; Case 11/82, *Piraiki-Patraiki v. Commission,* [1985] European Court Reports, 207.; Case T-96/92, *Comité central d'entreprise de la Société générale des grande sources v. Commission,* [1995] European Court Reports, II-1213 and Case T-12/93, *Comité central d'entreprise de la Société anonyme Vittel v. Commission,* [1995] European Court Reports, II-1247. See Hartley: *op. cit.* 369–373; Craig, P.–De Bùrca, G.: *EU Law. Text, Cases and Materials.* Oxford, 2003. 518–520.

[25] Case 25/62, *Plaumann v. Commission,* [1963] European Court Reports, 95.

[26] *Ibid.*, para. 107.

a market is not always open to anybody but is restricted by a plethora of factors. Those could include the strength of existing and established competitors, the growth potential of the market, the significance of established brands and a number of other factors that are beyond the scope of this work.[27]

The restrictive nature of the *Plaumann* formula has been confirmed in numerous subsequent decisions that can be placed in two categories: (i) application of *Plaumann* leading to "economically unrealistic"[28] results, and (ii) 'generous' application in a retroactive context.[29] In terms of challenging regulations, Art. 230 (4) EC allows for the challenge of regulations that are in essence decisions and the relevant requirement is again that of direct and individual concern, with *Plaumann* supplemented in *Calpak*[30] and the test whether a regulation is of general application or specific application.[31] Therefore, the economically unfounded and unrealistic approach of the ECJ in relation to the criteria applied in *Plaumann* has been applied in the context of regulations, regrettably reinforced with the additional requirement that the regulations have specific application.[32] Once again, a limited exception applies for occasions where the factual background is placed in the past and the set of events was

[27] A good starting point for appreciating the economic unstableness of the "future" requirement is the seminal work by Porter, M.: How competitive forces shape strategy. 59 (1979) *Harvard Business Review*. In brief, there are *5 forces* that influence a firm's competitive strategy. Four forces–the bargaining power of customers, the bargaining power of suppliers, the threat of new entrants, and the threat of substitute products–combine with other variables to influence a fifth force, the level of competition in an industry.

[28] Craig–De Bùrca: *op. cit.*, 489. See for examples the decisions in Case 231/82, *Spijker Kwasten v. Commission*, [1983] European Court Reports, 2559.

[29] See for example Cases 106–107/63, *Toepfer v. Commission*, [1965] European Court Reports, 405, 411. "the membership of the class is fixed and ascertainable at the date of the adoption of the contested measure". See also Case 11/82, *Piraiki-Patraiki v. Commission*, [1985] European Court Reports, 207.

[30] Cases 789–790/79, *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission*, [1980] European Court Reports, 1949.

[31] *Ibid.*, para. 9. For criticism see Craig–De Bùrca: *op. cit.*, 494; Craig, P.: Standing , Rights, and the Structure of Legal Argument. 9 (2003) *European Public Law*, 495.

[32] Case 101/76, *KSH v. Commission*, [1977] European Court Reports, 797; Cases 103-9/78 *Beauport v. Council and Commission*, [1979] European Court Reports, 17; Case 162/78, *Wagner v. Commission*, [1979] European Court Reports, 3467; Case 45/81, *Alexander Moksel Import-Export GmbH v. Commission*, [1982] European Court Reports, 1129; Cases 97, 99, 193 and 215/86, *Asteris AE and Greece v. Commission*, [1988] European Court Reports, 2181.

completed,[33] thus creating inconsistency through the weak technical dichotomy between the *Calpak* rule and the exception.[34]

The inconsistency is strengthened by the development of subject matter exceptions where the Court has relaxed the standing requirements applying to challenges of regulations that are disguised decisions. The five subject matter areas are *de facto* exceptions to the restrictive interpretation of individual concern, as it is evident from the case law in the fields of anti-dumping,[35] state aid,[36] competition,[37] trademark rights[38] and instances where a democratic consideration is present.[39]

As an interim conclusion, the approaches of the ECJ and the CFI in interpreting Art. 230 (4) EC and the requirement of individual concern have been extremely restrictive and narrow. The decision in *Plaumann* is highly problematic

[33] Case 100/74, *Societe CAM v. Commission* [1975] European Court Reports, 1393; Cases 41-44/70, *International Fruit Company BV v. Commission,* [1971] European Court Reports, 411.

[34] Cf. Case 138/79, Roquette Frères v. Council, [1980] European Court Reports, 3333; C-152/88, Sofrimport Sarl v. Commission, [1990] European Court Reports, I-2477 with Cases 789–790/79, Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission, [1980] European Court Reports, 1949; Case 11/82, *Piraiki–Patraiki v. Commission,* [1985] European Court Reports, 207.

[35] Case 113/77, NTN Toyo Bearing Co. v. Council and the Commission, [1979] European Court Reports, 1185; Cases 239, 275/82 Allied Corporation v. Commission, [1984] ECR-1005; Case 264/82, Timex Corporation v. Council and Commission, [1985] European Court Reports, 849; C-358/89, Extramet Industrie SA v. Council, [1992] European Court Reports, I-3813. See the Opinion by AG Jacobs in Extramet, para. 33 where he states "Nor do I believe it is necessary, in order to reach a satisfactory conclusion, to make direct reference to the European Convention on Human Rights, on which Extramet places some reliance in these proceedings. The Convention and the laws of the Member States are, however, indirectly relevant in that they support the existence of a general principle of law, namely the right to an effective judicial remedy: see Case 222/84, Johnston v. Chief Constable of the RUC, [1986] European Court Reports, 1651; Case 222/86, Unectef v. Heylens, [1987] European Court Reports, 4097. In my view, Article 173 should be interpreted so as to give effect to that principle".

[36] Case 169/84, *COFAZ v. Commission,* [1984] European Court Reports, 391;Case C-198/91, *William Cock plc v. Commission,* [1993] European Court Reports, I-2486; Case 730/79, *Phillip Morris Holland BV v. Commission,* [1980] European Court Reports, 2671.

[37] Case 26/76, *Metro-SB-Groâmärkte GmbH & Co KG v. Commission,* [1977] ECR 1875.

[38] Case C-309/89, *Codorniu SA v Council,* [1994] European Court Reports, I-1853.

[39] Case 294/83, *Partie Ecologiste 'Les Verts' v. Parliament,* [1986] ECR-1339. See Craig, P.: Democracy and Rule-making within the EC: An Empirical and Normative Assessment. 3 (1997) *European Law Journal* 105.

leading the subsequent case law to take the form of an anthology of examples of missed opportunities, economically unrealistic criteria, absurd outcomes and exceptions that are in reality further elaborations on and confirmations of the strictness of the tests. Unfortunately, those problematic parameters of individual concern for third parties were transplanted to challenges by representative groups.

3. Actions by representative groups and the Plaumann shadow

3.1. *Representative groups, the symbiotic relation with the institutions and their constitutional role*

The preceding section pictured the unduly restrictive and limited approach to standing that has been severely criticized[40] for its economic naivety and lack of protection for the individual. It is, therefore, interesting to examine whether the Court has adopted a different approach in relation to representative groups that bring actions on behalf of their membership. If the approach of the Courts is more liberal than that adopted for individual applicants, then there is an effective alternative circumventing the *Plaumann* test and its expansion in the jurisprudence. This is the rationale behind the agency analogy.

The agency analogy refers to the use of group actions as a medium for challenging the validity of measures where the individual applicant would normally fail due to the interpretation of the individual concern requirement in the case law.[41] Therefore, the idea of surrogate actions could provide an effective alternative for bypassing the consistent restrictive approach of the ECJ and the CFI in relation standing under Art. 230 (4) EC. The main theme of this section is whether it is desirable and justifiable to have a two-tier approach reserved for representative groups and other private applicants.

One dimension of the debate perceives representative groups as having extraordinary opportunities to intervene and influence the nature, content and scope of legislative measures. The influencing power of representative groups has been described as symbiotic with the Commission,[42] with the latter depending on representative groups for expert advice, technical expertise and for offering cross-national advocacy coalitions that are essential for the successful introduction

[40] See the thorough analysis by Enchelmaier, S.: *op. cit.*

[41] For an influential account supporting a reversal of the case law see Usher, J.: Judicial Review of Community Acts and the Private Litigant. In: Campbell, A.–Voyatzi, M. (eds.): *Legal Reasoning and Judicial Interpretation of Community Law.* Trenton, 1996, 121.

[42] Mazey–Richardson: *op. cit.*, 209.

of legislative proposals.[43] Consequently, such groups already have a disproportionately prominent role that generates influence impacting on the substance of legislative measures. Therefore, is seems unjust and democratically disproportionate for representative groups to have a special treatment reserved for them in the context of legal challenges.[44] Moreover, it has been argued[45] that associational standing is undesirable because it could be exploited by associations at the expense of the 'Hohfeldian claimant'.[46] Such type of claimant can be defined as the applicant that has a material claim correlative to a distinct obligation in another person or entity, while an interest group has an ideological claim.[47] Therefore, the argument is based on the subset of rules that Hohfeld identified in a legal system that have the functional task of regulating and directing the behaviour of the subjects of the system, namely individuals and associations, through prohibiting and stipulating what those agents are required by law to do. If an association takes advantage of the subset of rules that grants standing rights on the basis of a broad right to participation and at the same time the individuals with a concrete interest in challenging a measure are effectively excluded from doing so by the rules of the subsystem, then there is a legitimacy gap. In other words, the ideological right of associations to standing is placed at an equal level with the right of an individual to challenge where there is a vital interest at stake, or alternatively at a higher level if the individual is effectively denied of a standing right.[48]

The problem is magnified by the fact that the ECJ has persistently applied the strict *Plaumann* criteria to actions brought by private applicants. The creation of an exception favoring representative groups would create an unnecessary and unjustified dichotomy that would be creating the assumption that the individual deserves and receives protection of a lower intensity.[49] The consequences for the legitimacy and authority of the Union's judicial architecture would be negative and undesirable, since a double-standard yardstick would be seen as applying. At a practical level, the objection is that a liberal approach to the standing of representative groups could result in the creation of the

[43] *Ibid.* 409–410, 415.

[44] Harlow, C.: Public Law and Popular Justice. 65 (2002) *Modern Law Review*, 13.

[45] Douglas-Scott: *op. cit.*, 367.

[46] Term used to describe the ideas expressed by Hohfeld, W. N.: *Fundamental Legal Conceptions as Applied to Judicial Reasoning* [ed: Cook, W. W., Yale University Press]. New Haven and London, 1919.

[47] Douglas-Scott: *op. cit.*, 367.

[48] Tushnet, M.: The Sociology of Article III: a Response to Professor Brilmayar. 93 (1983) *Harvard Law Review*, 698.

[49] Cygan: *op. cit.*, 996.

phenomenon of "busybodies or meddlesome organizations".[50] As a corollary, the workload of the courts would increase, the legal certainty would be undermined as legislative measures would not be effective in practice until the time limit for challenge expires and the danger of test cases or delaying challenges from financially powerful bodies would be immanent.

On a different level, the creation of an exceptional class of private applicants in the form of representative groups could upset the delicate institutional balance. This is the case because according to Harlow[51] judicial review could be substituted by political accountability in the sense that legal challenges are to be made possible against policy decisions. In other words, the representative groups' function is not to second-guess informed policy decisions made under the complex legislative process when the result of their lobbying has proved to be unsuccessful. The democratic processes could, therefore, be bypassed with the practical consequence of placing the unelected judiciary at the difficult position of deciding cases that are in practice reviews of policy questions.

Finally, the argumentation against expanding standing rights for association groups includes a practical element that refers to the "repeat player phenomenon" and the "saga approach", whereby associations initiate repeatedly challenges and apply a systematic attack approach on a specific policy.[52] The consequence of the actions of such representative bodies would be the increase in the workload of the courts, while at the same time there seems to be an unjustified and disproportionate capitalization on the politically influential and expanding negotiating power of interest groups.

The opposite line of reasoning counters the latter point by pointing to the fact that judicial review is not isolated from the policy level and the judges have arguably the sensitivity of restraint in areas of pure policy determinations. Moreover, it is practically intricate to distinguish between administrative decisions and policy decisions, with the example of the *Greenpeace* case[53] proving the point. There, the issue was the funding of a power station that was on the face of the record in breach of the environmental safeguards provided under EU law. At which point does the policy element end and the administrative element begin? Or, can it be argued that the issue is purely a policy matter or alternatively solely an administrative propriety topic? Solving the Gordian

[50] *Ibid.*

[51] Harlow: Public Law and Popular Justice. *op. cit.*, 13.; Harlow, C.: Towards a Theory of Access for the ECJ. 12 (1992) *Yearbook of European Law*, 213.

[52] Harding: *op. cit.*, 116.

[53] Case T-585/93, *Greenpeace v Commission*, [1995] European Court Reports, II-2205.

knot of demarcation must be entrusted to the judiciary otherwise judicial review would be *ab initio* externally limited.

On a different point, the argument about placing representative groups higher than individuals in terms of standing must be approached with the pragmatic factor of an overly restrictive approach to standing of private applicants in mind. Therefore, the main issue is whether it is productive to maintain a legal lacuna in standing on the basis of a theoretically valid principle of equal treatment. It is submitted that the persistent unwillingness of the ECJ to reform the *Plaumann* criteria as was reaffirmed in the *UPA*[54] and *Jègo-Quèrè*[55] decisions and by Art. III-365 DTC[56] creates a pragmatically persuasive reason for relaxing standing requirements at any given opportunity through the creation of exceptions. The outcome is not ideal but is preferable than a stagnated *cu-de-sac*.

In relation to the workload concern,[57] it can be argued that the experience of national legal orders with a liberal approach to the standing of representative groups has not shown any increase in the workload of the national courts.[58] At the same time, the busybody phenomenon can be preempted since there is no argument supporting an *actio popularis* for representative groups, but a balanced test that distinguishes between representative groups with a genuine interest and those bodies that have a diametrically opposite agenda. The experience of national legal orders and the United Kingdom in specific that is analysed *infra*, points to the existence of such solutions.

As an interim conclusion, there are reasons of principle against the creation of a dual approach to standing of representative groups and individual applicants, but those arguments have to be approached in a holistic manner that takes into account the pragmatic limitations to standing and the need to create exceptions to the application of the *Plaumann* criteria until a new trend is created.

[54] Case C-50/2000 P, *Union de Pequenos Agricultores v. Council* [2002] European Court Reports, I-6677 (hereafter "*UPA*").

[55] Case C-263/02 P, *Commission v Jègo-Quèrè* [2004] CMLR 12 (hereafter "*Jègo-Quèrè Appeal*").

[56] For analysis see Kombos, C.: The Recent Case Law on Locus Standi of Private Applicants under Art. 230 (4) EC: A Missed Opportunity or A Velvet Revolution? *European Integration online Papers (EIoP)* Vol. 9 (2005) N° 17, <http://eiop.or.at/eiop/pdf/2005-017.pdf>, 14–16; Varju, M.: The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention. (2004) 10 (1) *European Public Law* 42.

[57] As expressed by the CFI in Case T-585/93, *Greenpeace v Commission,* [1995] European Court Reports, II-2205, 2230–2232.

[58] Conclusion reached by Cygan: *op. cit.*, 1000.

3.2. Representative groups and standing: the ECJ and the English approach compared

The jurisprudence of the ECJ is very restrictive towards representative groups and the Court has persistently refused to create an exception to the *Plaumann* approach when a representative group has sought to challenge under Art. 230 (4) EC.[59] Accordingly, the position has been summarized by the CFI in *Associazone Nazionale Bieticotori v. Council*[60] where it was held that interest bodies are able to bring actions under Art. 230 (4) EC when: a legal provision expressly grants procedural powers to trade associations;[61] the members of the association would have been able to bring individual actions as a result of being directly and individually concerned;[62] the associations negotiating position has been affected by the challenged legislative measure, thus attributing to the association direct and individual concern as an entity.[63]

This is partly surprising because groups have evolved to be a highly active and integral part of the legislative process and have been perceived as a remedial tool for the representative/democratic deficit of the Union.[64] Moreover, there is a comparative paradox in the sense that the development of the state of the law in Member States reflects a favorable disposition towards standing in general[65] and surrogate groups especially when those groups seek to initiate judicial review actions.[66]

[59] See Cases 16,17/62, *Conféderation Nationale des fruits et Producteures des fruits et Légumes v Council*, [1962] European Court Reports, 471. See also Cygan: *op. cit.*, 1003–1005.

[60] Case T-38/98, *Associazone Nazionale Bieticotori v. Council*, [1998] European Court Reports, II-4191, para. 25.

[61] Case 191/82 *Fediol* v *Commission*, [1983] European Court Reports, 2913, paragraphs 28 to 30; Case T-12/93, *Comité Central d'Entreprise de la Société Anonyme de Vittel and Others* v *Commission*, [1995] European Court Reports, II-1247, paras. 39–42

[62] Joined Cases T-447/93, T-448/93 and T-449/93, *AITEC and Others* v *Commission*, [1995] European Court Reports, II-1971, para. 62.

[63] Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] European Court Reports, 219, paras. 21–24; Joined Cases T-481/93 and T-484/93 *Vereniging van Exporteurs in Levende Varkens and Others* v *Commission* [1995] European Court Reports, II-2941, para. 64.

[64] Sudbery, I.: Bridging the Legitimacy Gap in the EU: Can Civil Society Help to Bring the Union Closer to its Citizens. 26 (2003) *Collegium*, 75.

[65] Conclusion reached by Cygan: *op. cit.*, 997.

[66] For the liberal stand of Member States on standing see, e.g., German law: *Bundesverwaltungsgericht 1.12.82 BverwGE 66, 307 (crab-fishermen case)*; Italian law: *TAR Lazio, 20.1.95, No 62 Foro Italiano 1995 II-460;* Belgian law: *Conseil d'État, Ville de Liége et*

In the English context, the modern origins of granting standing to surrogate groups can be found in the *Greenpeace (No.2)*[67] ruling, where Greenpeace sought to challenge a decision by the Inspectorate of Pollution (HMIP) that granted a variation in the license of BNFL, a company reprocessing nuclear waste, enabling the company to expand its operations in its plant in Cumbria. HMIP argued that Greenpeace had no standing as it could not show sufficient interest in the decision made, but the judgment by Otton J rejected that argument and held that a representative action could be brought by Greenpeace because there was a geographical proximity element. In other words, the deciding factor was the existence of 2,500 members of Greenpeace in the Cumbria area, thus establishing a sufficient interest in the decision that extended the license to processing of nuclear waste.[68]

In contrast to the pragmatic approach of Otton J in *Greenpeace (No.2)*, the *Pergau Dam*[69] decision represents an expansion in the sense that a more theoretically holistic and constitutionally sound reasoning was deployed for justifying the granting of standing to representative groups. The issue was the legality of a decision to use funds from the overseas aid budget for financing the building of the Pergau dam in Malaysia. The World Development Movement (WDM), an organization concerned with the distribution of aid, challenged the decision on the basis that the project was not going to be beneficial for the Malaysian economy and did not represent good value for the British taxpayer. The legal basis for the action was the failure of the Foreign Secretary to adhere to the provisions of the Overseas Development and Cooperation Act 1980 that enabled the financing subject to the existence of a purpose of promoting the development or maintaining the economy of an overseas country. Moreover, section 1 of the preceding Act limited funding to situations that it was of an economically sound nature.[70]

Heze, 20.9.91, No 37.676; French law: *Conseil d'État, 24.6.91, Soc Côte d'Azur, Lebon, 1110.*

[67] *R v Inspectorate of Pollution and another, Ex parte Greenpeace Ltd (No.2)*, [1994] 4 All ER 329.

[68] Analysis by Harlow: Public Law and Popular Justice. *op. cit.* 4 *et seq.*; Cygan: *op. cit.*, 998–1000.

[69] *R v Secretary of State for Foreign Affairs Ex parte World Development Movement Ltd*, [1995] 1 All Englis Reports, 611.

[70] Section 1 of the Overseas Development and Cooperation Act 1980: "The Secretary of State has the power, for the purposes of promoting the development or maintaining the economy of a country or territory outside the United Kingdom, to furnish any person or body with financial or technical assistance".

The judgment by Rose LJ concentrated on the constitutionally focal position of judicial review in a legal system and the essential function of judicial review as the guarantor of effective accountability of governmental agencies that includes both substantive and procedural fairness in decision-making processes.[71] Therefore, the fact that the action by the WDM was the only available legal challenge to the executive action in this instance was a relevant and significant consideration in ensuring that effective governmental accountability required under the constitutional rule.[72] The existence of technical legalistic requirements that could prevent access to a court in circumstances where no other legal action was possible,[73] was discarded by Rose LJ in the exact way that Lord Diplock regarded such obstacles as grave legal lacunae in a dissenting judgment in the *ex part Federation of Small Businesses* case.[74] Moreover, Rose LJ held that the specific characteristics of the pressure group were such that distinguished it from meddlesome busybodies, since WDM had showed in the past an active and constructive involvement in the distribution of aid.[75] The lack of an impact on the membership of WDM akin to that present in the *Greenpeace (No.2)* case was not a determinant factor because of the interests of accountability, the absence of other potential challengers and the evident expertise and prominent role of the organization in the field of development aid.[76]

It is, therefore, apparent that there is a favorable approach towards interest groups in the English context that is not adopting an *actio popularis* yardstick, but which is distinguishing between groups that have a contribution to make in the effectiveness of the process of judicial review. Therefore, the argument that a 'repeat player' could take advantage of a more liberal approach to the standing of surrogate groups to initiate actions that range from test cases to time wasting, delaying actions, can be rejected as simplistic. Moreover, the possibility of creating a system that would encourage the 'saga strategy' is again remote because each case is examined individually and the decision

[71] *R v Secretary of State for Foreign Affairs Ex parte World Development Movement Ltd*, [1995] 1 All ER 611, 619. For analysis see Tomkins, A.: Judges Dam(n) the Government. 7 (1996–1997) *Kings College Law Journal* 91; Harlow: Public Law and Popular Justice. *op. cit.*, 4 *et seq*; Cygan: *op. cit.*, 998–1000.

[72] *Ibid.*, 620.

[73] *Ibid.*, 619.

[74] *IRC v National Federation of Self-Employed and Small Businesses Ltd*, [1982] 2 AC 617, 620.

[75] *R v Secretary of State for Foreign Affairs Ex parte World Development Movement Ltd*, [1995] 1 All ER 611, 620.

[76] *Ibid.*

whether an interest group has standing in the specific case depends on a combination of tests that seek to establish the existence of a genuine interest.[77]

The problem created is the formation of a dichotomy of approaches to the standing of interests groups, with national courts and the ECJ adopting diametrically opposed methodologies and rationales. The national courts favor a structured and liberal stand that aims at the improvement of the effectiveness of the process of judicial review and of its purposes, while at the same time appreciating the increased participatory role of interest groups in modern society. On the other hand, the ECJ adopts a rigid approach founded on the perception that there can be no distinction between individual applicants and interests groups in terms of standing, thus applying the *Plaumann* criteria to surrogate actions. As a corollary, the extremely narrow and restrictive tests applicable to the actions of annulment under the ECJ's interpretation of Art. 230 (4) EC are applied to the actions by interest groups, on the basis that individual concern must be proved in accordance with *Plaummann*. The dichotomy of approach leads to the application of double standards and inconsistency, with national courts granting standing to interest groups that challenge national legislation for incompatibility with Community law, while the same group would not have standing to challenge a Community legislative measure. In *R v. S.S. for Employment, ex part EOC*[78] it was held that the Equal Opportunities Commission had standing to challenge the compatibility of an Act of Parliament with Art. 141 EC, which contrasts with the persistent denial of standing to pressure groups by the ECJ that is represented in the *Po Delta* judgment.[79]

3.3. *Representative groups in the environmental context*

In the *Po Delta* case the CFI[80] this time and later the ECJ[81] on appeal rejected the application of agriculturists and other affiliated associations seeking to challenge a Decision approving an EU funded plan for the environmental protection of their local area. The CFI concluded that the applicants were not in any way differentiated from the other residents of the area, because the

[77] See Harding: *op. cit.*, 116.

[78] *R v. S.S. for Employment, ex part EOC*, 2 [1994] Weekly Law Reports, 409.

[79] *Infra.*

[80] Case T-117/94, *Associazione Agricoltori della provincial di Rovigo et al. v. Commission (Po Delta)*, [1995] European Court Reports, II-455.

[81] On Appeal the ECJ confirmed: Case C-142/95 P, *Associazione Agricoltori della provincial di Rovigo et al. v. Commission (Po Delta)*, [1996] European Court Reports, I-6669.

effect of the plan on the agriculturists would have been the same with the effect on any other citizens living in the area. More significantly, it was stated that "it cannot be accepted as a principle that an association, in its capacity as the representative of a category of traders, is individually concerned by a measure affecting the general interests of that category".[82] Therefore, an association/interest group was equated with individual applicants and no special status was given to the association in terms of the *Plaumann* requirements.

In an analogous ruling, in *Danielson v. Commission*[83] an application for interim measures brought by residents of Tahiti in relation to nuclear tests undertaken by France was found to be inadmissible under Art. 34 EURATOM. The fact that they could show the possibility or likelihood of serious physical or economic harm[84] was not enough for establishing individual concern as they applicants were not in any way differed from the residents of the island as a whole.[85] In more detail, it was held that "even the assumption that the applicants might suffer personal damage linked to the alleged harmful effects of the nuclear tests in question on the environment or on the health of the general public, that circumstance alone would not be sufficient to distinguish them individually in the same way as a person to whom the contested decision is addressed".[86] The factual circumstances of the case and the unequivocal rejection of the claim of the applicants, irrespective of the logical argument that there is an actual threat to the health of the residents, has triggered negative criticisms of the strictness of the approach of the CFI.[87]

The landmark *Greenpeace*[88] decision is representative of the approach of the Court and a brief description of the factual background is necessary in

[82] *Po Delta, op. cit.*, note 80, 466.

[83] Case T-461/93, *Danielson v Commission*, [1995] European Court Reports, II-3051.

[84] *Ibid.*, para. 69.

[85] *Ibid.*, para. 70.

[86] *Ibid.*, para. 71.

[87] See Betlem, G.: Being 'Directly and Individually Concerned', the *Schutznorm* Doctrine and *Francovich* Liability. In: Reich, N.–Micklitz, H. (eds.): *Public Interest Litigation Before European Courts*. Baden-Baden, 1996. 319.

[88] Case C-321/95 P, *Stichting Greenpeace Council v Commission*, [1998] European Court Reports, I-1651 (hereafter referred to as the 'Greenpeace Appeal'). For the Opinion of AG Cosmas the same reference applies and for the CFI's ruling see Case T-585/93, *Greenpeace and others v Commission*, [1995] European Court Reports, II-2205 (hereafter referred to as 'Greenpeace'). For an excellent analysis see Torrens, D.: *Locus Standi* for Environmental Associations under EC law-Greenpeace-A Missed Opportunity for the ECJ. 8 [1999] *Reciel* 336.

order to present the standard type situation when a surrogate organization brings an action for annulment.

Three environmentalist groups and local residents of the Canary Islands challenged the legality of a bundle of Commission Decisions that granted aid from the European Regional Development Fund (ERDF) in order to contribute to the construction of two power stations. The allocation of funds from the ERDF is governed by Art. 7 of Regulation 2052/88[89] that requires that the distribution of funds complies with the purposes and provisions of the EU legal order, including environmental protection. Conformity with the preceding provision is ensured through the requirement that an Environmental Impact Assessment (EIA) should be carried out, but such an assessment was not commissioned. Subsequently, the first of four installments was paid to the Spanish Government in 1993, thus triggering the challenge by Greenpeace before a Spanish court, with the purpose of declaring the payment to be illegal and stopping further payments. The action was unsuccessful because the doctrine of *Foto-Frost*[90] prevents national courts from declaring a Community act invalid, but it is interesting to note that the Greenpeace's action was dismissed not because of lack of standing but due to the nature of the measure that was challenged and the limitations imposed by the ECJ in *Foto-Frost*. On this point, AG Cosmas in his Opinion stated that "I do not see in what way the issue of the legality of that decision could be raised in the context of national proceedings. Those proceedings can concern only the lawfulness of the administrative authorizations granted for construction of the electricity-generating power stations, or of the environmental impact assessment".[91]

The next step for Greenpeace was to initiate action before the CFI on the basis that the provisions of the Environmental Impact Directive[92] were not complied with prior to the payment of the first installment, because there was no Environmental Impact Assessment carried out.[93] Greenpeace also raised the point that it had raised this failure in communications to the Commission both prior and after the payment of the installment.[94] The applicants argued that the CFI must adopt a liberal approach to standing in the present case

[89] Official Journal L 185, 15. 7. 1988. 9.

[90] Case 314/85, Foto-Frost v. Hauptzollamt Lübeck-Ost, [1987] ECR-4199.

[91] Case C-321/95 P, *Stichting Greenpeace Council v Commission*, [1998] European Court Reports, I-1651, Opinion, para. 74.

[92] Directive 85/337/EEC, 27 June 1985, Official Journal 1985, L 175/40.

[93] Case T-585/93, *Greenpeace and others v Commission*, [1995] European Court Reports, II-2205, para. 25.

[94] *Ibid.*, paras. 10, 13.

because their interest is in the protection of the environment and not of an economic nature.[95] Moreover, the applicants stated that the membership of the association were individually concerned, thus creating a logical need to allow the association to represent their interests.[96] Alternatively, the applicants claimed that their focused and coordinated involvement during the stage of legal control differentiated them from other potential applicants.[97]

The CFI dismissed the application based on the lack of individual concern[98] in accordance with *Plaumann* as manifested in the failure of the applicants to show that they were different from all other individuals resident or working in the area and their inability to form a closed category in line with the *Calpak* test.[99] The appeal to the ECJ was the only option left for Greenpeace and the local residents seeking to challenge the decision.

Before examining the judgment of the ECJ, it must be clarified that the findings of the Court were expressed in an unusually laconic manner whereby only eight short paragraphs were devoted to the examination of the arguments of the applicants. The ECJ, relied on the CFI's judgment, thus it can be argued that the ECJ endorsed the arguments of the CFI which requires reference to both judgments in order to fully appreciate the reasoning applied.

The main argument of the applicants was that their communications to the Commission in terms of the lack of an Environmental Impact Study amounted to rights of participation that form procedural rights.[100] The ECJ rejected the argument by highlighting the fact that the participation of Greenpeace was voluntary, unsolicited and not part of the formal consultation process.[101] There was no invitation to Greenpeace to participate in the process of consultation, nor was there a request by the Commission to provide evidence and expert opinion that would have placed the organization within the contemplation of the decision-maker.[102] In the absence of a formal element that would create

[95] *Ibid.*, para. 32.
[96] *Ibid.*, para. 37.
[97] *Ibid.*, para. 39.
[98] *Ibid.*, paras. 54–62.
[99] Cases 789–790/79, *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission*, [1980] European Court Reports, 1949.
[100] Case C-321/95 P, *Stichting Greenpeace Council v Commission*, [1998] European Court Reports, I-1651, para. 25.
[101] *Ibid.*, paras. 28–29. In *Greenpeace, op. cit.*, note 88, the CFI reached that conclusion in paras. 61–63.
[102] *Stichting Greenpeace, op. cit.*, note 100, paras. 28–29. In *Greenpeace, op. cit.*, note 88, the CFI reached that conclusion in paras. 61–63.

participation rights, Greenpeace was not differentiated and singled out from the wider public in a manner that would grant standing.

Greenpeace's second argument stated that the Environmental Impact Directive's preamble sets as the purpose of the measure the protection of the public concerned,[103] thus outlining the creation of a closed group of applicants that possessed procedural rights of participation. The ECJ rejected the argument on the basis that the directive's purpose was too vague and could not be construed as creating a closed class of applicants that could have participation rights by virtue of their interest in environmental matters.[104] A directive is a general legislative measure that differs significantly to a decision and a failure under a decision to follow certain procedural requirements could create a closed class, whereas it is incoherent to have a closed class formed from a general legislative measure like a directive.[105]

Greenpeace made a third related argument contending that the right to environmental protection ensured through environmental policies could never form a closed class since by definition such interests are communal and of such paramount importance that warrants the granting of standing for their protection.[106] The ECJ repeated its earlier point, namely that the applicants lacked individual concern as defined in *Plaumann* and could not be distinguished and singled out from any other resident, worker or tourist.[107]

The decision is myopic and reflective of an inability to adjust to the demands created by the persistent reliance on *Plaumann*.[108] The overall effect is that the Courts remained within the spirit of their interpretation of individual concern and the pre-existing restrictive jurisprudence, which can be seen as an attempt to avoid criticisms for applying double standards in favour of pressure groups. In response, it can be argued that interest groups are more powerful and organised than individual applicants therefore it would be easier for those associations to meet the individual concern requirements. Moreover, a different approach would have created a paradox where an individual was offered weaker

[103] *Stichting Greenpeace, op. cit.*, note 100, para. 22. In Greenpeace, *op. cit.*, note 88, the CFI reached that conclusion in para. 56.

[104] *Stichting Greenpeace, op. cit.*, note 100, paras. 29–31.

[105] *Ibid.*

[106] *Ibid.*, para. 25.

[107] *Stichting Greenpeace, op. cit.*, note 100, paras. 27–28. In Greenpeace, *op. cit.*, note 88, the CFI reached that conclusion in para. 55.

[108] For criticism see Torrens: *op. cit.*, Cygan: *op. cit.*, 1002–1008; Reid, E.: Judicial Review and the Protection of Non-Commercial Interests in the European Community. (2001) 1 *Web Journal of Current Legal Issues*, <http://webjcli.ncl.ac.uk/2000/issue1/reid1. html>.

protection than organised groups, thus triggering criticism for expanding the liberal approach to individual applicants.

Nonetheless, the preceding line of reasoning must be approached with scepticism since the wider context of the strict approach to standing for individual applicants needs to be considered as a relevant factor requiring the relaxation of rules applying to interest groups in order to address certain of the deficiencies of the system. Unfortunately, yet understandably as the author argued elsewhere,[109] the ECJ refused to alter its position in the most important interest group case that came before it.

The *UPA* case[110] represented for some an opportunity to reform the unduly problematic *Plaumann* test and to set the criteria for standing in general and for interest groups in specific on a completely new foundation.[111] The case concerned UPA, a major Spanish trade association that represents the interests of Spanish farmers, that sought review of a Council Regulation concerning olive oil production aid and price caps. The ECJ stated in unequivocal terms that "a natural or legal person does not, *under any circumstances*, have standing"[112] if the *Plaumann* conditions are not met, thus directly rejecting the option to create an exception. The ECJ placed the burden on the national courts by requiring them to ensure access to effective judicial protection through establishing an appropriate system of legal remedies and procedures. The duty under Art. 10 EC required, according to the ECJ,[113] that the national courts should facilitate as far as possible access to a court when there is a claim of invalidity, by construing national rules accordingly. Therefore, the ECJ explained that the system of remedies is complete at the Union level and that the alternatives to Art. 230 EC are effective, with the obligation to ensure access resting with national courts.[114] The decision was reaffirmed in *Jègo-*

[109] Kombos: *op. cit.*

[110] Case C-50/2000 P, *Union de Pequenos Agricultores v. Council* [2002] European Court Reports, I-6677.

[111] Granger, M-P.: Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: Jégo-Quéré et Cie SA v Commission and Union de Pequeños Agricultores v Council. (2003) *Modern Law Review,* 124; Albors-Llorens, A.: The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat? 62 (2003) *Cambridge Law Journal,* 72.; Craig, P.: Standing, Rights, and the Structure of Legal Argument. 9 (2003) *European Public Law,* 493.; Ragolle, F.: Access to Justice for Private Applicants in the Community Legal Order: recent (r)evolutions. 28 (2003) *European Law Review,* 90.

[112] UPA, *op.cit.*, note 110, para. 37, emphasis added.

[113] *Ibid.* note 110, para. 40–42.

[114] *Ibid.* note 110, para. 40–42.

Quèrè,[115] a case that has no interest group element, and in this respect analogous to the *UPA* judgment where the standing of the trade association was considered in conjunction and inseparably from the general standing issue for individual applicants. Therefore, the *UPA* case focused solely on the standing according to *Plaumann* and made no reference to the distinct class of challenges by interest groups, thus falling outside the scope of this paper. It is suffice to say that the *UPA* case reaffirmed the approach of the ECJ that perceives interest groups and individual applicants as a unit under the umbrella of *Plaumann*.

In conclusion, the restrictive approach to standing of individual applicants seeking to challenge legislative measures at the Union level has provided the skeleton for the development of an equally restrictive jurisprudence in relation to interest groups. The agency analogy has been excluded by the ECJ and can not provide an effective alternative for circumventing the standing hurdles resulting from the *Plaumann* formula. However, it is submitted that the study of the case law relevant to interest groups offers an insight into ways in which such groups could create the conditions that would enable them to show the existence of individual concern and those conditions refer mainly to the creation of procedural rights expressly mentioned in and forming part of the legislative framework.

In other words, the existence of procedural rights ranging from participation to consultation would trigger a legitimate expectation that is essentially procedural and which would provide the foundation for the obtainment of individual concern. Representative groups can ensure the right to challenge legislative enactments through the medium of creating the conditions for influencing decision making bodies, which is in effect their driving goal. Whether the expansion of effective and efficient influencing for the attainment of a status of individual concern is the theoretically appropriate and principled manner for ensuring access to judicial review, is a completely different issue that would not be removed until the approach to standing is altered. What is more practical is the examination of the possibility of having a different judicial approach based on the type of claim and the area that the legislative action regulates. In other words, is there a typological approach in relation to representative groups that creates layers of standing rights? If the question is affirmatively answered, one must examine the input of that typology in the quest for finding effective ways to circumvent standing restrictions for representative groups and subsequently individual applicants. The employment context offers an interesting paradigm reflecting such factors.

[115] Case C-263/02 P, *Commission v Jègo-Quèrè* [2004] CMLR 12.

4. Representative groups in the sunshine and away from the *Plaumann* shadow: Lessons from the employment context

The Union's interest in promoting employment is entrenched in the Treaty and in secondary legislation, epitomised in Art. 2 EC that refers, *inter alia*, to the promotion of a high level of employment and social protection. At a functional level, the promotion of employment is performed at two interrelated levels. First, the gradual development of legislative initiatives[116] and secondly, the development of the "flanking policies"[117] that refer to the use of structural instruments that aid the restructuring and repositioning of the economic organisation of Member States.[118] The role of the European Social Fund (ESF) has been integral in financing the initiatives of the Union aiming to supplement national policies that address matters of employment. The management and general use of the ESF is regulated by Council Regulations[119] and is subject to judicial review, thus safeguarding the legitimacy, accountability and financial control of institutional action.[120] It is at this stage that Art. 230 EC becomes relevant and it is interesting to examine the approach of the Courts within an area like employment that has three specific characteristics.

Firstly, the allocation of funds from the ESF is primarily a political and economic decision founded on considerations of employment policy and long-term economic strategic organisation. Secondly, the use of the ESF exists in parallel and supplements national policies because employment and social policies remain within the ambit of national competence,[121] thus in pragmatic terms the application of the ESF is the corollary of complex political compromise.[122] Thirdly, there are always economic actors with a substantial

[116] See for example Council Regulation 99/1260/EC, laying down general provisions concerning the Structural Funds (Official Journal 1999, L 161/1) and Council Regulation 99/1784/EC concerning the European Social Fund (Official Journal 1999, L 213/5).

[117] Szyszczak, E.: *EC Labour Law*. 2000. 159.

[118] See the excellent analysis by Skiadas, D.: Judicial Review of the Management of Assistance Provided by the European Social Fund for the promotion of Employment. 6 (2002) *European Integration online Papers (EIoP)*, <http://eiop.or.at/eiop/texte/2002-001a.htm>, 1.

[119] Council Regulation 99/1260/EC, laying down general provisions concerning the Structural Funds (Official Journal 1999, L 161/1) and Council Regulation 99/1784/EC concerning the European Social Fund (Official Journal 1999, L 213/5).

[120] Hervey, T.: *European Social Law and Policy*. London, 1998. 39.

[121] *Ibid.*, 4.

[122] Tsakloglou, P.: Social Policy. In: Georgakopoulos, T.–Tsakalotos, E. (eds.): *Economic Policies of the European Union*. Athens, 1996. 205, 211.

interest in the allocation of resources from the ESF that are willing to challenge Community acts. From an economic perspective, the granting of aid, the continuation, the suspension and the readjustment of the size of financial input flowing from the ESF, represent a strong incentive to recipients and applicants for challenging measures that impact on their financial position.[123] It is within this framework that the judicial approach must be placed.

The approach of the ECJ and the CFI has been reflective of the preceding issues and is an illustration of economic pragmatism and judicial realism that contrasts with the broader jurisprudence that follows the dogmatic and problematic reasoning of *Plaumann*. The differences are numerous and are briefly examined in order to offer a complete picture of the judicial approach to challenges related to the ESF, before examining representative groups.

In the first place, the notion of a reviewable act has been broadly construed with the ESF context. The *ERTA*[124] judgment that established that reviewable acts include any act that produces legal effects has been applied broadly in the context of the ESF to include exclusively the legislative acts adopted by the Commission. Under the ESF, the national authorities cooperate with the Commission in the decision making process to the extent that "shared responsibility for the decisions of the Commission"[125] can be assumed. However, the ECJ held that the final responsibility rests with the Commission,[126] thus clarifying the identity of the body responsible for the legislative measure and excluding the delegation of legal responsibility to bodies that would fall outside the scope of Art. 230 EC.

[123] Neuwahl, N.: Article 173 paragraph 4 EC: Past, Present and Possible Future. 21 (1996) *European Law Review* 17, 18.

[124] Case 22/70, *ERTA*, [1971] European Court Reports, 263, paras. 48–55. See also Joined Cases C-8/66, C-9/66, C-10/66, C-11/66, *Cimenteries CBR Cementsbedrijven NV v. Commission of the European Communities*, [1967] European Court Reports, 75 (a letter is reviewable); C-106/96, *United Kingdom v. Commission of the European Communities (re Poverty 4)*, [1998] European Court Reports, I-2729 (a press release); C-57/95, *France v. Commission of the European Communities*, [1997] European Court Reports, I-1627 (a communication).

[125] Assumption rebutted by Skiadas: *op. cit.*, 3.

[126] See C-32/95, *Commission of the European Communities v. Lisrestal-Organização Gestão de. Restaurantes Colectivos Lda and Others*, [1996] European Court Reports, I-5373, para 29; Case T-271/94, *Eugenio Branco Lda v. Commission of the European Communities*, [1996] European Court Reports, II-749 para 39; Case T-151/95, *Instituto Europeu de Formação Profissional Lda (INEF) v. Commission of the European Communities*, [1997] European Court Reports, II-1541 para 36.

At the same time, the ECJ has balanced its approach by appreciating the distinct economic character of the operation of the ESF and as a corollary it has safeguarded the decision-making process that is purely advisory, expertise based and policy oriented. An example to that effect is the internal guidelines adopted by the Commission concerning the net financial corrections[127] whereby the Commission is empowered to suspend or reduce the assistance granted if irregularities are found on the basis of technical calculations provided by the internal guidelines. The challenge of the internal guidelines has been unsuccessful since the ECJ[128] found that the guidelines do not create rights or obligations for third parties and do not have produce legal effects. The same protective approach has been taken in relation to the reports and recommendations adopted by the anti-fraud bodies of the Union when examining the financial propriety in managing resources allocated from the ESF. The ECJ held that these reports are mere notifications to the national authorities and the Commission and produce no legal effects because it is the responsibility of the recipients of the reports to determine whether legal measures of recovering the resources should be taken.[129]

The balanced approach of the ECJ that ensured the protection of advisory bodies entrusted with technical matters has not extended to situations where the challenge of a legislative measure is made difficult because of the practice adopted by the Commission. Normally, the Commission issues a decision under the regulations that provide the legislative framework for the ESF and sends a letter to the national authority as a matter of notification, but without the actual decision enclosed. The national authorities either write to the recipient of the ESF assistance and inform them about the decision of the Commission or forward the Commission's letter and the decision itself. Therefore, the recipients of ESF assistance rarely receive the actual decision of the Commission, thus any potential challenge will lack all the information about the decision and would by implication be incomplete. The ECJ has identified the procedural gap and provided the necessary protection to incomplete

[127] In the context of Art. 24 Council Regulation 88/2052/ EEC as amended by Council Regulation 93/2081/EEC.

[128] Case C-443/97, *Spain v Commission*, [2000] European Court Reports, I-2415, paras. 28–36.

[129] Case T-492/93, *Nutral SpA v Commission of the European Communities*, [1993] European Court Reports, II-1023 paras 26–29; Case C-476/93 P, *Nutral SpA v Commission of the European Communities*, [1995] European Court Reports, I-4125 paras 30–31.

challenges lacking information[130] provided that there is evidence of the existence of a decision.[131]

Finally, the more favourable approach of the ECJ in the context of the ESF is evident in the indirect expansion of the standing for privileged applicant to cover regional authorities involved in the operation of the ESF.[132] Moreover, the ECJ held that the lack of challenge to the standing of local and regional authorities was an important factor that pre-empted the Court from examining the standing of such bodies on its own initiative.[133] Nonetheless, the Court stopped a step short from including local bodies as a matter of right in the class of privileged applicants by stating that the fact that the standing of regional bodies was intentionally not examined by the ECJ does not imply acknowledgment of the challenge was brought by a legal entity equivalent to a Member State.[134] Therefore, in the context of the ESF there is an effective, yet not formal, expansion of the privileged applicants' class to include regional bodies that "have a vital role to play in the articulation of cohesion and integration policies".[135]

In relation to private applicants, the approach of the ECJ departs from the *Plaumann* reasoning of economic unrealistic results and unduly restrictive narrowing of standing rights. One possible explanation, though simplistic, is the fact that under the legislative framework regulating the operation of the ESF, the Commission uses decisions and not regulations, thus limiting the scope of application of the measure. In other words, there is practically no danger to have challenge to a regulation that if successful, it could grant standing rights to numerous applicants. At the same time, the exclusive use of decisions renders the identification of potential applicants predictable and the number of such applicants is *ab initio* limited to those parties that the decision singles out. Therefore, within the context of the ESF the *actio popularis* concern of the ECJ and the possibility of an open ended class of applicants being formed are

[130] C-157/90, Infortec-Projectos e Consultadoria Lda v Commission of the European Community, [1992] European Court Reports, I-3525, para 14.

[131] C-130/91, *ISAE/VP and Interdata v Commission*, [1992] European Court Reports, I-69, para 11).

[132] Skiadas: *op. cit.*, 6.

[133] Joined Cases C-62/87 and C-72/87, *Exécutif régional Wallon and SA Glaverbel v Commission*, [1988] European Court Reports, 1573 para 8.

[134] C-95/97, *Région Wallone v Commission*, [1997] European Court Reports, I -1787 para 5. See similar conclusion in Besila Vika, E. and Papagiannis, D.: *Contemporary Competences of Local Government and European Integration*. Athens, 1996. 95–96.

[135] Skiadas: *op. cit.*, 6; Evans, A.: *The EU Structural Funds*. Oxford, 1999. 301.

excluded by the fact that the decisions are practically identifying and limiting the number of challengers.[136]

The jurisprudence of the ECJ shows a consistency in granting standing to applicants that were third parties to the decision of the Commission, but who can be distinguished and singled out since they were identified expressly in the decision.[137] The direct and individual concern requirement is satisfied in this context in cases relating to the suspension and withdrawal of assistance[138] and to cases relating to the granting of assistance with the beneficiaries clearly named in the decision.[139] Moreover, the ECJ has shown a willingness to recognise in effect rights to legitimate expectations in situations where the Commission refuses to make a payment that it has previously undertaken to grant,[140] regardless of the fact that no decision granting the assistance exists. The CFI has applied this reasoning in the *Murgia Messapica* case[141] where the applicant had previously applied for assistance and participated substantially in prolonged procedures for evaluation of their application by the Commission.

Therefore, there is a shift in the approach of the Courts within the context of the ESF, with an assumption in favour of granting standing and contra to the traditional *Plaumann* rationale, as evident from the case law in relation to competitors of the final recipient of assistance. The ECJ has ruled that such competitors may challenge the validity of the decision granting the assistance to another beneficiary if it can be established that the market position of the applicant has been significantly effected by the assistance granted.[142] This generous approach must be qualified with reference to the condition that the competitor and the recipient are located in geographically proximity to each

[136] Skiadas: *op. cit.*, 7.

[137] Case C-291/89, *Interhotel v Commission*, [1991] European Court Reports, I-2257 para. 13; Case C-304/89, *Estabelecimentos Isidoro M. Oliveira SA v Commission*, [1991] European Court Reports, I-2283 para. 13.

[138] Case C-181/90, *Consorgan-Gestão de Empresas, Lda v Commission*, [1992] European Court Reports, I-3557 para. 12; Case C-189/90, *Cipeke-Commércio e Indústria de Papel Lda v Commission*, [1992] European Court Reports, I-3573 para. 12.

[139] Case T-450/93, *Lisrestal-Organização Gestão de Restaurantes Colectivos Lda and Others v Commission*, [1994] European Court Reports, II-1177 paras. 45-46; Case T-85/94, *Eugénio Branco Lda v Commission*, [1995] European Court Reports, II-45 paras. 25–26.

[140] Case T-465/93, *Murgia Messapica v Commission*, [1994] European Court Reports, II-361.

[141] *Ibid.*, para. 26.

[142] Case C-169/84, *COFAZ v Commission*, [1986] European Court Reports, 391 para. 28; Joined Cases T-447/93, T-448/93, T-449/93 *Associazione Italiana Tecnico Economica del Cemento, British Cement Association, Titan Cement Company SA v. Commission*, [1995] European Court Reports, II-1971 paras 55–56, 80.

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other[143] and the establishment by the competitor of an interest resulting from participation in the proceedings leading to the adopted decision.[144] Consequently, the approach of the Courts can be seen as departing from the strict formalistic conditions and more importantly from the spirit of *Plaumann*, but the marked difference has failed to filter to the standing of representative groups.

The general conditions for representative groups that apply in general apply in the field of employment law. Trade associations and interests groups within the framework of the ESF must show that a personal interest exists in the case that is distinct from those of the industrial policy of the Member State concerned[145] and that the general interest of the membership has been affected within the *Plaumann* meaning.[146] Alternatively, it would suffice to show that the membership could have brought an action challenging the decision,[147] and that procedural rights flowing from participation existed.[148]

Before criticising the narrower approach to the standing of representative groups when compared to the more liberal stand towards applicants in the context of the ESF, it must be noted that the case law relating to representative groups within the ESF is extremely limited. The reason for this is the comparably greater possibility for successful individual challenges that results from the economically orthodox approach to challenges of measures in the context of the ESF. Moreover, there is the example of the *Murgia Messapica* case[149] where the applicants were a group of entrepreneurs set up to develop economic activities at the rural level, in the Italian Murgia Messapica region, and specifically to implement the Leader Programme launched by the Com-

[143] Joined Cases C-10/68, C-18/68, *Eridania v Commission*, [1969] European Court Reports, 459, 481.

[144] Case C-264/82, *Timex Corporation v. Council and Commission*, [1985] European Court Reports, 849, paras. 12-16; Case C-169/84, *COFAZ v Commission*, [1986] European Court Reports, 391, paras. 25–26.

[145] Case C-282/85, *Comité de Développement et de Promotion du Textile et de l' Habillement v. Commission*, [1986] European Court Reports, 2469 para 18.

[146] Joined Cases 16/62, 17/62, *Confédération Nationale des Producteurs de Fruits et Legumes v Council*, [1962] European Court Reports, 471, 479–480; Case T-117/94, *Associazione Agricoltori della Provincia di Rovino v Commission*, [1995] European Court Reports, II-455 paras. 27–28.

[147] Case T-197/95, *Sveriges Betodlares Centralförening and Sven Åke Henrikson v Commission*, [1996] European Court Reports, II-1283, para. 35.

[148] Case C-313/90, *CIRFS and others v Commission*, [1993] European Court Reports, I-1125 paras. 29–30; Joined Cases 67,68 and 70/85, *Kwekerij Gebroeders Van der Kooy BV and Others v. Commission*, [1988] European Court Reports, 219 paras. 20–24.

[149] Case T-465/93, *Murgia Messapica v Commission*, [1994] European Court Reports, II-361.

mission. The group is, therefore, not a representative group in terms of either offering representation for its membership or pursuing the promotion of certain broader interests, but is rather a collective body representing specific economic interests relating to the funding under a project. Nonetheless, the action was from a group and was approached by the CFI in a favourable way whereby standing rights were granted due to participation in the bilateral (Italian authorities and applicants) and tripartite (Italian authorities, applicants and Commission) discussions and assessments meetings for the proposal submitted by the applicants. Therefore, in this context the CFI was willing to grant standing on the basis of *Plaumann* for a group of entrepreneurs applying for funding under a project financed through the ESF, even if the proposal was initially selected but subject to numerous modifications proposed by the Commission, which were not undertaken by the applicants. The proposal was regarded as incomplete and substandard in the final assessment round, but the mere participation up to that stage was perceived by the CFI as creating procedural rights that satisfied the direct and individual concern requirement. Clearly, the judgment represents a significant shift from the broader approach to standing of both private applicants and representative groups and shows the way for a possible solution to the *Plaumann* problem. By placing the emphasis on participation, representative groups can ensure compliance with the *Plaumann* criteria since the ECJ and the CFI have shown a willingness to recognise procedural rights and a possible procedural legitimate expectation to challenge a legislative measure that has been adopted with the effective participation of the applicant. Therefore, representative groups could be granted standing rights under the present unsatisfactory legal system that is based on *Plaumann* and which influences the approach towards representative groups, if those groups manage to lobby there way into the legislative process. Enhanced participation and influencing the formation of the substance of legislative measures is the essential and core function of representative groups. It must now be used to target the procedural formation of legislative measures by ensuring that any input by representative groups becomes a formal part of the consultation and advisory processes, thus giving rise to procedural rights to participation. Therefore, the case law of the ECJ and the CFI leaves room for participation rights of representative groups that can be quite extensive as the *Murgia Messapica* case[150] shows and the representative groups can take advantage to bring surrogate actions on behalf of their members that would not otherwise be granted standing. The key is in the effective lobbying practices that have to target formal recognition of

[150] Case T-465/93, *Murgia Messapica v Commission*, [1994] European Court Reports, II-361.

their role in the legislative process. Representative groups can go round the standing problem by simply being effective at what they are doing, namely lobbying. Finally, the context within which a representative group operates plays an important role in whether standing would be granted as does the type of claim that the group makes before the Court. The case law has shown that the use of the human rights argument, whether in the form of effective judicial protection or a fundamental right like environmental protection being threatened by the challenged legislative measure, will not be successful by virtue of the paramount importance of human rights. What will make the difference is the existence of documented participation that creates procedural rights and which is not the result of the group's general activity in the field but part of the procedural requirement for the adoption of the measure, as the *Greenpeace* case showed. Moreover, the context of operation could be important, with cases brought within the contexts of state aid, competition, employment and social cohesion being favourably treated by the Courts, but this difficulty can be circumvented if the procedural rights are established in any context.[151] Therefore, there is a typology of claims and contexts in relation to the standing of representative groups, but the main deciding factor as regards the granting of standing is the effective lobbying at the procedural level leading to documented participation triggering procedural rights. This solution bypasses typologies of claims and contexts and simplifies standing for representative groups, which can then use surrogate actions on behalf of their membership as a solution to the restrictive criteria of individual concern that effectively exclude individual challenges.

Epilogue

The issue of *locus standi* performs an instrumental function in the process of judicial review and should act as the gateway that would distinguish between claims that are artificial and fabricated and claims that have a substance. In the Union, the regulation of standing on the basis of the *Plaumann* criterion has proved an impossible hurdle for individual applicants seeking to challenge the validity of a legislative measure. This regrettable outcome has filtered through to the challenges brought by representative groups. Consequently, the possibility of partially redressing the shortcomings of *Plaumann* through the medium of representative groups and the agency analogy, has been preempted by the reflection of the restrictive tests for individual concern to actions brought by

[151] See Torrens: *op. cit.*, Cygan: *op. cit.*

representative organizations. The ECJ's approach and the approaches of national courts towards representative groups and their right to initiate challenges are in state of divergence. The English legal system has managed to draw a dichotomy between fraudulent and unfounded claims that tend to reproduce litigation and aim to frustrate the formation and implementation of policies, from genuine and helpful challenges that fill in the gaps of accountability. The task is not simplistic, but it has proved to be beyond the ECJ that insists on the monolithic argument that there is a danger of creating a flood of cases that are unfounded and which take advantage of a liberal stand towards the standing of representative groups. The real concern of the ECJ seems to be the reluctance to create an exception to *Plaumann* that in effect grants broader rights to representative groups than individual applicants. This legitimacy concern has persistently influenced the ECJ to shed the shadow of *Plaumann* to the standing of interest groups. In the quest for a solution, this paper has examined the possibility of having a typology of claims and fields of activity that are treated more favorably by the ECJ. The conclusion reached states that the use by representative groups of arguments that are founded on human rights, like effective judicial protection and the protection of the environment, is not creating a positive framework that could facilitate the departure from the *Plaumann* yardstick. Moreover, there seem to be no strong thematic typology that is sympathetically treated by the ECJ since the exceptional relaxation of standing requirements for interest groups can not be identified in insulated areas. In this respect, even in the field of environmental protection the ECJ has refused to adopt a more liberal approach.

Therefore, there is no clear thematic or argumentative typology that can be identified in the approach of the Court, but there seems to be a uniting thread that connects most of the cases where the ECJ relaxed its approach: participation. It is submitted that the only way to create positive conditions for standing rights is for the representative groups to engage in effective lobbying practices that target formal recognition of their role in the legislative process. The differentiating factor in recognising standing rights by the ECJ is the existence of documented participation, continuous involvement in the specific area and engagement with the institutions during the drafting stage. These features trigger procedural rights and create a legitimate expectation to be part of the review of legality process. Put differently, the only way to take the standing of representative groups away from the shadow of *Plaumann*, is for interest groups to be effective at what they are doing, namely lobbying. Whether that type of light is bright enough to remove the shadow entirely, it remains to be seen but it can be state with certainty that any light is better than the *Plaumann* darkness.

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Constitutional Ambiguities Regarding Anti-Terrorist Financial Enforcement Measures–The Case of Hungary

Abstract. The policy of "proscription" or "designation" of groups and individuals as "terrorist" has been deployed as a crucial legal weapon in the global war on terrorism. Despite its serious human rights implications, judicial review is excluded from this highly politicised process, which has been embraced uncritically by the international community and member states' domestic legal system. The essay aims to survey certain contradictions within legal regimes imposed by the UN Security Council, the EU and the Hungarian Government, aimed at freezing assets and financial transactions of terrorist organisations and organs associated with anti-democratic political regimes. It is argued that legal regimes that would serve the thorough implementation of anti-terrorist sanctions brought by the UN Security Council or the European Council are extremely underdeveloped. In other words, the three normative levels of sanction measures–(1) legislation passed by the UN Security Council; (2) the implementing legislation of member states and the EU; (3) sui generis EU sanction-regulations–are not harmonized. Even though the examples are brought from Hungary, a new EU-member state that so far has not been directly affected by terrorism, arguably the scrutinized controversies point to general Rule of Law questions that presumably most European states are bound to face.

Keywords: international law, European law, anti-terrorist measures, due process, Rule of Law

The policy of "proscription" or "designation" of groups and individuals as "terrorist" has been deployed as a crucial legal weapon in the global war on terrorism. Despite its serious human rights implications, judicial review is excluded from the highly politicised process of designating persons and legal entities as terrorists.[1] Although proscription carries extremely serious consequences,[2] particularly for individuals subject to asset freezing, this policy has

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[1] See Statewatch Analysis, Terrorising the rule of law: the policy and practice of proscription , http://www.statewatch.org/terrorlists/terrorlists.pdf.

[2] "Proscription has extremely serious consequences, not just for the groups and individuals that are named expressly on the lists, but their associates, supporters and

been embraced uncritically by the international community and member states' domestic legal system.

This essay aims to survey certain contradictions within legal regimes imposed by the UN Security Council, the EU and the Hungarian Government, aimed at freezing assets and financial transactions of terrorist organisations and organs associated with anti-democratic political regimes. Even though the examples are brought from Hungary, a new EU-member state that so far has not been directly affected by terrorism, arguably the scrutinized controversies point to general Rule of Law questions that presumably most European states are bound to face.

While outlining the specific loopholes within the Hungarian legal regimes, the following general issue is raised: legal regimes that would serve the thorough implementation of anti-terrorist sanctions brought by the UN Security Council or the European Council[3] are extremely underdeveloped. In other words, the three normative levels of sanction measures–(1) legislation passed by the UN Security Council; (2) sui generis EU sanction-regulations; and (3) the implementing legislation of member states and the EU–are not harmonized. Several crucial questions remain unanswered with respect to sanctions that involve the curtailment of fundamental rights such as the freezing of assets of persons or legal entities. These questions include:

1. How are sanctions passed?

2. What is the legal nature of a UN Security Council resolution, especially if it involves sanctions against non-state actors and infringement on people's fundamental rights, such as freezing assets or deportation?

a) Can such a resolution be rebutted

aa) by the UN Sanctions Committee?

ab) by the European Court of Justice?

ac) by the European Court of Human Rights?

b) Can it be contrary to national jus cogens?

3. How should such a resolution be adopted or incorporated/transformed into national law?

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contact networks. Given these implications for fundamental rights, the failure to provide adequate mechanisms for appeal and redress for groups and individuals affected by proscription is extremely alarming." See above. As Iain Cameron notes: "The effect[s] of a freezing order, if it is effectively implemented, are devastating for the target, as he or she cannot use any of his or her assets, or receive pay or even, legally speaking, social security.", Cameron, I.: (2003) European Anti-Terrorist Blacklisting, in *Human Rights Law Review* 3 (2003) no. 2.

[3] See for example Bohr, S.: Sanctions by the United Nations Security Council and the European Community, *European Journal of International Law* 4 (1993) 156–268.

a) How is it implemented?
b) When does it take effect?
4. What procedures should apply to the enforcement of such a resolution?
a) Can a national court suspend the application of the resolution due to constitutional misgivings?
b) What standards should be applied in the process of granting, say, an emergency exception from the sanctions?
c) What practical standards can be applied in constructing the criminal sanctions applicable to those who provide material support to terrorist organisations?
d) Can a national court award compensation for damages caused by such sanctions?

Due to spatial constraints, I shall mostly limit my analysis to posing these questions as they arise in national law, leaving issues of international law out of the discussion. I wish to draw the reader's attention to a few points where institutional weaknesses, if not a degree of cynicism can be observed in the transformation or realization of international anti-terrorist measures. It seems as though states operate on the assumption that no cases would ever arise in which the lack of procedural guarantees or even the procedures themselves become substantive issues. The principle of rule of law is a recurrent mantra within UN and (especially) European documents,[4] but its application has been subject to a double standard. On the one hand, accessing states' commitment to the rule of law is thoroughly monitored. On the other hand the EU failed to formulate strict procedural guarantees for anti-terrorist financial enforcement measures, and instead broadened their scope of application (to non-terrorist anti-democratic regimes)[5] without paying attention to their potential human rights risks. As a

[4] See for example the Guidelines on human rights and the fight against terrorism on 11 July 2002 adopted by the Committee of Ministers of the Council of Europe: "II. All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision. ... IX. 1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law. 2. A person accused of terrorist activities benefits from the presumption of innocence. ... XIV. The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the lawfulness of such a decision before a court."

[5] The EC and the EU is and has been adopting regulations aimed at implementing UN sanction resolutions, but also created its own unilateral Community sanction regimes. See

new member state, Hungary has only travelled a short distance on the road of rule of law constitutionalism, when a restrictive legal regime has been induced from the (highly valued) international organizations and the new regime has been taken for granted without due political (or even professional) debate.

It is important to note that this is the context in which the Hungarian case study should be seen. Otherwise the debate over Islam or Muslim communities has not been a dominant issue in the Hungarian political discourse. Given the very small size of the Muslim community in Hungary (roughly 0.057 percent of the population), a fundamentalist terrorist threat is not considered a factor of significance, as the dominantly naturalised Muslim community lives integrated within Hungarian society.[6] There is no measurable public hostility towards the Muslim community, and, even after September 11 or March 11, Islamophobia appears to be an altogether marginal, if at all existent phenomenon or sentiment in Hungary. All in all, Hungary has had two unrelated incidents where individuals were accused of maintaining terrorist connections: one case involved a Muslim religious leader (2004), the other, a non-nationalised immigrant doctor (2003). These events received a considerable media attention but neither triggered a particularly long-lasting or prominent public debate.

Following the structure laid out above, let us begin the analysis of the controversial legal regime of anti-terrorist financial sanctions. As I mentioned before, this paper is limited in its scope: it aims to raise questions and point to controversies without developing a full analytical framework or solutions to the issues raised.

1. Conflicting constitutional obligations and the legal nature of UN Security Council sanctions

It appears that the threat of weapons of mass destruction and recurring terrorist attacks have overpowered the previously dominant principle that it is better to have nine criminals go free than to have a single innocent person punished. In a world where "kill ten and keep thousands in a state of fear" is the operating

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for example Pavoni, R.: UN Sanctions in EU and National Law: The Centrocom Case. *International and Comparative Law Quarterly*, 48 (1999) 582–612.

[6] In the 2001 national census 5,777 persons identified themselves as Muslim, which is about 0.057 per cent of the Hungarian population. Taking into account non-citizen migrants and converted Hungarians, media and academic estimates occasionally refer to a larger Muslim population size, sometimes as large as 20,000–50,000. http://www.mancs.hu/index.php?gcPage=/public/hirek/hir.php&id=10117 (11 April 2005).

principle of the social psychology of global terrorism, anti-terrorist measures obviously need to be strict and hit terrorist organisations where it hurts: their financial umbilical cord. Even if these measures involves unveiling legal entities and ordering financial organisations to identify their beneficiaries, or creating new, daring standards of criminal liability for those who donate to charities that might be involved in terrorist activities.[7]

It also appears to be the case that the implementation of these political commitments does not always go hand in hand with the subsequent adjustment of the legal and constitutional system. Popularly supported and politically accepted as it is, legal execeptionalism does not always fit well with the traditional principles of constitutionalism. Take for example the case of proscription: The selection criteria and process for designation is fairly straightforward. "Intelligence", much of it secret, provides the basis for including groups and individuals on the various lists. The judiciary is excluded and parliaments play only a minimal role. In the EU and UN frameworks there is no democratic scrutiny whatsoever. None of the regimes provide for notification to the accused that designation is pending or opportunity for the accused to contest any allegations before proscription: the normal judicial process is entirely discarded.[8]

The UN Security Council is a political organ, created to make political decisions that bind member states. Recent anti-terrorist action plans have, however, actually given quasi-judicial authority to the Council for imposing sanctions on persons and legal entities without the proper guarantees habitually present in all national procedures that may end in imposing such sanctions. It was commonly held that the Security Council (as a political organ) is not and should not be bogged down by restraints like judicial independence, the presumption of innocence, fair trial etc., because initially, Council resolutions affected states only and the sanctions were political in nature. Needless to say,

7 For more, see Pap, A.: Ethnic Discrimination and the War Against Terrorism–The Case of Hungary. In: Halmai, G. (ed): Hungary: Human Rights in the Face of Terrorism, Special English Edition of Fundamentum, Human Rights Quarterly, USA, 2006, also see at http://157.181.181.13/dokuk/05-eng-02.pdf (24 August 2006).

8 Together with the EU legislation allowing proscription, the first EU "terrorist" list was agreed by "written procedure" on the 27 December 2001. This meant that the four legal texts were simply faxed around to the foreign ministries of the 15 EU member states and adopted if none raised any objections, which two days after Christmas was surely unlikely. The various UN Security Council Resolutions have been adopted in similar fashion–at least in terms of the absolute lack of debate. Both the UN and EU lists have been amended so many times it is very difficult to keep track of the decisions being taken. See Statewatch Analysis, Terrorising the rule of law: the policy and practice of proscription , http://www.statewatch.org/terrorlists/terrorlists.pdf.

this is hardly the case today, with financial and other sanctions pertaining to persons and organisations designated as terrorists.

Because UN sanctions (qua non-self executing international rules) are formally only binding states and not, say, the financial institutions that will eventually freeze the accounts, it is obviously the state who is bound to simultaneously bear responsibility for keeping its international obligations and uphold internal rule of law.[9] In other words, it may create conflicting responsibilities if a state receives a Security Council resolution which is based on mostly unrevealed sources of information and political deliberations (invariably lacking fair trial guarantees). The reason: the state will be under an obligation to a) enforce these sanctions under its jurisdiction, while b) it will not be exempt from the rule of law obligation to respect the "presumption of innocence" principle, for example.[10] The first question (which will remain unanswered within the bounds of this paper) is thus the following: *can an obligation under international law be contrary to national jus cogens?* There is some literature that would support an affirmative answer to this question. For example, Derek Bowett argues that "...a Council decision is not a treaty obligation. The obligation to comply may be, but the decision per se is not. ... The Council decisions are binding only in so far as they are in accordance with the Charter."[11] Michael Fraas considers the UN and, as its organ, the Security Council to be bound by general international law, in particular basic human rights guarantees and

[9] According to Article 25 of the UN Charter, States have the obligation to implement enforcement measures adopted pursuant to Article 41, which obligation they perform in accordance with their national constitutional system.

[10] The presumption of innocence is a fundamental right, laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU). Article 6 of the Treaty on European Union (TEU) provides that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to Member States. The "presumption of innocence" is mentioned in Article 6(2) ECHR (The right to a fair trial): "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law" and Article 48 CFREU (Presumption of innocence and right of defence): "1. Everyone who has been charged shall be presumed innocent until proved guilty according to law. 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed." For more, see, The Presumption of Innocence, Green Paper, Commission of The European Communities, Brussels, 26 April 2006, COM(2006) 174 final.

[11] Bowett, D.: The Impact of Security Council Decisions on Dispute Settlement Procedures. *European Journal of International Law* 5 (1996) 4–5.

norms of jus cogens.[12] His reasoning about jus cogens is as follows: The constituent treaty of an international organization may not contradict jus cogens rules. "From this it follows that the organs of the organization may not be empowered to violate rules of jus cogens."[13]

But let us assume that national law actually satisfyingly accommodates these sanctions, say, with an institution that resembles pre-trial detention. Let us also assume that satisfactory forums and procedures (that include judicial guarantees) are being created for people under these sanctions to prove their innocence and provide evidence for, say, an error that caused them to appear on a list of terrorists. However unlikely, for the purposes of the example, let us imagine that even though her bank accounts are frozen, a terrorist suspect manages to hire a competent attorney who finds out that she is indeed an exemplary patriot only her name happens to closely resemble that of a terrorist's and it had been misspelled or mistyped in one of the secret service files – a phenomenon not entirely unusual when transcribing Arabic names to English. The question is, even if such a simple factual error relating the UN Security Council's decision can be proved, what procedures would follow? Can such a resolution be rebutted?[14] Or all the state can do is ask the Security Council to correct its decision?[15] Should we opt for the second alternative, subsequent questions arise: can a national court order the state to file such a request to the Security Council? What happens if the Security Council is reluctant to change its resolution? Can a national court nevertheless order the suspension of such a sanction?[16]

[12] Fraas, M.: *Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof: Die Rechtmässigkeitsprüfung von Beschlüssen des Sicherheitsrats der Vereinten Nationen im Rahmen des VII. Kapitels der Charta durch den Internationalen Gerichtshof.* Frankfurt am Main, 1998. 82–84, 246.

[13] *Ibid.* 77. For more, see Fassbender, B.: Quis judicabit? The Security Council, Its Powers and Its Legal Control, Review Essay, *European Journal of International Law* 11 (2000) No. 1.

[14] There is some literature that suggest this possibility. See Bowett, D.: The Impact of Security Council Decisions on Dispute Settlement Procedures. *European Journal of International Law* 5 (1994) 1–101.

[15] For example, Jochen Herbst argues that the judicial review of the legality of SC decisions is both possible under procedural law and permitted under UN constitutional law. The General Assembly and the SC have the right to request an advisory opinion of the ICJ on the legality of a SC decision. See Herkst, I.: *Rechtskontrolle des UN-Sicherheitsrates.* Frankfurt am Main, 1999.

[16] Bowring, B.–Korff, D.: Terrorist Designation with Regard to European and International Law: The Case of the PMOI, International Conference of Jurists, Paris, 10 November 2004, http://www.cageprisoners.com/articles.php?id=7822.

According to a Statewatch Analysis: "The UN and EU lists make no provision for appeal to the courts whatsoever. Groups and individuals on the lists may make diplomatic representations to their government, or the government that they believe proposed their proscription. An individual EU member state may grant a "specific authorisation" to unfreeze funds and resources after consultation with the other Member States, the Council of the EU and the European Commission (the issue of whether to continue to include someone on the EU list is decided by the Council). In the UN framework the requested member state may then make "diplomatic" representations to the Security Council Committee with a view to informal resolution of the issue[17] (and failing this, resolution by the Security Council itself). As far as the courts are concerned, individuals and groups could challenge the application of the EU/UN measures in the national courts on the basis that they contravene human rights or constitutional standards–though such appeals could well be denied on the grounds that international sanctions regimes are binding on member states. Groups and individuals have indirect recourse to the EU Courts and can seek annulment of the Council measures implementing the freezing regime, or damages for unlawful Council acts at the European Court of First Instance (and subsequently the full European Court of Justice). However, the proceedings in these courts would be directed at the EC/EU rules; they would not really concern the national measures implementing them."[18]

A number of groups have taken case to the EU Courts and claimed sizeable damages. The composition and functioning of the CFI and ECJ as international courts, however, leaves them inadequately equipped to deal with the complex issues raised by proscription cases. In such a situation, they offer no real prospect of adequate judicial redress for groups and individuals proscribed as "errorist" by the EU. A vivid example for this can be seen in the Court of First Instance judgements in the case of T-306/01 and T-315/01, 21 September 2005– 'Ahmed Ali Yusuf and Al Barakaat International Foundation[19] and Yassin

[17] In the Ahmed Ali Yusuf and Al Barakaat International Foundation case (see below), the Swedish government actually resisted and argued on behalf of its named citizens.

[18] Statewatch Analysis, Terrorising the rule of law: the policy and practice of proscription http://www.statewatch.org/terrorlists/terrorlists.pdf.

[19] Applicants argued that Articles 60 EC and 301 EC, on the basis of which that regulation had been adopted, authorise the Council solely to take measures against third countries and not, as it did in this case, against nationals of a Member State residing in that Member State. Applicants also denied the allegation that sanctions were imposed on them on account of their association with the regime of the Taliban in Afghanistan. In their view, the sanctions were not imposed on them because they maintained a link with that regime

Abdullah Kadi[20] v Council of the European Union and Commission of the European Communities'. Here, the court held that the European Community is competent to order the freezing of individuals' funds in connection with the fight against international terrorism. However, insofar as they are required by the Security Council of the United Nations, for the most part, these measures fall outside the scope of judicial review. The Court of First Instance held that, according to international law, the obligations of the Member States of the United Nations under the Charter of the United Nations prevail over any other obligation, including their obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms and under the EC Treaty and this paramountcy extends to decisions of the Security Council, as although it is not a member of the United Nations, the Community must also be considered to be bound by the obligations flowing from the Charter of the United Nations, in the same way as are its Member States, by virtue of the Treaty establishing it.[21] The Court went on to state that any review of the internal lawfulness of the regulation would therefore involve the Court in examining, indirectly, the lawfulness of the decisions in question. Having regard to the rule of paramountcy set out above, those decisions fall, in principle, outside the ambit of the Court's judicial review and the Court has no authority to call into question, even indirectly, their lawfulness in the light of Community law or of fundamental rights as recognised in the Community legal order.

In regards of the jus cogens issue, according to the Court of First Instance, it is nevertheless empowered to check the lawfulness of the contested regulation and, indirectly, the Security Council resolutions in the light of the higher rules of general international law falling within the scope of jus cogens, understood as a peremptory norm of public international law. However, after due scrutiny, the Court found that the freezing of funds provided for by the contested regulation does not infringe the applicants' fundamental rights as protected by jus cogens.[22] On the other hand, the Court was on the opinion that it is not for

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but because of the Security Council's desire to combat international terrorism, regarded as a threat to international peace and security.

[20] In support of his claims, the applicant has put forward in his application three grounds of annulment alleging breaches of his fundamental rights. The first alleges breach of the right to a fair hearing, the second, breach of the right to respect for property and of the principle of proportionality, and the third, breach of the right to effective judicial review.

[21] See Press Release No. 79/05.

[22] The Court held that because the contested regulation makes express provision for possible derogations, at the request of interested persons, allowing access to funds necessary to cover basic expenses. It is therefore neither the purpose nor the effect of those measures to subject the applicants to inhuman or degrading treatment, nor have the applicants been

it to review indirectly whether the Security Council's resolutions are compatible with fundamental rights as protected by the Community legal order, or to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council. The Court also pointed out that the right of access to the courts is not absolute. In this instance, it is curtailed by the immunity from jurisdiction enjoyed by the Security Council.[23]

Once all avenues for appeal have been explored, proscription may be challenged at the European Court of Human Rights. The ECHR, however, has so far held that all judicial remedies–including the ECJ must be exhausted before it can consider any cases, and this leaves applicants facing severely lengthy procedures.[24]

In conclusion, it is well to note that even though the EU has created a mechanism that is aimed at creating unified normativity, the EU is not a member of the UN and only national organs are regarded as addressees (and responsibility bearers) of sanction resolutions. National rules are therefore viable, indispensable and crucial elements in the process.[25]

This way, the key to the above questions will lie within how the state inserts its international obligation (and domestic national security interest) into its constitutional system. Through the example of Hungary, I will show that very often neither the process of implementation, and thereby the source of law

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arbitrarily deprived of their right to property, in so far as that right is protected by jus cogens. Indeed, the freezing of funds constitutes one aspect of the United Nations' legitimate fight against international terrorism and is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. Furthermore, the Court held, the resolutions of the Security Council provide for a means of reviewing, after certain periods, the overall system of sanctions and for a procedure enabling the persons concerned to present their case to the Sanctions Committee for review, through their State. As regards the rights of defence, the Court found that no rule of jus cogens appears to require a personal hearing of those individuals concerned by the Sanctions Committee. Since the regulation is a precautionary measure restricting the availability of property, observance of the fundamental rights of the persons concerned does not require the facts and evidence adduced against them to be communicated to them, where the Security Council was of the view that that there are grounds concerning the international community's security that militate against it. Id.

[23] For more, see Vlcek, W.: The European Court of Justice and Acts to Combat the Financing of Terrorism by the European Community, *Challenge Research Note Work Package 2–Securitization beyond borders: Exceptionalism inside the EU and impact on policing beyond borders*, November 2005.

[24] Id.

[25] See Pavoni: *op. cit.* 610.

nature of the sanctions, nor the adjacent legislation that would integrate them into the nation's legal system are sufficiently coordinated.

2. The implementation of resolutions imposing sanctions

The best way to show the contradictory Hungarian practice of implementing sanction-type resolutions is to divide the question into three further sub-questions: (1) how is a sanction-type resolution implemented? (2) when does it take effect?, and (3) when does it cease to be in effect?

2.1. The form of implementation

The Hungarian legislator does not take a clear stance on positioning itself in the monism versus dualism question. In a dualist legal system, international legal norms have no legal effect and are unenforceable without and prior to incorporation into national law. This implies that international norms themselves do not enjoy a special rank in the hierarchy of legal norms; their rank will correspond to that of the implementing instrument. According to modern theories, a legal system is said to be monist when it conforms to the idea that international law is automatically part of and superior to domestic law.

In Hungary, some international documents are properly promulgated and transformed into the Hungarian legal system; some are only published in the Official Journal[26] (which according to some authors[27] suggests a monist direct effect).

When it comes to sanction-type resolutions, some are promulgated in the form of acts of parliament. Such were for example the resolutions 827 (1993) establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY),[28] or 955 (1994) establishing the Tribunal for Rwanda (ICTR).[29]

Many other sanction-type resolutions, however, are promulgated in the form of a government decree such as for example 883 (1993) concerning The

[26] *"Magyar Közlöny"*.

[27] See for example Kovács, P.: Nemzetközi szervezetek szankciós típusú határozatai magyarországi érvényesíthetőségének alkotmányjogi gyakorlata és problémái (Constitutional Practice and Problems in Hungary During the Implementation of Sanction type Resolutions Taken In International Organizations). In: Bodnár, L. (ed.): *EU-csatlakozás és alkotmányozás* (EU-Accession and Constitution-Making). Szeged, 2001.

[28] Act 39 of 1996.

[29] Act 101 of 1999.

Libyan Arab Jamahiriya.[30] This is in itself a somewhat problematic scenario as Article 8 (2) of the Hungarian Constitution states that "in the Republic of Hungary, regulations pertaining to fundamental rights and obligations are determined by law [in this context meaning acts of parliament, ALP]; but the substance of fundamental rights cannot be restricted even by law." As sanction-type resolutions often carry severe restrictions on right to property, or even criminal liability, an act of parliament would be the desirable medium for implementation.

Nevertheless, government decrees are still ranked second in the hierarchy of legal norms in Hungary. Very often, however, we will find government resolutions promulgating Security Council resolutions. (See, for example, 748 (1992) concerning the Libyan Arab Jamahiriya.)[31] This is all the more worrisome given that these resolutions are not even proper legal norms according to the Hungarian legal system. It would be very difficult to detect any regularity within these practices: the two aforementioned sanctions against Libya were almost identical[32] and one might wonder why such different forms of implementation were used.[33]

What is more, some resolutions are only published as Foreign Ministry announcement-like documents, and to increase the chaos, some are published in English,[34] others in Hungarian, yet others in both languages, but quite a few resolutions are only implemented as summaries with references to the original.

Things can get even worse; a great number of resolutions are not implemented in any way.[35] This is not an insignificant issue, as some resolutions frequently make reference to further ones and it might take a few turns until we actually get to the lists that contain the names of individuals or companies to be sanctioned. And it may easily happen that some parts of this chain will not be formally implemented in Hungarian law.

Having said all this, it seems to be the least troubling element that when the UN Security Council resolutions are published in the Official Journal, they appear under the title "International Treaties"–which they clearly are not.

[30] 164/1993 (XI. 30.) korm. r. (government resolution).

[31] 1020/1992 (IV. 15.) korm. h. (government resolution).

[32] For another example see the respective government resolutions (2130/1999) and decrees (118/2000) implementing sanctions against 1999/206CFSP and 1298 (2000) on the situation between Eritrea and Ethiopia.

[33] For more see, Kovács: *op. cit.*

[34] 1996/16 Nemzetközi Szerződés a külügyminisztertől (Agreement International of the Foreign Ministry), for more see, Kovács: *op. cit.* 155.

[35] See Kovács: *op. cit.* 162.

2.2. *The time of implementation*

Besides the form of implementation, timing is another problematic issue: in particular, the starting and endpoint of the effect of the sanctions. Ideally and formally sanctions should take effect immediately. In reality, proper transformation (sometimes the mere translation), even if it takes the form of a summary released by the foreign minister, may take weeks or months. Nullum crimen sine lege is a fundamental rule of law requirement, which means that no criminal sanction (whether national or international in origin) may have retroactive effect. However this can indeed happen, if the original text (which obviously cannot be altered) contains a starting date that will pre-empt the time of promulgation.[36]

2.3. *The time of deregulation*

The next problem arises in the context of deregulation. The Hungarian practice again has been quite irregular regarding the implementation of resolutions lifting sanctions. The promulgation of such resolutions are often omitted, or done in sketchy summary documents issued by the Foreign Ministry.[37] What is more, we can even see examples of promulgation with one type of legal norm and annulations of the exact same resolution with another type–sometimes using media that are positioned significantly lower in the hierarchy of legal norms. What a constitutional gem: an act of parliament annulled by a government resolution! (This is unacceptable even in if the original source of law, the international sanction has been revoked, and the norm subsequently had been emptied.)

This cacophony of solutions is not only questionable from the constitutional point of view, but also creates a jungle of regulations which law enforcement agencies and private subjects (who are also bound to follow and enforce them) have difficulties following–and this runs against the principle of legal security. Péter Kovács, for example, refers to an incident in 1996 when apparently the Ministry of Foreign Affairs itself has lost track and erred in establishing the applicable status of revoked and reinstalled sanctions against Yugoslavia.[38]

[36] For a pre 9/11 example, see the sanctions concerning Eritrea and Etiopía. See supra note 10.

[37] For example, to bring examples of resolutions regarding Yugoslavia, 943 (1994) was promulgated but 988 (1995) was only released as a summary.

[38] Kovács: *op. cit.* 154.

3. National enforcement–Constitutional minsgivings and lack of efficiency

So far, we have seen how sanction-type resolutions "make their way" into the Hungarian legal system. And this is the point where the real problems emerge; as the sanctions need to be integrated within the constitutional structure. We will now focus our attention to post-9/11 anti-terrorist sanctions, in particular financial sanctions on designated terrorist organisations and persons supporting their activities.

As mentioned above, enforcement procedures pose a number of questions including these: can a national court suspend the application of an international sanction due to constitutional misgivings?; what standards ought to be applied in the process of granting for example an emergency exception from the sanctions?; what practical standards can be applied in constructing the criminal sanctions applicable for providing material support to terrorist organisations?; can a national court award compensation for damages caused by such sanctions?, etc.

Answers to these and related questions should ideally be provided within national legislation incorporating the international sanctions. It they are not (as it is with Hungary), their absence indicates the substantial amount of work still awaiting legislators. This paper will do considerably less: it will bring attention to the omissions and describe deficiencies in the harmonizing attempts of the Hungarian legislators.

The sanctions ordering the freezing of funds and other financial assets or economic resources against persons who commit, or attempt to commit terrorist acts or who participate in or facilitate the commission of such acts "arrived" in the Hungarian legal system with Act 83 of 2001, an anti-money laundering and anti-terrorism package which (motivated far more by the European Union integration process[39] than a fear of terrorism) contained a host of new measures and regulations intended to aid the global effort to combat terrorism, especially in the area of financial sanctions and restrictions towards organisations and persons supporting terrorism. The Act authorised the government to issue decrees which for 90 days can enforce and impose financial and economic sanctions posed by the UN Security Council or EU Council. The scope of this authorisation ran parallel with those in the EU and UNSC resolutions: freezing accounts, suspending contracts, imposing embargos and entry restrictions, etc. However, the Ministry of Justice was of the opinion that the application of this

[39] It is especially noteworthy that in June 2001, Hungary was put on the FATF/OSCE black list of countries non-conforming in money laundering issues.

authorisation would carry the risk of violating fundamental constitutional principles, as the authorisation enables the government to curtail the exercise of fundamental rights, whereas according to the constitution, only acts of parliament can issue such provisions. Thus, until May 1, 2004 (Hungary's accession to the EU and the consequential "incorporation" of all directly effective EU law, inter alia the sanction-type regulations) only one such government decree was issued.[40]

As EU regulations are directly enforceable and applicable in Hungary, the general legislative framework for preventing and combating money laundering and financing terrorism is in place, although Hungary has not done much to fine-tune EU regulations. For example, even *Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism* contained general guidelines and authorisations for exemptions from the sanctions[41] and on 27 March 2003 the Council adopted *Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002*;[42] instead of setting forth standards and procedures, the

[40] 56/200 (III. 29.) Decree. In line with UNSCR 1390 (2002) and 2001/931/CFSP.

[41] According to Articles 5–6: The competent authorities of the Member States under such conditions as they deem appropriate can defreeze accounts for the use of frozen funds for essential human needs of a natural person or a member of his family, including in particular payments for foodstuffs, medicines, the rent or mortgage for the family residence and fees and charges concerning medical treatment of members of that family. Also, certain payments can be made from frozen accounts for the purposes of: payment of taxes, compulsory insurance premiums and fees for public utility services such as gas, water, electricity and telecommunications, etc.

[42] On 27 March 2003 the Council adopted Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 (OJ 2003 L 82, 1). Under Article 1: 'The following Article shall be inserted in Regulation (EC) No 881/2002: "Article 2a 1. Article 2 shall not apply to funds or economic resources where: (a) any of the competent authorities of the Member States, as listed in Annex II, has determined, upon a request made by an interested natural or legal person, that these funds or economic resources are: (i) necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges; (ii) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services; (iii) intended exclusively for payment of fees or service charges for the routine holding or maintenance of frozen funds or frozen economic resources; or (iv) necessary for extraordinary expenses; and (b) such determination has been notified to the Sanctions Committee; and (c)(i) in the case of a determination under point (a)(i), (ii) or (iii), the Sanctions Committee has not objected to the determination within 48 hours of

Hungarian government decree[43] that was passed to implement and accomodate these procedures says almost nothing. All it contains is that the general rules of administrative procedure should apply in these procedures, where the National Police shall act as a first instance and the Ministry of Internal Affairs as an appeals authority; and the Foreign Ministry and the National Security Office should participate in the proceedings. Not a word about standards, equity, etc....

Besides human rights misgivings, one may also have serious efficiancy concerns, as, according to Hungarian law, a full fledged freezing of assets can only be ordered in the course of a criminal procedure,[44] or as part of an operation induced by international criminal cooperation. The problem concerns the fact that no automatic criminal procedure is initiated against persons on the various EU and UNSCR lists, not to mention corporations and other legal entities, against which such procedures cannot even exist. Thus, not even the direct effect of EU regulations will solve these issues, if (as it is the case) no criminal procedure is underway, say, against Usama bin Laden.

Also, directly effective EU law can only be applied to those assets which are somehow registered and processed by courts[45] or financial institutions. In theory, however, assets should include real estate, corporate ownership, etc. Thus, even though since September 2005 the Criminal Code[46] contains a

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notification; or (ii) in the case of a determination under point (a)(iv), the Sanctions Committee has approved the determination. 2. Any person wishing to benefit from the provisions referred to in paragraph 1 shall address its request to the relevant competent authority of the Member State as listed in Annex II. The competent authority listed in Annex II shall promptly notify both the person that made the request, and any other person, body or entity known to be directly concerned, in writing, whether the request has been granted. The competent authority shall also inform other Member States whether the request for such an exception has been granted.

[43] 306/2004 (XI. 13.) Decree.

[44] Articles 159–160 of Act 19 of 1998.

[45] Act 127 of 2004 amended Act 145 of 1997 on corporate registration which authorises civil courts to suspend the activities of corporations and order the freezing of assets and accounts.

[46] Article 261/A of Act 4 of 1978. Section 261/A (1) The person who violates an economic, commercial or financial prohibition pronounced on the basis of an international law obligation of the Republic of Hungary, if a separate Act orders the punishment of the violation of the prohibition, commits a felony, and shall be punishable with imprisonment of up to five years. (2) The punishment shall be imprisonment from two years to eight years, if the violation of an international law duty is committed a) with violence; b) in the quality of an official person. (3) The punishment shall be imprisonment from five years to ten years, if the violation of an international law duty is committed a) in connection with the trade of fire arms, ammunition, explosives, blasting-agent or an apparatus serving for

provision that sanctions the violation of an international law-based economic, commercial or financial sanction, without proper implementation, it cannot be enforced.

As the 2005 FATF Recommendations[47] for Anti-Money Laundering and Combating the Financing of Terrorism pointed out, even tough a comprehensive Act on the Prevention and Combating of Money Laundering has been adopted, some gaps remain in the legislative framework. Three points of particular concern were raised.

The first regarded the following: while the EC Regulations 881/2002 and 2580/2001 are self-executing in Hungary as an EU member state, there is no domestic legislation implementing the United Nations Security Council Resolutions (UNSCRs) 1267 and 1373, which is especially problematic in relation to the freezing of non-banking/financial assets. The second major criticism related to the criminal law framework. It was pointed out that the provisions regarding the financing of terrorism should include the financing of individual terrorists. The third point concerned the suspicious transaction reporting system. The current regulations seem over- and at the same time under-inclusive. On the one hand there is no legal obligation in the current legislative framework to report a transaction on the basis of a suspicion that the funds involved may be relevant to terrorism. On the other hand however, the system is producing a high volume of low quality reports from financial institutions and only a negligible number of reports from designated nonfinancial businesses and professions. The potential over-reporting from financial institutions could be linked to the criminal liability for both wilful and negligent non-reporting under the Criminal Code, which is also a concern for all service providers. This regime appears to have led to a large amount of "defensive reporting," rather than attempts to identify genuinely suspicious individuals, as very few of the reports have led to investigations and none to prosecutions. Out of 14,120 reports received in 2004, only 20 cases turned into investigations and no

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the utilization thereof, or of any product designed for military utilization; b) in an armed manner. (4) The person who perpetrates the preparation of the violation of an international law duty, shall be punishable for a felony with imprisonment of up to three years. (5) The person who credibly learns that the violation of an international law duty is prepared and fails to report that to the authorities as soon as he can, commits a misdemeanour, and shall be punishable with imprisonment of up to two years. As the wording requires the proper promulgation (in an act of parliament or a government decree), in its present form it appears to be applicable only for EU-induced sanctions but not to those passed by the UNSC.

[47] IMF Country Report No. 05/347.

prosecution was ever initiated out of an investigation arising from a suspicious transaction reporting.

We see that over-zealousness is not unheard of in regulating financial institutions in Hungary. For example, a recommendation of the President of the Hungarian Financial Supervisory Authority[48] on the prevention and impeding of terrorist financing and money laundering[49] provides a vivid example for

[48] No. 1/2004, See http://www.pszaf.hu/english/start.html.

[49] Act 15 of 2003 on the prevention and impeding of money laundering states that the objective of the act is to combat the laundering of funds originating from crime, or financing terrorism through the money and capital market system, or making accessible for criminals, through financial service providers. Act 4 of 1978 on the Criminal Code, Section 303 provides for the following definition of money laundering: (1) Any person who uses any item originating from the commitment of a criminal act punishable with imprisonment during his economic activities in order to conceal its origin, or perform any financial or banking transaction in relation to the item shall commit a crime and may be punished with imprisonment up to five years. (2) The punishment is imprisonment up to eight years if the money laundering is committed a) in a businesslike manner, b) involving especially large or even higher amounts, c) by an officer or employee of a financial organisation, investment enterprise, investment fund manager, clearing house, insurance company or an organisation involved in the organisation of gambling, d) by official persons, or e) attorneys at law. (3) Those who make an agreement on committing money laundering shall commit an offence and can be punished with imprisonment up to two years. (4) Those cannot be punished due to money laundering who voluntarily submit a report to the authority, or initiates such a report, providing that the action has not been detected at all, or it has only been detected in part. (5) The item specified in Paragraph (1) also includes documents and dematerialised securities representing a right to assets, which provide the right of disposal over the asset value or entitlement on their own or, in the case of dematerialised securities, for the beneficiary of the securities account. Section 303/A (1) In case of items originating from a punishable action committed by a third party, a) those who use the item while exercising business activities, or b) perform any financial or banking transactions in relation to the item, and are not aware of the origin of the item due to negligence, may be punished with imprisonment up to two years, community work or may be imposed a fine. (2) The punishment for an offence is imprisonment up to three years if the action defined in Paragraph (1) is committed a) involving an especially large, or even higher value, b) by an officer or employee or a financial institution, investment enterprise, investment fund manager, clearing house, insurance company or organisation engaged in the organisation of gambling games, or c) by official persons. Section 303/B (1) Those who do not fulfil the reporting obligation specified in the Act on the prevention and hindering of money laundering shall commit a crime and may be punished with imprisonment up to three years. (2) Those who do not fulfil their reporting obligation specified in Paragraph (1) for negligence shall commit and offence, and may be punished with imprisonment up to two years, community work, or may be imposed a fine. For the legislative background also consider the following: Act 83 of 2001 on combating terrorism, aggravation of regulations on

singling out Arab and Muslim countries by the very formulation of its due diligence and reporting requirements:[50] "The procedures aiming at the detection of money laundering intentions need to be used especially when.... Transactions should primarily be examined in terms of whether they are related to individuals, countries(!) or organisations contained in the specific international lists. ... Raised attention needs to be paid to electronically sent and received amounts, which are unusual for certain reasons, including especially the size of the amount, the beneficiary target country(!), the country(!) of the customer placing the order, currency or the method of sending or receipt. ... If an activity does not fit in the registered and reported activities, if the origin of received funds is unclear, if an amount increases from unusual sources, the target country(!) or addressee raises a suspicion, the financial service provider needs to analyse and evaluate them with special care, and the transaction should be reported to the authority even if the smallest suspicion arises."

4. Case law

Both of the two Hungarian terrorism-related cases involved charges of providing financial support to terrorist organisations and in one way or another started off from bank reports. Also, both cases show the inconsistencies within criminal law and UNSCR or EU-induced anti-terrorist legislation.

The first case involved Kinan Haddad, a Syrian physician who had been working in Hungary for several years and has been summarily expelled in 2003 after he transferred money to a bank account for a charity that was linked to a terrorist organization. Following the bank's report to the National Security Office, Interior Ministry's Immigration and Citizenship Office summoned Dr Haddad, notified him that the account number to which he made his donation was linked to Hamas, extradited him and told him he could not return for 10 years. Although he said he had not known who was behind the account, the National Security Office insisted that as the account belongs to one of the cover organizations of Hamas, in such cases, expulsion is the only possible reaction. Because the action was taken without a proper investigation and Dr Haddad has not been given an opportunity to defend himself and therefore was not afforded due process of law, Ferenc Kőszeg, chairman of the Helsinki

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the prevention of money laundering, and ordering certain restrictive measures, Act 101 of 2000 on the announcement of the Strasbourg convention of November 1990 (on money laundering, and the detection, seizure and confiscation of items originating from crime).

[50] Id. See Part 1.4. Blocking the funds financing terrorism.

Commission claimed that the Hungarian expulsion process conflicts with general human rights principles and leaves no room to mount a legal defence. (Some argued that the fact that Dr Haddad was separated from his wife, with whom they got married according to Islamic law, constituted a breach of Article 8 of the European Convention on Human Rights.) Mr István Diczig, Dr Haddad's lawyer, filed appeals with several government agencies but received no replies. Commentators draw attention to the following controversy: were the National Security charges well-founded, an ex-officio criminal procedure should have been initiated. As it was not done, the factual and legal basis for the extradition remains questionable.[51]

The second case concerned a naturalized Jordanian-Hungarian dual citizen dentist, Saleh Tayseer who also worked as imam of a mosque in Hungary, which was expecting a donation of 470,000 euros from the Al-Haramein Foundation (Saudi-Arabia) as contribution to building a new mosque. According to media reports, US intelligence has been watching the movement of this foundation's alleged money laundering activities for years and believed that the foundation is closely linked to Bin Laden's Al-Quaeda and has cell groups in several countries. The media also reported that the location where Tayseer's mosque is registered is the same as for a company called FAB Ltd, owned by a Sudanese national by the name of Hassanein, who, according to The Washington Post, was involved in arms smuggling to Bosnian Muslims and associated with Usama bin Laden. The accounts were frozen but Mr Tayseer was detained and placed under preliminary arrest only in April 2004, after someone reported to the police that on the first day of Israeli President Mose Katsav's visit, he had attempted to blow up the Jewish Museum in Budapest. (The opening ceremony at the museum was part of the president's programme.) Although Katsav's spokesperson in Jerusalem claimed that the attack was planned against the president of Israel, Hungarian police denied any connection between the visit and Tayseer's arrest. Nevertheless, within a few weeks, due to the lack of evidence the Prosecutors Office dropped the case which was eventually based on just one finger-pointing allegation, by an accuser who has had a long police track record and had been extradited from Hungary on two occasions.[52]

[51] For more, see for example Kovac, C.: Syrian doctor expelled from Hungary for allegedly supporting Hamas, *British Medical Journal* 2003; 326:1002, http://bmj.bmjjournals.com/cgi/content/full/326/7397/1002/b.

[52] For more, see for example S Kiss, T.: Police release suspect *Budapest Sun*, 1 July 2004, Vol. XII, Issue 27, or Szakacs, J.: Arrest Highlights Muslim Disunity, TOL, 23 September 2004, Volume XII, Issue 39.

We can see that both (we might as well say, all) Hungarian cases show the inconsistent implementation and application of anti-terrorist legislation.

Conclusion

This paper has argued that despite all the official commitment to the principles of rule of law and constitutionalism, much of the anti-terrorist legislation exists in a legal vacuum. Not only is the legal nature of UN Security Council resolutions ambiguous (a fact states may argue they cannot do much about) but in many countries (Hungary included) only half-hearted efforts are taken in national legislation to remedy this.

Thus, the use of financial sanctions against individuals merely accused of supporting terrorism permits only a very limited recourse for rebuttal and restitution. Furthermore, the use of evidence that must be kept secret from the accused for security reasons is problematic for a jurisdiction governed by the rule of law.[53] As noted by Piet Eeckhout, "In the absence of such [judicial] review, sanctions are pure executive acts, and no matter what type of foreign and security policy interests are at stake, it cannot be accepted in an organization based on the rule of law that executive acts which strongly affect people's lives are not subject to any effective judicial scrutiny".[54] This is rather unfortunate, because, as Derek Bowett reminds us, it "needs to be pointed out that verbal support for the Rule of Law, coupled with a refusal to accept any legal control over executive decisions, is not a consistent position in an age pledged to uphold democratic values."[55]

[53] Vilcek: *op. cit.*

[54] Eeckhout, P.: External Relations of the European Union: Legal and Constitutional Foundations. Oxford, 2004, 464.

[55] Bowett: *op. cit.* 12.

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BOOK REVIEW

Tamás Nótári: **Jog, vallás és retorika. Studia Mureniana** [Law, Religion and Rhetoric. Studia Mureniana]. Lectum Kiadó, Szeged, 2006. 322 pp.

It was three decades ago when Alfons Bürge analysed the *Pro Murena* by Marcus Tullius Cicero from a legal point of view in the professional literature of the last few *decennia*.[1] Bürge closely examined the paragraphs dealing with the *contentio dignitatis* of the *oratio*, which he called *Juristenkomik* (Cic. *Mur.* 22–30). After such an antecedent, it is no easy task to analyse the same speech from the perspective of legal history. After exploring the legal, historical and rhetorical background of the *Pro Murena*,[2] the work of Tamás Nótári (associate professor of the Károli Gáspár University) aims to analyse paragraphs twenty-six and twenty-seven, primarily from the aspect of legal history, and due to the character of the source, in light of religious history and the history of rhetoric as well. Because of the interdisciplinary nature of this study, its subject and aim–and therefore its methodological approach–are on the one hand made narrower, while on the other hand wider and more arborescent than Bürge's monography. It is narrower because after giving a more general overview of the historical and legal background of the *Pro Murena* in the first chapter, it outlines the career of the strategist, lawyer and orator, reviews the opinions appearing in the *Corpus Ciceronianum* and presents the theoretical and practical aspects of the Ciceronian sense humour, but does not analyse the whole *oratio*, not even the entire *contentio dignitatis*, focusing only on paragraphs 26 and 27–i.e. the eleventh *caput* of the speech. It is wider since the analysis is not devoted strictly to textual content, but also takes into consideration the questions arising in connection with it.

Following the historical, legal and rhetorical background outlined in the first chapter, the core issue dealt with in the second and third chapters concerning paragraphs twenty-six and twenty-seven is conservativism in the forms of law in the Archaic Age, which is described by Cicero–in accordance with the

[1] Bürge, A.: *Die Juristenkomik in Ciceros Rede Pro Murena.* Zürich, 1974.

[2] The Hungarian translation of the Pro Murena see Nótári, T. (ed.): Cicero–Négy védőbeszéd. (Cicero–Four speeches of defence.) Szeged, 2004. 73–132.

rhetoric situation rather than his own conviction–in a way that provokes a smile. More precisely, its austere and pragmatic adherence to the texts of legal acts, which sometimes opposes the real life situations and the *ius*, is designed to create the idea of justice. In searching for the source of this rigorousness–which deeply interpenetrates the whole of Roman intellectual life–and exploring Cicero's attitude to the literal interpretation of a statute or its interpretation based on equity, the thesis makes several side-tracks that do not belong to the survey of law, or legal history, but rather to the history of religion and literature. The analogies and the consequences that can be drawn from these, however, lead to a better understanding of the structure of different legal institutions (e.g. the *legis actio sacramento in rem*)[3] and of how they are embedded in the antique world of thinking and belief, which explains the wide-ranging complexity of the subject matter and methodological approach in the present paper. As the survey progresses, these seemingly scattered threads meet in the end to form a concise, organic synthesis. The widely laid theme springs from and returns to the analysis of one single source–coherence assured by the source analysed, the two Ciceronian paragraphs. Naturally, the limits of this study do not allow for a full-length presentation of the antique sources related to each question and legal institution in addition to various opinions appearing in literature, nor do they allow to argue for or against these, which in many cases did not even seem to be necessary since our aim was not to exceed the limits of the dissertation by exploring every detail of these questions and legal institutions, but to create an overall picture from their structural outline–as the author confesses in his *Preface*.[4]

In the first chapter, Nótári attempted to outline the historical background of the *Pro Murena*, comparing the opinions drawn up in other parts of the *Corpus Ciceronianum* in order to draw a line between the political-rhetorical situation and statements originating from personal conviction. During this process, the author tried to pay close attention to some of the means of the Ciceronian *eloquentia*. Lucius Licinius Murena and Decimus Iunius Silanus, brother-in-law of Marcus Porcius Cato, won the elections for *consul*ship in 63 BC. They also had two rivals: Servius Sulpicius Rufus, the most excellent jurist of the age, and the notorious Lucius Sergius Catilina. 63 BC was one of the most critical periods of the Roman Republic, because it was the time of the second Catilinan conspiracy. As *consul*, Cicero could have been motivated to accept

[3] Cf. Földi, A.–Hamza, G.: *A római jog története és institúciói* (History and Institutes of Roman Law). Budapest, 2005. 167. sqq.

[4] Nótári: *op. cit.* 7. sqq.

the defense of Murena against his friend, Servius Sulpicius, primarily by the fact that in early 62 BC it would have meant extreme danger to the state if only one *consul* had taken over control of state affairs.[5] Elections were necessarily accompanied by *ambitus*, a form of corruption that was first sanctioned in 432 BC. Acceptance of the *lex Tullia de ambitu* was forced through by Cicero himself in 63–encouraged by Servius Sulpicius among others–in order to sharpen the sanctions. It penalized corruption during elections by banishing the guilty party from the *senatus* and denied his right to participate in future elections in addition to imposing ten years of exile.[6]

In the *Pro Murena,* Cicero gives primacy to Murena in opposition to both the *iurisprudentia* and the *eloquentia.* The question arises, however, as to what extent these statements reflect his own personal convictions. Therefore, after sketching the career of L. Licinus Murena, it seemed worthwhile to the author to have a quick look at the evaluation of the *res militaris* in the *Corpus Ciceronianum.* He concludes that Cicero generally did not find the *gloria militaris* more valuable or useful to the state than leading the peaceful life of a citizen and hence the heroic task of serving the public. The career of Servius Sulpicius Rufus is remarkable considering his far-reaching work and his pioneering methodological activities, not only from the point of view of the analysis of the *Pro Murena*, but also in terms of jurisprudence at the end of the republic. In the *Pro Murena,* the orator does not wish to degrade the merits and knowledge of Servius Sulpicius against Murena. Disconnecting this from the personality of the two candidates, he instead compares the merits of the general with those of the jurist and decides to the benefit of the former, not so much in keeping with his personal opinion but rather because the historical and rhetorical situation forces him to do so. The author had also a brief look at the "*Cicero iuris consultus*" or Cicero's relation to *iurisprudentia.*[7] He concludes, that many of Cicero's works testify to his deep and overall legal knowledge,

[5] Nótári: *op. cit.* 15. sqq.

[6] Nótári, T.: Quaestio de ambitu. *Collega* 2001. 5. 43. sqq.

[7] Nótári: *op. cit.* 29–52. About the topic Cicero iuris consultus see also Hamza, G.: Das Vorbild des Rechtsgelehrten bei Cicero. Annales Universitas Scientiarum Budapestinensis de Rolando Eötvös nominatae Sectio Juridica 24. 1982. 57. sqq.; Hamza, G.: Ciceros Verhältnis zu seinen Quellen, mit besonderer Berücksichtigung der Darstellung der Staatslehre in De re publica. *Klio* 67. 1985. 492. sqq.; Hamza, G.: Riflessioni sulla teoria ciceroniana dello Stato. *Il pensiero politico* 29. 1996. 83. sqq.; Hamza, G.: Bemerkungen über den Begriff des Naturrechts bei Cicero. In: Nozione formazione e interpretazione del diritto dall'età romana alle esperienze moderne. Ricerche dedicate al professore Filippo Gallo. vol. I. Napoli, 1997. 349. sqq.

and he was convinced that knowledge of *iurisprudentia* was a necessary tool for an *orator*.[8] Given the fact that in the *studiorum atque artium contentio* Cicero applies the oratoral means of humour, Tamás Nótári also deemed it necessary to briefly examine humour and irony in light of antique rhetoric, and especially in theoretical works by Cicero.[9]

In connection with paragraph 26 of the Pro Murena as a source to be analysed, the author attempted to find an answer to problems related to the structure of the legis actio sacramento in rem in the second chapter. In view of the history of Roman religion and the field of ius sacrum, he tried to exploit the conclusions that could be drawn from these fields. As the height the Juristenkomik, Cicero describes one version of the manum consere ceremony applied to the legis actio sacramento in rem plots of land. After placing the act of manum consertum within the organisational procedure of the legis actio, it seemed useful to the author to observe how, why, and to what extent the preoccupation with text so mocked by Cicero characterised Roman (legal) thinking. Beginning with the well-known fact that one lost a lawsuit if he made even a single verbal mistake in his speech during the process of the legis actio, the author has examined many examples to observe the power of verbality, more precisely that of the spoken word, to create reality, as manifest in the ius sacrum and in religious thinking. From these, one can gain a clear picture of the neuroticly rigorous connection between Roman religion and jurisprudence of the Archaic Age and the spoken word. While conducting research into the symbolic meaning behind use of the rod instead of the lance as the symbol of ownership in the legis actio sacramento in rem, the author observed many cases of the application of the rod and lance and their relation to the dominium and the imperium, he paid special attention to the lituus of the augur, the commoetaculum of the flamen Dialis and the fasces of the lictores.[10]

From all of this, it can clearly bee drawn the conclusion, that the rod and the lance served as generally accepted symbols of power in Roman culture, not only in rituals connected with the legis actio sacramento in rem ceremony,

[8] Nótári, T.: De oratoris perfecti institutione. *Collega* 2003. 3. 47. sqq.

[9] See also Nótári, T.: Studiorum atque artium contentio (Cic. Mur. 22–30). *Aetas* 1999. 1–2. 224. sqq.; Nótári, T.: Jogtudomány és retorika – Cicero pro Murena 26. *Jogtudományi Közlöny* 2001. 12. 470. sqq.

[10] See also Nótári, T.: On Some Aspects of the Roman Concept of Authority. *Acta Juridica Hungarica* 46 (2005) 95. sqq.; Nótári, T.: Festuca autem utebantur quasi hastae loco. Acta Facultattisi Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae. 51. 2004. 133. sqq.; Nótári, T.: Remarks on the Origin of the *legis actio sacramento in rem*. *Acta Juridica Hungarica* 47 (2006) 133. sqq.

which belongs to the ius privatum, but also in the case of many procedures and institutions belonging to the ius publicum and the ius sacrum. The ius fetiale (the archaic law of war and peace) and the legis actio sacramento in rem offered many parallels, and there were many features common to the structure of the vindicatio and also to one of the plots in Plautus' comedy, Casina, in which the right of disposition over a slave girl was decided through battle accompanied by an ordeal. These examples and the accompanying arguments lead the author to the following–quite convincing–theory. Opinions formed in opposition to one another, and which search for the origin of the legis actio sacramento in rem either in the realm of private battle or in sacredness, serve to strengthen each other and reach the same conclusion, and can therefore be integrated into a single theory. The sacred element can be clearly traced in the procedure of the vindicatio, either from the oath, the sacramentum, or in the form of literal compliance with the carmen to be pronounced. One can find the motive for the battle either in the etymology of the vindicatio or in the application of the lance, but it was the hasta that held an additional sacral content in the imagination of the Romans, which cannot be neglected in the case of archaic civil law either. Applying the rules of this genre, Plaute presents a sort of a property case, the result of which was determined by a supernatural decision,–meaning the outcome of the controlled and restricted private battle defined by sortio. On this basis, the author assumes that the procedure of the legis actio sacramento in rem as we know it today was originally an ordeal fought with arms.[11]

In the third chapter the author studied paragraph 27 of the *Pro Murena*, beginning with the notes related to marital law, after which he tried to find the place of the statement *"in omni denique iure civili aequitatem relinquerunt, verba ipsa tenuerunt"* in the context of legal history and Cicero's works. Observing the *confarreatio* among the acts that the *manus* originates from, and the marriage ceremonies, one could clearly see that in the example the *orator* cited, Cicero made an ironic reference to the sentence *"ubi tu Gaius, ego Gaia"*– which corresponds with the argumentation and translation of Gary Forsythe[12]– a sentence the author interpreted as meaning *"where thou art happy, I am happy"*. In the course of these examinations, Nótári devoted some time to the presence of *flamen Dialis* in the *confarreatio*, and concluded–with the help of the parallels drawn from the cult of Zeus Naios of Dodona–that part of the

[11] Nótári: *op. cit.* 53. sqq.

[12] Forsythe, G.: Ubi tu gaius, ego gaia. New Light on an Old Roman Legal Saw. *Historia* 45 (1996) 240. sq.

instructions regarding the *flamen* and the *flaminica Dialis* hide hierogamic notions, which must have had a great significance in the ritual guarantees of fertility in marriage.[13] When talking about the *status* of women Cicero mentions that women were generally placed under power. It seemed logical, therefore, to more thoroughly examine certain institutions of the *manus mariti* and also of the *patria potestas*-because of the analogies based on the character of the sources.[14] Regarding the question of whether the *uxor in manu* is a member of the *agnatio*, the author followed the observations of Róbert Brósz and gave a negative answer.[15]

In the second part of this chapter the author discussed at length the aspect that archaic law insisted on the precise order of the pronounced words regarding the clarification of Cicero's comment *"in omni denique iure civili aequitatem relinquerunt, verba ipsa tenuerunt"*. Considering that Cicero placed emphasis on the contradiction between *verba* and *aequitas*, as a guideline Tamás Nótári tried to trace developments in the meaning of the expression *interpretatio*, during which the *interpretatio* merged aspects of the religious sphere and grammar and eventually reached the meaning of interpretation that was determinant in the Classic Age. The author then studied the proverb *"Summum ius summa iniuria"*, which became known in Cicero's works and occupied a significant place among the maxims of the logic of law that functioned as a means of legal interpretation, by examining its appearance in antique literature, such as in the works of Terence, Columella and Cicero. The meaning of proverb crystallized in the writings of the latter, according to which it signifies the over-extended application and enforcement of law in bad faith within the process of the *interpretatio iuris*, playing off the word of the law against its meaning. The sentence *"ius est ars boni et aequi"*, in harmony with the spirit of Cicero in the *Pro Murena*, formulates one of the most comprehensive fundamental principles of the *interpretatio*, which aims to offer protection against the extreme literal interpretation and application of the

[13] Cf. Nótári, T.: The Function of the Flamen Dialis in the Marriage Ceremony. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae Juridica* 45. 2004. 57. sqq.

[14] Nótári, T.: De iure vitae necisque et exponendi. *Jogtudományi Közlöny*, 1998. 421. sqq.; Nótári, T.: De matrimonio cum manu. *Jogtörténeti Szemle* 2005. 2. 52. sqq.; Nótári, T.: Quelques remarques sur le ius vitae necisque et le ius exponendi. *Studia Iuridica Caroliensia* I. 2006. 169. sqq.

[15] Nótári: *op. cit.* 101. sqq. See also Brósz, R.: Ist die uxor in manu ein Agnat? *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae Juridica* 18. 1976. 3. sqq.

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summum ius. During the interpretation of this sentence, the author concluded that it became a significant means of legal development as an interaction of *iurisprudentia* and *eloquentia*.[16]

Finally, while examining the historical background of *Pro Caecina*, and some sources connected to the *interdictum de vi armata*, the *interdictum uti possidetis* and the *deductio*, the author studied the disposition used by Cicero in the *oratio*, which exploited the opposition between *verba* and *aequitas*, and between *scriptum* and *sententia*. The author observed the way in which Cicero regulated his argument according to the actual situation and the interest of the trial rather than according to abstract principles. In doing so, the *orator* managed–with unprecedented rhetorical genius–to make the literal interpretation of law triumph by using tools of oratory that were created precisely for application against the literal interpretation of law.[17]

At this stage, an explanation must be given for the title *"Law, religion and rhetoric. Studia Mureniana"*. The speeches of Cicero had practical motivations. The lessons that can be drawn from them concerning law and order and the legal procedure of the given age are necessary consequences, and the legal themes outlined in them are the means rather than the aims of the *orator*. When examining these speeches, one cannot make a strict separation between legal and philological questions. Favouring one aspect exclusively to the detriment of the other would mean destroying the organic and structural unity of the source, and this approach would also oppose the thinking of Cicero, who always aimed at complexity. In Rome, especially the Rome of the Archaic Age, legal and sacred beliefs formed an organic unity. According to today's taxonomy, it would be justified to draw a distinction between the two, but the dangers present in the unjustified application of these modern categories in the Antique Age could hardly be avoided. If the author tries to accept this complexity, the reader might come nearer to the thinking of the Romans, who made almost no distinction between religion and politics. This is especially true in light of the fact that the examples cited in Cicero's *Pro Murena*–which refer to the moments of the *legis actio sacramento* and *coemptio*–originate from the organic unit of the *ius* and the *sacrum*. Tamás Nótári adjuncted the notes containing valuable informations at the end of the main part of his text,[18]

[16] See also Nótári, T.: Summum ius summa iniuria–Comments on the Historical Background of a Legal Maxim of Interpretation. *Acta Juridica Hungarica* 45 (2004) 301. sqq.

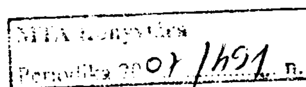
[17] Nótári: *op. cit.* 137. sqq.

[18] *Ibid.* 155–233.

and encomplished his monography not only with lists of the abbreviated antique sources and modern bibliographical references, but also with two indices of quoted sources and subjects.[19] On our part we would regard it as most desirable, if the author published the whole monography–useful both for historians and lawyers–in English.

István Sándor

[19] *Ibid.* 235. sqq.



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