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Manuscripts and editorial correspondence should be addressed to

ACTA JURIDICA HUNGARICA
P.O. Box 25, H-1250 Budapest, Hungary
Phone: (+36 1) 355 7384
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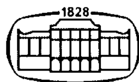

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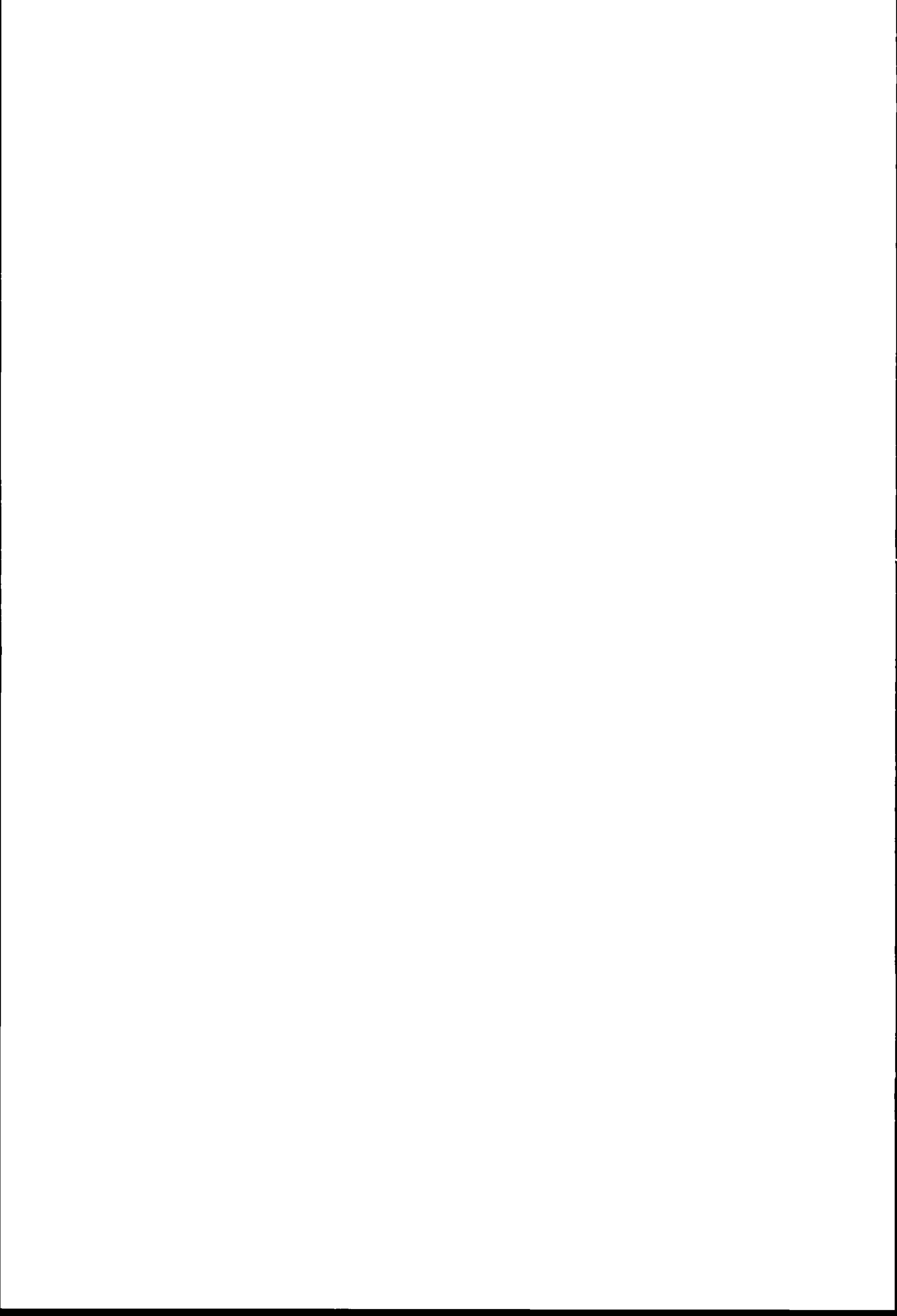
CONTENTS

STUDIES

MARIE-PIERRE GRANGER	The Preamble(s) of the French Constitution: Content, Status, Uses and Amendment	1
JAN KUDRNA	Two Preambles in the Czech Constitutional System	19
RYSZARD PIOTROWSKI	The importance of Preamble in Constitutional Court Jurisprudence	29
EWA POPŁAWSKA	Preamble to the Constitution as an Expression of the New Axiology of the Republic of Poland	40
MICHEAL SILAGI	The Preamble of the German Grundgesetz–Constitutional Status and Importance of Preambles in German law	54
VIKTÓRIA LINDER	Balancing between the Career and Position-based Systems. Some Aspects of Recent Developments in Civil Service Legislation in Hungary	64

KALEIDOSCOPE

JÓZSEF SZABADFALVI	From Original Sources–Neo-Kantian Legal Philosophical Thinking in Hungary	73
ANNA T. LITOVKINA	"Where There's a Will There's a Lawyer's Bill": Lawyers in Anglo-American Anti-Proverbs	82



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MARIE-PIERRE GRANGER*

The Preamble(s) of the French Constitution: Content, Status, Uses and Amendment

Abstract. This article analyses the way of the French Constitutional Council, starting with its famous Association decision in 1971, transformed a brief reference to historical declarations of rights in the thin Preamble of the current French constitution (adopted in 1958) into a wide-ranging judge-made catalogue of fundamental rights. This, combined with two important reforms of the procedure for submissions of statutes to the Constitutional Council for review (in 1974 and 2008), are gradually establishing the Constitutional Council as an important actor in the legislative process and a central body for the protection of human rights in France. The article also briefly explores the scope and limits of this protection. It then discusses recent proposals for amending the Preamble. It analyses the only amendment so far, namely the inclusion of a reference to the Charter for the Environment, which aimed at providing a constitutional basis for the protection of environment, as well as other controversial suggestions, such as those aiming at enabling positive discrimination measures towards minorities, the guarantee of media pluralism, the protection of privacy and personal data and the respect of human dignity. It concludes on the use and misuses of comparative law for constitutional reforms.

Keywords: constitutional reform, constitutional preamble, constitutional review, protection of fundamental rights, comparative law

1. Introductory remarks: the 1958 "Political" Constitution, its "Amputated" Constitutional Judge and its "Insignificant" Preamble

As is well-known, France has had a tormented constitutional history, going through many different political regimes, and no less than fifteen constitutions since the French Revolution in 1789. This is to say that

> the French should know about constitutions! One can differ as to whether the history of France should be considered a fruitful garden of constitutional thought, a graveyard of constitutional experiments, a *"musée des constitutions"*, or a minefield; in any case it is beyond doubt that the French are rather experienced in constitutions and constitutional changes.[1]

The current constitution, which provides for the basic rules for France's Fifth Republic, was adopted in 1958. It is the longest lasting French constitution after the constitutional laws of the Third Republic (1875). It has been amended twenty-four times.

As to the significance of the Constitution in French political life, it is important to recall that prior to 1958, the system was centered on the *loi* which was, in the words of Jean-Jacques Rousseau, the expression of the *"volonté générale"* (general will).[2] As such, it

* Associate Professor, Central European University (Budapest), Department of Public Policy, H-1051 Budapest, Nádor u. 9.
E-mail: Grangerm@ceu.hu

[1] van Nifterik, G.: French Constitutional History, Garden or Graveyard? *European Constitutional Law Review* (EuConst), 3 (2007) 3, 476.

[2] See also Art. 6 of the 1789 Declaration of the Rights of Man.

was sovereign and should not be subject to judicial control. This reluctance to submit statutes to any kind of judicial oversight was also reminiscent of the long-standing distrust of the French political class and society towards judges, dating back to the *Ancien Régime*, where judges (*parlements*) had been mostly concerned about maintaining privileges. Consequently, the Constitution was essentially a symbolic document, and was endowed with no serious enforcement mechanism. The 1946 Constitution (Art. 91) did provide for a *Comité Constitutionnel* to check whether the adoption of legislation required the revision of the Constitution. The procedure was nonetheless difficult to engage and remained unused.

The 1958 Constituant deviated slightly from this tradition, by setting up a body, the *Conseil Constitutionnel*, whose task was to check the conformity of legislative proposals and bills with the Constitution. This control was nonetheless minimalist; it provided only for concentrated, abstract and *a priori* constitutional review. Once in force, a statute could no longer be contested, even where it had not been subject to prior "constitutional clearance" or where its incompatibility with constitutional rules only unfolded through its application. Moreover, the control was political.[3] First, it was essentially aimed at limiting parliamentary influence over executive affairs and at preventing governmental instability of the kind which destabilised the Third and Fourth Republics.[4] Basically, the Constitutional Council was meant to be the "guard dog of the executive".[5] Second, only a restricted number of political personalities could refer legislation to the Constitutionnal Council for review. These were the President of the Republic, the Prime Minister or the President of one of the two parliamentary chambers (Assemblée Nationale and Sénat). Where all belong to the some political party, the likelihood of referral would be almost non-existent. Third, the membership of the *Conseil Constitutionnel* was political too, with no legal competences required from its members, and a nomination process controled by political personalities (three members nominated by the President of the Republic, three by the President of the National Assembly

[3] Stone, A.: *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. Oxford, 1992.

[4] It was part of a general attempt to "rationalise" parliamentarism. Art. 34 of the Constitution fixed the domain of intervention of the legislator; the rest was taken as falling under the competence of the executive (Art. 37 of the Constitution). The Constitutional Council was essentially set up to make sure that the Parliament remained within the limits set by the Constitution and did no endeavor to "govern", as it did in the previous regimes. The Council did not have the competence to review acts of the governments which interfered with legislative power. It was thus a one-way street, although the Conseil d'Etat, the highest administrative court, could check that decrees and regulations complied with laws and did not interfere with legislative competences. There were two ways to involve the Council in the control of legislation. The Council could be seized during legislative discussions by the Prime Minister (Art. 41 of the Constitution, not much used) where some provisions of envisaged legislation did not belong to the legislative field of competence. Since 2008, the President of each chamber can also raise such issue (Constitutional law No 2008-624 DC on the Modernisation of the Institutions of the Fifth Republic). A second situation calling for referral concerns legislative projects, which contain provisions related to the regulatory field (Art. 37.2 of the Constitution). The main mode of referral of proposed legislation to the Constitutional Council is provided by Art. 61 of the Constitution, and takes place after the law has been adopted in parliament, but before it comes into force, and may concern any provision of the Constitution.

[5] Vie Publique (2010) "Les Origines du Conseil Constitutionnel", available at http://www.vie-publique.fr/decouverte-institutions/institutions/approfondissements/origines-du-conseil-constitutionnel.html

and three by the President of the Senate), and former Presidents of the Republic were *ex officio* life members.[6]

Let us now turn to the aspect of this Constitution which concerns us here: its preamble. The preambles of past French constitutions not only offered an exposition of the motives or *"proclamation"* (1814, 1815, or 1852); the vast majority of them also included fully fledged bills of rights (1791, 1793, 1795, 1848, and 1946).[7] Indeed, traditionally, French *constituants* did not provide for self-standing Charters of Rights; neither did they integrate Bills of Rights into the core of the Constitution. The French custom was to place the Declaration of Rights in the preamble. This positioning seemed to indicate that these Declarations of Rights were meant to have purely symbolic value; something which in any case was not such a big deal, since the Constitution itself, for lack of constitutional review system, also remained purely aspirational.

At first sight, the 1958 Preamble, does not impress. Nothing like the "We the People of the United States..." which opens the American Constitution. It only consists of two sentences.[8] The last sentence oddly refers to the right to self-determination of overseas peoples, whilst the first sentence briefly states that "the French people solemnly proclaim their attachement to the rights of the Man and principles of national sovereignty as defined in the Declaration of 1789, confirmed and complemented by the Preamble of the Constitution of 1946".[9] However, although in formal terms it stops there, most commentators would agree that, in substantive terms, the Preamble also encompasses what is now Art. 1,[10] which provides that "France shall be an indivisible, secular, democratic and social Republic; ... ensure the equality of all citizens before the law, without distinction of origin, race or religion, [and]...respect all beliefs." The rest of the Constitution, at least in its original configuration, dealt with the various organs of the state and their relationships. Thus, the only mention of fundamental human rights in the French 1958 constitutional settlement was in the Preamble, which bearing in mind constitutional tradition, did not augure well for the the protection of such rights. However, the apparent modesty of the 1958 Preamble will turn out to be its greatest strength, as it offered a discrete, yet potentially limitless, short-cut to human rights resources.

2. The 1971 Freedom of Association Decision, the Rights Revolution and the Russian Dolls Preamble

From 1958 until the 1970s, France's Constitution was a "Separation of Power–Constitution" but not a "Charter of Rights and Liberties–Constitution"[11] or, to use the typology developped

[6] Art. 56 of the Constitution.

[7] Only the rapidly adopted constitutional laws of 1875, which founded the Third Republic, had no preamble. Note, in passing, that it did not prevent it from lasting 70 years...!

[8] It is one of the shortest Preambles in the world of constitutions. Orgad, L.: The Preamble in Constitutional Interpretation. *International Journal of Constitutional Law,* I-CON (forthcoming), 8 (2010) 5, footnote 15.

[9] Since the constitutional revision of 2005 (Constitutional Law No 2005–205 of 1 March 2005 relating to the Charter for the Environment), it also makes reference to the rights and duties as defined in the Charter for the Environment of 2004.

[10] Part of what is now Art. 1 used to be Art. 2, until the Constitutional Law No 95-880 of 4 August 1995.

[11] Veil, S.: *Redécouvrir le Préambule de la Constitution–Rapport du comité présidé par Simone Veil.* La Documentation Française. 2008, 7.

by Dean Maurice Hauriou, France was endowed with a political constitution, but no apparent social constitution (save for a frail embryo in the 1958 Constitution Preamble).

The "rights' revolution"[12] took place in 1971, when the Constitutional Council turned the "insignificant" 1958 Preamble into Russian dolls, revealing almost limiteless constitutional resources.

Perhaps because they had introduced some kind of constitutional control, the drafters of the 1946 Constitution had explicitly forbidden the weak ancestor of the *Conseil Constitutionnel*, the *Comité Constitutionnel*, from assessing the compatibility of laws with the Constitution's ambitious and progressive Preamble.[13] However, as the 1958 Preamble was so "low-key", the drafters of the Fifth Republic's Constitution probably thought it unnecessary to take similar precaution and did not make any explicit provision as to its legal value, or rather lack thereof. The *Conseil Constitutionnel* thus did not face formal constitutional obstacle to upgrading the Preamble into a constitutional norm. However, that would mean flexing its muscles, as constitutional traditions in France and abroad suggested tha constitutional preambles were meant to be essentially for symbolic, or at beast, interpretative purposes, and not to serve a independent sources of rights.[14] It would also have to deploy a fair amount of legal ingenuity to transform the ugly little duck-preamble into a beautiful swam. The Freedom of Association case provided the right opportunity for such delicate operation.[15]

In the follow-up to May 1968, the Interior Minister started a policy of limitations of individual freedoms (right to demonstrate, right to free movement, the freedom of the press, the freedom of assembly, and eventually freedom of association). Based on a ministerial instruction, a prefect (a representative of the state at local level) refused to the founding members of the *"Association des Amis de la Cause du Peuple"*, the receipt for the declaration of this association, without which it could not operate. The administrative court annuled the prefect's refusal. The Minister, who realised that its position was in breach of the law, simply decided to have the law changed. In June 1971, the National Assembly adopted, despite the opposition of the Senate, a legislative proposal which enabled a prefect to delay his/her issuance of an authorisation until judicial authorities had reviewed the lawfulness of an association. The President of the Senate referred the law to the Constitutional Council.

The judges of the *Rue de Montpensier*[16] engaged into what I like to call Russian Dolls reasoning. First, the Constitutional Council declared that the 1958 Preamble was an integral part of the Constitution. In doing to, it integrated the Preamble into the *"bloc de constitutionnalité"*, that is the collection of constitutional norms against which statutes can

[12] This expression is also used in the French context by Lasser (2009); however, he uses it in relation to the way the *"contrôle de conventionalité"*, whereby national courts checked the compatibility of national legislation with international agreements, especially the European Convention on Human Rights, enabled national courts to limit legislative infringements of human rights, in a manner which was not allowed by constitutional review (at least until the 2008 reform).

[13] Art. 92 of the 1946 Constitution.

[14] Orgad: *op. cit.*

[15] Decision No 71-44-DC Freedom of Association of 16 July 1971.

[16] Address of the Constitutional Council.

be reviewed (analogy with the *"bloc de légalité"*).[17] Second, the Constitutional Council explained that the 1958 Preamble proclaimed the "attachement" of the French people to human rights as expressed in the 1789 Declaration, and confirmed in the 1946 Preamble. From these, it concluded that these two documents also had constitutional value. In doing so, it basically granted the 1946 Preamble a status which the 1946 Constituant had refused it.[18] Third, it noted that the 1946 Preamble itself referred to the fundamental principles recognised in the laws of the Republic. Since the famous *"Loi 1901"* (an ordinary law), which was such a "republican" law, had granted protection to the freedom of association, such freedom therefore should also have constitutional status.

To sum up, by granting constitutional value to the 1958 Preamble, the Constitutional Council also gave the texts to which the 1958 Preamble made reference, namely the 1789 Declaration and the 1946 Preamble, similar superior status. By the same token, it conferred on all the rights and principles to which these two constitutional documents referred, or which could be derived from them, the nature of supreme law. The Preamble thus operated like Russian dolls, with new constitutional rules and principles to be derived from past constitutional documents, themselves found in the current Preamble.

3. Moving towards comprehensive constitutional review: the 1974 and 2008 revisions

The Freedom of Association decision was welcome in legal circles and by the public alike. It became such a "popular" issue, that V. Giscard d'Estaing, during his presidential campaign, made the promise that he would extent the right to refer laws to the Constitutional Council to a wider range of personalities. When he became President of the Republic in 1974, he obtained a revision of the Constitution which granted the right to submit proposed legislation to the Council to sixty deputees and senators.[19] This reform marked a second turning point for the protection of fundamental rights through constitutional review in France.

This reform basically enabled the parliamentary Opposition to use constitutional review systematically to obtain the partial or full invalidation of bills, or threatening to use it, to secure amendments in planned legislation. The new perspective of negotiating in the shadow of constitutional review thus changed the legislative game. It also enabled the Constitutional Council to play a greater role in the protection of fundamental rights and freedom, and to flesh up the Constitution, and more particularly, its Preamble, at least *in abstracto*.

The reform nonetheless maintained the French constitutional review system within a pure Kelsenian tradition, focused on a procedural and theoretical aspects. Further expension of the right to apply to the Constitutional Council where thus halted for quite a while, although academics and politicians regularly called for a more comprehensive review system, to enable constitutional compatibility checks after a statute had come into force (for

[17] In fact, this decision was only the logical result of a less-known decision adopted in the previous year, which had already established the legal value of the preamble, although in relation to the conformity of a treaty (and not a statute) to the Constitution (Decision No 70-39 DC European Community Budget of 19 June 1970).

[18] Orgad: *op. cit.* 13.

[19] Constitutional Law No 74-904 of 29 October 1974 on the revision of Art. 61 of the Constitution.

example, 1990 Badinter proposal, 1993 Vedel Committee report). These nonetheless remained *lettre morte*, due to the Senate's opposition. The idea eventually returned on the political agenda, when President Sarkozy, in its Epinal speech of 12 July 2007, raised the question, and entrusted a Committee of Reflection on modernisation of the institutions of the Fifth Republic, chaired by Edouard balladur, to examine possible reforms. The work of the Committee led to the important 2008 constitutional revision, which amended many constitutional rules.[20] For our purpose, we should mention that the amendments created a new institution, the Defensor of Rights, a sort of Ombudman, whose task will be to make sure that administrations and public bodies respect citizens' rights (New Title XIA). The constitutional revision also introduced a long-awaited *a posteriori* and concrete constitutional control mechanism, by means of exception, through the Priority Preliminary Ruling on the Issue of Constitutionality (in French, *Question Prioritaire de Constitutionalité* or QPC).

This reform should enable the Preamble to develop its full social potential and the Constitutional Council to finally become a real guardian of fundamental rights and liberties. Indeed, the new Art. 61-1 of the Constitution provides that "if, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes *the rights and freedoms guaranteed by the Constitution*, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* to the Constitutional Council, within a determined period." The organic law, which determines the conditions of application of the new mechanism, specifies that the question must be relevant to the dispute and serious, and that the legislative provision should not have been already declared as complying with the Constitution by the Constitutional Council.[21]

What this new constitutional review mechanism will actually bring remains to be seen. Some believe it comes too late to transfor the Constitutional Council as the choice defensor of human rights, for such role has already been taken up, for quite a while, by the European Court of Human Rights,[22] or even the European Court for Justice.[23] But one can also be more optimistic. The road to Strasbourg is a long one, and the QPC, if the *Cour de Cassation* and the *Conseil d'Etat* play the game, and refer all questions which fulfill the conditions, offers a short-cut to Paris.[24] If the judges take care of at least aligning their standards of protection with the Strasbourg judges, any rational being would opt for the QPC. Truly

[20] Constitutional law No 2008-624 DC on the Modernisation of the Institutions of the Fifth Republic.

[21] Organic law No 2009-1523 du 10 December 2009 related to the application of Art. 61-1 of the Constitution.

[22] Chantebout, B.: *Droit Constitutionnel.* Paris, 2009, 578; M. de Lasser, S. O.: *Judicial Transformations: the Rights Revolution in the Courts of Europe.* Oxford, 2009.

[23] In that regard, it is interesting to note that the Cour de Cassation recently sent a reference for a preliminary ruling challenging the compatibility of the QPC with the principle of supremacy of EU law; however, the ECJ considered it compatible with EU law, taking into account the Conseil d'Etat and Conseil Constitutionnel's explanations of the operation of the procedure, as not interfering with courts' ability to interpret national law in conformity with EU law and to set aside national measures incompatible with EU law. C-188/10 and C-189/10 Aziz Melki and Selim Abdeli [2010], nyr.

[24] Recently, the *Conseil D'Etat* refused to refer a QPC concerning the constitutionality of measures relating to the dissolution of sport associations to the Constitutional Council, arguing that the question was not new and serious. The parties are planning to take the case to the European Court of Human Rights. CE, 2ème et 7ème SSR, 8 October 2010, *Groupement de fait Brigade Sud de Nice et M. Zamalo* (No 340849).

enough, it is problematic that legislative provisions which have already been given a priori abstract clearance cannot be challenged through the QPC, even if their application revealed unforeseeable constitutional flaws; these renders many of the legislative provisions adopted since 1974 "untouchables". Yet, the reform should still help to clear up the French legal order from legislative provisions which, either for lack of jurisdiction, negligence, or political calculation, have remain "unchecked".

The procedure was used for the first time in May 2010. After five months of actual operation, the pace of examination of legislative provisions by the Council under the QPC is accelerating, with around twenty decisions per month over the last two months. This should be contrasted with the one or two decisions a month delivered under the previous system. More significantly, from all the provisions referred under the QPCs, the Council found that one-third were in either a total or partial violation of the Constitution, or that they were only compatible if interpreted and applied according to its instructions.[25] Finally, and unsurprisingly, QPCs basically concern the compatibility of statutes with rights and principles protected on the basis of the Preamble. With that in mind, the new review procedure should contribute to the Preamble establishing itself as the central pillar of constitutional review in France.

4. The "rights and liberties guaranteed by the Constitution": a "judge-made" catalogue based on the France's constitutional tradition

Let us now turn to the question of which rights and liberties are hidding in our Russian Dolls Preamble, which contain constitutional texts drafted over a range of more than two hundred years, for different regimes, with different, and perhaps even conflicting, ideologies in mind? How do these fit, and interact, with one another to build a protective web for peoples' rights.

The information page of the *Conseil Constitutionnel* specifies that "the rights and liberties guaranteed by the Constitution" which statutes must respect are the ones mentionned in the 1958 Constitution (as amended), the text to which the 1958 Constitution refers, namely the 1789 Declaration, the 1946 Preamble, the fundamental principles recognised by the laws of the Republic (referred to in the 1946 Preamble) and, since 2005, the Charter for the Environment. However, in reality, there is more than that, since from these sources, the Constitutional Council derived a number of further constitutional principles and objectives.[26]

The 1789 Declaration of Rights was strongly inspired by the Enlightment philosophy. Drafted by the Marquis de Lafayette, it was destined to become the basis for a constitution for France. It was based on the notion of natural rights, the concept of social contract (Locke and Rousseau) and Montesquieu's theory of separation of powers. It is thus a text with a strong liberal and individualist orientation, focused on what we now refer to as "first

[25] Over the fifty or so decisions made so far under the QPC, about 20% found a total or partial non-conformity (about half with temporal limitations of their effects), and another 10% of the decisions declared compatibility with reserve of interpretation.

[26] "Qu'entend-on par 'droits et libertés que la Constitution garantit'?", under Question Prioritaire de Constitutionnalité, at http://www.conseil-constitutionnel.fr/

generation" rights.[27] It recognises civil rights, or the "rights of a man as a person",[28] such as the principles of equality (Art. 1), liberty (Arts 1 and 4), including the right to safety and civil resistance (Art. 2), legality and legal certainty (Arts 7–8), the presumption of innocence (Art. 8), the freedom of opinions and thoughts (Art. 10), the freedom of expression (Art. 11), and the right to property (Arts 2 and 17). It also recognises political rights, or the "rights of the man in relation to the Nation", such as the right to participate directly or indirectly in the elaboration of the law (Art. 6), equal access to public positions (Art. 6), the unity of national sovereignty (Art. 3), the principle of agreement to taxation and its equal sharing (Art. 14), the existence of *force publique* (Art. 12), the control and accountability of the administration (Art. 15), and legal guarantees (Art. 16).

The Declaration has been a wonderful source of inspiration for the recognition and protection of civil and political rights, since the Constitutional Council has granted constitutional value to every rights it contains.[29] However, its anachronism sometimes poses problematic restrictions on constitutional jurisprudence. Notably, the formal equality notion on which it is based prevents positive discrimination measures in France.[30] The only way out is to amend the Constitution itself, to provide for a "concurrent" constitutional basis for affirmative action. Art. 1 of the Constitution was thus amended on in 1999, to include that "statutes shall promote equal access by women and men to elective offices and posts".[31] It served as a basis to the 2000 statute on equal access of women and men to electoral mandate and elective functions,[32] which the Council eventually validated.[33] However, the narrow focus of the constitutional amendment excluded positive measures beyond the political world. In 2008, the Constitution was thus amended again to enable legislative promotion of equal access between men and women to "positions of professional and social responsibility" (new Art. 1).[34] Yet, to the extent that the successive constitutional amendments only focus on sex discrimination in certain fields, the formal equality principle of the Declaration still blocks the way to other types of positive discrimination measures, towards ethnic minorities for example. It is seen as effectively blocking the way to any "communautarist" legislation. Art. 1 also prohibits statistical information on ethnicity or race, despite the strong support

[27] Note in passing that it only granted rights to men and male citizens, and not to women (despite Condorcet's support to the inclusion of women). It prompted Olympe de Gouges to publish a concurrent Declaration of the Rights of Woman and the Female Citizen in September 1791. Women equal rights were eventually recognized in the 1946 Constitution. The principle also did not apply to slaves.

[28] Veil: *op. cit.* 21.

[29] The first time that a statute was checked against a provision of the Declaration was in the Conseil Constitutionnel Decision 73-51 DC Finance Law of 27 December 1973, concerning the principle of equality.

[30] For example, Decision No 82–146 Local Elections of 18 November 1982, confirmed by a decision No 98-407 Regional Elections of 14 January 1999.

[31] Constitutional law No 99-569 of 8 July 1999 relating to the equality between women and men.

[32] Law No 2000-493 of 6 June 2000 to favor the equal access of women and men to electoral mandate and elective functions.

[33] Decision No 2000-429 DC Equal access of women and men to electoral mandate and elective functions.

[34] Constitutional law No 2008-624 DC on the Modernisation of the Institutions of the Fifth Republic.

from the academic and scientific community for such data, as many consider them as essential in the fight against discrimination.[35]

The Preamble of 1946, for its part, is "a legal discourse of political facture",[36] which aims a fairer society.[37] In addition to adhering to the French liberal constitutional tradition through a reference to the 1789 Declaration and the "fundamental principles recognised by the laws of the Republic", the 1946 Preamble adds its own list of political, social and economic principles "particularly necessary to our times", such as equal rights for men and women (para 3), the right to protection of health, material security, rest and leisure of mothers, children and older workers (para 11), the right of the family to the conditions of development (para 10), the right for anyone unable to work to have suitable means of existence (para 11), and the right to asylum for persecuted persons (para 4). It also includes workers rights, such as the right to work and have a job (para 5), the right to defend ones interests through trade union membership and action (para 6), the right to strike (para 7), and the right to the determination of working conditions and participation in the management of companies (para 8). Finally, it added the right to education, vocational training and culture through a laic and free education system (para 13), solidarity and equality in the face of national catastrophies (para 12), and a few principles related to international relations (paras 14–18). The Constitutional Council's first reference to such principles necessary to our times was in its famous Abortion decision of 1975,[38] which established the right to health.

So much for the rights and principles explicitly mentionned in this bundle of constitutional texts. These are, in any case, only the visible tip of the iceberg, as the constitutional judge also nees to identify what lies behind the cryptic, and apparently open-ended, formula of the "fundamental principles recognised by the laws of the Republic", to which the 1946 Preamble refer without further ado.[39] The *Conseil d'Etat* had already started such process by recognising, as early as 1956, the freedom of association as such principle.[40] The Constitutional Council followed up and recognised a number of such principles, such as the freedom of association (identified in the groundbreaking decision of 1971), the rights of the defense or "due process" (1976),[41] individual freedoms (1977),[42] the freedom of education (1977),[43] including the freedom of higher education[44] (1999), the freedom of

[35] Decision No 2007-557 DC Immigration management of 15 November 2007. Veil: *op. cit.* 60.

[36] Koubi, G.: Le Préambule de la Constitution de 1946. *Antinomies juridiques et contradictions politiques.* PUF, 1996. 9.

[37] Conac, G.: Le Préambule de la Constituion de 1946. Une Genèse difficile, un itineraire imprévu. In: Conac, G.–Prétrot, X.–Teboul, G. (eds): *Le Preambule de la Constitution de 1946. histoire, analyse et commentaires.* Paris, 2001, 4.

[38] Decision No 74-54 DC Abortion of 15 January 1975.

[39] Simone Veil submits that it proceeded of the desire of the 1946 Constituant to link the Constitution back to the political liberalism of the Third Republic, and definitely end with the Vichy regime. Veil: *op. cit.* 23.

[40] CE, Amicales des annamites de Paris', 11 July 1956, Rec 317.

[41] Decision No 76-70 DC Prevention of occupational accidents of 2 December 1976.

[42] Decision No 76-75 DC of Vehicle Search of 12 January 1977.

[43] Decision No 77-87 DC Freedom of education and conscience of 23 November 1977.

[44] Decision No 99-414 DC Agricultural Orientation of 8 July 1999.

thoughts (1977),[45] the independence of administrative justice (1980),[46] the independence of University professors (1984),[47] the judicial review competence of administrative courts (1987),[48] the notion of judicial courts as guardians of private real estate (1989),[49] and the educative nature of criminal sanctions for minors (2002).[50] The *Conseil d'Etat* added to that list the duty of the state to refuse extradition when it is asked for political motives (1996)[51] and the principle of *"laicité"* (2001).[52] These, by and large, correspond to values which are recognised in most European constitutional systems. However, aware of the potentially limitless nature of the notion and risk of arbitrariness, the Constitutional Council rapidly put some limits to this category of constitutional norms, by considering that only really fundamental principles, stating a sufficiently important rule, in a sufficienly general manner and concerning essential fields for the life of a nation, such as fundamental liberties, national sovereignty or the organization of public powers, could be granted constitutional value. In addition, it explained that they must be found in, and never have been derogated from, laws adopted under a republican regime prior to 1946.

In addition to these principles "based" on republican laws, the *Conseil Constitutionnel* also endeavoured to flesh up the Constitution and its Preamble, by recognising "principles" and "objectives" of "constitutional value", which are not explicitly referred to in the constitutional texts, but can be deduced from them. The Constitutional Council recognised for the first time an objective as having constitutional value in the famous Decision on the Audiovisual Law, which established the objective of pluralism of the press and media of objective of constitution.[53] These objectives can serve to place limits of individual rigths which are constitutionally protected. But let us detail a little how these principles and objectives are discovered by the constitutional judge.

For example, from Art. 6 of the 1789 Declaration, the Constitutional Council drew a principle of equality before justice. Based on this, it considered that the legislator could not impose more than one penalty for the same offence,[54] could not refuse to legal persons a right of response which natural persons have,[55] or could not prevent victims of strike from introducing law suits to obtain compensation.[56] From Art. 11 of the 1789 Declaration on the freedom of communication, it derives a right to information, and from that, the objective of pluralism of the press and media,[57] or the right of access to the Internet as a fundamental freedom.[58] From the principle of individual freedom provided by Art. 2 of the Declaration

[45] Decision No 77-87 DC Freedom of education and conscience of 23 November 1977.

[46] Decision No 80-119 DC Validation of Administrative Act of 22 July 1980.

[47] Decision No 83-165 DC University freedoms of 20 July 1984; Decision No 2010-20/21 QPC University of 6 August 2010.

[48] Decision No 86-224 DC Competition Council of 23 January 1987.

[49] Decision No 89-256 DC Urbanism and new towns of 25 July 1989.

[50] Decision No 2002-461 DC Justice Law of 29 August 2002.

[51] *Conseil d'Etat*, Decision of 3 July 1996, Ass., Koné, Rec. 255.

[52] CE, SNES, 6 April 2001.

[53] Decision No 82-141 DC Audiovisual Communication of 27 July 1982.

[54] Decision No 75-56 DC Penal Law of 23 July 1975.

[55] Decision No 82-141 DC Audiovisual Communication of 27 July 1982.

[56] Decision No 82-144 DC Staff Representation of 22 October 1982.

[57] Decision No 84-181 DC Concentration, Financial Transparency and Pluralism of Press Undertakings of 11 October 1984.

[58] Decision No 2009-580 DC HADOPI of 10 June 2009.

or Art. 66 of the Constitution, it constructs not only the right to come and go, but also the prohibition of arbitrary detention, the inviolability of the home, the right to private life,[59] in particular regarding the protection of personal data,[60] the right to marry, the right to have a normal family life, and the right to family reunion for foreigners.[61] Probably the most far-stretched "discovery" is that of the principle of protection of human dignity, which the Council derived from the first sentence of the 1946 Preamble, providing that "all human being without distinction of race, religion or beliefs, possess ineliable and sacred rights".[62]

Other principles having constitutional value are the continuity of public services,[63] the freedom to carry out a business (*liberté d'entreprendre*),[64] or contractual freedom.[65] As for the "objectives of constitutional value", these cover the safeguard of public order, the respect of others' freedom, the preservation of the pluralist character of means of socio-cultural expressions,[66] the pluralism of beliefs and opinions,[67] the protection of public health,[68] the prevention of public order offences, in particular threat on the security of persons and goods, and the search for those commiting offences,[69] the possibility for everyone to have a decent accomodation,[70] the accessibility and clarity of the law,[71] the fight against tax fraud and evasion,[72] and the financial balance of social security.[73]

Next to the list of recognition, we should also add the list of rejections, that is the principles to which the Council refused to give constitutional value. These are the principle of legitimate expectations,[74] the transparency of public activities,[75] the equity between generations,[76] the criminal irresponsability of minors,[77] the *"principe de faveur"* in labor

[59] Decision No 76-75 DC Vehicle Searches of 12 January 1977, No 94-352 DC Security Law of 18 January 1995, No 99-416 DC Universal health Cover Law of 23 July 1999, No 2003-467 DC Internal Security Law of 13 March 2003; No 2010-25 QPC Internal Security Law of 16 September 2010.

[60] Decision No 2004-499 DC Treatment of Personal Data of 29 July 2004.

[61] Decision No 93-325 DC Immigration of 13 August 1993.

[62] Decisions No 94-343/344 DC Organ donation of 27 July 1994; No 2010-25 QPC "Internal Security Law" of 16 September 2010.

[63] Decision No 79-105 DC "Continuity of Public Service of radio and Television" of 25 July 1979

[64] Decisions No 81-132 Nationalisation Law of 16 January 1982 and No 92-316 Corruption and Transparency Law' of 20 January 1993.

[65] Decisions No 81-132 Nationalisation Law of 16 January 1982.

[66] Decision No 82-141 DC Audiovisual Communication of 27 July 1982.

[67] Decision No 2004-497 DC Electronic and Audiovisual Communication Law of 1 July 2004.

[68] Decision No 90-283 DC Fight against Tobacco Dependence and Alcoholism Law of 8 January 1991.

[69] Decision No 94-352 DC National Security of 18 January 1995.

[70] Decision No 94-359 DC Accommodation Diversity Law of 19 January 1995.

[71] Decision No 99-421 DC Codifications of 16 December 1999.

[72] Decisions No 99-424 DC Finance Law of 29 December 1999; 2010-19/27 QPC Modernisation of the Economy Law of 30 July 2010.

[73] Decision No 2002-463 DC Social Security Financing of 12 December 2002.

[74] Decision No 97-391 DC Urgent fiscal and financial measures of 7 November 1997.

[75] Decision No 93-335 DC Urbanism and construction of 21 January 1994.

[76] Decision No 97-388 DC Pension saving fund (PEP) of 20 March 1997.

[77] Decision No 2002-461 DC Justice Law of 23 August 2002.

law[78] or recently the prohibition, exception and exclusivity related to gambling and betting.[79]

And of course, one should also bear in mind the rules and principles which the Conseil uses to determine the degree of control which it applies (for example, proportionality, the sanction of only manifest errors).[80]

It is important to point out that there is no hierarchy within this *"bloc de constitutionalité"*, based on the origin of the norm, or its form. In French constitutional law, unlike in Germany, no norm have supra-constitutional value and are inalienable. A 2003 decision of the Constitutional Council confirmed it, when it declined having competence to assess the compatibility with the Constitution of laws amending it.[81] In case of contradiction, the rights and principles "must be conciliated, and they do no exclude eachother; thus, a 'recognised fundamental principle' like that of the 'continuity of the public service' justifies some restrictions to the right to strike, expressly proclaimed by the Preamble of 1946."[82] Also, as noted before in relation to the principle of equality, since the constitutional value of the 1789 Declaration and the 1946 Preamble is based on the 1958 Constitution, amendments to the Constitution can "go against" them. In France, the Preamble, although an independent source of rights, thus still does not go as far as "walking before the Constitution".[83]

The creative and expensive nature of constitutional jurisprudence is not typically French. And modern trends also point at greater reliance on constitutional preambles not only as providing determinant interpretative guidance, but also as creating rights.[84] Yet, the scope of the French Constitutional Council's law-making has been remarkable, considering the frail constitutional basis, and its weak (original) institutional position. Probably its closest "competitor" in Europe is the European Court of Justice, which developped a susbtantial catalogue of fundamental rights based on no legal basis at all.

This is for the theory. Now what does this mean in practice? Indeed, it is one thing to declare rights and values as constitutional, it is another one to give them a concrete realisation.

5. Constitutional practice and the protection of human rights

Some noted a certain timidity in the application of the "hard won" principles, in the aftermath of the 1971 "coup". For example, the Council never invalidated any of the major socialist reforms of the early 1980s, mostly "amputating legislation" by sanctioning flaws in implementing legislation or giving interpretatative or application directions.[85] However, during the R. Badinter's presidency (1986–1995), the Council became more activist.[86] Not

[78] Decision No 2004-494 DC Vocational Training and Social Dialogue of 29 April 2004.

[79] Decision No 2010-605 DC Gambling and Betting of 12 May 2010.

[80] Veil: *op. cit.* 24–25.

[81] Decision No 2003-469 DC Decentralisation of 26 March 2003.

[82] Decision No 79-105 DC Continuity of Public Service of Radio and Television of 25 July 1979.

[83] Schmitt, C.: *Constitutional Theory* (Seitzer, J.–Thornhill, C. eds). Durham, 2008, 79.

[84] Orgad: *op. cit.*

[85] Although these decisions could have some important practical impact. For example, his decision on the nationalization law led to an increase of 30% of the compensation granted to shareholders of nationalized companies, and his 1984 decision "saved" the press group Hersant, which had been targeted by the law on the press. (Stone Sweet 1992)

[86] Chantebout, B.: *Droit Constitutionnel*. Paris, 2009. 595.

only did it invalidate a number of legislative provisions, it also made a greater use of interpretative restrictions *("declarations de conformity sous reserves")*, by which it imposed "its" interpretation of the law on those who will apply and enforce it. It started to write precise decisions which left no margin of maneuver for those who had to revise the law to make it pass the constitutional test. At some stage, it even seemed to want to lock-in fundamental freedoms, such as the right to asylum or the freedom of communication,[87] by only validating legislative provisions which reinforced them *("effet de cliquet")*; however, this policy was not pursued.[88]

In practice, the "interference" of the Constitutional Council disturbs the political class, which on occasions, worked to exclude it from the process (for example reform of the *Code Pénal* in 1992). Besides, it results in the government needing to resort more frequently to constitutional revision in order to pass legislation. We already mentionned the revisions to allow equal chances between men and women; there was also a reform related to the right to asylum in the application of the Schengen agreement. [89] In 1999, the refusal by President Chirac to engage a revision of the Constitution to allow the adoption of the Charter on regional and minority languages was strongly criticized by the socialists as being a move against civil liberties. It remains that, again, this constitutional revision frenzy is not a French phenomenon and seems to be common currency other EU countries, too.

To sum up, stone by stone, the Constitutionnal Council built on the foundations of the Preamble an comprehensive bills of rights. Yet, this gradual discovery of new principles, which may be accelerated with the new reform which will also give a more "individual drive" to the constitutional case law, is being criticized by some commentators as favoring particular interests over the public good.[90] Indeed, with the QPC, the speed of construction is likely to accelerate, on a piece-meal basis, as disparate provisions from past statutes are examined by the Council. It may also be that, wary of this new "social" legitimacy, the Constitutional Council becomes more "sensitive" to individual human rights arguments which plaintiffs can now put directly to it, rather than through the mediation of members of the parliament. This semi-direct link with the "people" may grant the Council, and the courts which refer cases to him, a new autonomy, which could affect the direction of the case law. It is too early to tell us, but one should watch for inflections in the case law.

It remains that the "French way", this web of written and unwritten constitutional norms based on an alledgedly symbolic document, is still a bit of an oddity in the European constitutional tradition. Critics are plenty, who stress its lack of transparency and accessibility, and call for (some) codification. One could even point at Europe for inspiration, where the fundamental rigths jurisprudence of the ECJ was eventually codified in an EU Charter of Fundamental Rights, which the Lisbon Treaty endowed with legally binding status. However, the French seem to be attached to their "unwritten" declaration of rights. In the country which put together the Code Civil more than 200 years ago, and which has Codes on everything, this constitutional exception looks strange.

[87] Decisions No 93-325 DC Immigration Law of 13 August 1993 and No 84-181 DC Law on the Concentration, Financial Transparency and Pluralism of Press Undertakings of 11 October 1984.

[88] Decision No 2002-461 DC Justice Law of 23 August 2002.

[89] Constitutional Law 93-1256 of 25 November 1993, relating to international agreements in the field of the right to asylum.

[90] Benoit-Rohmer, F.–Grewe, C.: *Les droits sociaux ou la demolition de quelques principes.* Strasbourg, 2003.

6. The strange reluctance of the French constituant to "touch" at the Preamble

Various projects of amendments, or even total redrafting, of the Preamble have emanated from the civil society (for example project of the Nouveaux Droits de l'Homme Association, in the 1990s) or from the government itself. In 1975, the Edgar Faure "Commission Spéciale des Libertés" listed a number of constitutional principles, which could have taken place in the Preamble, alongside the references to the 1946 Preamble and the 1789 Declaration; these were the principles of diversity, equality of chances, equality between men and women, dignity, right to life and physical and moral integrity, protection of privacy and personal data, and pluralism of the means and expression and medias. However, the Left refused to support the proposal. In 1993, again, a consultation committee on the revision of the Constitution, presided by Dean Vedel considered it desirable to grant express constitutional recognition to certain new rights bearing in mind the conditions of developments of the French society; these were the right to human dignity and private life (proposal 32) and the freedom and pluralism of communication (proposal 33). Finally, in 2008, President Sarkozy set up a Committee chaired by Simone Veil, to analyse the Preamble, and make suggestions as to possible amendments. After a very thoughful, informed and detailled analysis of the current status, substance and uses of the Preamble, and the pros and cons of a number of specific amendments, it eventually concluded that "the urgency was less in supplementing it, than in exploiting its richness through ambitious, concrete and active policies".[91] It therefore seems that everytime, the importance of maintaining the rich constitutional *acquis*, the flexibility and adaptation which the current set-up allows, and the complementarity of overlapping international, european, and national constitutional and legislative framework for the protection and promotion of human rights, plead in favor of the status quo.

As put by one of the most eminent French constitutional scholars, Guy de Carcassone,

> "...the seventeen articles of 1789, supplemented by the 18 paragraphs of 1946, which themselves incorporate the fundamental principles recognised by the laws of the Republic, constitute a Declaration of Rights and Freedoms, tainted enough by time so that they cannot be called into question, eternal enough so that they remain modern, precise enough to be protective, and vague enough to be subject to evolutions imposed by progress."[92]

There is one single exception to the French Constituant's reluctance touch at the Preamble. As France entered the New Millenium, it was felt that this sedimented constitutional block lacked an ecological flavour.[93] President Chirac, supported by French TV presenter, journalist and environmental activist Nicolat Hulot, commissioned the Coppens Committee to put together a draft Charter for the Environment, which was adopted in 2004. The Charter consists of ten articles encompassing third generation rights, including the right of everyone to live in an environment which is balanced and respectul of his or her health, as well as duties imposed on individuals, public authorities and research and

[91] The Committee instructed to read their report "not as the acknowledgement of an impossibility to make France progress on the way to law (justice?) and equality, but as an encouragement to make that 'she' moves forward". Veil: *op. cit.* 6.

[92] de Carcassone, G.: *La Constitution.* (Traduction by the author) Essais, 6th ed., Paris, 2004, 39.

[93] Veil: *op. cit.* 13.

education institutions to take part in the preservation of the environment. It also incorporated a carefully drafted precautionary principle. On 1 March 2005, a constitutional revision for the first time ever amended the Preamble to add a reference to the 2004 Charter for the Environment, thereby giving it constitutional status.

The constitutional value of the Charter was confirmed by the Constitutional Council "GMO" decision, which stated, in 2008, that "all the rights and duties defined in the Charter for the Environment have constitutional value".[94] However, in 2005 already, the Council has relied on it to invalidate important legislation,[95] including the famous law on the carbon tax, as exemptions granted to polluting industries were declared incompatible with provisions of the Charter.[96] First instance judicial courts have also used the Charter creatively, for example to order the discharge of environmental activitists who had destroyed GMO crops and were threatened with criminal penalties.[97] First instance administrative courts also did not wait long to declare that the Charter had granted the right to a clean and healthy environment the status of "fundamental freedom of constitutional value".[98] The Conseil d'Etat, for its part, was rather timid at first, limiting the effects of the provisions of the Charter.[99] However, in a 2008 decision, he finally recognised the full constitutional value of the Charter.[100]

Whilst these judicial confirmation and uses testify that any addition to the Preamble is not anodine and is followed with practical effects, it remains that this only amendment of the preamble since its inception in 1958 does not disrupt the evolutive dynamics of the constitutional block. It simply adds one more written source of constitutional norms, alongside the others.

Despite that all projects aiming at significantly amending the Preamble and codifying the constitutional case law eventually "failed", it is nonetheless instructive to review the last endeavour, for it highlights well the advantages and drawbacks of the current system, and the adverse consequences that could result from touching at a text which has had such a fruitful progeny.

7. The latest attempt at amending the Preamble: highlights and comments

The Veil Committee was asked to reflect initially on three themes. Two of them are clearly inspired by the limitations imposed by the Declaration's formal conception of equality. Should one enable the legislator to better guarantee the equal access of women and men to

[94] Decision No 2008-564 DC GMO of 19 June 2008.

[95] Decision No 2005-514 DC Ship Register of 28 April 2005. The Council considered that the legislator has not violated the principle of sustainable development of Art. 6 of the Charter. Decision No 2008-564 DC GMO of 19 June 2008. It gave the Council the opportunity to censure some provisions based on the Charter and the Constitution itself.

[96] Decision No 2009-599 DC Carbon Tax of 29 December 2009, the CC invalidated provisions of the finance law related to the carbon tax, based on "rupture" of equality regarding exemptions provided by the law to industrial and polluting installations covered by a quota scheme, since these quotas were free (para 82). The grounds for exemptions were found to be contrary to Arts 2, 3, and 4 of the Charter (para 79).

[97] *Tribunal correctionnel* of Orléans, 09/12/2005; but the decision was quashed in appeal.

[98] Administrative Tribunal of Chalons-en-Champagne, order of 29 April 2005, No 050082805.

[99] CE, 6 April 2006 Ligue pour la Protection des oiseaux (LPO) No 283103, et 19 June 2006 Association Eaux et Rivières de Bretagne, No 282456.

[100] Decision of 3 October 2008 Commune d'Annec, No 297931.

responsibilities, outside of the political sphere? Should one make it possible to have new integration policies valuing the diversity of French society to favor the effective respect of the principle of equality (affirmative action)? The last one was triggered by scientific and medical progress. Are there guiding principles on which to based our approach on bioethics?

A few more topics were also suggested, which have already receive some constitutional recognition in the case law of the CC: the recognition of human dignity, the pluralism of means of expression and media; the respect for private life and the protection on personal data; and the European anchoring of the Republic.

The Veil Committee's work was guided by a number of principles. Some of them are obvious, such as the respect of the French constitutional heritage or of recent constitutional revisions. Wisely, they were also keen to limit the constitutional amendments' frenzy, and considered that the addition of new norms into the Preamble should only occur where these were unlikely to "change" in the medium to long term. However, the Committee was also determined to suggest amendments to the Preamble only if they had an uncontested *"effet utile"*. They rejected any symbolic addition, and were strongly opposed to any codification of the case law. They considered that academia or committee works produced enough "descriptive" codifications to ensure the visibility of rights, and that with codification came the risk of limiting constitutional dynamism. Besides, they identified important technical difficulties concerning the scope of such codification. Finally, they also feared that it could be perceived as a threat on the constitutional judges' independence.

Let me develop on some of the points which the Committee had to examine, and which may be relevant to the Hungarian context.

A specific reference to a commitment to the European legal order or to international and European treaties for the protection of fundamental rights was rejected in the sense as it would constitute a pure abandonment of *"soveraineté constituante"* and would not allow for the protection of principles touching on "French constitutional identity" against conflicting European norms.[101]

Relating to positive action beyond gender issues, although the Committee admitted that the *constitutional acquis* did not enable differentiated treatment based on criteria such as race, origin and religion, it nonetheless rejected the idea that either Art. 1 be modified, or that the Preamble be amended so as to authorize such positive action policies on ethnical or racial grounds. No doubt that the Committee was sensitive to the strong anti-communaurism movement within the French constitutional doctrine and political movements. However, it insisted that the current constitutional texts and case law offered a sufficient margin a maneuver for ambitious positive action policies.[102] It allowed for the special treatment of persons with special difficulties[103] or in dire social situations (for example young people, aged workers, unemployed)[104] or based on where they live (for example suburds, rural areas...). In relation to the collection of racial or ethical data, which was considered not compatible with the Constitution[105] they considered that the Constitution allowed for the gathering of sufficiently related data (for example geographical origin, feeling of

[101] Decision No 2006/540 DC Copyright Law of 27 July 2006.

[102] Veil: *op. cit.* 57–64.

[103] Decision No 86-207 DC Economic and Social Order of 26 June 1986.

[104] Decision No 2006-535 DC Equality of Chances of 30 March 2006.

[105] Decision No 2007-557 DC Immigration, Integration and Asylum of 15 Nov. 2007.

belonging...), which could give sufficient indications as to the composition of the population.

Another issue under consideration was the pluralism of the means of expression and media. As exposed earlier, the Constitutional Council declared the pluralism of daily newspaper as being a constitutional objective, necessary to guarantee the free communication of ideas and opinions protected by Art. 11 of the 1789 Declaration. Later on, it extended its cope to radio and television and the internet. Under pressure from the Senate, the constitutional revision of 23 July 2008 amended the Constitution (but not its Preamble) in order to give competence to the legislator (and no longer the executive) to adopt statutes determining the rules relating to "freedom, diversity and the independence of the media".[106] Although it did not give further constitutional protection to this objective, it led the Veil Committee to decline examining any amendment to the Preamble which would reaffirm this principle.

Concerning the protection of privacy and personal data, these did not have any textual basis in French constitutional documents. However, the constitutional judge had developped a rich jurisprudence, exposed earlier. Based on Art. 2 of the 1789 Declaration, it derived a right to respect of private life, with the result that it allows the exchange and sharing of personal data between public bodies only with individual's consent and for a purpose of constitutionally protected general interest[107] or prevents legal legal persons from treating datas relating to offences for the purpose of fighting against fraud.[108] Besides, there exists also quite extensive international standards, as well as protective legislation. Because of these, the Committee felt that any amendment would be superfluous, in particular as international and European treaties provided complementary safeguards. It applied a similar reasoning to the guiding principles related to bioethics.

As for the right (or principle) of human dignity, it considered the notion to be very vague and polyphormic; however, it agreed that Art. 1 of the Constitution could be amended to include a precisely drafted principle of "equal dignity".

Another aspect which transpires across the Committee's study, although without being explicitly mentionned, is the difficulty in amending preambles in a consensual manner, once the national urgency and drama which led to a adoption of a new constitution passes. This is not peculiar to France, but is noticeable wherever attempts were made to amend national constitutional preambles.[109]

8. Conclusions

Legal transplants are delicate operations. This is even more so in the case of constitutional rules and principles, which reflect not only universal(isable) values, but also norms, values and processes which are peculiar to particular states and their peoples. Comparative constitutional law thus has its limits when it comes to inspiring constitutional reforms. Yet, I hope that this little "tour" of the Preamble of the French Constitution, which highlighted

[106] Art. 4: addition of "Statutes shall guarantee the expression of diverse opinions and the equitable participation of political parties and groups in the democratic life of the Nation." To the competence of the legislator in Art. 34, the revision added "freedom, diversity and the independence of the media".

[107] Decision No 93-325 DC Immigration Law of 13 August 1993.

[108] Decision No 2004-499 DC Personal Data of 29 July 2004.

[109] Orgad: *op. cit.* 22.

its "potential" as well as its limits, can contribute to the Hungarian debate on constitutional reform. In any case, at the moment, contemporary France and Hungary seems to have in common a liking for "gradual" rather than drastic constitutional development. But, if I understand well the current Hungarian debate, they may soon depart, for the better or for the worst.

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JAN KUDRNA[*]

Two Preambles in the Czech Constitutional System

Abstract. The preambles are used in the Czech legal system during the last twenty years rather rarely. Nonetheless, constitutions in the Czechoslovak history as in the Czech history are traditionally introduced by the preambles. As the Czech constitutional system inclines to consist of more constitutional legal acts at the supreme level of the interior legal system, we can found two constitutional preambles in the recent Czech constitutional system. Both top constitutional acts–the Constitution and the Charter of Fundamental Rights and Basic Freedoms are preceded by their own preamble. The preambles differ as they are focused on different part of constitutional issues. Despite of this obvious fact they are built-up on some features, which are common to both of them.
The preambles are characterized by a modest form–their purpose is to explain, why the new chapter of the legal development is opened, and to offer us a common starting line. Nonetheless, they also keep to us a freedom of movement in the new legal period. Their main goal is to connect the people, not to divide, if the constitutional act, which is introduced by them, should be an expression of the common national will.

Keywords: preamble, Czech Republic, constitution, Charter of Fundamental Rights and Basic Freedoms, democracy, rule of law, human rights, constitutional values

I. Introduction

During the current discussions in Hungary about the preamble of the possible new constitution, the constitutional solutions of the neighbouring countries are worth a look. The Czech Republic is in quite a special situation, as its constitutional system contains not only one, but two preambles. As will be shown, this quite unusual state is not the result of a reasoned decision of the makers of the constitutional system. Rather, it is a legacy of the constitutional development in the last years of the existence of Czechoslovakia.

The Czech constitutional system is weighed towards constitutional legal acts at the supreme level of the interior legal system. In other words, the Czech constitutional system is *polylegal.*

If the term *constitutionalism* as a legal idea is defined to mean that the government, or the public power, should be legally limited by a supreme legal act–usually called a *constitution*–adopted by the people or with their consent, then it includes the concept that the constitution should regulate at least two main questions: the organisation and limitations of the public or state power and the guarantees as to the position of an individual in a society consisting of others and in relation to the state. Thus, constitutions have an organisational part and a catalogue of human rights.

States tend to regulate those main questions in one legal act. Such a solution is more lucid and understandable to the addressees. That is, the citizens themselves, as possible problems stemming from the need to interpret two or even more equal constitutional acts are avoided.

The situation before the Czech Republic was established did not allow enough time for preparation of a complex constitution for the upcoming new state. Thus, the Czech Republic

* Ph.D., Lecturer, the Department of Constitutional Law of the Faculty of Law of Charles University, nám. Curieových 7, 116 40 Praha 1, Czech Republic.
E-mail: kudrnaj@prf.cuni.cz

has had three main constitutional acts in an equal legal position since the moment of its declaration. The first is the Charter of Fundamental Rights and Basic Freedoms; the second is the Constitution of the Czech Republic; and the third is Constitutional Act No. 4/1993 Coll., which sets up the rules for the continuity of the former Czechoslovak legal system in the independent Czech Republic.

Two of those constitutional acts are preceded by their own preambles–these are the Charter of Fundamental Rights and Basic Freedoms and the Constitution of the Czech Republic.

II. Historical Roots of *Polylegalism* in the Czech Republic

From the proclamation of the independent Czechoslovak state on October 28, 1918, its constitutional system consisted of more than one constitutional act. At the very early beginning of Czechoslovakia there were two reasons for such a constitutional solution.

First, the constitution of the new state was influenced through its writers and creators by the Austrian constitutional tradition. Especially the Czech political elites of those times had spent all their professional political lives in the Austrian parliamentary system based on the December Constitution of 1867. The Constitution proclaimed on December 21, 1867 consisted of seven constitutional acts. Each branch of state power had not only its own section, but in fact a separate constitutional act. In addition to five organisational constitutional acts there were an act on civil rights and a federalisation act. Thus, this collection of separated acts created the constitution. Such a situation, which continued for 50 years, certainly influenced many Austrian politicians, who did not experience a *polylegal* constitutional solution as something strange and unusual.

Second, there were strong practical reasons for avoiding a single complex constitutional act in autumn 1918. Above all, it should be stressed that the first, interim Czechoslovak constitution was prepared during a two-week period. The drafters' ambitions were not too high; the interim constitution need only define a basic constitutional framework for a relatively short period during which the definitive constitution would be written, adopted and promulgated.

Even though there were strong proclamations about discontinuity with the former legal and state system, in reality the new state used Austrian and Hungarian legal acts to the extent that these did not contradict the declaration of independence of Czechoslovakia. Thus, for example, the Austrian catalogue of civil rights was adopted by the Czechoslovak state for the interim period.

The preparatory works on the new Constitution during 1919 tended toward a complex solution in the form of one constitutional act as much as possible. Nonetheless, some special issues were omitted from the Constitution. The most important and most understandable such element was the issue of national minorities, which were still being negotiated at peace conferences in France when the definitive Czechoslovak constitution was adopted on February 29, 1920. Thus, during the 20 years of the existence of the so-called First Republic its constitutional system was still *polylegal,* although it was not so strongly clustered as the Austrian monarchical ancestor.

After World War II, when Czechoslovakia was liberated from the Nazi occupation the state returned to the pre-war constitution with a plan to prepare a new constitutional document that would offer more contemporary solutions. This goal was fulfilled by the Constitutional National Assembly, which was established by the way of the general election

in spring 1946. The new Constitution was written as a complex document regulating all constitutional issues. It was promulgated on May 9, 1948.

From 1948 to 1989 the Czechoslovak constitutional system was based on a single complex constitutional act. In fact, the Constitution was amended several times by special and independent constitutional acts; nonetheless, all the main important issues that constitute the constitutional field were included in the Constitution.

That situation changed as a result of the events and social and political changes that started on November 17, 1989. The need to adopt a new constitutional framework for human rights in Czechoslovakia was very quickly obvious as a result of the ensuing events. If the issues relating to the organisation of the state powers between a federation and republics could wait, the problem of human rights appeared as more acute.

More or less, human rights had been a crucial topic in Czechoslovak society since the so-called Prague Spring in 1968. When this process was frozen, including the informal social and political movements that requested more civil rights and freedoms, by the intervention of the Warsaw Pact member state armies, the issue of human rights remained partially hidden yet reappeared in certain special moments. One of these moments was in 1975, after the Helsinki summit. This moment led to the civic initiative Charter 77, demanding respect for human rights according as agreed at the Helsinki summit; the Charter criticized the Czechoslovak government for non-implementation into the Czechoslovak legal system of the human rights treaties that Czechoslovakia had signed.

The importance of human rights issues was so evident in the 1980s that even the supreme communist officials reacted to the problem and allowed the possibility of a very liberal solution in this regard as part of a project considering a new constitution, which was carried out from 1986 to 1988. However, this project was never published for the general public before the November 1989 events. For the conservative wing of the communist party, such a possibility was probably too liberal to accept. To tell the truth, as to the question of human rights the proposed solution did not differ too strongly from the human rights catalogues of those times in Western Europe. In fact, the ambition was to prepare a document that would fit with all the international treaties binding Czechoslovakia as a party to the treaties.

Nonetheless, the issue of human rights and their violation was not solved until November 1989. Until then a more radical solution for the situation was needed. The solution needed to be based on the following four main rules:

- Stress on the natural law origin of human rights
- Democracy as a way to define rule over society
- Rule of law as a guarantee of human rights
- Respect for human rights on the international field

These rules became the most significant features of the re-born Czechoslovak constitutionalism, which influenced the forthcoming political and constitutional developments.

At this moment, we can observe the point since which the prevailing concept of *monolegal* constitution had been abandoned for 40 years. In the first half of 1990, decisions were adopted that led to a splitting of the constitutional matter into at least two parts. The opinion that urged solving the issue of human rights separately and as a question of high priority won.

At that time there appeared two factors, which were decisive as to the separate preparation of the future Charter of Fundamental Rights and Basic Freedoms.

First was the *time factor*. It was a common opinion that the issue of a new definition of human rights is too important to postpone. Human rights and a respect for them was one of the crucial topics of the November events, generally called the *Velvet Revolution*.

The second reason to give the highest priority to human rights was the *common support* that this issue had gained across not only politicians, but also the general public. This common support stood in contrast to the problem of the division of powers between the federation on the one side, and the republic on the other. It was absolutely clear that the division of powers under the new, democratic circumstances would need much more time to solve.

Thus, under the natural contemporary circumstances the complex constitutional matter was split into two separate parts–those relating to human rights and to the organisation of the state power at the supreme level.

When the preparation of the future Charter of Fundamental Rights and Basic Freedoms started, the work was planned with intentions as to a symbolic date of adoption for the document. The very first date, which was strongly preferred from the political point of view, without any special consideration of the difficulty of the preparatory work, was November 17, 1990, the 1st anniversary of the Velvet Revolution.

As I have stressed, the political will was not supported by any special experience or estimation how difficult it would be not only to prepare, but above all to discuss and adopt such an important constitutional act under democratic rules. During the preparatory work the goal of November 17 appeared unrealistic.

Therefore, an alternative date was found in December 10, 1990, a day celebrated as Human Rights Day. Nonetheless, even on date the preparatory work was not finished. Finally the Charter of Fundamental Rights and Basic Freedoms was adopted and promulgated on January 9, 1991.

III. Preambles in the Czech Legal System

As an initial matter, it should be stated that in the Czech legal system preambles are not generally used. If they are found, then it is in the most important legal acts, which usually found a legal discontinuity. Thus, preambles are rarely used. They serve as an explanatory statement or introduction of the legal act that follows them. Their purpose is to provide an explanation of the legislative motivation, and to set out the historical circumstances and reasons under which the legal act was prepared and adopted. Sometimes the expected results of the legal act are also declared.

In Czech legal theory a preamble is understood as a part of the legal act, but without a normative character. The preamble is thus comprehended as a text containing important rules, which are enacted in detailed form in the text of the legal norm. This way the preamble may help significantly in the process of interpreting the legal act. This purpose might be especially important in the case of legal norms creating elements of legal discontinuity and founding the basis of a new legal order.

IV. The Preamble of the Charter of Fundamental Rights and Basic Freedoms

During the approximately one year period of preparation the text of the Preamble of the draft of the Charter of Fundamental Rights and Basic Freedoms was also considered. There were many factors that played significant roles. Not only the Charter, but also the introductory part had to constitute a compromise that could establish the basis for a new constitutional and legal order in the Czechoslovak Federation. For example, legal and social

values differed slightly in Czech and Slovak society, there were some differences in the view on modern history, different views on the relationship between the federation and republics, etc.

Thus, there was a need to find a compromise based situation, in which the Preamble could be designed as a text connecting both nations, and looking more to the future than trying to judge the recent or distant history.

The final version of the Charter's Preamble was adopted in the following form:

"The Federal Assembly,
On the basis of the proposals of the Czech National Council and the Slovak National Council, Recognizing the inviolability of the natural rights of man, the rights of citizens, and the sovereignty of the law, Proceeding from the universally-shared values of humanity and from our nations' traditions of democracy and self-government, Mindful of the bitter experience of periods when human rights and fundamental freedoms were suppressed in our homeland, Placing hope in the common endeavours of all free nations to safeguard these rights, Ensuing from the Czech and Slovak nations' right to self-determination, Recalling its share of responsibility towards future generations for the fate of all life on Earth, and Expressing the resolve that the Czech and Slovak Federal Republic should join in dignity the ranks of countries cherishing these values, Has enacted this Charter of Fundamental Rights and Basic Freedoms:..."

The first aspect of the Preamble's text that is worthy of notice relates to the body that enacted and promulgated the Charter, including the Preamble. It was the Federal Assembly of the Czechoslovakia as the supreme legislative and representative body, with exclusive capacity to adopt constitutional acts. No other body was granted the power to act on a constitutional level. This was an issue especially with respect to the two republics' national councils, which were allowed only to propose or to be consulted over constitutional matters relating to the whole of Czechoslovakia.

It is also very interesting that in the Preamble there is no mention of the people, in whose name the Charter was prepared.

There could be different reasons why the first portion of Preamble is drafted so modestly. Generally the Czechoslovak Federation, since 1968, and Czechoslovakia as unitary state, since 1945, as well, were built up on the theory that the common state is created from the will of two nations, which together create the people of Czechoslovakia. The people then were represented in the National, and later Federal Assembly, which is rather a complex structure, and its proceedings to protect the vital interests of both nations.

Thus, the interests of inner balance led to the choice to list the Federal Assembly as the adopter of the Charter and not to solve the problem of which element should be stressed as a constitutive one.

This way of thinking appeared in the formulation as follows. The remarks on the proposals of both National Councils found in the Preamble show that the Federal Assembly did not force its will upon the two republics or nations, or on their institutional and political representation.

The Preamble's first sentence mentions the proposals of the National Councils. In fact, the preparation of the Charter did not start from two viewpoints, but rather there was one framework project offered as a starting document to both National Councils and they discussed it and prepared their own proposals on its basis. This way, the initiative went out from the whole-nation's representation, gathered in the Federal Assembly.

The role of both National Councils is stressed later in the Preamble, where it is mentioned and confirmed that the Charter and its contents fully respect the right of both nations to self-determination. Therefore, the drafting itself had to fit to this key national right.

The narrow approach of the first parts of the Preamble was used throughout the text. The authors of the Preamble did not try to solve anything beyond explaining the importance of the following Charter for the future through its subject, human rights.

First, the Federal Assembly stressed the need for a new attitude about human rights, such that Charter should open a new chapter in the constitutional and legal system in Czechoslovakia. As a result of the Charter's adoption, human rights should be understood in their natural law character–not granted by a state, but just recognized by the state power, which should respect them. Thus, human rights should create a boundary that cannot be trespassed by the state (or any individual).

The Preamble also stressed the fact that the complex system of legal limitations and guarantees, called the *rule of law,* is one of the institutional protections of human rights. In other words, the Federal Assembly declared the will to respect the *rule of law* in the interests of human rights. Here we can see the connection of a *material and formal rule of law.* The procedures are not values in themselves, but should serve another, supreme goal.

It was very important at the very early 1990s, after 40 years of authoritarian regime in Czechoslovakia that the Federal Assembly did not try to "invent" human rights. To the contrary, the Charter should be anchored in the wider context. The Federal Assembly even declared its belief that human rights have a common source, the universally shared values of humanity. Thus, in the conviction of the Federal Assembly human rights exist in wider context and are common to all people around the world.

This declared belief also reflected the fact that the international as well as the regional human right treaties and pacts served as important inspirations. This way, the new Charter was absolutely compatible from the beginning with all the international human rights documents that Czechoslovakia had newly adopted. It was very important for the entry or in some cases re-entry of Czechoslovakia into the family of democratic states respecting human rights, and into international organisations like the Council of Europe.

Further, we can see a combination of the rule of law and the way the Czechoslovak conception of human rights is anchored in general human values. The Federal Assembly expressed a strong belief that human rights as an idea can be protected in the wider context only by the common effort of the democratic states respecting human dignity. Here, the Czechoslovak experience of 40 years under an authoritarian regime controlling a significant part of Europe is expressed. The isolated effort to reach democratisation and respect for human rights failed not only in Czechoslovakia but in other socialistic states as well. Therefore, the Preamble stresses the interest in cooperation in the international arena with other free nations on human rights protection.

From the historical point of view, in the Preamble there is only a modest commemoration of the periods in which human rights flourished or were violated. The expression does not aspire to be a judgement of recent or distant history. The authors of the Preamble only recalled two historical facts. One was the bright years for human rights during the years of democracy, not only in pre-war Czechoslovakia, but also during the years before World War I. The other was a commemoration of the years when human rights were broken in Czechoslovakia.

Thus, we can see that this part of the Preamble creates a starting point for discussions for those interested, but does not aspire to instruct how the discussion should continue further.

We can see some kind of reflection on recent history and a perspective of the future in the belief that Czechoslovakia can join the family of states and nations that respect the values of human rights, democracy and the rule of law. We can also understand this proclamation as a persuasion that a state can exist in dignity only if it respects those values. From a certain point of view, it's a kind of judgement on the last decades in Czechoslovakia. Nonetheless, that kind of opinion can hardly be confirmed.

The Preamble's aspects that can, from the current point of view, be understood as environmental or "green" are also very interesting. Of course, this aspect of state activity and social responsibility was very important in the days of preparing and adopting of the Charter. Environmental protests were a motivating power of the social and political changes in northwestern Bohemia. It should be said that those protests started in October 1989, even before the student demonstrations in Prague, and were of a huge scale and independent of them at the beginning. Later, in the second half of November, they both were connected together into a united and coordinated movement.

That is why the environmental aspect of human rights is expressed in the Preamble of the Charter so conspicuously. Nonetheless, the words about responsibility for the future of life on Earth also can and should be understood from a different point of view. We should not forget that the Charter was being prepared at the end of two super-powers' arms race, which focused on nuclear weapons. This experience of nuclear threat is another ideological source of the stress on responsibility for the whole planet.

In the end, it could be said that the Charter's Preamble marks a milestone initiating a new era. With the Charter new legal values were established and a new approach of the state to human rights began. Since then one of the state's most important tasks is to protect human rights.

Regarding to the form and content of the Charter's Preamble, it should be stressed its modest attitude towards the issues addressed. This form of the Preamble allows a start to a new era with an open future. The authors do not aspire to judge or declare an end to recent history or enact their judgement on the supreme constitutional act in a binding form. Thus, the Preamble can serve as a common starting point for the entire society, more connecting than dividing.

V. The Preamble of the Constitution of the Czech Republic

During the 18 months after the adoption of the Charter of Fundamental Rights and Basic Freedoms, discussions and drafting to accomplish a re-organisation of the federation continued. As I mentioned above, this process started and ran simultaneously with the Charter's preparation. In fact, the federal reform in post-1989 Czechoslovakia took place for more than 30 months.

A certain breaking point appeared in June 5 and 6, 1992, when general elections were held. The winning parties in both republics very quickly agreed with each other that they could not find a mutual solution for the future existence of the federation and agreed further that the federation should be dissolved.

The process of dissolution started almost immediately, on June 17, 1992, when the Declaration of Independence of the Slovak nation, which was understood as a proclamation starting the process of secession from the federation, was adopted by the Slovak parliament.

The Constitution of the Slovak Republic was adopted and proclaimed on September 1, 1992. This constitutional act still respected the sovereignty of the federation as a temporal solution, just as long as necessary to dissolve the common state.

On the Czech side the situation did not go forward so rapidly. Only in the middle of August did serious work on the new constitution start. It should be said that some projects were prepared during the 1990–1991, but they were being prepared for a republic as a member state of a federation. Thus, the projects had to be re-discussed, because some proposed solutions were not applicable and some issues were not solved at all–they would have been regulated by the federal constitution. We can say that intensive work on the new Czech constitution started at the moment when the work on the Slovak constitution was being finished.

There were no doubts that the new Constitution would be introduced by a preamble. As all of the Constitution was being prepared by a government expert commission, the text of the Preamble was prepared by that group of experts as well. Nonetheless, the former Czechoslovak president, and the main and probably only possible candidate with a real chance to be elected to the office of the Czech president, Václav Havel, played a significant role in the process of preparation. His notices and proposals to change the syntax of the Preamble to make it simpler and more readable were very useful. Thus, he influenced (not only) the Preamble in significant form.

The final version of the Constitution's Preamble was adopted in the following form:

"We, the citizens of the Czech Republic in Bohemia, Moravia and Silesia, at this time of the reconstitution of an independent Czech State, true to all the sound traditions of the ancient statehood of the Lands of the Crown of Bohemia as well as of Czechoslovak statehood, resolute to build, protect and develop the Czech Republic in the spirit of the inalienable values of human dignity and freedom as the home of free citizens who are aware of their obligations towards others and of their responsibility to the community, as a free and democratic State founded on respect for human rights and on principles of civil society, as a member of the family of European and World democracies, resolute to protect and develop their natural, cultural, material and spiritual heritage, resolute to take heed to all the well-proven tenets of law-abiding state, have adopted this Constitution of the Czech Republic through our freely elected representatives."

The first significant feature of the Constitution's Preamble is the civic base upon which the new state is declared. As is stressed, the Constitution of the future independent Czech Republic is adopted by the representatives of the citizens of the republic. This is not an oxymoron. When the Czechoslovak federation was being dissolved, there were generally no special problems of defining the rules governing who would be a citizen of which republic. During the existence of the federation there existed two citizenships–citizenship in the federation, which was important in relations outside and citizenship in one of the two republics. The republic citizenship was not really important for everyday life inside the federation. Nonetheless, for purposes of the existence of the republic inside the federation it was important on the level of constitutional ideas, because the citizens of the republic created together the Czech or Slovak political nation. The rules under which the republic citizenship of each Czechoslovak citizen was added to the previously uniform Czechoslovak citizenship, which was turned into Czechoslovak federal citizenship, had been prepared and applied since 1969. Thus, at the end of 1992 it was generally clear who is and would be a citizen of which republic. Thus, the Preamble could also declare that it is a result of the will of the Czech Republic's citizens.

When the new Constitution came into force, at the same moment the original citizenship in the republic in the federation turned into citizenship in the independent state. We can see here since that moment the existence of an independent *political* nation as well, which also includes the members of all national minorities living in the Czech Republic. But no member of the Czech ethnic nation without citizenship, for example living abroad, was included in the political nation.

In fact the Preamble establishes a *limited* form or model of the political nation. The new state is created by the will of *the citizens living in the territory of the Czech Republic.* We can see this important fact in the formulation recalling the historical parts of the Czech Republic, which are *Bohemia, Moravia* and *Silesia.*

Thus, the mention of the historical countries is not just a manifestation of some regional political movements that existed in 1992 especially in Moravia that demand consideration of Moravian identity. It also has a constitutional sense, as was described above.

It should be stressed that the enumeration of the historical countries does not mean any territorial demands. This is especially so in the case of Silesia–the great majority of this historical region is now situated in Poland. The Preamble addresses only the regions inside the borders of the Czech Republic.

This emphasis has strong importance in a further part of the Preamble, which refers to the statehood of the Lands of the Crown of Bohemia. This sentence also means only a reference to the long tradition and one of the paramount phases of Czech statehood, not any territorial demands and requests.

Why the authors of the Preamble refer to statehood in the later middle ages, and not to more ancient roots is not entirely clear. They probably wanted to stress the form of the Czech state in one of its most extended phases.

The reference to the Czechoslovak statehood that declares the continuity of the state ideas and a close mental connection of the Czech nation with the Czechoslovak state is also very important.

Generally it can be said that we can see in this part of the Preamble a reference to the best traditions of Czech statehood in the middle ages and in modern times. The stress on the continuity of statehood is also very important, as the Preamble also mentions statehood in its "hidden" form, as in the times of the existence of Czechoslovakia.

The Preamble of the Constitution talks about the issue of human rights in relatively modest terms. There are two possible reasons of such an approach.

The first can result from the fact that the Constitution should not have involved a catalogue of human rights. The Constitution should solve mainly the issues bound to problems of the structure of the supreme state bodies, division and distribution of the powers among them and the system of checks and balances.

The other reason is that the existing Czechoslovak Charter of Fundamental Rights and Basic Freedoms should have been recognized as a part of the *polylegal* constitution of the new state. Thus, its Preamble was also taken into the new legal and constitutional system, and the issue of human rights could be understood in a certain sense as redundant in the Constitution's Preamble.

Nonetheless this topic was not omitted and the orientation of the new state as to respect for human rights and the rule of law was declared in a form that is not different from the formulation and approach described in the Charter's Preamble.

Similarly, as in the Charter's Preamble the Constitution's Preamble also mention the desire to belong to the wider family of democratic states respecting human rights. Only membership in this group of states can create conditions that are friendly to democracy,

human rights and the rule of law. Thus, the belief that a small state is not able to protect these values itself was clearly declared. Here we can also see some foundations of the Czech aspiration to enter into the European Union, as well as other international human rights and security organisations. This part of the Preamble also legitimates the Czech effort to support dissidents in different countries, which is a priority of the current Czech foreign policy.

A very special task of the state is declared in its responsibility for all kinds of manifestations of the heritage created by the Czech society and country. One of the main problems of the former regime was a lack of required respect or effort to protect all aspects of the national heritage. Thus, this point appeared as one of the most important demands during the Velvet Revolution. And later it was still an issue during the process of reconstitution of the independent Czech Republic.

Also, the Constitution's Preamble can be judged as a modest document in its formulations and aspirations. Its content does not open any special controversies, as the document is written to open a new chapter of Czech statehood and constitutionalism, but not to explain all the reasons and the previous history. The Preamble also remains a space for open future interpretation–with the exception of some very special values like democracy and respect for human rights, freedom and the rule of law, which are the crucial values of contemporary Czech constitutionalism. Also, the Constitution's Preamble may serve as a common starting point for the entire society, more connecting than dividing.

VI. Conclusion

What I wanted to show is that the authors of both of the current binding constitutional Preambles followed the concept of drafting in a modest form, more to connect than to divide. Such an approach to the problem of the Preamble is, in my opinion, the ideal one. The more complex the text is, the more dangers of discontent it contains. Such a danger should not be underestimated by the authors of the constitutional project. According to the theory of constitutionalism, the constitution as a basic law should be a document of the common will of the people. The more groups and interest it covers, the better and more stable the new constitutional system is and will be in the future. The stability of the constitution is one of its basic values. The constitution, including its preamble, should serve as a common anchor for the times, which are not always friendly. The constitution should not be in a position of ballast or deadwood, which would stir up desires to cut off some of its parts. Sometimes it is better not to mention a controversial topic in favour of general success.

Thus, the purpose of the preambles is to explain why a new chapter of legal development is opened, and to offer us a common starting line. Nonetheless, they should keep for us a freedom of movement in the new legal period as well.

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Ryszard Piotrowski*

The Importance of Preamble in Constitutional Court Jurisprudence

Abstract. The Constitution comprises general clauses and notions whose meaning it does not specify in detail–and this meaning can be established by Constitutional Court. In the Polish doctrine of Constitutional law, opinions about the legal status of the Preamble are diversified. The dominant view in the contemporary doctrine of Constitutional law is that the Preamble has a normative character. The Constitutional Court has many times drawn upon the provisions of the Preamble in its rulings. The provisions of the Preamble dealing with Constitutional principles and values form a "bridge" between natural law and positivist law, which may be conducive to a fuller protection of human rights in the state, and consequently a better operation of Constitutional democracy. But the higher the frequency of principle- and value-invoking notions in the Constitutional text (usually in the Preamble), the greater and the more real is the authority of those who interpret these notions–and impart sense to them–in conditions of a particular constitutional dispute.

Keywords: Constitution, preamble, constitutional law, constitutional democracy, constitutional court, values, jurisprudence

1. The jurisprudence of values has an important role to play in interpreting the Constitution in the legal culture of a democratic state ruled by law.[1] The Constitution comprises general clauses and notions whose meaning it does not specify in detail–and this meaning can be established in the light of principles and values set out in the Preamble to the Constitution.

2. The opening statements of the Polish Constitution[2] define the axiological identity of Constitutional democracy and they identify the system's underlying principles, including some which are mentioned only in the Preamble and not elsewhere in the Constitution (such as subsidiarity).

3. In the Polish doctrine of Constitutional law, opinions about the legal status of the Preamble are diversified.

The normative importance of the Constitution lies in that its particular provision may serve as a benchmark, a point of reference in respect of "norms, principles and values". All this holds for the Preamble, too. The dominant view in the contemporary doctrine of Constitutional law is that the Preamble has a normative character. An opinion expressed in literature on the subject posits that "irrespective of its specific features, the Constitution's introductory part indeed has a normative character. It also plays an important role in

* Ph.D., Department of Law and Administration, University of Warsaw, Krakowskie Przedmieście 26/28, 00-927 Warszawa.
E-mail: r.j.j.piotrowski@uw.edu.pl

[1] Values make possible a grounding "in the post-modern law–fuzzy and indeterminate, polycentric and multilayered as it is". See Giaro, T.: Wartości w języku prawnym i dyskursie prawniczym (Values in legal language and discourse). In: *Trybunał Konstytucyjny: Preambuła Konstytucji Rzeczypospolitej Polskiej* (Constitutional Court: Preamble to the Polish Constitution). Warszawa, 2009, 15.

[2] The English-language text is provided online at www.sejm.gov.pl

mapping out the lines of interpretation of the basic law's individual norms. And in addition, it serves for the Constitution to perform other-than-legal functions, such as integration or public education".[3] It is also argued that an assessment of the Preamble's normative character must always be made in respect of a particular Constitution, and that this assessment does not have to be the same for all provisions of the Preamble. It is pointed out in literature that a tendency towards "normativation" of Constitutional preambles is inevitable within the framework of statutory law, where the Constitution is the fundamental legal act of the highest import–and this also applies to the Preamble as an integral part the Constitution.[4]

In the past, it was asserted that "the Constitution's opening remarks are its integral part; and the different manner in which these are formulated ... does not suffice to conclude that the framers of the Constitution wanted to deprive the Preamble of its normative character".[5] The view was also presented that the Preamble–even if being of a normative character, as part of the Constitution–may also include parts of propagandist and political nature, or formulations serving as pointers to interpret the entirety of Constitutional provisions.[6] According to yet another opinion, the fact that the Preamble is part of the Constitution does not necessarily determine the legal status of its provisions.[7] And A. Gwiżdż claimed that individual sentences in the Constitution's introductory part "take on a normative character".[8]

According to theorists of law, the Preamble is not of an obligatory nature and as such it does not contain norms which would bind an interpreter of the Constitution.[9] And in the more recent literature on the theory of law, we can find the opinion that "the texts of Preambles do not contain material from which to directly construct legal norms" and that preambles "should rather serve as an aid to be drawn for the purpose of interpretation, and especially when applying the articles laid down in the normative acts to which these preambles are attached."[10]

Nowadays, it is proposed in the doctrine of Constitutional law that Preamble provisions should be divided into those "of a normative character" which "themselves form a legal norm or a major part of such norm", and those which do not meet this condition and as such

[3] See Banaszak, B.: *Prawo konstytucyjne porównawcze współczesnych państw demokratycznych* (Comparative Constitutional law of modern democratic states). Kraków, 2004, 130.

[4] Cf. Jamróz, A. In: *Prawo. Administracja. Obywatele* (Law. Administration. Citizens). Białystok, 1997, 107.

[5] Cf. Rozmaryn, S.: *Konstytucja jako ustawa zasadnicza PRL* (Constitution as the basic law of the Polish People's Republic). Warszawa, 1967, 61.

[6] Cf. Burda, A.: *Polskie prawo państwowe* (Polish Constitutional law). Warszawa, 1977, 158.

[7] Cf. Siemieński, F.: *Prawo konstytucyjne* (Constitutional law). Warszawa–Poznań, 1980, 30.

[8] Cf. Gwiżdż, A.: Wstęp do konstytucji–zagadnienia prawne (Constitutional Preamble–legal aspects). In: Trzciński, J. (ed.): *Charakter i struktura norm konstytucji* (Nature and structure of Constitutional norms). Warszawa, 1997, 183. Cf. also Bałaban, A.: Prawny charakter wstępu do polskiej Konstytucji z 2 kwietnia 1997 roku (The legal character of the Preamble to Polish Constitution of 2 April 1997). In: Kudej, M. (ed.): *W kręgu zagadnień konstytucyjnych* (Around Constitutional issues). Katowice, 1999, 120.

[9] Cf. Lewandowski, S.: Kontrowersje wokół preambuł (Controversies over Preambles). *Studia Iuridica*, (1996) 31, 88.

[10] Cf. Jabłońska-Bonca, J.: *Wstęp do nauk prawnych* (Introduction to Legal Sciences). Gdańsk, 1992, 89.

are of "normative importance".[11] According to Constitutional interpreters,[12] the following dimensions of a Preamble's normative nature should be differentiated:

1. interpretative dimension–the provisions belonging in this dimension "indicate how other Constitutional provisions, and all provisions in the entire body of Polish law, should be understood". This dimension embraces all provisions of the Preamble, which formulates the axiological foundation of the Constitutional order and which specifies the direction along which detailed provisions should be interpreted;

2. constructional dimension–the provisions of the Preamble belonging in this dimension may be used in the construction of Constitutional norms, by deriving elements of the constructed norm from these provisions. According to L. Garlicki, only some provisions of the Preamble may be handled in this way. But it is "almost always" that the Preamble and other Constitutional provisions are applied jointly, because "almost always" a principle formulated in the Preamble is enlarged upon or repeated in the articles of the Constitution. The normative importance of Preamble provisions may consist in that they express on their own a Constitutional principle of a normative character (subsidiarity principle).[13]

4. The Constitutional Court has many times drawn upon the provisions of the Preamble in its rulings.[14]

The Constitutional Court said: "Freedom, justice, cooperation and dialogue–these are among the values clearly expressed in the preamble to the Constitution of 1997, which must be used as criteria in assessing any activities by the public authorities, including the legislative activity aiming to realise the principle of a democratic state, ruled by law and implementing the tenets of social justice. These requirements unequivocally invoke the so-called material understanding of the rule of law, and they categorically rule out arbitrary law-making" (memorandum of explanation to ruling in case K 34/97).

Given the Preamble's provision which counts "truth, justice, good and beauty" among "universal values", the Constitutional Court said: "The notion of truth is a normative one, and not only purely factual. This can be seen in the wording of the Constitution itself. The framers of the Constitution refer in the Preamble to truth as a universal value upon which the system of government of the Republic is founded" (memorandum of explanation to ruling in case SK 13/05).

In the memorandum of explanation to its ruling in case K 20/00, asserting the constitutionality of a provision in the Environment Act,[15] the Constitutional Court pointed out that "the Preamble to the Constitution lists among an individual's basic obligations the obligation of solidarity with others", which is further fleshed out in Art. 20 of the Constitution. According to the Constitutional Court, "the arrangements introduced under

[11] Cf. L. Garlicki's comments on the Preamble. In: Garlicki, L. (ed.): *Konstytucja RP. Komentarz* (Polish Constitution. A commentary). Warszawa, Vol. V, 2.

[12] Cf. Garlicki: *op. cit.* 18.

[13] *Ibid.*

[14] Stefaniuk, M.: Preambuła do Konstytucji RP z 2 kwietnia 1997 roku w orzecznictwie Trybunału Konstytucyjnego (Preamble to Polish Constitution of 2 April 1997 in jurisprudence of the Constitutional Tribunal). *Annales UMCS*, 2003/2004. Constitutional Court rulings are posted online at www.trybunal.gov.pl

[15] Uniform text in *Dziennik Ustaw* (Journal of Laws of the Republic of Poland) of 1994, No. 49, item 196, as amended.

the referred provision do serve the implementation of the Constitutional principle of solidarity of citizens living in different municipalities".

Citing the Preamble's provision about the "need for cooperation with all countries for the good of the Human Family", the Constitutional Court found that the "interpretation of the law of the country should take into account the Constitutional principle of favourable attitude towards the process of European integration and cooperation among states (cf. Preamble and Art. 9 of the Constitution). Interpreting the law in a way which serves the implementation of this Constitutional principle is correct in Constitutional terms and preferable" (memorandum of explanation to verdict in case K 11/03).

In some of its rulings, the Constitutional Court not only cites the provisions of the Preamble, but it also makes direct use of the Preamble by affirming a compliance of the referred regulation with the provisions of the Preamble. In such instances, the Preamble, cited by the plaintiff as part of the benchmark of Constitutional control, is referred to by name in the text of the ruling.

And so, when assessing the conformity of Poland's Europe Agreement and the Accession Terms Act with the values indicated in the Constitutional Preamble, the Constitutional Court analysed the significance of the Preamble (case K 18/04). In the opinion of the Constitutional Court, the Preamble "contains a characterisation of Poland's system-of-government pathway, emphasising the universal pro-independence and democratic experiences and pointing to the universal Constitutional values and to the underlying principles organising the life of community living in the state, such as democracy, respect for human rights, cooperation between the public powers, social dialogue and the principle of subsidiarity". Simultaneously, the Constitutional Court said, these values and the principle of subsidiarity, are among the underlying foundations of the European Communities and the European Union–and this remains relevant for the fundamental European values indicated in the Treaty of Lisbon.

In the memorandum of explanation to its ruling in case K 18/04, the Constitutional Court stated that legal norms *sensu stricto* cannot be derived from the text of the Constitutional Preamble. What the Preamble does provide are "indications, based on the Constitution framers' authentic pronouncement, of the lines along which to interpret the provisions of the Constitution's normative part, these lines of interpretation being in compliance with the intentions of the framers of the Constitution". According to the Constitutional Court, the Preamble also retains such status with regard to the benchmarks of Constitutional control indicted by the plaintiffs in case K 18/04. This translates into seeing to it that in the process of European integration there is "concern about a sovereign and democratic determination of the present and future existence of the Homeland and about guarantees of civil rights as well as the efficiency and diligence in the work of public bodies" (memorandum of explanation in case K 18/04). An opinion has been expressed in the Polish doctrine of Constitutional law that the statement of the Constitutional Court "legal norms sensu stricto cannot be derived from the text of the Constitutional Preamble" means in fact that "certain parts of the Constitution cannot be presented in the form of a traditionally understood legal norm".[16]

The Constitutional Court is currently examining motions from Sejm Deputies and Senators about the compliance of certain provisions of the Treaty of Lisbon with the

[16] Garlicki, L.: Uwagi do wstępu (Comments on the Preamble). In: Garlicki, L. (ed.): *Konstytucja RP. Komentarz* (Polish Constitution. A commentary). Warszawa, Vol. V, 20.

provisions of the Preamble on the sovereign and democratic determination of the fate of the Homeland. The provisions of the Preamble defining the axiological identity of Poland and the European Union may, therefore, play an important role legitimising Poland's membership of the European Union.

When ruling on a competences dispute between the Polish President and the Prime Minister as to which of the state's central Constitutional bodies is authorised to represent the Republic of Poland and communicate the position of the state at meetings of the European Council, the Constitutional Court based its ruling on the Preamble. It found that in discharging their Constitutional duties and competences, the Polish President, the Council of Ministers and the Prime Minister are guided by the principle of cooperation between the public powers, as laid down in the Preamble and Art. 133.3 of the Constitution of the Republic of Poland (memorandum of explanation in case Kpt 2/08).

The Constitutional Court has ruled on the compliance of a referred regulation with the provisions of the Preamble in a case involving the understanding of the subsidiarity principle, whose binding nature is recognised only in court jurisprudence. In the Constitution, that principle is only laid down in the Preamble.

And so, for example, in its ruling in case U 5/04, the Constitutional Court found the Council of Ministers' regulation on border delineation and change of name and seat of authority for some municipalities and towns and on raising to township the status of some localities[17] is in compliance with the Preamble to the Polish Constitution to the extent where the Preamble cites the principles of cooperation between the public powers, social dialogue and subsidiarity.

The significance of the subsidiarity principle was taken up by the Constitutional Court in the memorandum of explanation to its ruling on case K 24/02. The Constitutional Court then said that the principle of subsidiarity, defined in the Preamble as one which strengthens the powers of citizens and their communities, "warrants the taking of activities at a higher-than-local level where such an arrangement turns out to be better and more effective than the activities of bodies of local-level communities. The subsidiarity principle should be viewed in all its complexity, which means that the strengthening of citizen and local-community powers does not mean abandoning above-local activities by public authorities. Such activities are actually a must where it is not possible for the local-level bodies to solve problems."

In its ruling in case K 14/03, the Constitutional Court said that the "diligence and efficiency of public bodies, and especially those public bodies, which have been created to implement and protect the rights guaranteed by the Constitution, is among the values of Constitutional importance". This, in the opinion of the Constitutional Court, "clearly results from the text" of the Preamble, which "lists the two main objectives of the Constitution: guarantying civil rights and ensuring diligence and efficiency in the work of public bodies".

The Court therefore may examine "whether the regulations on the activity of these institutions are so designed as to enable their diligent and efficient operation. A regulation whose design is not conducive to the diligence or efficiency of institutions protecting the Constitutional rights actually represents a violation of these rights, and it is therefore warranted to declare it unconstitutional". A similar opinion was expressed by the Constitutional Court in the memorandum of explanation to its ruling in case K 20/00.

[17] *Dziennik Ustaw* of 2003, No. 134, item 1248.

In case K 54/05, the Constitutional Court ruled that a provision in the Spatial Planning and Development Act[18] complies with the Preamble to the Polish Constitution to the extent, where this Preamble expresses the principle of cooperation between the public powers, the subsidiarity principle and the requirement of efficiency and diligence of the public bodies.

In its ruling in case K 31/06 Constitutional Court attested to the constitutionality of the whole Act of 6 September 2006 amending the rules governing elections to municipality councils, county councils, and regional assemblies.[19] The principle of diligence and efficiency in the work of public bodies, espoused in the Preamble, was used by the Constitutional Court as a benchmark of Constitutional control of the referred regulations.

The jurisprudence of the Constitutional Court also includes the opinion that the charge of Preamble violation by a normative act on the basis of which a final ruling has been issued about Constitutionally defined rights, freedoms and obligations must not by itself provide a basis for Constitutional complaint. The Constitutional Court said so in the memorandum of explanation to its ruling in case SK 10/03: "The Constitutional complaint is warranted only where Constitutional freedoms or rights have been violated, and only where the violation comes as a result of unconstitutionality of the normative act on the basis of which the final judgment, injuring the plaintiff, was issued. Therefore, not every Constitutional provision may serve as a benchmark of Constitutional control in a proceeding launched in response to a complaint". Consequently, among benchmarks in a Constitutional complaint proceeding, "the Preamble to the Constitution must be ruled out because–leaving out doubts about its normative character–it certainly does not comprise norms from which arise freedoms and rights" (memorandum of explanation in case SK 10/03). It is thus inadmissible for the Constitutional Court, acting in response to a Constitutional complaint, to rule on the referred regulations' compliance with the Preamble to the Constitution.

The issue looks a bit differently in the light of the Constitutional Court's ruling in a constitutional-complaint case SK 39/06. The complaint pointed to the Preamble as a benchmark of Constitutional control, and the Constitutional Court found in its response that the "Preamble is part of the Constitution, and its pronouncements may be of a normative character, in the context of a given case and especially in connection with particular provisions of the Constitution". However, the Constitutional Court went on, "the plaintiff did not indicate the relevant pronouncements of the Preamble and, consequently, did not indicate the norms which could be constructed on the basis of such pronouncements. Nor did the plaintiff indicate which civil-law right was violated as a result".

But the part of the Preamble evoking the times "when fundamental freedoms and human rights were violated in our Homeland" was actually cited by the Constitutional Court in explaining its ruling in constitutional-complaint case SK 42/01. It found then that the "negative identification of a group of judges" (deprived of a retirement right), who have "worked for, or served in, the security services, and their separation from other judges, shows no signs of arbitrariness and complies with the principle of fairness. For this reason, it is relevant to characterise people holding the office of judge as participating in the apparatus of repression in the indicated period. Consequently it is acceptable, perhaps even advisable, (...) that these persons be not treated as equal with the other judges, who did not embark on such work for, or collaboration with, the security apparatus". In the opinion of

[18] *Dziennik Ustaw* of 2003, No. 80, item 717, as amended.

[19] *Dziennik Ustaw* No. 159, item 1127.

the Constitutional Court, such reasoning is premised on the indicated part of the Preamble to the Constitution.

In its ruling in case Kp 5/08, the Constitutional Court found a particular provision of the Act of 4 September 2008 amending the passport act and the stamp fee act to be in compliance with the Preamble. The ruling, in a way, sums up the opinions presented in earlier rulings and the doctrine of Constitutional law.

In its memorandum of explanation in case Kp 5/08, the Constitutional Court recalled that "doubts exist as to the normative character of the Preamble to the fundamental law". In the opinion of the Constitutional Court, these doubts "result from the circumstance that it is not possible to derive legal norms *sensu stricto* from the text of this Preamble". But on the other hand, "the introductory part of the Constitution of 1997 contains a characterisation of Poland's system-of-government pathway, emphasising the universal the pro-independence and democratic experiences and pointing to the universal Constitutional values and to the underlying principles organising the life of the community living in the state, such as democracy, respect for human rights, cooperation between the public powers, social dialogue and the principle of subsidiarity". The Constitutional Court further said that "in the light of the most recent Constitutional doctrine, this suffices to recognise the normative character of the Preamble to the Constitution". In the opinion of the Constitutional Court, "a tendency towards 'normatisation' of Constitutional preambles is inevitable within the framework of statutory law, where the Constitution is the fundamental legal act of the highest import–and this also applies to the Preamble as an integral part the Constitution".

5. The Constitutional Court has often cited Preamble provisions in its rulings. In particular, the Court checked the compliance of particular regulations with the provisions of the Preamble, these provisions constituting for the Court a benchmark by which to control the referred regulations. In other rulings, the Court cited the Preamble when "supplementing arguments with regard to the assessment of norms with other benchmarks, contained in articles of the Constitution" (memorandum of explanation in case Kp 5/08). That was about the provisions of the Preamble, especially those concerning the sovereignty of the Polish People, the cooperation between the public powers, subsidiarity, and also diligence and efficiency in the work of public bodies.

It looks like the Preamble, which largely found itself in the Constitution in order to emphasise the continuation of Constitutional tradition,[20] has been gradually gaining in importance in the Constitutional Court's jurisprudence as material to construct Constitutional principles and norms, in search of solutions to major problems related to the system of governance.

Constitutional commentators point out that the Preamble "provides an important clue to interpreting the provisions of the act which it opens". According to representatives of doctrine, "a modern constitutional court cannot adjudicate without invoking various kinds of values. And their largest collection is provided in the opening credits to fundamental laws. In addition to stating the overarching ideas and underlying principles, the Constitutional Preamble also expresses the framers' other statements of the most important points of law".

[20] See Stefaniuk, M. E.: Tradycje preambuł w polskich konstytucjach i ich wpływ na rozwiązania współczesne (Traditions of Polish Constitutional Preambles and their influence on modern arrangements). In: Witkowski, W. (ed.): *W kręgu historii i współczesności polskiego prawa* (The past and present of Polish law). Lublin, 2008, 696.

If the Preamble were ignored in Constitutional Court rulings, this would "put in question the legality and correctness of the decisions taken. Without steadily taking note of the Constitution's opening part, these decisions would be flawed and would fail to reflect in full the rich contents of the Polish supreme law. (...) A progressing juridisation of the whole Constitutional text stands in contradiction to the opinions regarding the introductory part as just an ideological and political declaration."[21]

By invoking provisions of the Preamble, it is easier to find rules legitimising the country's membership of the European Union–and this is also conducive to a polycentric system of sources of law. It transpires from the Preamble that the Constitution should be understood and applied in conformity with a common European tradition, while respecting national sovereignty and identity. The provisions of the Preamble dealing with Constitutional principles and values form a "bridge" between natural law and positivist law, which may be conducive to a fuller protection of human rights in the state, and consequently a better operation of Constitutional democracy.

From this viewpoint, how Preamble is understood may also serve to strengthen the capacity to defend the Constitution against hypothetical changes contradicting its function of human rights' guarantee and, consequently, compromising the tenets of constitutionalism.

For the Constitution to be understood in a way commensurate with the constitutionalist approach, one first needs to assume that the authorities should be constrained by human rights.[22] Thus, the public authorities, even if backed by a majority, cannot just do "anything"[23]–even if they observe the rules laid down in the text of the Constitution. In particular, the constitutionalist approach contests the opinion that we enjoy human rights because they are inscribed in the Constitution. On the contrary, they are inscribed in the Constitution because they are human rights. This means that not all provisions of the fundamental law can be changed without risking that it will lose features of a Constitution. Constitutionalism is opposed by theories of Constitution which posit that by observing the relevant procedural requirements, it is possible to arbitrarily determine the contents of the fundamental law.[24]

The injunction to respect "the inherent dignity of the person, his or her right to freedom and the obligation of solidarity with others" is described in the Preamble to the Constitution as "the unshakeable foundation of the Republic of Poland". The way in which the Constitution is applied must rest of a foundation of principles, not on fluctuating political configurations reflecting election results. A serious approach to the Constitution requires that we notice the special significance of the Preamble's conclusive part. Having regained the possibility of a sovereign and democratic determination of Homeland's fate, we now bar the authority–including a majority-backed authority–from legitimising violations of the state's axiological foundations. These foundations must remain "inviolable", meaning "resistant to being revised, undermined, moved or overturned".[25] In this way, the Preamble defines the limits of legitimate authority, including the authority to revise the Constitution.

[21] See Boć, J.: *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.* (Polish Constitutions and comment on the Constitution of 1997). Wrocław, 1998, 12.

[22] See Murphy, W.: *Constitutional Democracy: Creating and Maintaining a Just Political Order*. Baltimore, 2007, 6.

[23] Cf. Memorandum of explanation of Constitutional Court ruling in case U 4/06.

[24] Cf. Murphy: *op. cit.* 15.

[25] See Dunaj, B. (ed.): *Słownik współczesnego języka polskiego* (Modern Polish Dictionary). Warszawa, 1996, 616.

And it is precisely through the prism of Preamble provisions that we should understand the rules governing Constitutional change, as provided in Chapter XII. That chapter contains procedural provisions which take on a substantive importance precisely due to the Preamble which serves as an "important axiological clue in the process of interpreting other Constitutional provisions, as phrased in individual articles".[26] Chapter XII does not set the limits to change, because it deals with procedure. It is in the introductory part that the limits are defined (in the form of "unshakeable foundation"), the principles are named which must not be breached, and the overriding objective to be sought by the changes is indicated: "the good of the Third Republic." Other objectives are ruled out by the Preamble, which thus constrains the authority wielded by a majority capable of bringing about changes in accordance with the procedure defined by the Constitution.[27]

The obligation to respect the provisions of the Preamble rests upon all those who apply the Constitution, including the Constitutional Court, in all its functions. Now, if we accept that the Constitution must not infringe "the inherent dignity of the person, his or her right to freedom and the obligation of solidarity with others", it remains to be explained who else–other than the legislators and the electorate–shoulders the responsibility for the observance of these principles and values. Given the Preamble's closing passage, where respect for principles is described as the unshakeable foundation of the state, one could hardly rule out an extension of the Constitutional Court's terms of reference to embrace the content of Constitution-revising statutes–precisely from the viewpoint of those principles and values which are described in the Preamble as "unshakeable". As has been pointed out in doctrine, the Constitutional Court may examine the constitutionality of Constitution-revising procedure as part of preventive control[28] (exercised before a Constitution-changing statute is signed by the president). But if such examination is accepted as part of *ex ante* control, this means that we recognise the Court's competence to make pronouncements on Constitution revising laws. It is my belief that the terms of reference of the Constitutional Court may include the control of such statutes (both *ex ante* and *ex post*) not only in its procedural aspect but also in the material aspect–precisely because of the Preamble's closing part. Supporting this position is the specific nature of the Constitutional Revision Act, remembering that the Constitution–strictly speaking–is not a new constitution but rather a statue revising the existing constitution. In a situation, where its is found acceptable to examine the constitutionality of a statute ceding state bodies' competences in some matters to an international body or organisation–even though the passage of such statute requires special procedure in both chambers (including the requirement of two-thirds majority in both chambers)–, then constitutional control of a Constitution-revising statute no longer looks out-of-the-question from the viewpoint of procedural requirements. If a statute approving the previously mentioned cession of competences comes within the terms of reference of the Constitutional Court–as defined by the notion of "statute" in Art. 188 of the Constitution[29]–then a "Constitution-revising statute" may likely come within these terms

[26] See Garlicki, L.: *Polskie prawo konstytucyjne* (Polish Constitutional law). Warszawa, 2009, 42.

[27] Cf. Piotrowski, R.: Preambuła i zagadnienie granic zmian w Konstytucji RP (The Preamble and the question of limits to revision of Polish Constitution). In: *Trybunał Konstytucyjny, Preambuła Konstytucji Rzeczypospolitej Polskie.* Warszawa, 2009, 139.

[28] Cf. W. Sokolewicz's comments on Art. 235 of Polish Constitution. In: Garlicki, L. (ed.): *Konstytucja RP. Komentarz* (Polish Constitution. A commentary). Vol. II, Warszawa, 2001, 72.

[29] See L. Garlicki's comments on Art. 188 of Polish Constitution. In: Garlicki, L. (ed.): *Konstytucja RP. Komentarz* (Polish Constitution. A commentary). Vol. V, Warszawa, 2007, 14.

as well. Consequently, the statute referred to in Art. 188 of the Constitution also means a Constitution-revising statute.[30] It would indeed be hard to accept a situation where, in a democratic state ruled by law, the framers of the system of governance are not bound by the requirement of decent legislation within the area subject to Constitutional Court's examination, while they are so bound in their capacity as legislators. And besides, it is only natural that the framers of the system of governance should act on the basis of law and within the bounds of the law.

The interpretation of the provisions of the Preamble to the Polish Constitution may provide an instrument with which to defend Constitutional democracy's axiological identity against potential threats from a majority susceptible to pressure from politicians and media. This line of defence may prove useful in avoiding a situation where the creators of public opinion (as reflected in the results of public opinion polls) will become the creators of Constitutional changes. The proposed interpretation reflects neither the position of doctrine of Constitutional law nor the jurisprudence of the Constitutional Court which has had no reason to take up the question of limits to Constitutional change. The Polish Constitution, in its part phrased in articles, does not regard any provisions as unchangeable. Doctrine rules out the existence of unchangeable provisions in the Polish Constitution. It has been demonstrated, though, that there are restrictions on Constitutional change, stemming from Poland's membership of the European Union.[31] On the other hand, the importance of external factors, related to membership of the European Union, seems to be fairly limited by the Constitutional Court's recognition of the primacy of the fundamental law over European law.

It is my opinion that the Polish Constitutional Preamble, in its closing part, contains a clause on the immutability of the Constitution. The formulation of this clause and identification of an internal benchmark on limits to Constitutional change leads us to the conclusion that the clause itself must be regarded as unchangeable–as long as there exists the world of values defining the identity of a Constitutional culture in which it belongs.[32] The values in question–coessential to the constraint on authority due to the dignity of the person–have been present in European culture since the times of Homer and Sophocles. They have survived triumphs of violence, and they remain relevant despite manifestations of the "intelligence of evil"–and despite the ambivalence of all political forms connected with phenomena such as "voluntary enslavement" or "instinctive, suicidal ineffectiveness of systems of power".[33] The unshakeable Constitutional foundation, laid down in the Preamble, thus represents a steadfastness of values which constitutionalism accepts as an authority higher than the highest "powers that be"–an anchor for dignity of the person. At the same time, this unshakable nature makes of the Preamble a barrier to virtualisation,

[30] Cf. Sokolewicz: *op. cit.*, who however argues that "from the very essence of a Constitutional-revising statute it transpires that control must not be applied to the statute's substantive provisions which by definition have been designed to modify Constitutional provisions". Similarly, L. Garlicki: *ibid.*

[31] Cf. Garlicki, L.: Aksjologiczne podstawy reinterpretacji konstytucji (Axiological basis for reinterpretation of the Constitution). In: Zubik, M. (ed.): *Dwadzieścia lat transformacji ustrojowej w Polsce* (Twenty years of systemic transformation in Poland). Warszawa, 2010, 99.

[32] Cf. Piotrowski: *op. cit.* 142.

[33] Cf. Baudrillard, J.: *Pakt jasności. O inteligencji zła* (The Lucidity Pact, or The Intelligence of Evil). Warszawa, 2005, 136.

which poses a threat to the Constitution in the same degree as other contraptions of the social world, where "anything, any moment, can turn into anything else".[34]

6. But the higher the frequency of principle- and value-invoking notions in the Constitutional text (usually in the Preamble), the greater and the more real is the authority of those who interpret these notions–and impart sense to them–in conditions of a particular constitutional dispute. This holds in particular for situations where, in particular circumstances of a particular case, the values declared in the Preamble stand in conflict among themselves, which requires that some of these values be either preferred over, or counter-balanced by, others. The judges empowered to interpret the Preamble, and also interpret the Constitution from the Preamble's viewpoint, are thus awarded with the right of last word in particular political disputes–and they will hold this prerogative at least as long as the Constitution stays. This requires an appropriate restraint in invoking the Constitutional Preamble in Constitutional Court rulings and appropriate prudence in appointing the Justices of the Court, whose legitimacy stems from the special role of the Constitution under democracy and from the Constitutional Court's mastery of the art of passing judgement on what is good and what is bad–in accordance with the maxim *ius est ars boni et aequi*. The existence of Preamble to the Constitution, and its application in Constitutional jurisprudence, is conducive to an inter-penetration of statutory-law culture and the culture of judge-generated law–which is an element of the common Constitutional tradition of European countries.

The transformations of the notion of national sovereignty, linked to its restriction by human rights, offer a great deal of legitimacy to the activities of the Constitutional Court which thus becomes a guardian of the limits to sovereignty, understood as exercise of authority based on the force of values referred to in the Preamble to the Polish Constitution–and simultaneously restricted by these values. Such re-definition of the notion of sovereignty legitimises the activities of the Constitutional Court, and at the same time makes this legitimacy contingent on the Constitutional Court's involvement in the protection of human rights–remembering that respect for human rights provides a yardstick of sovereignty.[35]

The impact exerted by the Preamble on the Polish Constitutional Court's jurisdiction is both positive (from the standpoint of the tenets of constitutionalism) and restricted. The provisions of the Preamble proved useful for the purpose of legitimising the process of European integration and legitimising the public authorities because, when it comes to the application of the Constitution, the Preamble basically favours a balance between the realm of ideas and values on the one hand and the sphere of social practice on the other, between the need for change and the necessity of continuity in state affairs–and that, one might venture to suggest,[36] is what constitutions are for.

[34] Arendt, H.: *Między czasem minionym i przyszłym* (Between Past and Future). Warszawa, 1994, 117.

[35] Cf. Piotrowski, R.: Uwagi o ustrojowym znaczeniu sądownictwa konstytucyjnego [Comments on the systemic importance of Constitutional courts]. In: Budziło, K. (ed.): *Księga XXV-lecia Trybunału Konstytucyjnego* (In commemoration of the 25th anniversary of Constitutional Court). Warszawa, 2010, 323.

[36] Cf. Spadaro, A.: *Contributo per una teoria della costituzione*. Milano, 1994, 47.

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EWA POPŁAWSKA*

Preamble to the Constitution as an Expression of the New Axiology of the Republic of Poland

Abstract. If we realize that in the first constitutional laws of modern constitutionalism (such as the Constitution of the USA of 1787, the Declaration of the Rights of Man and of the Citizen, the Polish Constitution of 3 May 1791 and the French Constitution of 3 September 1791), the contents of the preambles corresponded to contemporary chapters defining the principles of the systems of state government, while the opening chapter of the Polish Constitution of April 2, 1997 includes 29 articles, a question arises whether it was necessary to precede that Constitution with a preamble.[1] Introductions to constitutions are part of the Polish systemic tradition: they featured in the Constitution of 1791, as well as in the so-called March Constitution of 1921, the Constitution of the Polish People's Republic of 1952 and the so-called Small Constitution of 1992, whereas the so-called April Constitution of 1935 did not have one.

Like those of other states, the major contents of the Preamble to the Constitution include a solemn proclamation of those principles and assumptions that its makers found particularly important in light of the state's history and contemporaneous situation. Setting these out explicitly was assumed to further the goal of integrating consecutive generations around a certain system of values as well as legitimising the system of government that was thereby established.[2] This is why the Preamble indicates the entity who acts as the constitutional legislator *(pouvoir constituant)* as "the Polish Nation–all citizens of the Republic", describes the Constitution itself as the "the basic law for the State", characterizes the historical context in which the fundamental law was adopted and–most significantly–lists all the basic goals of the Polish State and the fundamental principles underlying the fundamental law.

The reader may find it striking that the Preamble contents largely overlap, or at least are not coordinated with, the wording of provisions of the first chapter, entitled "The Republic". This chapter is, as we have mentioned, very long and–as the title suggests–not only does it list the classic principles of the state government system, but it also gives quite an exhaustive description of the Polish national community in all its complexity (including the state's main tasks and symbols, but also, among other things, references to the institutions of civil society, the definition of marriage enjoying the protection of the state, the duty to take care of war invalids, etc.).[3]

Keyword: Polish constitution, National Assembly classic principles, preamble, European Union, subsidiarity

* Ph.D., Institute of Legal Studies of the Polish Academy of Sciences, Nowy Świat 72, 00-330 Warszawa, Poland.
E-mail: epoplawska@poczta.onet.pl

[1] Sarnecki, P.: *Systematyka konstytucji* [Systematics of the Constitution]. In: Trzciński, J. (ed.): *Charakter i struktura norm konstytucji* [Character and Structure of Norms of the Constitution]. Warsaw, 1997, 25.

[2] Garlicki, L.: Commentary on the Introduction to the Polish Constitution. In: Garlicki, L. (ed.): *Konstytucja Rzeczypospolitej Polskiej* [Constitution of the Republic of Poland]. Vol. V, Warsaw, 2008, 2.

[3] Gebethner, S.: *Rzeczpospolita w świetle postanowień rozdziału pierwszego Konstytucji z 1997 roku* [The Republic in the light of provisions of the first chapter of the Polish Constitution]. In: *Podstawowe pojęcia pierwszego rozdziału Konstytucji RP* [Basic Notions in the First Chapter of the Polish Constitution]. Katowice, 2000, 14–16.

It is something of a paradox that because of the moment and circumstances of adoption, the Preamble is more a device supporting and crowning the fundamental law than an introduction to it.[4] This results from the fact that, despite the intentions the National Assembly previously adopted, according to which there was to be no introduction, at the final stage of work on the Constitution (at the end of 1996) a decision was made to include an introduction which was to determine finally the ideological character of the fundamental law. Out of the seven constitutional bills submitted to the National Assembly, four had introductions, while three did not. Although in the course of work the idea of adding a preamble was not excluded, the vast regulation of Chapter I originally tipped the scales against a preamble. The eventual decision to add an introduction at the final stage of work on the Constitution was taken on strictly political grounds. In an attempt to get the supermajority in the National Assembly required to adopted the constitution (2/3) and then passage in the national referendum, a decision was made to include a Preamble with a *denominatio Dei* and references to axiology similar to the social teaching of the church.

The coalition of the centre-left parties (SLD, PSL, UW, UP) that reached agreement as to the text of the Constitution hoped to broaden approval among members of the Parliament and, later on, the Poles voting in a referendum, to include right-wing circles by means unequivocally anchoring the fundamental law in a system of values close to Christian democracy. The plan failed, because the opposition did not change its hostile attitude despite the inclusion of a preamble.

Eight drafts of the Preamble were submitted, and of these the version Tadeusz Mazowiecki had promoted, prepared by Catholic intellectual and activist Stefan Wilkanowicz, was chosen. The somewhat hasty preparation of the Preamble and failure to correct the provisions of the first chapter after the Preamble had been adopted caused the existing repetitions and inconsistencies.

The introduction is written in a particularly solemn style, which is typical of preambles in general. Although doubts as to the normative character of the introduction, or at least its portions capable of direct application, currently seem to have been positively settled by the Constitutional Court, at the time the Constitution was adopted the situation was less unequivocal and the views of Polish legal scholars and commentators diverged. One should not be surprised that devotion to traditional, pompous and sometimes not sufficiently clear language prevailed over care for clarity of the language of the law.

The first problem caused by the Preamble concerns the definition of the Polish Nation as the constitution-maker–the entity that establishes the Constitution "as the basic law for the State". In this context, the Preamble further defines the Polish Nation as "all citizens of the Republic", therefore a political and not an ethnic nation. But at the same time it makes reference to being "bound in community with our compatriots dispersed throughout the world", therefore not ignoring the other definition of a nation.

The National Assembly decided to recognise the existing division of Polish citizens by referring to both "those who believe in God as the source of truth, justice, good and beauty" and "those not sharing such faith but respecting those universal values as arising from other sources". Members of both categories are treated as "equal in rights and obligations towards the common good–Poland". The authors' intention was to stress the universal character of the highest values on which the Polish national community is founded: truth, justice,

[4] Complak, K. In: Boć, J. (ed.): *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.* [Polish Constitutions and Commentary on the 1997 Constitution]. Wrocław, 1998, 13.

goodness and beauty, even though there are various sources from which different persons assume their origin. A more down-to-earth argument for choosing the expression was the intention to find a formula to replace the invocation of God, which was firmly demanded by right-wing and Catholic circles. Although the introduction also refers to the "Christian heritage of the Nation", these expressions did not convince those opponents, who did not consider these a worthy substitute for the desired express reference to God ("In the name of God Almighty..." was included in Polish constitutions of 1791 and 1921). These references were also criticised by supporters of consistent secularisation of the Constitution. Paradoxically, the dualist formula, judged as moderately successful in Poland, was taken into consideration when the Convention on reform of the European Union worked on the Preamble to the Constitutional Treaty.

References to a supernatural being are not references to a specific religion, but relate to all faiths especially in the context of recent events that polarized the Polish community after the presidential plane crash, when reflecting on the expediency of the double definition of members of the Nation in the Constitution, one cannot lose sight of its basic meaning. The Constitution clearly emphasises the shared highest values, while realistically stating the different ideological backgrounds of citizens. It does the same when it mentions "our responsibility before God or our own consciences", which is to accompany the establishment of the Constitution.

From that formulation one can draw an important interpretative conclusion as to the nature of the Polish state. Firstly, it excludes both transformation into a religious state and into a radically atheist one. (The details of the relationship between the state and religious organizations is regulated by Art. 25 of Chapter I and Art. 48 and 53 of Chapter II, which is devoted to the status of an individual.) Secondly, it introduces into the text of the fundamental law a reference to transcendental, supernatural values, which fits well with the definition of "the inherent and inalienable dignity of the person" as "a source of freedoms and rights of persons and citizens" (Art. 30). Thus, the Preamble initiates the introduction of natural law into the Polish fundamental law and gives it a binding character.

It is also in the classical part of the introduction, which refers to the history and place of the state in the contemporary world, that one can find important axiological provisions, to which the Constitutional Court has often referred in its judgments. The makers of the Constitution leave no doubt as to which periods of Polish history and corresponding systemic solutions they perceive as positive (for example, "struggle for independence achieved at great sacrifice", "the best traditions of the First and the Second Republic") and which ones they condemn ("bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland").

In a way unprecedented in Polish constitutional history, the fundamental law of 1997 expresses the State's attitude towards its international surroundings. Constitution makers, in light of the Preamble, declare that they are "aware of the need for cooperation with all countries for the good of the Human Family". In the legal sphere, pursuant to Art. 9 ("The Republic of Poland shall respect international law binding upon it."), there is proclaimed as a principle a general favourable attitude of Polish law towards international law, which is then concretised by way of a detailed regulation on the place of international agreements in the domestic legal order and through openness to integration processes. Not only did the Constitution provide for the possibility of transferring the powers of State authorities as to some matters to an international organization or body, together with a specific procedure for expressing consent to ratification of an agreement upon such a transfer, but it also anticipated the inclusion in the national legal order of legal instruments with an integrative character enacted by such an organization.

Due to the scope and abundance of constitutional provisions that form the grounds for the international cooperation of the Republic of Poland, they can be considered as an element of axiology of the fundamental law. Unlike "constitutional values", this axiological choice in the Constitution is realized by way of sub-constitutional instruments (among others, extensive amendments to laws because of the need to harmonize them with EU law before accession, and now implementing directives), and expressed in the case law of the Constitutional Court. In its judgment assessing the conformity of the Accession Treaty with the Constitution, the Court referred to the constitutional principles quoted in the Preamble, such as democracy, respect for rights of the individual, cooperation between the public powers, social dialogue and the principle of subsidiarity, and pointed out that these principles belong at the same time to "fundamental assumptions of functioning of the European Communities and the European Union" (judgment K 18/04). It was on the axiological aspects that it grounded, among other things, its convictions about the lack of discrepancies between the Accession Treaty and the Polish Constitution.

The Preamble identifies the basic values to be realised by the Polish State. It mentions the desire to "guarantee the rights of the citizens for all time" and ensure "diligence and efficiency in the work of public bodies". The principles on which–according to the Preamble–"the basic law for the State", that is, the constitutional provisions, are to be based occupy a special place. It also refer to "respect for freedom and justice", "cooperation between the public powers", "social dialogue" and "the principle of subsidiarity in the strengthening the powers of citizens and their communities". It is clear from the context that there can be no doubt that the constitutional legislator intended that those applying the fundamental law be guided by the above principles. The first is developed in detail in the "articled" part of the Constitution. The second further defines the principle of the separation and balance of powers from Art. 10 and clarifies that the system of government in Poland corresponds to the parliamentary model. "Social dialogue" should be understood more broadly than just in the context of a social market economy, as a principle of the socio-economic system of the Republic of Poland (Art. 20), where the term is used again.

The last principle, that of subsidiarity, deserves special attention, because it is the focus of problems relating to the normative character of the Preamble. Although this principle, too, is reflected and concretised in detailed constitutional provisions, it is not clearly repeated there, nor, all the more so, is it defined, which arouses doubts in light of Poles' slight familiarity with (or even the prevailing misunderstanding of) this principle.

* * *

While the principle of subsidiarity is a novel solution as far as Polish constitutional provisions are concerned, it has already served as a useful point of reference and a general guideline in the political and constitutional transformations that Poland has been going through in recent years. It offers an exceptionally pertinent answer to a fundamental question about the desired extent and tasks of State authority. While in search of the model of the State and its functions that best corresponds with the needs of post-Communist society, one could hardly accept without any greater objections the model of the welfare State which–as shown by recent West-European experience–has failed due to its overdevelopment of the administration and impoverishment of the public sector and the related growing passivity of the citizens. What seems just as ill-suited to the social situation of Poland is another model initially thought to be an effective remedy against the negative social phenomena inherited from the former system: that is, the model of a liberal State in the classic sense, with the State's organizational functions restricted to the minimum.

According to the principle of subsidiarity, the chief function of power is to satisfy the needs of its subordinate communities or persons who shape their fates independently and bear the related responsibility but are incapable of full development. The aims and tasks of power should not extend beyond those of its subordinate individuals or groups. What justifies the existence of power is the lack of self-sufficiency on the part of those individuals and groups. Therefore, the role of power is secondary and auxiliary as it is nothing but a means to the achievement of aims by individuals and communities.

The idea of subsidiarity–a specific "common sense" principle relating to the nature of all social organizations–has been known for many ages now and can be found repeatedly in the history of philosophy and in political thought. Subsidiarity's roots lie in Aristotelian political science and Thomist doctrine and philosophy. In the former, it appears as a principle of justice implicit in the notion that an association is not an end in itself but serves to help participants in the association to help themselves. This has been recognised in that since in large organizations the process of decision-making is more remote from the initiative of most of the many members who will carry out the decision, the same principle requires that larger associations should not assume functions that can be performed efficiently by smaller associations.[5] In the Thomist context, it not only forms part of the Thomist notions of hierarchy and order but is also to be found in the notion of social and rational collaboration and the diversity of individual and collective capacities essential to such collaboration.[6]

However, Wilhelm Emmanuel von Ketteler gave the subsidiary principle its name only quite recently, in 1862 in "Freiheit, Autoritaet und Kirche", with respect to Germany and Switzerland.[7] Since the 1930s, the social teaching of the Catholic Church, which related that principle to the philosophy of personalism, has made an important contribution to the conceptual development of the principle of subsidiarity.[8]

Until recently, subsidiarity was not a familiar part of the contemporary legal lexicon. That it has become so is largely due to controversy within the European Community over the terms on which it should progress towards some form of European Union. It has been employed in the debates over the division of competences between the Community (and then the Union) and its Member States. That process eventually resulted in a statement of the principle being incorporated in the European Community Treaty (Art. 3b) as amended by the Treaty on European Union (Maastricht) 1992, and then clarified in the Protocol on the Application of the Principle of Subsidiarity and Proportionality attached to the Amsterdam Treaty, 1997, approved and developed recently by the Lisbon Treaty of 2007. There, an attempt is made to allocate competence in terms of the criterion of achieving the objectives of the Community. Some have hailed it as a guiding principle for relations

[5] Aristotle: *The Politics*. Translated by J.E.C. Welldon, New York, 1886.

[6] Aquinas, St. T.: On Kingship or the Governance of Rulers. In: *On Politics and Ethics*. Translated by Paul E. Sigmund, New York, 1988.

[7] von Ketteler, W. E.: Freiheit, Autorität und Kirche. In: von Ketteler, W. E: *Sämtliche Werke und Briefe*. Mainz, 1877.

[8] Millon-Delsol, Ch.: *Le principe de subsidiarité*. Paris, 1993, 3–8; Millon–Delsol, C.: *L'Etat subsidiaire*. Paris, 1992, 18–84; Melchionni, M. G.: Subsidiarity from the historical perspective. In: Hrbek, R. (ed.): *Die Anwendung des Subsidiaritätsprinzips in der Europäischen Union*. Baden-Baden, 1995, 105–111.

between the Union and its Member States;[9] others regard it as a mere facade and doubt its value as a legal concept.[10]

Putting aside the specific application of the principle of subsidiarity with respect to the mechanisms of European integration, the mere fact of its introduction into the legal terminology contributed to its considerable popularity and theoretical development. As a principle of constitutional law, the principle of subsidiarity was among the subjects discussed at the 14th International Congress of Comparative Law held in Athens in August 1994. In a recapitulation of the work of 12 national reporters, Prof. John W. Bridge (University of Exeter, UK) stated that "subsidiarity is not generally found as an express principle of constitutional law, other than in the context of the European Union. But either the principle or the underlying concept from which the principle is derived is generally implicit or inherent in constitutional law and/or structures. In some cases the principle or concept has informed or is informing the constitution-making process. In others it is used as a tool of constitutional implementation and interpretation in relation to the allocation of decision-making power."[11]

In accordance with the formulations of Catholic social science, the principle of subsidiarity is based on the assumption that man is the sole independent being.[12] Just like man, who only seeks the community's help through organization of or participation in communities created by nature if he cannot perform his life tasks himself, and only to the extent necessary, any smaller or "inferior" community also only resorts to the help of larger or "superior" communities if it cannot perform its tasks as determined by the needs of all its members. Hence all "superior" communities are obliged to respect the rights of "inferior" communities, thus securing to them the possibility of performing their natural tasks.

The principle of subsidiarity can be reduced to the following two basic postulates in reference to the individual–community–State relation:

1. as much freedom as possible, as much collectivization as absolutely necessary;
2. as much society as possible, as much State as absolutely necessary.

Even if they have never been formulated as explicitly in official documents, these postulates formed the foundations of the Polish reform movement aimed at subversion of the totalitarian system.

The position of subsidiarity in the constitutional law follows from the principles of the organisation of socio-political life that can be educed from it. The first of these is the principle of organic construction of State community, in other words, of State pluralism. It postulates a multi-level organisation of society where, situated between individual and State, there are many varied intermediate communities: professional (trade unions and employers' unions), local (local governments), political (political parties) and cultural (associations). This conception sees the State as the supreme social organisation that coordinates and manages the whole of the social system, and not just something that controls

[9] Delors, J.: *Subsidiarité: défi du changement. Actes du colloque Jacques Delors*. Maastricht, 1991; Constantinesco, V.: La subsidiarité comme principe constitutionnel de l'intégration européenne. *Aussenwirtschaft*, 1991, 439–459.

[10] Dehousse, R.: Does Subsidiarity Really Matter? *European University Institute of Florence Working Paper*, LAW 92/32.

[11] Bridge, J. W.: *Subsidiarity as a Principle of Constitutional Law*. General Report, International Academy of Comparative Law, XIV Congress, Athens, 31 July–6 August 1994, 30.

[12] In particular, the encyclical Pope Pius XI: *Quadragesimo Anno*. 1931 and the encyclical Pope John XXIII: *Mater et Magistra*. 1961.

an atomized society of individuals through its machine of coercion. What follows from the principle of pluralism are principles of self-government and of federation, a special case of national self-government.

Another principle of the organisation of social life that follows directly from subsidiarity is the principle of decentralisation of State authority. It consists of the State's renunciation of a part of its rights to inferior communities: national, local, professional organizations, unions of families, etc. The minimum postulate of decentralization is the separation of powers among the legislative, executive and judiciary, which prevents an accumulation of power with its demoralizing effect and the danger of abuse, and guarantees mutual supervision of the functionally separate elements of the State machine. Real decentralisation depends also on the structure and range of competences of administrative authorities, and in practice also on the professional level and moral standards of the administrative machine.

The third and probably most important principle to be educed from subsidiarity is the principle of democracy expressed by way of the real and not just formal participation of broad masses of society in government. For genuine democracy to be introduced, it is indispensable that all citizens be made equal and given the opportunity to participate in all spheres and manifestations of State activity.

To recapitulate the importance of the principle of subsidiarity, subjective freedom of individuals based on their equality before the law should be the basic source of law in a democratic State. This provides the foundations for social justice that meets the requirements of personal dignity and is based on the moral sense and free cooperation of community members. In a genuine democracy, the community of interests of the rulers and the ruled is derived not only from the rulers' awareness of being plenipotentiaries of the society but also from the two groups' profound inner moral bond that unites them in their journey towards the common good.[13]

The Republic of Poland is a unitary State where in the last 20 years a radical transformation of the political and socio-economic system took place and the autocratic totalitarian system controlled by the Communist party and the centrally planned economy were abandoned. For these reasons, manifestations of subsidiarity in Poland's constitutional system should be sought not precisely in the repartition of the powers of decision-making between the separate levels of the State machine but rather, and predominantly, in the radical and multi-plane subjectivisation of the society that resulted from the adopted principles of political pluralism and the free market.

These two principles follow from the profound revaluation of the mutual relations between individual, society and State that proceeds in the ideological sphere. The idea of subjection of the individual to the laws of history is replaced by that of inalienable human rights, the philosophy of collectivism by that of personalism and the idea of statism by the idea of civil society.[14]

Although the principle of subsidiarity was introduced expressly into Polish constitutional law only in the Constitution adopted in 1997, the whole of the reforms launched previously, which aimed at transforming the system from autocracy into liberal

[13] See more: Strzeszewski, Cz.: *Katolicka nauka społeczna* [Catholic Social Teaching]. Warsaw, 1985, 508–521.

[14] Sokolewicz, W.: Democracy, Rule of Law and Constitutionality in Post-Communist Society of Eastern Europe. *Droit Polonais Contemporain-Polish Contemporary Law*, (1990) 2, 5–6.

democracy and at submission of the State to the rigours of law and of the Constitution above all, are of paramount importance to the position of individual in society and the State; they guarantee the rights and liberties of individuals and define the functions of the State with respect to society as a whole and to individuals as elements of that society.

The principle of subsidiarity was introduced into the Preamble of the Constitution as a principle underlying the whole legal system of the State, including–first and foremost–the Constitution. The principle of subsidiarity is mentioned in this context on a par with the principles of respect for freedom and justice, social dialogue and cooperation between the public powers. The National Assembly has not gone beyond "naming" the principle of subsidiarity in the Preamble, without elaborating on the topic in the main body of the Constitution. This does not seem to be a good solution, for the essence of the principle of subsidiarity remains rather obscure to society, while the most widespread interpretation that it has received limits subsidiarity to obliging authorities (the State) to provide unconditional assistance to individuals and communities in the name of "the common good". Describing the principle of subsidiarity as "strengthening the powers of citizens and their communities" will not prevent further interpretations of subsidiarity that ascribe, in the spirit of the welfare State, a rather narrow scope to the principle–indeed it may lead to such interpretations being perpetuated.

In formulating the preamble–as Tadeusz Mazowiecki, the MP who made the preamble motion, said–e was "oriented towards what actually is stipulated in the Constitution but what cannot be couched in the language of articles, but what can be put in terms of formulating a certain direction".[15] Difficulty arriving at a proper definition of the principle of subsidiarity in terms of legal and constitutional language was actually invoked by members of the Constitutional Committee as an argument to abandon such an attempt. However, despite the evident difficulties that such a legislative task might involve, it would be a sign of excessive pessimism and restraint to claim, as deputy Jerzy Ciemniewski has, that "the principle of subsidiarity cannot be translated into a system of institutions" and that it is only the kind of "idea that such institutions may or may not be inspired by".[16] Elaborating on the principle of subsidiarity in the Constitution seems to have been indispensable because while it has binding force, the public remains rather ill-informed as to its actual nature. Needless to say, for a principle to become an enforceable foundation of the social and constitutional order, it has to be understood by all those who are to adhere to it. Any possible misunderstandings concerning the term "subsidiarity" necessitate an educational effort. A special role should have been played here by an elaboration of the principle in the main body of the Constitution in the chapter dealing with the principles of the constitutional system in Poland.

Inclusion of the principle of subsidiarity in the Preamble and failure to fully elaborate on it in the main, so-called normative, part of the Constitution, might, in light of views sometimes presented by legal experts, have given rise to doubts as to the normative character of the principle. This, however, is not the case, for both the context in which the principle is invoked in the Preamble, as well as its normative content, i.e. the fact that the principle makes it possible for particular kinds of obligations to be specified for bodies that apply the Constitution, provide convincing grounds to recognize that the principle is unequivocally

[15] See: proceedings of the session of the Subcommittee of general issues and introductory provisions of the Constitutional Committee, on 23 October 1996, 1.

[16] Further page 10.

normative in nature. The definitive answer to the question about the normative (binding) character of the Preamble is to be given by the judiciary, especially by the Constitutional Court. The principle of subsidiarity, even if it does not impose any specific and currently binding obligations on State authorities, indirectly sets down guidelines for legislation and for the application of the law.

Besides the reference to the principle of subsidiarity as a principle underlying the constitutional order of the State, in the Preamble elements of the principle of subsidiarity and provisions that have been inspired by it can be found in the following parts of the Constitution. Included among the constitutional principles, even before the definition of the Republic of Poland (as a "democratic State ruled by law and implementing the principles of social justice"), is the principle that "The Republic of Poland shall be the common good of all its citizens". Despite the general approval of the principle by members of the National Assembly, its sense and meaning, which goes beyond any ideological considerations, do not seem to be unambiguous. On the one hand, the quoted article is a tautology if the word "Republic" [Rzeczpospolita = literally: common good] is understood in its historical sense. On the other, if the article is meant to give special protection against any form of discrimination, it coincides with provisions to the same effect contained further on in the text. Their prominence in Art. 1 can be accounted for only by the intention to make them acquire the status of a constitutional principle, however, without creating much impact on the eventual application of the provisions, e.g. by adjudicating bodies. The prevalent view of members of the National Assembly was that describing the State as "the common good of all its citizens" would contribute towards developing an awareness of the natural link between the obligations of the State towards the citizens and the duties of the citizens, such as loyalty to, and the bearing of costs and burdens for the benefit of, their common good, the State (including taxes or military service). Such an interpretation seems to be confirmed by the reference to the "common good" in the Preamble: it appears in the context of the citizens' duties with respect to the State in the following passage: "[...] we, the Polish Nation–all citizens of the Republic, [...] equal in [our] rights and obligations towards the common good–Poland [...]".

A manifestation of the principle of subsidiarity in the Constitution is to be found in the formula in Art. 12 relating to civil society, based on the principles of liberty and pluralism with regard to public activity: "The Republic of Poland shall guarantee freedom of the creation and functioning of trade unions, socio-occupational organizations of farmers, societies, citizens' movements, other voluntary associations and foundations". The clause represents a step forward in comparison to the former formulation of the principle of political pluralism, for it also refers to civil society with its manifold forms of self-organization, and it is not restricted to guaranteeing freedom of formation and activity for political parties. In the chapter on "The freedoms, rights and obligations of persons and citizens", there are additional provisions regarding freedom of association, freedom of activity of national and ethnic minorities' organizations, religious communities, etc.

The constitutional formula on relations between the State and churches and religious unions (providing for their "autonomy and mutual independence of each in its own sphere, as well as their cooperation for the good of the person and the common benefit"–Art. 25 para. 3) is a reflection of an idea underlying the principle of subsidiarity, namely the idea of the separateness and preservation of specific methods of activity, as regards religious organisations and the State. The Constitution emphasises their mutual complementarity in the implementation of the overriding goal constituted by the good of the individual and the community.

The constitutional principles also include provisions for participation of local authorities in the exercise of public power (Art. 16 para. 2: "Local government shall participate in the exercise of public power. The substantial part of public duties which local government is empowered to discharge shall be done in its own name and under its own responsibility"). This principle is further elaborated, in the spirit of subsidiarity, in other provisions of the Constitution dealing with local government, in particular those stipulating a presumption of the power of local government to perform public duties (Art. 163: "Local government shall discharge public functions that have not been reserved by the Constitution or statutes for other public authorities"), a presumption of the power of communes, the lowest tier of local government units, to perform the duties of local government (Art. 164 para. 3: "The commune shall discharge all local government functions that have not been reserved for other local government units"), and judicial protection of the autonomous nature of local government units (Art. 164, paragraph 2: "The autonomous nature of local government units is subject to judicial protection"). These provisions are, *toutes proportions gardées*, an equivalent of similar clauses in countries with a federal system of government, which recognize the powers of Ländern, cantons, states, etc. with regard to those duties that have not been enumeratively reserved for the federal authorities.

Separate regulations in the Constitution that have the force of constitutional principles relate to professional self-government. They provide for the creation by statute of self-governments for professions enjoying a high degree of public confidence, with a view to monitoring the proper practice of the professions within the limits, and for the protection, of the public interest (Art. 17 para. 1). They also permit other forms of self-government, provided they do not infringe upon the freedom of practicing a profession or impose restrictions upon the freedom to engage in economic activity (Art. 17 para. 2). The new formula highlights the public duties of self-governments within professions of public confidence, and at the same time makes the freedom of other forms of self-government dependent on respect for the fundamental freedoms of practicing a profession and engaging in economic activity.

The principle of subsidiarity also emerges in the newly introduced citizens' legislative initiative (under Art. 118 para. 2 of the Constitution; such an initiative can be launched by one hundred thousand citizens eligible to vote in *Sejm* elections). The citizens' initiative creates opportunities for organized groups of citizens, representing shared interests, to influence the shape of legislation. This provision, it seems, may contribute to giving a more tangible expression to the objectives held by various groups in society, and it may help such constituencies to organize themselves.

Another manifestation of the principle of subsidiarity, this time at the supranational level, is to be found in Art. 90 paras. 1 and 2 and Art. 91 para. 3. Their provisions concern the legal conditions as well as the limits of accession to the European Union, a legal entity based on the principle of subsidiarity itself: "The Republic of Poland may, by virtue of international agreements, delegate to an international organization or an international institution the competence of organs of State authority in relation to certain matters." If an international agreement ratified by the Republic of Poland constituting an international organization so provides, the laws it established by it shall be applied directly and have precedence in the event of a conflict of laws.

The principle of subsidiarity–the core and essence of a democratic and truly citizen-friendly State–has become a new constitutional principle in the Republic of Poland. In all its variety of meanings, it was even before this an excellent point of reference for appraisal of the legal and actual state of the country's systemic transformation. The conclusion emerges

that constitutionalisation of that principle by way of a duty imposed on State authorities to observe it in all their actions of control should contribute to a fuller development of civil society and prevent arbitrariness on the part of the State machine. While, however, institutionalized and particularly judicial review of the observance of the principle of subsidiarity is common in the sphere of distribution of powers between the separate levels of public administration, it is difficult to find appropriate means and instruments of such review with respect to broader obligations that follow from that principle: this is shown by the force of the controversies and doubts as to the practice caused by the introduction of subsidiarity into the European Union treaties.[17]

That this is possible, however, is evidenced by the European Union's institutions, which, in spite of the controversies and practical problems that arise from the introduction of the subsidiarity principle into the Treaty on the European Union, have managed to work out a system of operationalizing the principle in a fairly effective way. The system requires every unit of the EU institutions involved in the law-making process to analyze drafts of new acts with regard to their conformity with the principle of subsidiarity, and now, pursuant to the provisions of the Lisbon Treaty, national parliaments of Member States are involved in the control of adherence to this principle.[18] To a certain degree, a similar system of regular assessments of new bills with respect to the principle of subsidiarity results from the Regulatory Impact Assessment of governmental legislative bills and requirements set in the Rules of the Sejm requiring justification of all bills submitted to the Speaker of the lower chamber of the Parliament.

Work in the National Assembly has shown just how difficult a task it is to formulate the principle of subsidiarity for purposes of constitutional regulation. Hence, there is also a lack of precedents in the constitutional law of other countries, which have recognized its constitutional significance but have failed to introduce the provisions that would unequivocally define it (the above-mentioned federal clauses constitute an exception here).[19] It is worth noting that Poland is bound by an instrument of international law that does define the principle of subsidiarity. This instrument is the European Charter of Local Self-

[17] The legal definition of subsidiarity is contained in the Treaty on European Union (Art. 5.3): "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional or local level,and can rather, by reason of the scale or effects of the proposed action, be better achieved by the Union."

[18] See more: Overall Approach to the Application by the Council of the Subsidiarity Principle and Art. 3b of the Treaty, European Council of Edinburgh –11–12 December 1992–Presidency Conclusions; Interinstitutional Agreement of October 25, 1993 between the European Parliament, the Council and the Commission on procedures for implementing the principle of subsidiarity; Keukleire, S.: The Principle of Subsidiarity between Word and Deed. Operationalization of Art. 3b of the Maastricht Treaty. In: De Groof, J.: *Subsidiarity and Education.* Leuven-Amersfoort, 1994; Ciavarini Azzi, G.: La Commission en matière du principe de subsidiarité. In: Hrbek, R. (ed.): *Die Anwendung des Subsidiaritätsprinzips in der Europäischen Union.* Baden-Baden, 1995, 59–69. See Winczorek, P.: Zasada subsydiarności w dyskusjach ustrojowych w Komisji Konstytucyjnej Zgromadzenia Narodowego [Principle of Subsidiarity in systemic debates in the Constitutional Committee of the National Assembly]. In: *Subsydiarność* [Subsidiarity]. Warszawa, 1996, 140–146.

[19] See Winczorek, P.: Zasada subsydiarności w dyskusjach ustrojowych w Komisji Konstytucyjnej Zgromadzenia Narodowego [Principle of Subsidiarity in systemic debates in the Constitutional Committee of the National Assembly]. In: *Subsydiarność* [Subsidiarity]. Warszawa, 1996, 140–146.

Government–Convention of the Council of Europe of 15 October, 1985, which in Art. 4, on the scope of activity of local government, recommends that the management of public affairs should generally speaking be the responsibility of authorities that are closest to the citizens, and that decisions going against that principle should take into account the scope and nature of the task, as well as considerations of efficiency and economy.

Attempts have also been made to define the principle of subsidiarity in legislative work in Poland. The initial guidelines for the draft law on activity of public benefit (a term used to describe non-governmental organizations) carried a formula that could have led to a related constitutional principle: "Activity of public benefit should be conducted in compliance with the principle of subsidiarity, consisting in that public authorities (government and local government) engage in direct operational activity in the field of public benefit only provided that:

(1) the obligation to engage in a particular kind of activity follows from existing regulations [...] or (2) the public tasks in this field are not adequately executed by non-public agents engaged in activity of public benefit."[20]

During the proceedings of the National Assembly, an attempt was made to introduce the principle of subsidiarity into Chapter 1 of the draft in wording proposed by deputy Jerzy Ciemniewski ("The Republic of Poland protects voluntary individual and collective activity of the citizens within the field of implementing public goals, and restricts the social and economic functions of the State to activities indispensable for the implementation of the tasks of public authorities"). However, it ended in failure because it stressed the need to reduce the organizational and social welfare role of the State to a bare minimum. This proves that many who support including the principle of subsidiarity in the Constitution associate it with imposing an obligation upon the State to provide assistance to communities and individuals incapable of achieving their goals on their own, while at the same time they treat as marginal the idea of requiring such communities and individuals to undertake efforts to solve their problems relying on their own resources. This results from, among other things, the features of Polish society, where the prevalent attitude expects the State "to provide for the people", the ability to organize is rather poorly developed and efficient "intermediate levels" are very few.

It is worth stressing that introducing the principle into the Constitution was especially important with regard to the scope of State interventionism in the economy (cf. the formula used by an expert of the Constitutional Committee, Prof. Piotr Winczorek; "Public authorities should engage in only such kind of economic activity that cannot be independently undertaken by non-State economic entities and associations").[21] In one version of the constitutional draft (completed on 19 June, 1996), which did not envisage a preamble, the constitutional principle of the inviolability of ownership (providing for expropriation only for public purposes and only for adequate compensation) could have led to privatisation becoming illegal. That danger was avoided, while the Constitution in its Preamble contains the principle of subsidiarity, which also relates to the subsidiary character of the State's economic activity.

No doubt, the realization in constitutional law of the principle of subsidiarity is conducive to the development of civil society, one that is aware of its rights and duties and

[20] Izdebski, H.: *Fundacje i stowarzyszenia. Teksty i objaśnienia* [Foundations and associations. Sources of law and explanation]. Warszawa, 1996, 177.

[21] Constitutional Committee of the National Assembly. *Bulletin* No. XIV, 74.

able and willing to defend them, and also one that respects the rights and freedoms of others. On the other hand, though, the success and effectiveness of legal solutions inspired by that principle depends largely on citizens' civic maturity and political culture, e.g. on their willingness to compromise, respect for minority rights and so on. In countries that were deprived of democratic political practice for many decades, it is most important that those restructuring State and society should be guided by the postulates that together make up the principle of subsidiarity, yet achieving the full effect is bound to take time. For this reason introduction of the definition of the principle of subsidiarity into the Constitution would have been highly desirable.

* * *

Although created (at least by the groups that held the majority in the National Assembly, which decided on its adoption in the current version) with an assumption of juridicality, the Polish Constitution contains a large number of axiological references, especially in the Preamble. They enable us to decode the vision of the State assumed by the constitutional legislator, manifested in particular in the definition of the State as a special organization of society, built on the basis of certain principles, and locate it in the international context. In addition, the functioning of a society/community in the broadest sense, both inside and outside of the State, corresponds to the same assumptions: putting in first place the individual with his/her freedoms and rights and solidarity and cooperation in realising everything that is the common good at each stage of the organisation of human society.

Compared to the previous constitutional regulation, the currently applicable fundamental law contains many elements that are saturated with axiology. Before October 17, 1997, the basic norm determining the values upheld by the Republic of Poland was the then Art. 1 of Constitutional Provisions Maintained in Force, which provided that "the Republic of Poland shall be a democratic state ruled by law implementing the principles of social justice". From this principle, in its case law the Constitutional Court derived the axiological foundations of the relationship between the State and the individual in Poland, such as the right to life, right to trial, or right to privacy, as well as the principles of the functioning of the State organization: the supreme place of the Constitution in the system of laws, the autonomy of courts and impartiality of judges, the special role of a statute as the basic source of law, the operation of public authorities exclusively within the limits of, and pursuant to, the law, as well as the principle of non-abusive legislation, including prohibition of retroactive laws and the principle of protecting the citizen's trust in the State.

The constitutional regulation covers unequivocally and quite exhaustively the "component" principles of a state ruled by law, especially those relating to the rules governing the functioning of the state and its legal order. Therefore, the Constitutional Court has considered the principle of a state ruled by law, repeated in Art. 2 of the 1997 Constitution, as mainly an interpretation hint to assist in construing other norms (e.g. judgment K 28/97), and as an independent model for constitutional review where the Constitution did not offer sufficient regulations, for instance, with reference to the law-making principles (e.g., judgment K 10/98).

The principle of a democratic state ruled by law gained a new dimension in the new constitutional context. Both the notion of a "state ruled by law" and the "principles of social justice" it implemented must now be read through the lens of basic assumptions underlying the constitutional order in Poland and as implementing and protecting the set of values expressed in the Constitution. "Consequently, one cannot judge the respect for the principle

of a state ruled by law without taking into account the values identified in the Preamble to the Constitution and neglecting the principle expressed in Art. 1 of the Constitution: that Poland is the common good of all its citizens" (judgment TK 8/98). The concept of justice expressly mentioned in the Preamble became, together with other values referred to there, one of the principles that everyone is to treat "as the unshakeable foundation of the Republic of Poland". Respect for these principles and values is also a duty on the part of the legislative power. In this context (the juxtaposition of Art. 1 and Art. 2 of the Constitution) the main focus is on the principle of justice understood as a factor conducive to fairness or, in other words, a just balance of the interests of the society as a whole (common good) and interests of an individual.

The Republic of Poland was defined, as early as in the first article, as "the common good of all its citizens" (a similar expression is used in the Preamble and in the context of citizens' duty of concern for the common good–Art. 82), and subsequently as a state ruled by law "implementing the principles of social justice" (Art. 2). "The inherent and inalienable dignity of the person" was recognized as the source of freedoms and rights of persons and citizens (Preamble and Art. 30), while the Constitution–the basic law for the State–was declared as based (among other things) on "social dialogue as well as on the principle of subsidiarity in the strengthening of the powers of citizens and their communities" (Preamble). Therefore, the definition of the Polish State in the Constitution refers to values typical of the Christian-democratic theory on the system of government (the social teaching of the Catholic Church).

Social dialogue, solidarity and subsidiarity should be, according to the letter of the Constitution, the basic tenets of the State's law-making activity. These values assume special importance in the situation, where the principles of the market economy have become solidified in a country, with all the related social costs, which are particularly onerous in a period of poor business trends and the impoverishment and marginalisation of large groups of the population.

However, the quite clear and consistent axiology of the Constitution is realised only to a limited extent in the contents of legislation or in the assessment of conformity of lower-ranking instruments to the Constitution. There were sporadic, though increasingly frequent, cases in which the Constitutional Court based its judgments on this issue on the so-called "constitutional values", whereas applicants invoked them to support their theses as to the incompatibility of the challenged provisions with the more "specific" constitutional norms. This moderation is rooted in the opinion of the Constitutional Court that "constitutional values" are chiefly a starting place for interpreting other provisions of the Constitution. And so, the principle of subsidiarity is mainly referred to when elaborating on the interpretation of another constitutional principle, that of decentralization, while "common good" is used by the Court mainly to stress the interdependency between the rights of individuals and their duties to the whole of society, and the need to balance the interests of the individual and public interest.

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MICHEAL SILAGI*

The Preamble of the German Grundgesetz–Constitutional Status and Importance of Preambles in German Law

Abstract. Generally, normative acts are passed without preambles in Germany. The federal Basic Law of 1949, like the Weimar Constitution of 1919, however, did contain a preamble, which has been modified in 1990, upon German reunification. The predominant view on that preamble minimizes its importance for the interpretation of the operative sections of the Grundgesetz. Until 1990, the only normative directive read into the preamble by the Constitutional Court was the precept of the reunification of Germany. According to most authorities on constitutional law, the introductory reference to God (nominatio or invocatio dei) has no legal connotation whatsoever.

Keywords: proems to normative acts-nature and legal relevance, preambles in German legislation, the 1949 and 1990 preambles to the Grundgesetz, the precept of reunification of Germany as a normative directive before 1990, the reference to God *(invocatio dei)*

A) Introduction

Preambles, i.e. prologues or prolegomena, to operative parts of legislation take different shapes, and legislators pass normative acts together with such preliminary sections for quite different reasons.[1] Constitutional preambles might include references to the historical or political circumstances leading to the making or to the amending of a constitution. They might identify the bearers of the constituent power with respect to a particular territorial entity, or epitomize the political and moral conceptions of the drafters of the new codification. As will be seen, both versions of the preamble to the German Basic Law (the preamble of 1949 and the revised version of 1990, replacing the original wording upon German reunification) are very much related to the legal circumstances and political conditions leading to their adoptions at the resepctive date of their origin. Especially the original preamble of 1949, but, albeit to a lesser extent, the preamble of 1990, were also intended to point to the future.

Whereas the federal consitution of Germany, i.e. the Basic Law, as well as 14 out of the 16 constitutions of the federated Laender of Germany contain preambles, ordinary legal acts drafted after 1949, only rarely are preceded by introductory sections. Only statutory instruments (so-called "Verordnungen"), shall, according to article 80 of the German Basic Law, contain an introductory statement of their legal basis.[2]

* Professor, Senior Research Fellow, Institute of International and European Law, University of Göttingen, D-37073 Platz der Göttinger Sieben 5, Göttingen.
E-mail: intecolaw@gwdg.de

[1] On preambles in general see Fögen, M. T.: *Das Lied vom Gesetz*. Munich, 2006; Siedentopf, H.–Huber, N.: Präambeln, Vorsprüche und Zweckbestimmungen in den Rechtsordnungen der westlichen Welt. In: Hermann, H. (ed.): *Gesetzesvorspruch*. 1988, 37; Varga, Cs.: The Preamble: A Question of Jurisprudence. *Acta Juridica Hungarica*, 13 (1971), 101.

[2] Cf. Papenheim, A.: *Präambeln in der deutschen Verfassungsgeschichte seit Mitte des 19. Jahrhunderts*. Doctoral thesis, Münster, 1998, passim.

In other legal orders, introductory sections of ordinary legal acts frequently refer to the normative or constitutional basis of the particular act in superior legal norms, or they give reasons for or justify that act of legislation. Such references and justifications preceding the operative part of a law are known from the EU regulations or directives according to art. 296 TFEU[3] and they are commonly applied, e.g. in Spain, in the UK and the USA. In Germany, if the legislator deems it appropriate to give reasons for or justify his particular act of legislation, one ore more articles will be included in the operative part of the law, usually in an introductory section, holding so-called "Leitvorschriften", i.e. guiding rules. And even in the few cases where a preamble has preceded a legal act in German legislation since 1949, the operative articles of that act contained additional guiding rules, stating the purpose of legislating or containing definitions.

B) Preambles in German legislation

In the Federal Republic of Germany, the legislator's general dislike of proems to normative acts may be explained with the preceding practice of the Third Reich and the practice of the German Democratic Republic and, possibly, also with an aversion to the legislation of the authorities of the Allied Forces occupying Germany, Allied directives frequently including detailed introductory sections on the purpose and scope of a particular act. In the Third Reich and, to some extent, also in the German Democratic Republic, preambles to laws were quite a costumary way of informing the public of the ideological basis for and, thus, a manner to determine the content of a normative rule, and they were sometimes of more importance for the interpretation of a concrete act of legislation than the wording of the bill itself. As one author said in 1988, many legal acts passed under National Socialism, were literally opposed with their preambles. Such preambles were sometimes longer than the operative sections and they were deemed to be more closely related to real life and considered as more immediate and, therefore, less questionable manifestations of the will of the legislator. Thus, one could get the impression that the proems were intended to undermine the positive normative rules following.[4]

In spite of the mentioned general dislike of preambles, in exceptional cases, the German legislator, when passing a legal act, still felt it appropriate to make some delcaratory statement and include it by way of an introductory statement, even after 1949. Thus, in the case of the Lastenausgleichsgesetz (Equalisation of Burdens Act) of August 14, 1952, the preamble contained an acknowledgement of the special sufferings of the ethnic German expellees from the East with, however, no practical relevance for the system of equalization of burdens. The preamble was merely meant to be a political statement and it was not a substitute for those "Leitvorschriften", i.e. guiding rules in the first section of the law, especially art. 1, stating the "goals" of the compensatory payments to individuals for losses during and after World War II and the further articles containing definitions.

When, after World War II, the Austrian State regained its independence from the Germany, the authorities of Western Germany and Austria disagreed on the question, if and at what moment legal personality and capacity of Austria had been restored and whether Austrians had lost German citizenship as of April 26, 1945, or at some later date, or not at

[3] Art. 253 EC which has been replaced by art. 296 TFEU as of Nov. 1st, 2009, has been analyzed by Naumann, K.: *Eine religiöse Referenz in einem Europäischen Verfassungsvertrag*. Tübingen, 2008, 115–117.

[4] Siedentopf: *op. cit.* 42.

all. When regulating the loss of German citizenship by Austrians in 1956, the German legislator deemed it appropriate to state the official German legal point of view concerning the fate of the Austrian State in 1938 in a preamble to that act. According to that preamble the German Act of 1938 on Reunification of Austria and Germany had been valid at the time it was enacted, and it had only ceased to be in force at the end of World War II. Thus, Germany explicitly disagreed with the Austrian position, claiming that the law declaring the "Anschluß" had been void ab initio.[5]

C) The Constitutional Preamble

While ordinary laws generally were passed without preambles in the Federal Republic of Germany after 1949, the federal Basic Law of 1949, like the Weimar Constitution of 1919, contained a preamble–as do, according to an Austrian scholar, 143 out of 191 contemporary constitutions worldwide.[6] The original preamble to the Grundgesetz had the following wording: "The German People in the Laender Baden, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, Northrhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Wuerttemberg-Baden and Wuerttemberg-Hohenzollern, conscious of its responsibility before God and Men, animated by the resolve to preserve its national and political unity and to serve the peace of the World as an equal partner in a united Europe, desiring to give a new order to political life for a transitional period, has enacted, by virtue of its constituent power, this Basic Law of the Federal Republic of Germany.

It has also acted on behalf of those Germans to whom participation was denied.

The entire German people is called on to achieve in free self-determination the unity and freedom of Germany."

After World War I, in the Case of the 1919 Constitution, it was the general view that the preamble contained only some delcaratory remarks concerning freedom, justice, peace and progress. As Hermann von Mangoldt has stressed in his monograph explaining the Basic Law,[7] "under the present circumstances", i.e. the situation of the year 1949, the significance of the introductory remarks to the Basic Law must be viewed quite differently, having regard to certain aspects of the history of origin of the Grundgesetz (von Mangoldt was the leading public law expert among the CDU-members of the Parliamentary Council, whose members, from September 1, 1948, to May 8, 1949, were drafting the Grundgesetz basing themselves on proposals of the Council of Experts convened in Herrenchimsee in August 1948).

The legal moment of those introductory remarks, i.e. of the preamble to the Grundgesetz, could, of course, not be predicted when passing the Basic Law in 1949. One reason is the unforeseeable future state of Germany. Another aspect should be mentioned, too: According to the German Grundgesetz, the Federal Constitutional Court was and still is to be the Court of last (and in most cases also of first) instance in all questions concerning the authentic interpretation of the Grundgesetz and of judiciary review, and it is considered by some authors to be the equivalent of a permanent constitutional assembly. However, it cannot be doubted that the drafters of the preamble to the Basic Law in the Bonn

[5] Cf. Hailbronner, K.–Renner, G.–Maaßen, H.-G.: *Staatsangehörigkeitsrecht.* 5th ed., Munich, 2010, 2. StAngRegG marginal no. 2.

[6] Schambeck, H.: Verfassungsrecht, Religion und Geschichte. In: Kohl, G.–Neschwara, Ch.–Simon, T. (eds): *Festschrift für Wilhelm Brauneder.* Vienna, 2008, 469, 474.

[7] von Mangoldt, H.: *Das Bonner Grundgesetz.* 1st ed., Berlin, 1953, 29.

Parliamentary Council, wanted their constitution to be read and interpreted subject to certain provisos, based on the special circumstances of post-war Germany, which should be included in a preamble.

D. The Situation of 1949 mirrowing in the Preamble to the Grundgesetz

In 1948/49, it was the Western Allied Powers, who suggested to the Laender of the American, British and French zones of occupation to form a federal West German State. Its constitution should be drafted by a constituent assembly elected by the people in the several Laender and it should then be ratified by the Military Governors. Finally, it was to be submitted to popular vote and it was supposed to enter into force upon being accepted by a simple, though not qualified, majority of voters in at least two-thirds of the Laender.

The offer of the Western Allies to support the foundation of a West German Federation was considered to be a mixed blessing by the Laender. The Minister-Presidents, i.e. the heads of Laender governments, got into a state of conflict: There was the real danger that a State limited to the Western Zones of occupied Germany would further deepen the division between East and West. The Laender Prime Ministers accepted the offer of the Western allies albeit only with important reservations. The federal State to be established by the Laender in the Western Zones of Germany should be set up as a transitory entity and it should cease to exist upon Germany regaining its unity. Therefore, the assembly drafting the Constitution of that provisional State was not to be a constituent assembly elected by the people at large, but it was rather conceived as a Parliamentary Council, whose members were to be elected by the parliaments of the several Laender. The constitutional draft presented by that Parliamentary Council should not be submitted to popular vote as suggested by the Allied Powers; instead of being accepted by the people at large it should by ratified by a qualified majority of the Parliaments of the Laender involved in the drafting process. And to make it clear that the new fundamental law of the provisional federal State to be established was supposed to be provisional or transitional as well, that act was to be called Basic Law (Grundgesetz) instead of Constitution (Verfassung). In the beginning of the drafting process it was planned to conceive the Basic Law merely as an organisational statute of an occupied country. The Parliamentary Council wanted the preamble to the Basic Law, among others, to mirror the special circumstances of occupation, and the Council had therefore intended to adopt the following reference in the preamble to the limitations imposed upon the independence of the Federal Republic by the occupying powers: "The occupation of Germany by foreign powers has subjected the exercise of the right [to the free formation of national life] to severe limitations."

At a later stage, the General Drafting Committe of the Parliamentary Council, however, thought that a preamble stressing the restrictions to sovereignty caused by the Allied occupation would sound too much like resignation, and, finally, they avoided any mention in the Basic Law of the occupation regime and the legal relationship of the German law-maker to it. The historical circumstances of 1948/49 were, rather on the contrary, even veiled by the final draft of the preamble: Though the members of the Council drafting the Grundgesetz were neither chosen by immediate popular election nor did they submit the Grundgesetz to a popular referendum, the preamble stated that "the German People in the [enumerated] Laender, has enacted, by virtue of its constituent power, this Basic Law of the Federal Republic of Germany." When the drafting process of the Basic Law was completed, the fundamental law for Federal Germany was, therefore, no longer considered as just an

organisational statute of an occupied country. It had, rather, in the Words of the Constitutional Court, "ultimately assumed the guise of the constitutional charter of a sovereign state".[8]

With respect to the unforeseeable future, the Parliamentary Council had been very fortunate to drop its complaints for the lack of sovereignty and not to stress in the preamble to the Basic Law that, in 1949, the Parliamentary Council lacked self-determination and, therefore, could not pass a constitution proper. In 1990, those voices that were stressing the provisional character of the Grundgesetz of 1949 by referring to the preamble, and, upon reunification, were therefore pleading for its replacement by a genuine constitution for the whole of Germany, could easily be ignored. Upon reunification of the divided State of Germany in 1990, it would have been, however, much more difficult to refrain from drafting a genuine new constitution, had there been any explicit reservation in the original draft of the Grundgesetz, as to the lack of of German sovereignty in 1949.

Besides the dropped proviso concerning the lack of sovereignty of the entity to be called Federal Republic of Germany, the Parliamentary Council, when drafting the Grundgesetz, wanted several provisos to be included in its preamble. According to von Mangoldt[9] they were a) the right of the German people to self-determination, b) German unity, c) the enforced territorial limitation of the order to be established to only one part of Germany, i.e. Western Germany, d) the invitation of other, still excluded, parts of Germany to accede to the newly formed State, e) the name of the newly formed entity and f) its relationship to the German Reich, i.e. the question of continuity or State succession, then, under g), the provisional character of the fundamental Law to be passed, and, finally, h) the dropped statement on the lack of sovereignty. Except for the last point, all provisos had been somehow referred to in the Titel of or in the preamble to the Basic Law in 1949.

Already the title "Grundgesetz für die Bundesrepublik Deutschland" ("Basic Law for the Federal Republic of Germany") was meant to be an allusion to the last three provisos and the legal viewpoint of the majority of the members of the Council. The first part, "Federal Republic", replacing "Reich", was to indicate some distance from the Reich, especially the "Third Reich". That "Federal Republic" was used as an attributive noun to qualify Germany, was, of course, also meant as a plea for German unity. But calling the new State "Germany" should first of all demonstrate the identity of the Federal Republic with the Reich. Not only the official name of the Federal Republic, but also the statements in the preamble, according to which the "the German People [...] has enacted, by virtue of its constituent power, this Basic Law" and that the "German People" was "animated by the resolve to preserve its national and political unity", referred to the identity of the Federal Republic with the German Reich that was supposed to be "preserved". Besides calling the constitution "Basic Law", the preamble expressed the desire for a "new order to political life for a transitional period".

The references to the German people and to national and political unity alluded also to three underlying aspects of the situation of divided post-war Germany, which, according to von Mangoldt, had to be taken into account by the preamble to the Grundgesetz. These aspects were the question of German unity, then, the enforced territorial partition, allowing the new order to be established only in the Western parts of Germany, and, finally, the invitation of other, still excluded, parts of Germany to accede to the newly formed State. The 2nd sentence of the preamble, therefore, declared that the German people, by enacting

[8] Decisions of the BVerfG, Vol. 1, Part I, Baden-Baden, 1992, 19.

[9] von Mangoldt: *op. cit.*, 30.

the Basic Law, "has also acted on behalf of those Germans to whom participation was denied". And the 3rd sentence of the preamble was not only a mere declaration, but it called upon "the entire German people [...] to achieve in free self-determination the unity and freedom of Germany". Though the preamble was silent on and avoided any hint at the infringements of the occupation, this last sentence explicitly adverted to the right of the German people to self-determination as a precondition for the German people to become, as the preamble declared in its first sentence, "an equal partner in a united Europe". Thus, the authors of the Grundgesetz were demanding for the German State equal treatment and non-discrimination according to the general principles of international law.

E. The Legal Relevance of the Preamble

The reach of any legal impact of the original preamble could, of course, not be predicted at the time of the passing of the Basic Law in 1949. As mentioned before, it was up to the Karlsruhe Constitutional Court to ascribe material import to the preamble.[10] And until 1990, the only normative directive read into that preamble by the supreme constitutional judges, was the precept of reunification of Germany. It was their 1957 judgment ordering the dissolution of the Communist Party of Germany (KPD) and thereby forbidding any further activities of the KPD, which is considered to have been the guiding decision concerning the legally binding commitment of all German State organs to reunification.

When the Communist Party was to be dissolved, because it was said to oppose and fight the free democratic basis order established under the Grundgesetz, the attorneys defending the party argued that dissolution of the KPD would impede reunification and would, therefore, violate the Basic Law. In the first headnote of its dissolution order of August 17, 1956, the Court confirmed that the preamble to the Basic Law, though of special political importance, had also legal implications for the State organs. All State organs of the Federal Republic were obliged to aspire "with all strength" German unity and to refrain from actions impeding or making impossible reunification. The dissolution of the KPD was therefore decreed under the resolutory condition of all-German elections, in the case of which a Communist party would be allowed to run again.

The precept of reunification played a role again in the case concerning the Basic Treaty of December 21, 1972 between the Federal Repulic of Germany and the German Democratic Republic initiated by Bavaria. Only after its entry into force, on July 31, 1973, the Court gave an interpretation of that treaty in the light of the reunification precept of the preamble. The treaty was qualified as an inter se agreement between to segments of Germany that were separated from each other not by an international border but by a border similar to that between to West German Laender. If Karlsruhe had handed down that opinion, binding on the State organs of the Federal Republic, before ratification documents had been exchanged between Bonn and East Berlin, the German Democratic Republic would probably have stopped the exchange procedures. Therefore, the German Constitutional Court did not even grant an injunction demanded by Bavaria, but decided ex post, on July 31, 1973.

Except for the precept of reunification with its very limited influence on practical politics, the legal significance of the old preamble can be neglected. But the hazards of interpretation might have led to quite some problems in 1990. At that time a serious

[10] A list of the nine decisions of the Constitutional Court having referred to the preamble until 2009 is presented by Hobe, S. In: *Berliner Kommentar zum Grundgesetz*. Berlin (looseleaf, instalment of December 2009), marginal nos. 150–158.

discussion took place, as to whether Germany could continue with a Basic Law intended to be provisional. In this connection, along with its preamble, the final article of the old constitution could also be mentioned, where it said that "This Basic Law shall cease to be inforce on the day on which a Constitution adopted by the free decision of the German people comes into force." Read in conjunction with the desire expressed in the preamble "to give a new order to political life for a transitional period", the Constitutional Court could have possibly disagreed with the perpetuation of the Basic Law by transforming it into a regular constitution.

In the end, however, the provisos concerning the transitional and provisional character, which were inserted into the premable of the Grundgesetz in 1949, did not prevent the German legislator to extend the territorial scope of the original Basic Law to the former German Democratic Republic as of October 3, 1990.

F. The New Preamble of 1990

Upon reunification, some provisions of the Basic Law became out of date, however, and internationally improper. According to the "Two-plus-Four" Treaty of September 12, 1990, terminating the Allied rights and responsibilities for Germany, the existing outer frontiers of the two German States were to be final, and Germany undertook not to raise any further territorial claims. Therefore, art. 23 of the Basic Law of 1949, allowing admission of "other parts of Germany" to the territorial scope of the Basic Law, had to be cancelled. Concerning the preamble, the present order could no longer be conceived as to be meant for a transitional period of time only. According to the "Two-plus-Four" Treaty, there were also no longer any "Germans to whom participation was denied". The new preamble therefore reads:

"Conscious of its responsibility before God and Men,

Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constitutent power, have adopted this Basic Law.

Germans in the Laender of Baden-Wuerttemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, Northrhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people."

We have already mentioned that, if at all, the preamble of 1990 was only to a lesser extent intended to point to the future than the original preamble of 1949. Its main importance lies in the delcaratory remarks concerning the territorial saturation of the German State after reunification and concerning the end of the transitional period.

Still, in a decision of 2009, the German Constitutional Court referred to the "determination to promote world peace as an equal partner in a united Europe". Proclaimed in the preamble to the Basic Law. In itself, that statement does, of course, not stipulate any obligations for the State organs taking part in international efforts to develop a closer European Union, but as the Court held on June 30, 2009, in the decision concerning the Lisbon Treaty, the preamble emphasises the "moral basis of responsible self-determination" and, on the other hand, the "willingness to serve world peace as an equal partner in a united Europe".[11] This willingness becomes operational only, if read in conjunction with the operative clauses of the Basic Law on integration (arts 23, 24, 26). It is these clauses that lend

[11] BVerfG, Lisbon Decision of 30 June 2009, marginal no. 222.

empowerment to the declaration of willingness, declared in the preamble.[12] Therefore, it is from art. 23.1 of the Basic Law "and its preamble" that follows the "constitutional mandate to realise a united Europe".[13] Needless to say that the Court could have reached its conlusions as well without any reference to the "determination to promote world peace as an equal partner in a united Europe" as declared by the preamble.

G. "Conscious of its responsibility before God ..."–On the reference to God in the Grundgesetz

"Conscious of its responsibility before God and Men" (or mankind?) is the initial phrase, one might say the preamble to the preamble, of both the 1949 and the 1990 versions of the introduction to the Basic Law. The preamble to the Weimar Constitution did not refer to God,[14] and also the Herrenchimsee proposal of August 1948 did not yet containing any nominatio dei.[15] It was only at a late stage of its drafting by the Parliamentary Council that the quoted initial phrase of the Grundgesetz was first included in the preamble. There, "God and Men" as two cumulative points of reference for the reclaimed responsibility of the legislator of the Grundgesetz, were placed next to each other. Technically speaking, the introductory phrase of the preamble does not imply an "invocatio dei", but a "nominatio dei", a mere reference to God. The juxtaposition of God and Men minimizes, of course, the plausibility of any assertion of a specific religious connotation of the reference to God. It is hardly justifiable or arguable, at least as far as the original version of 1949 is concerned, to read more into the two references, made simultaneously and equally, to God and to Men, than a mere demonstration of awareness of the historic situation that led to the drafting of the new Basic Law and a change of consciousness due to the experiences, the German people had made during the years of National Socialism. Therefore, and considering the strict religious and ideological neutrality decreed by several operative articles of the Basic Law (first, by art. 4 on religious freedom, then, by art. 3 paragr. 3 and art. 33 paragr. 3, explicitly forbidding discrimination for religious or ideological reasons, and, finally, also by art. 140 with regard to religious association), most authorities on the Grundgesetz will agree that the reference to God in the preamble has "no legal connotation".[16]

Still, authors, of course, differ in their interpretations of the invocation of "God" in the preamble, and, notwithstanding the juxtaposition of God and Men, the historic circumstances, and the operative clauses in the Grundgesetz on strict religious neutrality, some constitutional lawyers see it differently. As late as 2009, one author commenting on the preamble wrote that the invocation of God, though not decreeing a State religion, was meant to refer to the threefold God of Christianity.[17] The author differentiates between the responsibility before God and that before Men, devoting five times more space to his remarks on God than to

[12] Lisbon Decision, marginal no. 222.

[13] Lisbon Decision, marginal no. 225.

[14] According to Schambeck: *op. cit.*, only 65 out of 143 contemporary constitutional preambles refer to God.

[15] On the different proposals concerning a naming of God (nominatio dei) or an invocation of God (invocatio dei) in the Basic Law, cf. Murswiek, D. In: *Bonner Kommentar zum Grundgesetz*. Heidelberg (looseleaf, instalment of September 2005), Präambel, marginal no. 19–24.

[16] Leisner, W. G. In: Sodan, H.: *Grundgesetz*. Munich, 2009, Präambel, marginal no. 2.

[17] See Hillgruber, Ch. In: Epping, V.–Hillgruber, Ch. (eds): *Grundgesetz*. Munich, 2009, Präambel, marginal no. 7.

those on Man. That interpretation would bring the God of the German preamble close to that of the Irish and Greek constitutions, the main difference beeing that Germany, of course, has no State Religion, the lack of a State religion beinig explicitly confirmed by art. 140 of the Basic Law.

The predominant view on the preamble, therefore, minimizes the importance of God. In the already quoted monograph of von Mangoldt on the Basic Law any reference to the invocation of God is missing. Von Mangoldt, himself a Christian Democrat, was commenting every other phrase of the preamble, also stressing differences between the Weimar and the Bonn preambles, but he did not even mention the introductory phrase of the Bonn preamble of 1949 concerning the responsibility before God and Men, although, in this point, the Weimar preamble was quite different. In 1991, Dieter Hömig, then member of the Federal Administrative Court, dropped only one sentence on the reference to God, when commenting the preamble of the Basic Law. He wrote that nothing could be drawn from the reference to God and Men but an indication to the "ideological state of the legislators" in 1949.[18] In 2010, the author, after having served on the bench of the Karlsruhe Constitutional Court, is less harsh, without, however, changing his opinion substantially. According to the 2010 edition of his comment, the reference to God still does not contain any religious or ideological message in the stricter sense. In his view, stressing the responsibility before God an Men, is tantamount to a rejection of all forms of totalitarianism and to confessing a minimum standard of pre-set values.[19]

Hömig's conception of the introductory clause of the preamble seems to be the prevailing understanding of it. That his interpretation is correct, can be seen from the limited or rather non-existing practical relevance of the "nominatio dei" in constitutional jurisdiction. It has not been referred to by the German Constitutional Court, especially in the recent cases concerning religious instruction in East Germany. It has also not been discussed, when the Court had to decide on the question of shop closing hours, where the special protection of Sundays and religious holidays by the Basic Law was affirmed by the Court, or in the case concerning removal of crucifixes from class-rooms. If the appelants in a constitutional complaint (e.g. concerning religious instruction in Brandenburg) argue with the invocation of God in the preamble, the Court dismisses that argument for procedural reasons without referring at all to the invocation in the merits, because no enforceable rights can be drawn by appellants of a constitutional complaint out of the preamble.

As to the several Laender of the Federal Republic of Germany, nine out of the 16 constitutions of the Laender do not refer to God in their preambles at all[20] (the Constitutions of Saarland and of Schleswig-Holstein do not contain preambles at all)–already before reunification, it was seven out of eleven constitutions, among them the Saarland: Contrary to the French conception of secularism, the constitution introduced in the territory of Saarland, when it was under French control after World War II, contained a preamble with a reference to God.[21] Upon reintegration into the Federal Republic of Germany, in 1957, the

[18] Hömig, D.: *Grundgesetz für die Bundesrepublik Deutschland.* (Seifert, K.-H.–Hömig, D. eds), 2nd ed., Baden-Baden, 1991, Präambel, marginal no. 2.

[19] Hömig: *op. cit.*, 9th ed., 2010, Präambel, marginal no. 2.

[20] In Austria, neither the federal constitution nor the basic laws of the federated Laender–with the exception of the preamble to the Tyrolian constitution of 1989–contain references to God. Cf. Moser, M.: Nicht jedem Anfang wohnt ein Zauber inne. Vom B-VG 1920 zur gegenwärtigen Präambeldiskussion. In: Ehs, T. (ed.): Hans Kelsen. Vienna, 2009, 193 (201).

[21] Bosig, R.: *Die Verfassung des Saarlandes.* Cologne, 2001, 128.

preamble was removed. On the other hand, the provisional Constitution of Lower Saxony of 1951 and the Constitution of 1993 did not contain a preamble. But in 1994 the representative organs of the Protestants, the Catholics, and of the Jews in Lower Saxony were demanding the inclusion of God into the new Constitution, and they succeeded in collecting 120 000 signatures in a popular initiative. Thereupon, the Parliament of Lower Saxony amended the Constitution. An introductory clause, similar to the first part of the prologue to the Grundgesetz, was adopted, proclaiming that "The people of Lower Saxony, conscious of its responsibility before God and Men, has, by their representatives, enacted the following Constitution".

Any invocation of God seems to be of little relevance, however, and moderate as well as orthodox theologians even find it presumptious to have God invoked in a secular constitution. In the fedarated State of Brandenburg, the two Christian Churches themselves agreed on the omission of God from the new constitution.[22] In 1949, it was, among others, the prominent Protestant Bishop of Berlin, Otto Dibelius, who rejected any reference to God in the Grundgesetz.[23] In 1990, Wolfgang Ullmann, an outstanding Protestant cleric and East German dissident, deputy of the last Parliament of the German Democratic Republic and, after reunification, till his death in 2004, member of the Bundestag and the European Parliament for the Green Party, had suggested to completely drop God from the preamble of the Federal Basic Law.[24] Therefore, not only the lack of legal significance should make legislators refrain from referring to God in State Constitutions.

With regard to the missing ideological or religious homogeneity, in Germany and its Laender as well as in most of the other European States, the invocation of God might not prove to be fateful or momentous, but it has created and will create problems, e.g. at present, in Germany, with its Muslim minority. Here, Christian Wulff, now the German President, had appointed the first Muslim State Minister, when he was still head of government of Lower Saxony. When the nominee took her official oath, adding, "so help me God", she was asked what invoking God meant in her case, and she told an astonished audience that she was invoking Allah.

Following the much disputed remarks on integration in the speech held by the German President, Christian Wulff, on October 3, 2010, the discussion on whether there are religious values underlying the order of the Grundgesetz, has become more heated. Only ten days after that controversial speech, on October 13, 2010, Friedrich Wilhelm Graf, a protestant scholar at the Munich University, internationally of great academic repute and of high theological standing, warned of the consequences of "babtizing" the Grundgesetz.[25] According to Graf, it would be utterly wrong to assert that the Grundgesetz is based on a "Christian-Jewish heritage", the German constitution being the result of enlightened thought. And he cautioned against qualifying or modifying the difference between rights and religion and between rights and morals.

Thus, it seems that respect and esteem for God should make us hesitate to invoke Him carelessly in the secular and profane context of any secular Basic Law or Constitution.

[22] Papenheim: *op. cit.* 163.

[23] Murswiek: *op. cit.* marginal no. 23.

[24] Papenheim: *op. cit.* 123.

[25] Wir sollten das Grundgesetz nicht taufen [We should not babtize the Basic Law]. An Interview with Friedrich Wilhelm Graf. *Süddeutsche Zeitung*, Munich, 13 October, 2010.

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VIKTÓRIA LINDER*

Balancing between the Career and Position-based Systems. Some Aspects of Recent Developments in Civil Service Legislation in Hungary

Abstract. This article analyses some aspects of the wavering course the Hungarian civil service is taking between the career and position-based systems. Since the turn of the new millennium a number of new measures have been introduced in civil service legislation. These reforms have pushed the employment system of the civil service in two directions simultaneously. While some of the new elements have aimed at dismantling what had been a quite typical career-based system, others have further entrenched it. These very frequent, detailed, but less than consistent amendments to the civil service legislation have resulted in a climate of uncertainty. It remains to be seen which tendency will prevail in the coming years.

Keywords: civil service legislation, career and position-based systems, modernisation attempts in HR-management

I. Historical backgrounds before the naissance of the organic civil service code, in brief

The first steps towards creating a professional civil service in Hungary were taken in the third quarter of the 19th century. Since that time a great number of measures have been implemented to regulate the legal relationships of state employees. Up until the outbreak of the First World War, a strongly career based civil service system was created in our country, with all of characteristics of the Weberian-type civil service, regulated by many arborescent legal instruments. No unified civil service code has existed to date, but every element of the ideal-typical career civil service system[1] was regulated, except what is surely the most important one: for the recruiting and selection of civil servants there existed no unified regularization.[2]

The career civil service system existed until the end of the Second World War. After the subsequent elections, the winning communist party wanted to control all the important

* Ph.D., Research fellow, ECOSTAT Institute for Research of Economy and Society, H-1024 Budapest, Margit krt. 85.
E-mail: viktoria.linder@t-online.hu

[1] Bekke, H. A. G. M.–van der Meer, F. M.: *Civil Service Systems in Western Europe.* Cheltenham-Northampton, (MA), 2000; Gajduschek, Gy.: *Közszolgálat. A magyar közigazgatás személyi állománya és személyzeti rendszere az empirikus adatok tükrében* (Civil Service. On the Personnel and Personnel System of the Hungarian Public Administration with empirical Data). Budapest, 2008; Weber, M.: *Gazdaság és társadalom I* (Economy and Society I). Budapest, 1987.

[2] Lőrincz, L.: *A személyzeti politika változásának szakaszai a magyar közigazgatásban 1945 után* (The Changes of Periods in Personnel Policy in the Hungarian Public Administration after 1945). Budapest, 1986; Lőrincz, L.: A szocialista zsákmányrendszertől a merit-system küszöbéig (From the Spoil System in Socialism until the Door-step of the Merit-system.). In: Lőrincz, L.: *A magyar közszolgálat. Közigazgatási szakemberképzés a XX. században* (Hungarian Civil Service. Training of Public Administration Experts in the XXth Century). Budapest, 1995.

posts in public administration and thus polish off the ancien régime. So, the public administration became "cleared" of all of the professional civil servants of the "rotten" old regime. The newly created posts were filled with faithful party-comrades, no matter if they were ill-educated and incompetent at carrying out the tasks of administration. The direct and inevitable consequence of these actions was the radical and disastrous decrease in the working standards of the administration.[3] As in those days it was the state, which exclusively owned all companies, the communist party proclaimed that there was no need to regulate the employment relationships of people serving in administration differently to those of other employees working in any branch of the economy. Legally speaking, by using the fiction of all employees working for the state–no matter if they worked in industry, agriculture, education or administration–all belonged organically under the scope of the nationwide applicable, unitary labour code. From the 70s and 80s onwards, however, it was gradually recognized that the tasks of public administration differ in several respects from other occupations. Consequently, various measures were taken over the years in order to accentuate the differences in the regulation of these employment relationships (this has also been the case concerning other branches of state power–courts, state attorney offices, etc.).

II. The advent of the organic civil service code

During the period of political transition in the 1990s Hungary, was the first country in the Central Eastern European region to accept a new form of civil service regulation.[4] After the collapse of the communist regime, for the new democratic states in transition there were plenty of Western examples to choose from in shaping the basic institutions of the new rule of law, taking into consideration the requirements of the division of power, etc. This was also the case in shaping the new structure of public service. As the transition period in Hungary ran in parallel with the first steps of Europeanization in creating the new personnel system in public administration, there existed a need to settle it in a way which suited the standards of the European Union, too. For the Central and Eastern European Countries, the forming of the new personnel policy first of all meant the need to conceptualize a new set of principles for the civil service. After the change of regime in Hungary the new, democratically elected Parliament had to answer several fundamental questions. So, it was necessary to decide whether it was rational to regulate the employment relationships of public employees differently from the general labour code. (As was mentioned earlier, in the last years before the change of regime the differences became increasingly evident.) Furthermore, the question of how to delimit the notion of public service demanded an answer–in order to decide whether all employees of the state and municipalities should belong under the scope of a single framework code, or whether the different categories of the public service should be subject to different codes depending on their various special characteristics. There was also another question to be answered, namely, where the regulatory dividing line between elected officers and employed professionals lay. Finally, there was the fundamental question of where to draw the demarcation line between the political sphere and the executive power.

[3] Lőrincz.: *A személyzeti politika változásának szakaszai...* (The Changes of Periods in Personnel Policy...). *op. cit.*; Lőrincz: *A szocialista zsákmányrendszertől...* (From the Spoil System in Socialisme...). *op. cit.*

[4] Balázs, I.: *Rugalmasság a közigazgatásban* (Flexibility in Public Administration). In: Fogarasi, J. (ed.): *A közigazgatás személyi állománya* (The Personnel of Public Administration). Budapest, 1995.

In response to these questions and the prevailing circumstances the Hungarian Parliament gave their answer in 1992, by accepting several codes regulating the employment relationships of different categories of persons employed by the state and private sectors. This year also saw the passing of code No 23 of 1992 regulating the legal relationships of the civil service organically, but separately from the employees belonging under the scope of the general labour code and also separately from other categories of the public service, who–depending on their status and special characteristics–belonged under the scope of other codes. The code on the civil service enumerated the types and specified the concrete organs which employed civil servants. These were the organisations of the public administration on central, territorial and local level-both in the state administration and in municipalities. (In addition there are some offices of other state organs which also employ civil servants to run the offices of these state organs.[5]) Other categories of public employees include public servants, judges, state attorneys, officers of armed forces, etc.–their legal status and employment relationships are regulated by separate laws. In Hungary elected officers do not fall under the notion of "public employee". The basic and "background" law for employment relationships is the Labour Code.

The civil service code passed in 1992 was the first in Hungary to regulate the legal and employment relationships of civil servants organically, but many other legal instruments (government decrees, decisions, etc.) have appeared which complement it. The structure of the civil service regulation of 1992 aimed to create a career civil service system–similar to the one which had existed until the end of World War II. In most of its dispositions and arrangements it has also succeeded in fulfilling this endeavour. This regulation, under the scope of public law, determined the different elements of civil servants' employment relationship, such as admission requirements, career development, promotion and remuneration, the training and appraisal system, the question of life-time tenure and dismissal, etc. However, as was also the case with the regulation from the inter-war period, this code did not address the question of access to the civil service; that is, recruitment and selection as a whole.[6]

III. The context of modernisation efforts in the civil service after the millennium

Turning to the most important developments in Hungarian civil service legislation after the millennium, several factors ought to be mentioned, which prompted the new measures and also correlated with each other. These factors are part of the constant endeavour to motivate civil servants better, with the aim of enhancing their performance, in order to cut down the expenditures and costs of the public sector, and at the same time to meet the needs of citizens for a better public administration in the 21st century. These ideas are very common in discussions about civil service modernisation in the whole of the developed world. The

[5] After 18 years of this type of categorization, from June 2010 a new law (No LVIII of 2010 on the status of civil servants of central government) has come into force after being passed by the newly elected Parliament. This law draws several distinctions between the civil servants of the organs belonging to the central government and those of municipalities and other state organs. This paper does not analyse this newly published legislation.

[6] Linder, V.: Versenyvizsgák a közigazgatásban (Councours in Public Administration). *Magyar Közigazgatás*, (2006) 12; Lőrincz, L.: Kiválasztás a közigazgatásban (Selection in Public Administration). *Magyar Közigazgatás*, (2000) 6. és (2000) 8; Lőrincz, L.: *A közigazgatás alapintézményei* (Basic Institutions of the Public Administration). Budapest, 2005.

tools for accomplishing these tasks have also been widely tested since the 1980s. Since then, in the course of different civil service reforms in various countries there have been many attempts to adapt the human resources management tools used in the private sphere to the needs of the public sector. The idea behind this was that public servants–including civil servants–should be motivated by the same measures as ordinary people employed on labour market; that the rigidity of the normatively regulated, non-responsive carrier systems should be lessened, and that civil servants should be personally interested in working and serving in a more effective and efficient way.

In a mere 20 years, since 1992, the Hungarian civil service code has been amended more than 70 times.[7] The most important amendments and at the same time the most relevant ones–in connection with the dichotomy mentioned in the title of this article–the career vs. position-based systems–have been introduced since the millennium. From that time onward the most committed believers in civil service modernisation have introduced a lot of new measures in the Hungarian civil service legislation, hoping to solve–at least partially–the problems of the costly, slow acting civil service. These deep seated problems, which were far from new, could not be deal with in one or even several blows. The modernisation measures introduced "from abroad" were not new. The countries, which began to apply these internationally known, quite similar modernisation attempts in the course of the 1980s and 1990s have by now accumulated a wealth of experience. But these experiences have also been enough to declare that these initiatives were not the "miracle cures" for all of the problems of the civil service.[8] The slogans heard in the Hungarian civil service during the last decade were the same as those proclaimed in Western countries,

[7] Hazafi, Z.: *A karrier rendszerű szabályozás múltja, jelene, jövője a közigazgatásban a köztisztviselők jogállására vonatkozó törvény változásainak tükrében* (The Past, Present and Future of the Career-type Regulation in Public Administration, with Special Regards to the Changes of Civil Service Act). Budapest, 2006.

[8] See for example Bouckaert, G.: La réforme de la gestion publique change-t-elle les systèmes administratifs? *Revue française d'administration publique*, (2003) 105–106; Bouckaert, G.: Moderniser l'État. La route à suivre. Le Commentaire. *Revue Internationale des Sciences Administratives*, 72 (2006) 3; Bouckaert, G.: *Changing World, Changing Public Administration: New European Trends*. Conference Paper. Budapest, 2009; Gajduschek, Gy.: Egyéni teljesítményértékelés a magyar közigazgatásban. Egy funkcionális elemzés (Personal Performance Evaluation System in the Hungarian Public Administration. A Functional Analysis). *Vezetéstudomány*, 38 (2007) 1, Gajduschek, Gy.: A köztisztviselő munkájának értékelése: a magyar jogi szabályozás és a gyakorlat elemzése az empirikus adatok tükrében (Evaluation of the Civil Servant's Work: Analysis of Empirical Data in Respect of the Regulation and Praxis in Hungary). *Humánpolitikai Szemle*, (2007) 11–12; Gajduschek: *Közszolgálat...* (Civil Service). *op. cit.*; Haque, M. S.: Moderniser l'État. La Route à Suivre. Sa Contribution et sa Critique. *Revue Internationale des Sciences Administratives*, 72 (2006) 3; Kettl, D. F.: Moderniser l'État. *Revue Internationale des Sciences Administratives*, 72 (2006) 3; Linder, V.: *A magyar közszolgálati humánerőforrás-gazdálkodás nemzetközi összehasonlításban* (The Human Resource Management in the Hungarian Civil Service in International Context). Budapest, 2009; Lőrincz, L.: A kormányzás modernizációja (The Modernization of the Government). *Magyar Közigazgatás*, (2006) 11; Lőrincz, L.: Közigazgatási reformok: mítoszok és realitás (Reforms in Public Administration. Mythes and Reality). *Közigazgatási Szemle*, (2007) 2; Premfors, R.: Modernising government. The way forward. *International Review of Administrative Science*, 72 (2006) 3; Talbot, C: Modernising Government: The Way Forward–A Comment. *International Review of Administrative Sciences*, 72 (2006) 3; OECD: *Modernising Government: The Way Forward*. Paris, 2005; OECD: *Performance-related Pay Policies for Government Employees*. Paris, 2005.

which have tried to solve the problems in their civil services–or speaking in a broader context in their public service–in the 1980s, and consisted mostly of applying the solutions of the New Public Management. However, and despite our late attempts to try to adapt these solutions, we paid scant any attention to the clear warnings that "Context matters".[9] These warnings imply that modernisation efforts, which have met with some success in one country, will not necessarily succeed in others–particularly if the timing, economical and social contexts, cultural and administrative traditions, etc. are not taken into consideration. Another key issue and one of the potential causes of the difficulties with the modernisation efforts in the Hungarian civil service has been the fact that the starting point of every reform measure has always been codification. This has meant that every time a modernisation measure has been introduced, a new legal instrument has been passed or maybe an old one amended. It is hardly surprising then, that when for example a management tool "copied" from private sector human resource management is introduced by legislative tools into a career civil service system, with no significant adaptation or testing, for almost 100 thousand civil servants, from one day to another, is not a success. Indeed, this kind of implanting has proven de-motivating for civil servants.[10] Several examples of this type of attempt at reform can be found as we will see in the next chapter.

IV. The most important developments in legislation in recent times

Under the aegis of the modernisation of civil service employment relationships in Hungary, a series of new measures have been introduced by legislative tools over the last decade. Most of these initiatives–following one trend–have aimed to open up the thus far quite strict career system, while others–following a different trend and in other aspects–have tried to reinforce it.

The most relevant guiding principle behind these processes has always been the aim of enhancing the performance of the civil service, in order to better serve the needs of the citizens for a better public administration, and at the same time to realize this task in a less costly manner. The tools for carrying out this endeavour have been first and foremost practices adapted from human resources management in the private sector. In consequence these tools–which have been widely tested in the civil services of many countries in recent years–have been adopted by passage of legislation in Hungary, too. However, due to the fact that the Hungarian legal system is of the German-type, a quite grotesque situation has emerged. Thus, the management tools which were adapted, such as various types of individual personal performance appraisal systems, performance-related pay and competency management have been accompanied by very detailed and exhaustive legal regulation. Furthermore, this regulation has been nationwide and unitary in character–without taking

[9] Bouckaert: *Moderniser l'État... op. cit.*; Haque: *Moderniser l'État... op. cit.*; Kettle: *Moderniser l'État. op. cit.*; OECD: *Modernising Government... op. cit.*; Premfors: *op. cit.*; Talbot: *op. cit.*; OECD: *Modernising Government... op. cit.*; OECD: *Performance-related Pay Policies... op. cit.*

[10] Following the collocation of the different stages of convergence in the field of public administration modernisation by Christopher Pollitt, these solutions in Hungary incorporate the so-called »decisional convergence«–when a decision is adopted on the introduction of a measure which fits into a modernisation trend. The phases specified by Pollitt in series are discursive convergence, decisional convergence, practice convergence and results convergence. Pollitt, Ch.: Clarifying Convergence. Striking Similarities and Durable Differences in Public Management Reform. *Public Management Review*, 3 (2001) 4, 471–492; Pollitt, Ch.: Convergence: The useful myth? *Public Administration*, 79 (2001) 4, 933–947.

into consideration the different branches of public administration, local conditions, the type of work, etc. Let us now consider these in greater detail.

In 2001 the organic civil service code was amended in many of its provisions. It was then that the *compulsory individual personal performance appraisal system for the whole civil service*–including central, territorial and local level, state administration and municipalities[11]–was introduced. At the same time *performance-related pay* (PRP) was connected with this process. According to the provisions of the code, the head of the organisations of public administration had the right to adjust civil servants' annual salaries by as much as minus or plus 20%, according to the results of their performance appraisal.[12;13] Of course, the payment of the performance related pay also depended on the financial circumstances of the public administration organ. According to the results of research carried out by the Hungarian Institute of Public Administration[14] after the introduction of performance related pay, the civil servants were initially keen on it and felt motivated by the new HR-instrument, which sought to replace the existing rigid system of remuneration connected to seniority. After some years of experience, however, the results have been disappointment and demotivation: the causes of the failures were just the same as in other countries that had introduced PRP earlier, for example not enough budgetary tools for compensating good performance,[15] deficiencies in measuring performance objectively, inequity in distribution among the organisations, but also among organisational units or civil servants, too many administrative tasks associated with the appraisal system, etc.

Having confronted the failures in the functioning of PRP, but having then failed to remedy them, the government decided to implement a *new individual personal performance appraisal system* alongside the old one. From 2007 onwards, another type of personal performance appraisal system was gradually introduced for civil servants of the central state administration. This type of appraisal system was connected to the payment of bonuses. The new individual personal performance appraisal system involved a very complicated process, implying also a lot of administrative tasks for evaluated civil servants, as well as for managers and HR staff. To give an example of the complexity of the system, the new type of appraisal was meant to take place 4 times per year (including the self-appraisal of the civil servant), then at the end of the year a 5th, complex appraisal was to be carried out, including the whole-year evaluation of the civil servant. When it came to awarding bonuses, depending on the budgetary tools of the public administration organ, the number of civil servants awarded was pre-determined at different levels, using different methods.[16] The amounts of the bonuses awarded also depended on the salary of the civil servant. The calculation method for civil servants differs from that of managers; it is of course more advantageous for the latter. Despite the name of this HR-tool, the new performance appraisal system doesn't measure only the civil servants' performance itself, but also his/her comportment and the development of his/her competency level. This means that performance management, competency management and performance related pay have all been included

[11] Up to 100 thousands civil servants then.

[12] The process of the performance appraisal have taken place at the end of the year.

[13] This rate is quite higher then the average in international praxis.

[14] After decades of existence the Institute was dissolved in 2006.

[15] In spite of the absence of satisfactory budgetary tools, the rate of the performance related pay has been modified in the code later up to –20% – +30%.

[16] In fact, civil servants awarded by bonuses are few in numbers, but the amounts awarded for the few are quite high (although, in consequence of budgetary restrictions, they have been cut back).

in one single HR-management process. This is a situation, which the international praxis and literature explicitly warns against, due to the fact that competency management should be connected to input while performance management is linked to output. Merging them in a single management process is a hopeless undertaking, with many obstacles.[17]

It is a quite strange phenomenon that with the introduction of the new forms of appraisals in the last decade, there exist at present 3 types of appraisal systems in the Hungarian civil service. As the third type of appraisal, called the "evaluation system", has been in place for many years now I will not discuss it in detail here. This evaluation system takes into consideration the results of the performance measurement and other facts, which may be relevant in connection with the work of the civil servant. This "old" evaluation system parallels and overlaps with the other two forms of appraisal currently in place. Taking into consideration the experience gained over recent years, the present setup is a costly, time consuming process, whose functioning has been rather demoralising for civil servants and managers.[18] It is clear then that in order to make it more efficient it needs to be fine tuned in the future.

Another element already mentioned in connection with the newly applied performance appraisal system is the introduction of *competency management* in the Hungarian civil service. In recent years competency management has been applied

– as an evaluation criterion of the subsequently introduced personal performance appraisal (bonus) system, and

– as an element of the newly introduced recruitment and selection system.

Below I will briefly describe the *new recruitment and selection system* of Hungarian civil servants, with the accent on newly introduced elements. As mentioned below, the unified access into the civil service was not regulated in Hungary until recently. As a true novelty, the introduction of the centralized recruitment and selection system, which has taken place gradually since 2008, has been an important and widely discussed change in our civil service legislation. This very detailed and complicated new system has been a step in the direction of a strict career-like system.[19] According to the legislation in force from 2008 until 2010, applicants wishing to be employed in the civil service must meet the following requirements:[20]

1. the general conditions of acceptance–uniformly regulated for the whole civil service;

[17] Horton, S.–Hondeghem, A.–Farnham, D.: *Competency Management in the Public Sector: European Variations on a Theme.* Amsterdam, 2002.

[18] Based on data collected during our research named »The staff of public administration« in the framework of the European Union's Regional Operative Programme 3.1.1 carried out in the Hungarian Institute of Public Administration (leader of the research team: György Gajduschek).

[19] While other measures taken at the same time–for example the facilitation of the dismissal of civil servants, or the restraining of the severance pay for them, among others–have broken up the career-like system.

[20] After the parliamentary elections in 2010, this newly elaborated recruitment and selection system has been suspended in most of its elements. At the moment (summer 2010) the so-called councours (competitive entering exam) can be passed voluntary, and the competition process is not generally obligatory any more.

2. the 3-stage competitive entrance exam, the so-called "concours" (1st part: multiple choice test, 2nd part: a set of other types of written examination, 3rd part: oral examination)– as a general condition for acceptance;

3. the specific conditions for acceptance–determined for specific posts;

4. the generally obligatory competition procedure (carried out centrally in central administration; and also centrally published at other levels of public administration);

5. the competency evaluation(s)–in certain cases including 3 types of evaluations [a) interviews, b) tests for assessing the suitability of the candidate, c) assessment centres];

6. any further types of assessments when the head of the public administration organ, advertising the vacant post feels it necessary;

7. the generally compulsory half year-probation period.[21]

As the general and specific conditions of acceptance, these are quite similar as those which are in place in the other member states of the European Union, which have a civil service with elements of a career system. From 2009 onwards, passing the "competitive" entrance examination, the so called concours, has also become a general condition for nomination. The design of the newly introduced Hungarian concours was drawn up according to international standards, based on international praxis (on French examples and the praxis of the institutions of the European Communities). In its other fundamental elements, however, it has failed to meet the requirements of a real concours; a real competitive entering examination. In a nutshell, the Hungarian-type concours is not a truly competitive examination. This is due to several factors: First of all, every candidate for a civil service position is required to take the entrance examination, but no provision has been made to ensure that the candidates will be ranked according to the results they achieve. The new central organ responsible for the coordination of the human resources management of the government is able to rank candidates while taking into consideration other factors too (it is not clear exactly how.) In addition, the head of the organisation wishing to fill a vacant post has the right to choose new colleagues at his/her discretion. The other problem has been that all candidates–regardless of their qualification, profession, the post to be filled, etc.–must pass the same examination with the same content. The topic is the same for every candidate. (The only distinction is that people with secondary education have to meet lower requirements[22] than those with tertiary education.) So, for example a biologist has to compete with a lawyer. Perhaps civil servants in English speaking countries, with completely different administrative cultures (and education systems) may wonder why this is a problem in our country. But in Hungary, with its German-type legal system, where public administration studies are also strictly determined by legal thinking and the knowledge required (also) for this examination is dominated by legal materials, equality of opportunity becomes highly questionable using this method. After functioning for a short period of time, it has become clear that if the "Hungarian-type concours" is to function in the future, this anomaly requires correction.

Competency management is another newly adapted HR-management tool, which has recently been introduced in the Hungarian civil service system. This management tool, first applied to the HR-practice of market oriented companies several decades ago, has been a quite new phenomenon in public administration. In many countries competency management

[21] Linder, V.: A közigazgatás személyi állománya (The Personnel of the Public Administration). In: Kilényi, G. (ed.): *A közigazgatási jog nagy kézikönyve* (The Big Handbook of Public Administration). Budapest, 2008.

[22] In fact the thematic has been less comprehensive for them.

has gained ground gradually in public organisations, too. Public managers began to feel it necessary to adapt competency management, and use it in the HR-activity of their organisation in order to make it more effective and more responsive to the requirements of modern HR-management.[23] The most important HR field, where most of these countries–or to be precise most organisations in different countries–have applied competency management is the selection process and the definition of training needs. In this respect, Hungary also fits into the wider trend, and there is no doubt that this management tool can add value and develop traditional approaches in positive ways. But there are some aspects which require further consideration: it is disputable whether competency management should be regulated by law and government decree as it is in Hungary. The real purpose of this management tool is to serve the needs of an organisation according to local circumstances. In order to meet this need it is usually the public managers who decide on its application. It is also unusual, and both theoretically and methodologically questionable that the evaluation of competencies–and what is done with the results of such evaluations–has been directly connected with the process of performance management and with the payment of bonuses (!), as we saw earlier.

As to other elements of the relatively recently introduced, and for the moment suspended unitary selection system (for example the generally obligatory competition), which have tended–from one point of view–to strengthen the civil servants' career system, it remains for the moment unclear, whether they will function in the future and when they do, in which way.

V. Conclusions

This article analyses the Hungarian civil service's tentative path between the traditional career and the so-called position-based systems. During the transition period from the communist regime to a democratic rule of law, the legislation of the Hungarian civil service has taken the form of organic civil service legislation, which has regulated the employment relationships of Hungarian civil servants'–in most of its provisions–in a career system. After the millennium, reacting to the modernisation needs of the personnel system of public administration, the Hungarian legislatures introduced a lot of new measures–all of them by legal instructions. The new legal instruments and the amendments of old ones started to change the system in two directions. While some new elements aimed to dismantle the career-like system (for example the introduction of the performance management system and performance related pay, the extending of the possibilities for dismissal, etc.), others have deepened the career-elements (for example the introduction of a new generally obligatory recruitment and selection system–in a detailed and complicated procedure). These very frequent but not at all consistent modifications to civil service legislation have resulted in an incertitude, which has done a lot of damage to the prestige of the civil service. After the new government came to power in the spring of 2010, it is not possible to predict which trend will continue in the future. The only sure thing is that the current decision makers would like to amend–and have already partially amended–the civil service legislation with just the same aims, which motivate the reform processes in all countries of the developed world and which have also been witnessed since roughly the middle of the 1990s in Hungary: cutting the costs of public administration, motivating civil servants and enhancing the capacity and reliability of the civil service in order to better serve the citizens' needs. The newly published solutions must be analysed in another paper.

[23] See Horton–Hondeghem–Farnham: *Competency Management in the Public Sector... op. cit.*

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JÓZSEF SZABADFALVI*

From Original Sources–Neo-Kantian Legal Philosophical Thinking in Hungary

The traditions of Hungarian legal philosophy followed the various periods of the Continental legal philosophical thinking until the mid-20th century. The oeuvres of the most significant legal philosophers are not restricted to the interpretation of the achievements of the more developed legal cultures, but are also reflected in independent theoretical efforts. In addition, Hungarian neo-Kantian theorists have created a number of works acknowledged internationally.

Among these studies, *Juristische Grundlehre*[1] by Felix (Bódog) Somló and *Rechtssoziologie*[2] by Barna Horváth distinguish themselves, being frequently cited in international legal literature and available in renowned libraries across Europe. In addition, a number of other studies written by the above-mentioned authors in the German language must be mentioned. In addition, a number of references by European contemporaries, especially to Julius (Gyula) Moór's works, appeared in publications between the two World Wars as well as in the years afterwards.

Somló's monograph, first published in 1917, was reissued by the same publisher[3] ten years later, due to its favourable reception and general interest, and this was then followed by a third reprint by Scientia Verlag in 1973.[4] Horváth's *Rechtssoziologie* rivals its great predecessor's reputation. The monograph, published in 1934 by the aforementioned well-known publisher, attracted the attention of scholars both in Europe and overseas. This is proved by the fact that the first part of *Rechtssoziologie*, complemented with other studies which had been published earlier in German, was republished by Buncker and Humbolt in 1971.[5] *The Theory of Civil Law and Society* by Ágost Pulszky, the founder of Hungarian legal positivism, published in London in 1888, is also to be mentioned here.[6] His work, comprised of his university lectures, is considered the peak of his efforts to create an independent theory, which may be regarded as one rivalling any other contemporary achievement of the kind.

These papers and their afterlives prove that there exists a segment of legal philosophical tradition in Hungary that is renowned even outside the country's borders in professional circles. For the sake of Hungarian jurisprudence, all the significant achievements of

* Professor of Law, University of Debrecen, Faculty of Law, Department of Philosophy and Sociology of Law, H-4010 Debrecen, P.O. Box 81.
E-mail: szabadfalvi.jozsef@law.unideb.hu

[1] Somló, F.: *Juristische Grundlehre.* Leipzig, 1917.

[2] Horváth, B.: *Rechtssoziologie. Probleme der Gesellschaftlehre und der Geschichtslehre des Rechts.* Berlin, 1934.

[3] Somló, F.: *Juristische Grundlehre.* Leipzig, 1927.

[4] Somló, F.: *Juristische Grundlehre.* Aalen, 1973.

[5] Horváth, B.: *Probleme der Rechtssoziologie.* Berlin, 1971.

[6] Pulszky, Á.: *The Theory of Civil Law and Society.* London, 1888.

international standards should be made accessible for the world. In this field our great predecessors have provided a good example through providing the world with their evaluations of Hungarian legal philosophical thinking.[7] The evaluations had, at that time, an orientating effect on contemporary international scientific attitude, and are still regarded worthy of consideration. For the past two decades great efforts have been made to rediscover the traditions of Hungarian jurisprudence. A number of essays, monographs, volumes of studies, and reprints of the oeuvres of legal philosophers representing the major trends have been published, which has resulted in the revaluation of the "bourgeois" legal philosophy, to use the Marxist term that had been forgotten before the change of regime (1989/90).[8] Today all of these possibilities and sources of information are available for those interested in legal philosophy.

Hereafter I wish to call the reader's attention to a series of books that aims to make public the achievements of Hungarian legal philosophy published in foreign languages in the early 20th century. The title of the series is "Philosohiae Iuris", edited by Csaba Varga, with its sub-series in foreign languages called "Excerpta Historica Philosophiae Hungaricae Iuris", which contain essays representing perhaps the most prosperous period of Hungarian legal philosophy, partly as faximile reprint as well as the first edited publication of manuscripts.

In the volumes published so far the reader can find essays mostly in German, but also in French, English and Italian, which are supplemented with short biographies, lists of publications, and lists of essays introducing the oeuvres, and in the end, lists of names and, in two cases, of legal sources. All reflect a unified editorial concept.[9]

Schriften zur Rechtsphilosophie[10] by Felix Somló (1873–1920), professor of Nagyvárad Academy of Law as well as of the Faculty of Law at Kolozsvár University, was published as the first in this series in 1999. This edition includes the essays and book reviews written and published between 1907 and 1914 by the professor of law, who achieved international fame for Hungarian legal philosophy in the early 20th century. Another point of interest of the book is that it contains the first critical reviews by Joseph Kohler, Leonidas Pitamic and Robert Redslob in 1917–1918, as well as a preface written by Gyula Moór in Somló's *Gedanken zu einer Ersten Philosophie*,[11] a fragmented posthumous work from 1926, which established his legal value principle. The volume also includes Moór's preface to the second edition of *Juristische Grundlehre* in 1927.

[7] See Somló, F.: Die neuere ungarische Rechtsphilosophie. *Archiv für Rechts- und Wirtschaftsphilosophie*, 1 (1907–1908) 315–323.; Horváth, B.: Die ungarische Rechtsphilosophie. *Archiv für Rechts- und Wirtschaftsphilosophie*, 24 (1930) 31, 37–85.

[8] See about contemporary Hungarian legal philosophical thinking In: Szabadfalvi, J: Transition and Tradition. Can Hungarian Traditions of Legal Philosophy Contribute to Legal Transition? *Rechtstheorie*, 33 (2002) 2–4, 167-185. [Krawietz, W.–Varga, Cs. (eds): On Different Legal Cultures, Premodern and Modern States, and Transition to the Rule of Law in Western and Eastern Europe. II. Sonderheft Ungarn.] Revaluation of Hungarian Legal Philosophical Tradition. *Archiv für Rechts- und Sozialphilosophie* (ARSP), 89 (2003) 2, 159–170; Varga, Cs.: Philosophysing on Law in the Turmoil of Communist Take-over in Hungary (Two Portraits, Interwar and Post-war). In: Leszkiewicz, M. (ed.): *The 2005 ALPSA Annual Publication of the Australian Legal Philosophy Students Associations*. Brisbane, 2005, 82–94.

[9] The volumes of this series of books are accessible on www.stephanus.hu website.

[10] See Somló, F. in: Varga, Cs. (ed.): *Schriften zur Rechtsphilosophie*. Budapest, 1999.

[11] Somló, F.: *Gedanken zu einer Ersten Philosophie*. Berlin–Leipzig, 1926.

These are less known but nevertheless significant essays if the evaluation of an oeuvre is considered. While the writings in the appendix offer the evaluation of Somló's work after his neo-Kantian turn, the previous studies and reviews provide an introduction to the break with the sociological-positivist traditions of a Julius Pikler student following Spencer, as well as his acceptance of the neo-Kantian paradigm. Important milestones in this process are his study on the new Hungarian legal philosophy of positivism *(Die neuere ungarische Rechtsphilosophie)* and his essay on the application of law (*Die Anwendung des Rechts*), as well as his lecture, reflecting his change of paradigm, which was delivered at a conference on legal philosophy in Germany in 1911 (*Das Verhältnis von Soziologie und Rechtsphilosophie, insbesondere die Förderung der Rechtsphilosophie durch die Soziologie*). The lecture was based on the definition of law and the examination of the justness of law as two fundamental issues in the philosophy of law. The latter question is discussed in more detail in his study on the value standards of law (*Massstäbe zur Bewertung des Rechts*) published in 1909. In his investigation of the right law, moral values are considered as the most appropriate tools for evaluating law as the norm of act.

The publication of these studies provides an opportunity for those interested in gaining insight into the revival of Hungarian legal philosophy in the decade after the turn of the 19th–20th centuries. The neo-Kantian philosophy being established in those years on the Continent surpassed the traditional theories of natural law and legal positivism as well as the historical view. Jurisprudence, seeking new paths, emphasized a new approach to law through modern methodology and value theory, and Somló had a laudable role in this process. His works created a possibility to abolish the previous delay in development and to establish in Hungary the then leading neo-Kantian legal philosophy. This all resulted in his being considered the number one representative of Hungarian legal philosophy for decades. The essays included in this volume may help us to understand the process. Hungarian legal philosophy can be proud of the fact that Somló, alongside Rudolf Stammler, Gustav Radbruch, Hans Kelsen and Alfred Verdross, is considered to be among the great representatives of the European neo-Kantian philosophy of law.

The second volume of the series, published in 2002, is devoted to *Abriss eines realistischen rechtsphilosophischen Systems*[12] written by István Losonczy (1908–1980), a reserved, rather eccentric figure of legal philosophy in Hungary, who had comprehensive knowledge of not only jurisprudence but of natural and medical sciences as well. Besides the "realistic" legal philosophy promised in the title, the book also contains, in the appendix, a study published in a professional journal. Losonczy wrote this study upon Alfred Verdross' request at the turn of 1948–1949 to be published in *Österreichische Zeitschrift für öffentliches Recht*, however, it was not issued due to the socio-political changes at that time. This study was originally published under the title *Über die Möglichkeit und den Wissenschaftscharakter der Rechtswissenschaft* in 1937. Here the author discussed issues on jurisprudence as a field of science, including mainly problems of theories of existence, the theory of knowledge, and methodology. The editor of the series, as a former student of Losonczy, may have appreciated this study the most, since it allowed the young jurist's philosophical oeuvre to be reconstructed starting from the 1930s.

The essays included in the volume allow insight to be gained into the attempt to surpass the neo-Kantian paradigm. Losonczy expressed his concept of law against Kelsen's "pure

[12] See Losonczy, I. in: Varga, Cs. (ed.): *Abriss eines realistischen rechtsphilosophischen Systems*. Budapest, 2002.

theory of law"–representing a real challenge for his contemporaries. According to Losonczy's theory, law is a phenomenon including logical, explicative and normative elements, which seems to be evident regarding jurisprudential research, originating in statute law. By refusing Kelsen's dogmas, he stands for applying a complex or in other words a "synthetic method", which is based on the recognition of rules that constitute law. In his view, "purified" synthetic methodological theories have already been created, among which he emphasizes the theories represented by Barna Horváth, Albert Irk, and Julius (Gyula) Moór, as well as Erik Kaufmann, Wilhelm Sauer and Alfred Verdross in the German scholarly literature. It is a great loss for the Hungarian philosophy of law that after 1949 Losonczy, as well as some of his contemporaries such as József Szabó and István Bibó, or the few years younger Kornél Solt (Scholz), were not allowed to continue their research. They either had to change careers or were forced into inner exile, or, in the worst case, they were imprisoned. Losonczy, for the sake of Hungarian jurisprudence, was able to continue his activity as a criminal lawyer.

The most extensive edition was published in 2006, *Schriften zur Rechtsphilosophie*,[13] a volume of studies by Julius (Gyula) Moór (1888–1950), professor of legal philosophy at the universities of Szeged and Budapest. This is a book of 500 pages in excellent faximile quality, comprising seventeen studies in German, two in Italian and one in French, published between 1922 and 1943, representing his whole oeuvre in a comprehensive manner. Moór insisted on making his writings, in which he primarily expressed his views on the philosophy of law, available for the international community of scholars. In this respect, he can be regarded as the most internationally-aware author in the Hungarian literature of legal philosophy in the first half of the 20th century. Unfortunately, a monographic representation of his synthesis on legal philosophy is missing, to the great disappointment of this field of study.

The collected and published essays provide a retrospective overview on the work of the most beloved student of Somló, the number-one personality of legal philosophy in Hungary between the two World Wars, who was in the early 1920s rightly called by his famous colleague Barna Horváth the creator of the "new Hungarian philosophy of law" as well as its "representative man". Moór's philosophy of law was fundamentally determined by his acceptance of the neo-Kantian view, which he openly declared as a starting point in philosophy. However, he admitted that neo-Kantianism with its numerous trends allows very different philosophical conclusions to be drawn.

His system of legal philosophy (fundamental doctrine of law, sociology of law, legal axiology, and methodology of jurisprudence) was characterized by a complex view on posing problems. It was not by chance that he considered his own view to be among "comprehensive philosophical views of law", which involves an overall concern with "eternal" issues of jurisprudence. Moór was inspired to create a system based on the most significant literature of jurisprudence, drawing conclusions from the mistakes of previous doctrines, and exempt from one-sided extremes.

Moór was from the beginnings of his career an advocate of neo-Kantian philosophy who, considering the distinction between reality and value to be fundamental, attempted to settle the relationship between these two spheres. A cornerstone of his reasoning was his doctrine on the dual character of law, which emphasized duality between reality and value in law. In his view, law is a complex phenomenon composed of elements belonging either to the world of existence or to that of values. This concept was first described in the starting

[13] See Moór, J. in: Varga, Cs. (ed.): *Schriften zur Rechtsphilosophie*. Budapest, 2006.

study of the volume titled *Macht, Recht, Moral* (1922), which is at the same time a brilliant summary of his basic doctrine on law. Another study, titled *Das Logische im Recht* (1928), summarizing his fundamental views on legal dogmatics and methodology, was included in the volume as his leading work from the 1920s. Among the works representing the 1930s, a study *Reine Rechtslehre, Naturrecht und Rechtspositivizmus* (1931) published in "Kelsen-Festschrift" can be read, which provides interpretation and criticism on the most significant system of legal theory of the 20th century. Furthermore, *Reine Rechtslehre: Randbemerkungen zum neuesten Werk Kelsens* (1935) is to be mentioned as the first evaluation of Kelsen's synopsis[14] in Hungary, in which Moór expressed his opinion as a contemporary of equal standing to Kelsen, professor in Vienna.

As part of the notional analysis of law, *Recht und Gewohnheitsreicht* (1934) discussing the issue of common law is also included in the volume, as well as the following studies: *Das Wesen der Philosophie nach Pauler* (1936) on the issues of the philosophy of science, *Creazione e applicazione del diritto* (1934), discussing the problems of creating and applying law, and *Öffentliches und privates Recht* (1938) and *Das Rechtssystem* (1939) discussing his special point of view on the system of law. *Das Problem des Naturrechts* (1935), one of the works of key importance in that decade, is a summary of Moór's "negative or limitative natural law". In his study, similarly to most contemporary Hungarian neo-Kantian philosophers of law, he expressed his opposition to Kelsen's view, which attempted to simplify reality, as well as to the extremes of legal positivism.

The first study in the series from the 1940s is *Der Wissenschafts-Charakter der Jurisprudenz* (1940) discussing issues of theory and methodology of science, followed by a study on the problems of legal loopholes, titled *Sulla questione delle lacune nel diritto* (1941). *Recht und Gesellschaft* (1942) discussed causal connections in detail. The closing study in the volume, *Was ist Rechtsphilosophie?* (1943) is Moór's last comprehensive work written in German, which might as well be considered as a final synopsis of his legal philosophical views. In Moór's view pointing towards a synthesis, a decisive turn occurred during the 1930s and in the early 1940s, and a synthesis of characteristic changes appeared, mainly in the philosophical basis of his philosophy of law. This new kind of view represented a new trend, which had developed from a synthesis of neo-Kantian and neo-Hegelian views, whose legal philosophical consequences were not subsequently elaborated in detail.

This brief overview does not provide the opportunity to describe and emphasize the importance of each study written by Moór. Nevertheless, it seems a pity that the volume only includes a short resume of two important studies [*Metaphysik und Rechtsphilosophie* (1929) and *Soziologie und Rechtsphilosophie* (1934)]. Mainly this latter study could have represented the progress that had occurred in Moór's oeuvre resulting in his describing law as a phenomenon in the empire of "valuable reality". In spite of all this, the volume represents this diverse life's work in a sufficient way. The author of the review aims to call the attention of the reader to another issue which with Moór was concerned in the 1920s, namely the problem of pacifism and anarchy. He published a book and a study in this topic in German.[15]

[14] Kelsen, H.: *Reine Rechtslehre*. Leipzig–Wien, 1934.

[15] Moór, J.: *Zum ewigen Frieden. Grundriss einer Philosophie des Pazifismus und des Anarchismus*. Leipzig, 1930; Das Wesen des Pazifismus und die darin enthaltenen ethischen, logischen und soziologischen Probleme. In: *Studi Filosofico-Giuridici dedicati a Giorgo del Vecchio bel XXV anno di insegnamento (1904–1929)*. II. Società Tipografica Modenese, Antica Tipografica Soliani, Modena, 1931, 146–159.

A unique piece in the series is the volume *The Bases of Law / A jog alapjai*[16] by Barna Horváth (1896–1973), professor of philosophy of law at Szeged and Kolozsvár universities. A point of interest in this publication is that although it was originally written in English around 1947–1948, it is also available in Hungarian translation. A brief biography and a list of references in English are supplemented with two further studies by István H. Szilágyi, who has long been concerned with Horváth's oeuvre. These essays give an insight into the author's career and also provide information on the mutual intellectual influence of Horváth and István Bibó, his former student. The published manuscript bears a further point of interest in that an important element concerning the oeuvre was focused on through giving an answer to the question of how Horváth reconsidered his system of the theory of law prior to his emigration at the end of 1949.

The originality of Horváth's legal philosophy, which he preferred to call "pure legal sociology", considering Kelsen's terminology, lies in his synoptic attitude and the closely related processual legal view, which was discussed in detail in his *Rechtssoziologie* of 1934 and in *A jogelmélet vázlata* (Outlines of legal theory),[17] published three years later. The originality of the theory is included in harmonizing two paradigms that were in contradiction within the contemporary legal philosophy. The parallel effectiveness of the continental neo-Kantian view and the pragmatic-empirical attitude of Anglo-Saxon origin proved to be a pioneering idea not only in Hungarian but in European legal thought as well. Horváth, through applying the synoptic method, provides a completely original interpretation of one of the fundamental issues of neo-Kantian legal philosophy, namely the relationship between value and reality. He evolved his method from the essence of the activity of lawyers and modelled it as the scheme of thoughts in the judge's head. The processual view, connected to the synoptic one, claims that law is not simply a norm but a theoretical norm of behaviour and the related actual behaviour, which is nothing else but the procedure. A continuous co-ordination (of synoptic character) between a legal case and the legal norm creates the procedural process. The significance of Horváth's oeuvre lies in the fact that he created new perspectives for further development in the national legal theory through combining the familiar German-Austrian ties with views on jurisprudence in the English-speaking world.

The novelty of the recently published volume lies in the fact that Horváth, possibly thinking of emigration, chose the English language to summarize (practically word for word, as István H. Szilágyi pointed out) the view that he had elaborated a decade earlier. At the same time he reacted to the critical remarks included in István Bibó's–his former student and by that time colleague–*Zwang, Recht, Freiheit* (1935). However, it is problematic why only a decade later he, an author completing research in the history of theory, sociology and the history of law, considered a return to legal theoretical roots an issue of great importance. After his emigration two dozen reviews and articles were published, mostly in English. The period of more than two decades that he spent in the USA brought about only one important paper in English, published in Australia, which revealed his attempt to think over the synoptic method. This work resulted in high professional interest and international discussion and aimed to describe the theory of "law field" in law. The underlying idea of this view was a change in the concept of the physical world due to the findings of modern physicists (Einstein and Maxwell). The theory of law field is not an elaborated view, it is

[16] See Horváth, B. in: Varga, Cs. (ed.): *A jog alapjai* (The Base of Law). Budapest, 2006.

[17] Horváth, B.: *A jogelmélet vázlata* (Outlines of Legal Theory). Szeged, 1937.

rather an exciting theoretical experiment worth reconsidering.[18] In addition to this, in the 1950s he began to translate into English his monograph *Angol jogelmélet* (English legal theory),[19] which was published in Hungarian in 1943, but was unable to complete it. The only professional recognition for him was the publication of the previously mentioned *Probleme der Rechtssoziologie.*

It deserves a mention that Horváth's other studies written in foreign languages are to be issued in the near future as part of this series. The three volumes will include writings by Horváth on processual legal theory, the theory of justness and studies published during his years abroad, written mostly in German and English.[20] These further volumes will make available the entire works of Horváth published in foreign languages.

Finally, the volume *Die Schule von Szeged* completes the series.[21] The subtitle (*Rechtsphilosophische Aufsatze von István Bibó, József Szabó und Tibor Vas*) aims to inform the less-informed reader on those authors whose legal philosophical studies are included in the book. Even today we know little about the "School of Szeged", a community composed of former students of Horváth.[22] Nevertheless, even if it cannot be compared to the "new Austrian school" marked by Hans Kelsen, Adolf Merkl, and Alfred Verdross, which had a great effect on the European legal philosophical thinking after the turn of the century, still, as the only Hungarian school of jurisprudence, it has a considerable importance in national as well as in international jurisprudence.

The first publications by the members of the school of Szeged, approaching the world of law through the neo-Kantian paradigm represented by their professor, were issued from the mid-1930s. The first part of the volume includes István Bibó's (1911–1979) legal philosophical studies. Under the title *Zwang, Recht, Freiheit* a summary in German of his major work on legal theory is included, which was printed in 1935 when he was a student of law. [23] This detailed resume clearly reflects the fact that the young legal theorist attempted to compose his own view even in this early work. In those years each legal philosopher expressed his own views. Bibó carried out this challenging undertaking with a thoroughness and moderation contrary to his age. According to his aim, he wished to grasp the essence of law in the connection between force and freedom.

When elaborating his theory, he adapted two major categories used by Barna Horváth, the idea of synopsis and the term of social objectification. In terms of Bibó's definition, law simultaneously exercises the most objective force and performs the most objective freedom. This two-faced character of law is not a novelty in legal theory and a number of views have emerged emphasizing one or the other of its faces. According to Bibó, this kind of double

[18] See Horváth, B.: Field Law and Law Field. *Österreichische Zeitschrift für öffentliches Recht*, 8 (1957), 44–81.

[19] Horváth, B.: *Angol jogelmélet* (English Legal Theory). Budapest, 1943.

[20] Horváth, B.: *Schriften zur Rechtsphilosophie.* I. 1926–1948: Prozessuelle Rechtslehre; II. 1926–1948: Gerechtigkeitslehre; III. 1949–1971: Papers in Emigration. (hrsg. Csaba Varga), Budapest, 2011 (in preparation).

[21] Varga, Cs. (ed.): *Die Schule von Szeged. Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas.* Budapest, 2006.

[22] See Szabadfalvi, J.: Bibó István és a szegedi iskola (István Bibó and the School of Szeged). In: Dénes, I. Z. (ed.): *A szabadság kis körei. Tanulmányok Bibó István életművéről* (Small Circles of Liberty. Studies on the Life-Work of István Bibó). Budapest, 1999. 125–152.

[23] Bibó, I.: Kényszer, jog, szabadság (Zwang, Rechts, Freiheit). *Acta Litterarum ac Scientiarum Reg. Universitatis Hung. Francisco-Josephinae.* Sectio: Juridico-Politica, Tom. VIII. Szeged, 1935.

tension will provide the real strength of law as objectification. In concluding this study, József Szabó's contemporary review published in German is included, which is a credit to the editor. Szabó, as a contemporary in close connection with Bibó, called the attention of the public opinion to this early achievement of the school of Szeged in a significant legal journal in the year of publication.

Furthermore, two complete studies by Bibó–originally written in French and German–are included, which provide a thorough analysis on certain minor problems of legal philosophy. It is not by chance that all this is expressed as criticism of the great theory with respect to Kelsen's theory. A study *Le dogme "bellum justum" et la théorie de l'infaillibilité juridique* (1936) is a critical paper of Kelsen's pure theory of law. In this paper Bibó gives an immanent judgement on the debate-inspiring study, which had been published two years earlier. He is concerned with the infallibility of law, with the problems of obligation, awareness of international law, those of sanctioning acts and with the normative character of Kelsen's method.

In his paper *Rechtskraft, rechtliche Unfehlbarket, Souveränität* (1937) the author discusses his view regarding legal force, infallibility and sovereignty, through a different method from the pure theory of law, on the infallibility of law and other related issues. The paradigm of neo-Kantian philosophy is again considered, namely the problem of dualism of "Sein" and "Sollen" and its capability to be transmitted. Bibó seems to be sceptical of the views emphasizing a complete separation of the two spheres and he stands for the feasibility of Horváth's synoptic approach.

The second part of the volume is composed of two papers by József Szabó (1909–1992) and a short summary in German of a study in written in Hungarian. This study is titled *Ort und Stelle der Rechtswissenschaft in dem menschlichen Denken* (1942), which is an explanation for a wider audience of his new-realistic ("neurealistischen") view being formed at that time. We can read, as one of his complete studies, *Wahrheit, Wert und Symbol im Rechte* (1943), which was issued, along with the studies of Moór and Horváth, in the "Ungarn-Heft" of *Archiv für Rechts- und Sozialphilosophie* discussing contemporary Hungarian legal philosophy.[24] The main aim of this study was to summarize the theses on jurisprudence previously elaborated only in Hungarian. According to Szabó, a number of neo-Kantian theories emerging from the duality of existence and validity attempted to find a connection between these two spheres of the world in highly different ways. The reason that most attempts were unsuccessful may lie in the fact that existence and validity are not to be found in the objective world but in the subjective one.

Szabó claims, based on the views of theory of knowledge referring back to Hume, that the world of human subjectivity is one where existence and validity, object and norm have a differentiating sense. The deepest roots of law are to be sought in human subjectivity. This idea allows him to trace back the validity basis of law to moral considerations in human consciousness. Psychological considerations play, not by chance, an important role in his theory, as well as the fundamental idea that the world of law is to regarded as a symbol or a system of symbols. The task of jurisprudence is to find the meaning behind symbols. The

[24] József Szabó applied the term "new-realistic" to describe his concept of law in the title of a paper published in 1948. See Szabó, J.: Der Rechtsbegriff in einer neurealistischen Beleuchtung. *Österreichische Zeitschrift für öffenliches Recht*, 1 (1948) 3, 291–311. (A point of interest in the paper is that it is word by word equal to his study "Wahrheit, Wert und Symbol im Rechte" published five years earlier.)

paper goes into detail about the connection between formalism and justness. Perhaps the most significant feature of Szabó's new-realistic theory is the fact that he could find answers to questions of neo-Kantian philosophy due to his knowledge of philosophy and jurisprudence of the English-speaking countries, which had been inspired by his one-time schoolmaster. Thus in Szabó's theory the views of two great legal cultures are in creative inter-connection. Unfortunately, the author did not have the chance to further elaborate his theory.

The second Szabó paper was originally published in 1974. *From Chaos to the Rule of Law*, containing his earlier views on jurisprudence, was published in a Festschrift in honour of René Maric. It is to Szabó's merit that, despite his scientific isolation, he was up-to-date in following with attention the international literature in the field, which is reflected in the references.

In the final part of the book, *Die Bedeutung der transzendentalen Logik in der Rechtsphilosophie* (1935), a work by Tibor Vas (1911–1983)–a former fellow student and friend of Bibó–published by his alma mater is included, which is followed by a review written by József Szabó. Vas in his paper is concerned with the importance of transcendental logics in legal philosophy; nevertheless, he includes his critical remarks as well. In the first part he introduces in detail the Kantian origins of transcendental logic and its progress in neo-Kantian philosophy, including the efforts by the schools of Marburg and Baden. In the second part the application of the transcendental method is examined through the views of the three most significant representatives of neo-Kantian legal philosophy (Stammler, Kelsen and Somló). The author provides criticism regarding all three theories and proves how the terms applied as prerequisites of general validity in law can lead to the application of meta-legal terms of natural law. The methods of jurisprudence will help to solve this problem of considering not only one but two objects of knowledge in law and denying the possibility of a unified knowledge of law; consequently they do not apply a constitutive method but a reflective one. Among the views that are considered as modern in surpassing the transcendental method, he emphasizes Horváth's synoptic view and Gurvitch's ideal-realistic method, which consider the dual-objectivity of law. Vas seems to be very consistent in undermining the illusory conviction in the transcendental approach. All this allows him to seriously criticize the neo-Kantian philosophy of law.

Having briefly introduced the current volumes, the author has no other task than to express his wish that the volumes published so far and the ones being or planned to be published will achieve the editor's goal, the international re-discovery of Hungarian legal philosophy. It is the future responsibility of book distributors that this series of publications should become available for their target audience.[25]

[25] The first review on the first volume of the series: Funke, A.: Die Definition des Rechts und die Brille auf der Nase der Juristen. *Rechtstheorie*, 36 (2005) 4, 427–433.

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ANNA T. LITOVKINA*

"Where There's a Will There's a Lawyer's Bill": Lawyers in Anglo-American Anti-Proverbs

Introduction

1. Anti-proverbs

Proverbs have never been considered sacrosanct; on the contrary, they have frequently been used as satirical, ironic or humorous comments on a given situation. For centuries, proverbs have provided a framework for endless transformation. In the last few decades they have been perverted and parodied so extensively that their variations have been sometimes heard more often than their original forms. Wolfgang Mieder has coined the term *"Antisprichwort" (anti-proverb)* for such deliberate proverb innovations (also known as *alterations, parodies, transformations, variations, wisecracks, mutations,* or *fractured proverbs*) and has published several collections of anti-proverbs in German and English.[1]

Like traditional gems of wisdom, anti-proverbs appear in a broad range of generic contexts, from personal letters to philosophical journals, from public lectures and sermons to songs, from science fiction to comics and cartoons, from fables to poetry. They are also found in great abundance on the Internet, in advertising slogans, in the titles of books and articles, and in magazine and newspaper headlines. Anti-proverbs are commonly quoted in collections of puns, one-liners, toasts, wisecracks, quotations, aphorisms, maxims, quips, epigrams and graffiti. There is no sphere of life where they are not used. It should be noted that while some anti-proverbs negate the "truth" of the original piece of wisdom completely [for example, *Crime pays–be a lawyer {Crime doesn't pay}*[2]], the vast majority put the proverbial wisdom only partially into question, primarily by relating it to a particular context or thought in which the traditional wording does not fit. Typically, an anti-proverb will elicit humor only if the traditional proverb upon which it is based is also known. Otherwise, the innovative strategy of communication based on the juxtaposition of the old and "new" proverbs is lost. Anti-proverbs may contain revealing social comments. More often than not, however, being based on mere wordplay or puns, they are playful texts generated primarily for the goal of amusement.

All's fair for anti-proverbs: there is hardly a topic that they do not address. As Mieder states, "Just as proverbs continue to comment on all levels and occurrences in our daily life, so do anti-proverbs react by means of alienating and shocking linguistic strategies to

* Ph.D., Tomori Pál College, Center of Foreign Language Teaching, H-6300 Kalocsa, Szent István király út 2–4.
E-mail: litovkin@terrasoft.hu

[1] For a summary of relevant research see T. Litovkina, A.–Mieder, W.: *Old Proverbs Never Die, They Just Diversify: A Collection of Anti-Proverbs.* Burlington–Veszprém, 2006, 1–54.

[2] For the reader's ease all anti-proverbs are followed by their original forms, given in { } brackets.

everything that surrounds us".[3] There is a wide range of professions and occupations subjected to mockery in Anglo-American anti-proverbs, embracing politicians and doctors, accountants and policemen, teachers and writers, whores and housewives, among many others:

Politics makes strange bedfellows–rich. {Politics makes strange bedfellows}
What can't be cured supports the doctor. {What can't be cured must be endured}
Those who can do; those who can't, teach; and those who can't do anything at all, teach the teachers. {Those who can do; those who can't, teach}
Crime doesn't pay, except for the writers of detective stories. {Crime doesn't pay}
You can lead a whore to culture but you can't make her think. {You can lead a horse to water, but you can't make him drink}
All work and no pay makes a housewife. {All work and no play makes Jack a dull boy}.

Without any doubt, the lawyer[4] is the most popular target of Anglo-American anti-proverbs.

2. Lawyers as object of people's scorn and butt of American lawyer jokes

In "Legal Ethics: A Comparative Study" common complaints about lawyers from around the world were classified into five general categories:[5]

- abuse of litigation in various ways, including using dilatory tactics and false evidence and making frivolous arguments to the courts;
- preparation of false documentation, such as false deeds, contracts, or wills;
- deceiving clients and other persons and misappropriating property;
- procrastination in dealings with clients; and
- charging excessive fees.

As has been pointed out by Anna T. Litovkina in a previously published analysis of American lawyer jokes from the Internet[6] (collected from hundreds of websites in spring 2009),[7] the greatest anger and irritation in the jokes is directed at lawsuits, the high income

[3] See Mieder, W.: *American Proverbs: A Study of Texts and Contexts.* Bern, 1989, 244.

[4] See T. Litovkina, A.: Professions and Occupations. In: T. Litovkina, A.: *Old Proverbs Cannot Die: They Just Fade into ParoDY: Anglo-American Anti-Proverbs.* Habilitation essay (manuscript). Budapest, 2005, 107–112.

[5] Hazard, Jr. G. C.–Dondi, A.: *Legal Ethics: A Comparative Study.* 2004, 60.

[6] In the early 1980s, a new joke cycle appeared in the USA, and has continued to flourish ever since. This is a lawyer joke cycle. Lawyer jokes have been published in book form, and have also been displayed on various American websites. According to a 1997 Internet search by a legal journalist, 3,473 sites were devoted to lawyer jokes (see Yas, D. L.: First Thing We Do Is Kill All the Lawyer Jokes. *Massachusetts Lawyers Weekly*, 1997, 20 October, 11). For more, see T. Litovkina, A.: Law is Hell: Death and the Afterlife in American Lawyer Jokes. *Acta Juridica Hungarica*, 50 (2009) 3, 311–328.

[7] See T. Litovkina, A.: Greed, Lies and Negotiable Justice: Stereotyped Lawyers in American Lawyer Jokes. *Acta Ethnographica Hungarica*, 2011 (in press). See also Galanter, M.: The Faces of Mistrust: the Images of Lawyers in Public Opinion, Jokes and Political Discourse. *University of Cincinnati Law Review*, 66 (1998) 3, 827. For more on the stereotypical traits of lawyers see Galanter, M.: *Lowering the Bar: Lawyer Jokes and Legal Culture.* Madison, 2005; Galanter, M.: The Great

of lawyers, and lawyers' greed and stinginess. According to the jokes, attorneys frequently bill their clients services that they fail to provide. To drain more and more money out of their clients, lawyers deliberately try to delay justice by focusing on technicalities and legal procedures. Lawyers' ignorance, skillful manipulation, corruption and dishonesty are also common themes. Since lawyers are inveterate liars, they are not to be trusted under any circumstances. They take advantage of their own clients, and they frequently take sexual advantage of them. They are pushy, arrogant and snobbish. They associate with Devil. These are only the most common stereotypical traits of the lawyers who are ridiculed in American lawyer jokes from the Internet. Not surprisingly, considering all these negative traits, lawyers should be exterminated.[8] The place where they go after they die is Hell.[9]

3. The focus of the present study

The present study focuses on stereotypical traits of lawyers according to the Anglo-American anti-proverbs. What are the dominant stereotypical traits of a lawyer and his behaviour? What negative features is he hated for? Why is it that the lawyer, and not the representative of any other profession or occupation, is the figuire who is most often mocked in American anti-proverbs? Does the lawyer's stereotype in American anti-proverbs contain any truth? These and many other questions may be posed in regard to Anglo-American anti-proverbs about lawyers.

The anti-proverbs discussed in the present study were taken primarily from American and British written sources. The texts that follow, along with others too numerous to include, were drawn from hundreds of books and articles on puns, one-liners, toasts, wisecracks, quotations, aphorisms, maxims, quips, epigrams, and graffiti. All of the anti-proverbs quoted here (together with references to their sources) can be found in the book "Old Proverbs Never Die, They Just Diversify: A Collection of Anti-Proverbs".[10]

While certain themes occur pervasively in anti-proverbs about lawyers, others appear in only a few. For this reason, my discussion may sometimes appear to be uneven and the treatment of certain thematic categories may seem to be disproportionately broad or narrow, but in all cases my examples reflect the proportions found in my source collections. It must also be mentioned here that a number of our anti-proverbs treat several thematic categories simultaneously. Such examples could be discussed in various parts of the present study. As a rule, anti-proverbs that embrace more than one theme will be quoted and discussed only once, except in cases in which only a few anti-proverbs have been identified to illustrate a specific theme.

American Lawyer Joke Explosion. *Humor–International Journal of Humor Research*, 21 (2008) 4, 387–413; Davies, Ch.: American Jokes about Lawyers. *Humor–International Journal of Humor Research*, 21 (2008) 4, 369–386.

[8] Lawyers' extermination is a theme of one of the largest groups of American lawyer jokes, and also one of the themes of two of my articles see T. Litovkina: Law is Hell... *op. cit.*; T. Litovkina, A.: Az ügyvédekkel történő leszámolás különböző módjai az amerikai ügyvédviccekben (Various Methods of Reckon with Lawyers in American Humor). In: Gecső, T.–Sárdi, Cs. (eds): *Új módszerek az alkalmazott nyelvészeti kutatásban* (New methods in Applied Linguistic Research). Székesfehérvár–Budapest, 2010, 191–197.

[9] Hell is a theme of another largest group of American lawyer jokes, and also one of the themes of my other article see T. Litovkina: Law is Hell... *op. cit.*

[10] See T. Litovkina–Mieder: *op. cit.*

Although this study focuses on anti-proverbs, in a few cases–in order to make a point, or to confirm or challenge some statements expressed in anti-proverbs–I could not resist the temptation to quote American lawyer jokes or other humorous texts (they are generally cited in notes with precise reference to their sources).

I. Discussion

Before presenting an analysis of stereotypical traits of lawyers according to Anglo-American anti-proverbs let us at first examine some American proverbs concerning law, lawsuits and lawyers.[11]

I.1. American Legal Proverbs

Donald F. Bond stated that "Perhaps no profession has contributed more to our proverbial stock than the law".[12] Elsewhere he wrote: "the view of the law reflected in proverbs reveals the distrust of legal matters which the common man has long held. The dangers of becoming involved in law suits, the expense, the interminable progress of litigation, the uncertainty of justice–on all these points his instinct has been to steer clear. Similar lines–and equally unflattering–form the picture of the lawyer in proverbial lore".[13]

Let us first see how law is reflected in American proverbs. It is better to observe the law, and not be involved in any legal procedure: *Keep the law and keep from the law.* Indeed, after a legal case has been started, its outcome cannot be predicted: *To go to law is to go to sea.* 'Law' is depicted as something extremely cruel: *In a thousand pounds of law there is not one ounce of love.* Moreover, it justifies disorder and madness: *Law often codifies disorder and make madness legal.* People who don't know that something is against law can still be punished for doing it: *Ignorance of the law is no excuse.* This idea is contested in the following two proverbs: *Laws are made to be broken; Laws are made to be evaded.* Laws should not be too gentle, neither should they be too severe, since *Laws too gentle are seldom obeyed; too severe, seldom executed.* Where there are many laws, there will be definitely a lot of offenders, since there will be always a chance to find various ways to overcome such laws: *The greater the number of laws, the more thieves there will be; The more laws, the more offenders.* By using money, and through corruption, one might turn the law in whichever direction is needed, as affirmed in the proverb, *The law is like an axle: you can turn it whichever way you please if you give it plenty of grease.* Justice is given to the rich, therefore, *There is one law for the rich and one for the poor; Who will have law, must have money.* While petty criminals are punished, large ones are frequently allowed to go free: *Laws catch flies and let hornets go free.* Someone in need might be forced to do illegal things: *Necessity knows no law; Where there is hunger law is not regarded, and where law is not regarded there will be hunger.* In times of misfortune, no one pays attention to laws, and, therefore, they are constantly broken; more than that, those who break them, are not punished: *Laws are silent when wars are waging.*

[11] The proverbs quoted here were recorded in the USA at the second part of the XX century see Mieder, W. (ed.): Kingsbury, S. A.–Harder, K. B. (eds): *A Dictionary of American Proverbs.* New York, 1992, 362–364.

[12] See Bond, D. F.: English Legal Proverbs. *Publications of the Modern Language Association,* 1936, 51, 935.

[13] See Bond, D. F.: The Law and Lawyers in English Proverbs. *American Bar Association Journal,* 1935, 21, 725.

How is the nature of the lawyer revealed through American proverbs? A good attorney is seen as a very bad person: *A good lawyer, a bad neighbour.* Lawyers are pushy and arrogant: *Lawyers earn their bread in the sweat of their browbeating.* Attorneys' frequent task is to deal with dishonest people and criminals. Just in vein, the following proverb emphasizes: *If there were no bad people, there would be no good lawyers.* Lawyers' ability to "change white into black" and reshape reality is emphasized in the proverb *Lawyers, like painters, can easily change white into black.* Attorneys delay justice by focusing on technicalities and legal procedures. Instead of trying to reach harmony and timely resolution of their cases, they do anything possible in order to foment and prolong conflicts. The better a lawyer is, the longer his case can last, that is, the more money he can make. Indeed, as the proverbs stress, *Lawsuits were invented to make lawyers rich; The longer the lawsuit, the larger the lawyer's fee.* The proverb *No matter who loses, the lawyer always wins* points out the 'win-win' situation of a lawsuit–for an attorney. In fact, lawyers are not needed when laws speak: *The best government is that in which the law speaks instead of the lawyer.*

A few additional American proverbs about law, lawsuits and lawyers:

A man who is his own lawyer has a fool for a client.
Always tell your doctor and your lawyer the truth.
Possession is nine points of the law.
Lawmakers should not be lawbreakers.
Where there's no law, there's no bread.
Where law ends, tyranny begins.
The execution of the laws is more important than the making of them.
Fond of lawsuits, little wealth; fond of doctors, little health.
If one family has a lawsuit, ten families are involved.

Now let us turn to the main point of our discussion, Anglo-American anti-proverbs that target lawyers, and let us examine the dominant features of lawyers and their behavior, according to these biased anti-proverbs. My discussion is organized in six sections. The first two sections focus on the main stereotypical traits associated with lawyer in Anglo-American anti-proverbs: the cost of lawsuits, the high income (and fees) of lawyers, and their stinginess, greed and general fondness for money. While the first section treats these themes in general, the second reflects how lawyers are portrayed in comparison with doctors and accountants. The focus of the third section is on lawyers' ignorance and stupidity, and the fourth discusses such basic features of lawyer profession as lying, dishonesty, cleverness, and cunning, as well as skilful ability to manipulate. The fifth section, portraying two special breeds of lawyer–defense attorneys and those dealing with marital law–depicts their main features. Last but not least, the sixth section displays other stereotypical qualities of lawyers, for example, their feeding on the troubles, misfortunes and conflicts of others, as well as their fighting nature, toughness, arrogance, and so on.

I.2. Anglo-American Anti-Proverbs about Lawyers

I.2.1. "Practice does not make a lawyer perfect, but enough of it will make him rich"

The greatest anger and irritation in Anglo-American anti-proverbs are directed at the cost of lawsuits, the high income of lawyers, their fondness for money and greed:

Time is money, especially when you're talking to a lawyer or buying a commercial. {Time is money}
Possession is nine points of the law, and lawyers' fees are the other ninety-one points. {Possession is nine points of the law}.

Despite the fact that some attorneys do not attain professional competence and might not have enough legal experience, they still charge their clients a lot of money, and can make quite a good living:

Practice does not make a lawyer perfect, but enough of it will make him rich. {Practice makes perfect}.

Nowadays, the fees of American lawyers (especially of those who are "high-powered", "good", or "first-class") are incredibly high. Not surprisingly, quite a lot of Anglo-American anti-proverbs from our corpus treat this topic:

Ignorance of the law is no excuse, unless you can afford to hire a good lawyer. {Ignorance of the law is no excuse}
After a man has had occasion to employ a first-class lawyer it is useless to tell him that talk is cheap. {Talk is cheap}
An honest confession is not always good for the soul, but, in most cases, it's cheaper than hiring a high-powered lawyer. {An honest confession is good for the soul}
Honesty is the best policy, because good lawyers come high. {Honesty is the best policy}.

These days lawyers are even called "money grabbers". There is a belief that they put their hands in their clients' pockets, and try to empty them.[14] They are especially good at prospering by their clients' deaths. This is why a diligent, hardworking person who, by accumulating wealth and taking care to save his money, only contributes to the financial well-being of his heirs and, consequently, of their lawyers:

Take care of the pennies and the dollars will take care of your heirs and their lawyers. {Take care of the pennies and the dollars will take care of themselves}.

The numerous transformations of the proverb *Where there's a will, there's a way* express a similar idea. All the anti-proverbs below are based on different connotations of the noun "will",[15] for example, "the legal statement of a person's wishes concerning the disposal of his property after death"; "the document containing this", indicated by the parodies below:

[14] If, however, a lawyer's hands are in his own pockets, as the following humorous text suggests (although not an anti-proverb), it might be only due to the fact that it's cold:
"It was so cold last winter that I saw a lawyer with his hands in his own pockets."
http://www.scroom.com/SCROOMtimes/Humor/Lawyer.shtml

[15] The popularity of the proverb, *Where there's a will, there's a way,* for homonymous punning (i.e. based on sound identity) may be explained by existence of different connotations of the noun "will". By seeing the words "dissatisfied relative", "lawsuit", "inheritance tax", etc. introduced into the context of the following transformations one has to reinterpret the original meaning of "will" from the proverb text and switch it to other connotations.

Where there's a will–there's a greedy solicitor getting in on the act.
Where there's a will there's a lawyer's bill.
Where there's a will–there's a dissatisfied relative.
Where there's a will, there's a lawsuit.
Where there's a will, there's an inheritance tax.

1.2.2. "The lawyer agrees with the doctor that the best things in life are fees"

There is a wide range of professions and occupations depicted in American lawyer jokes, along with the career of a lawyer. Very frequently lawyers show up together with professionals who, similarly to them, are also assumed to have skills based on extensive theoretical knowledge, and professions which also enjoy a high social status, regard and esteem (for example, medicine, scripture, accounting, or engineering). Most frequently, the lawyer shows up simultaneously with his eternal rival, the doctor. It is not surprising, since these two professions are considered to be two of the most preferred, prestigious and valued professions in American society. Accountants, engineers and priests are very frequent companions of lawyers and doctors in American lawyer jokes.[16] In the same vein, according to a 1997 Internet search by a legal journalist,[17] there were 3,473 websites devoted to lawyer jokes, while 227 sites displayed jokes about doctors, and only 39 featured accountant jokes.

Many parents dream that their children will choose a career in medicine or law, which will definitely bring them financial success:

When you grow up, son, you can be whatever you want–a lawyer or a doctor. (caption to a cartoon)[18]

These two professions are especially popular with Jewish parents:

Two Jewish women meet on the street, one with children. The other says, "Such beautiful children how old are they?"
"The doctor is seven and the lawyer is five."[19]

What happens to a Jewish boy who can't stand the sight of blood and who stutters? Unfortunately he cannot become a lawyer, and he cannot become a doctor either. Therefore, according to the joke below, the only prestigious profession left for him is the career of an accountant:

What is the definition of a C.P.A. (Certified Public Accountant)?
It's a Jewish boy who can't stand the sight of blood and who stutters.[20]

[16] For more on professions and occupations in American lawyer jokes, see T. Litovkina, A.: "Advice Is Cheap...Except When You Consult a Doctor or Lawyer or Tax Accountant": Lawyers, Doctors and Representatives of Other Professions in American Lawyer Jokes, 2011 (in press).

[17] See Yas: *op. cit.* 11.

[18] http://www.lawyer-jokes.us/modules/news/index.php?storytopic=3

[19] See Dundes, A.: *Cracking Jokes: Studies of Sick Humor Cycles and Stereotypes*. Berkeley, 1987, 124.

[20] See Dundes: *Ibid.*

As in American lawyer jokes, in Anglo-American anti-proverbs the lawyer's most frequent companion is his eternal rival, the doctor. The following anti-proverb deals with the theme of lawyers and doctors' greed, stinginess, and their fondness for money:

The lawyer agrees with the doctor that the best things in life are fees. {The best things in life are free}.

The proverb transformation above employs a technique of punning, one of the most popular techniques of eliciting humor in anti-proverbs: the word "free" is substituted by the word "fees", which sounds and is spelled similarly but not identically,[21] and is antonymous to "free", thus completely negating the meaning of the original proverb text (i.e. the most important things do not cost any money and can't be bought for any money).

In the following anti-proverb lawyers, doctors and tax accountants–the choice left to the "Jewish boy who can't stand the sight of blood and who stutters" in one of the jokes above–are shown as formidable and greedy economic predators, unwilling to move without fees:

Advice is cheap...except when you consult a doctor or lawyer or tax accountant. {Advice is cheap}.

I.2.3. "Necessity knows no law, and neither does the average lawyer"

The havoc created by an ignorant lawyer is also one of the commonest themes of Anglo-American anti-proverbs about lawyers. Observe the four examples below reworking a popular legal proverb of Latin origin *{Ignorantia iuris non excusat}*, the proverb *Ignorance of the law is no excuse*. Our first example is in the form of a joke:

The judge interrupted proceedings to observe, "Ignorance of the law is no excuse in the eyes of the law." "I should like to ask, Your Honor," inquired the prosecuting attorney, "if your remarks are addressed to the defendant or to his lawyer?"

If one can be punished for not being familiar with law, and, consequently, for breaking it, lawyers who are not familiar with law are exempted from being punished for their ignorance of the law:

Lawyers are the only persons in whom ignorance of the law is not punished.

Moreover, they might be even rewarded (that is financially, by getting their fees), despite the fact that their pour counsel might even do harm to their client:

Ignorance of the law excuses no man who retains poor counsel.

The following text is in the same vein as the American proverb *No matter who loses, the lawyer always wins*:[22]

[21] Such kind of punning is called paronomasia.

[22] Here is a humorous definition of a contingent fee:
When asked, "What is a contingent fee?" a lawyer answered, "A contingent fee to a lawyer means, if I don't win your suit, I get nothing. If I do win it, you get nothing". http://www.notary.com.sg/law_jokes_3.htm

Ignorance of the law prevents a lawyer from winning your case, but not from collecting his fee.

Both the proverb and the anti-proverb above aim at the 'lose-lose' situation of a lawsuit–for a client (that is if a client loses a case, he gets nothing, since a claim bankrupts him; if, however, he wins, the situation is the same, and he gets nothing, since he has to pay his lawyer's fees). Thus, lawyers always win, even if they are poor professionals, and are not familiar with law.

The three transformations of another legal proverb, *Necessity knows no law* (also of Latin origin {*Necessitas non habet [frangit] legem*}), touch upon the topic of the lawyer's ignorance as well. In the second and third texts lawyers are even sarcastically given a nickname[23] ("Necessity", the first word of the original proverb):

Necessity knows no law, and neither does the average lawyer.
As a student in law school, they called him "Necessity" because he knew no law.
The trial had been proceeding for some time and everyone was amused by one lawyer's consistently referring to the opposing lawyer as "Mr. Necessity." After awhile, the judge inquired, "May I ask, Mr. Jackson, why you always refer to learned counsel as 'Mr. Necessity'?" "Simply, Your Honor," was the reply, "because he knows no law."

In spite of the fact that the vast majority of anti-proverbs stress lawyers' cleverness, intelligence, and cunning (dominant traits lawyers needed for lawyers; see the last section of the present study), nevertheless, according to the following anti-proverb in the form of a wellerism,[24] some lawyers might be stupid, although stupidity is not one of their stereotypical features. The fact that the cabbage-head is compared to the head of the lawyer simply speaks for itself:

"Two heads are better than one," as the cabbage-head said to the lawyer. {Two heads are better than one}.

[23] Employing puns that play on personal names is a frequent technique of proverb transformation, for example "*A Chicago man calls his sweetheart Revenge because she is so sweet*" {*Revenge is sweet*} (for more on punning in Anglo-American anti-proverbs see T. Litovkina, A.: The Pun Is Mightier than the Sword: Types of Punning in Anglo-American Anti-Proverbs. In: McKenna, K. (ed.): *The Proverbial 'Pied Piper': A Festschrift Volume of Essays in Honor of Wolfgang Mieder on the Occasion of His Sixty-Fifth Birthday*. New York, 2009, 141–154; T. Litovkina, A.: Paronomasia, Homonymy and Homophony in Anglo-American Anti-Proverbs. In: Soares, R. J. B.–Lauhakangas, O. (eds): *2 Colóquio Interdisciplinar sobre Provérbios–Actas–2nd Interdisciplinary Colloquium on Proverbs–Proceedings*. Tavira, 2009, 275–288.

[24] Wellerisms, named for Charles Dickens' character Samuel Weller, are particularly common in the USA, Great Britain and Ireland. This form of folklore is normally made up of three parts: 1) a statement (which often consists of a proverb or proverbial phrase), 2) a speaker who makes this remark, and 3) a phrase that places the utterance into an unexpected, contrived situation. The meaning of the proverb is usually distorted by being placed into striking juxtaposition with the third part of the wellerism.

1.2.4. "There's honor among thieves–at least, until they begin to deal with lawyers"

Some of the most stereotypical traits of the legal profession according to Anglo-American anti-proverbs are connected with lying and dishonesty. Let's demonstrate this with two examples. The proverb mutation below plays on two different words pronounced and spelled identically:[25] to *lie* (to deceive), as opposed *to lie*[26] (to be in a reclining position; or to be at rest). In fact, the transformation does not use explicitly the words *"lying"* but only implicitly refers to them:

> Any time a lawyer is seen and not heard, it's a shame to wake him. {Children should be seen and not heard}.

The anti-proverb above might also be considered an allusion to the proverb *Let sleeping dogs lie*, indicating one should never do anything that might instigate trouble from a lawyer. The anti-proverb might also refer to other qualities popularly associated with lawyers, such as their ability to talk too much, to use language that is hard to understand, and to complicate things, creating chaos and confusion.

The anti-proverb below is a clear indication that honest lawyers simply don't exist, and therefore, they should never be trusted or relied upon. Indeed, lawyers are even depicted as less honest than thieves:[27]

> There's honor among thieves–at least, until they begin to deal with lawyers. {There's honor among thieves}.

[25] As we can see from the two texts below, the two different connotations of the word "lying", which have already been discussed above, are played upon again, this time in American lawyer jokes:
"What do lawyers do after they die?
They lie still."
http://www.lawyer-jokes.us/modules/news/article.php?storyid=77
"How does an attorney sleep?
First he lies on one side, and then he lies on the other."
http://wilk4.com/humor/humorm353_lawyers.htm

[26] These words are some of the most frequently used words for punning in Anglo-American proverb transformations:
"Truth lies at the bottom of a well, but if it lies, how can it be the truth?" {Truth lies at the bottom of a well}
"As you have made your bed, why lie about it?" {As you make your bed, so you must lie on it}
"Politics makes strange bedfellows, but they are always willing to lie on their own side." {Politics makes strange bedfellows}.

[27] Not surprisingly, lawyers are called thieves in a number of jokes:
"If you see a lawyer on a bicycle, why don't you swerve to hit him?
It might be your bicycle."
http://jokeparty.com/
"A lawyer and a physician had a dispute over precedence. They referred it to Diogenes, who gave it in favour of the lawyer as follows: 'Let the thief go first, and the executioner follow'."
http://xar.us/funny/lawyer/shortjokes.html
Or, as the next rhyme suggests:
"Between grand theft and a legal fee,
There only stands a law degree."
http://www.vakilno1.com/lawoneliner.htm

We have already mentioned above that one of the frequent tasks of lawyers is to work for dishonest people, for those who in pursuit of getting more money (or power, or fame, etc.) "help themselves" by breaking the law. As we know from everyday life experience and from a well-known proverb, *Evil communications corrupt good manners*:

Lawyers help those who help themselves. {God helps those who help themselves}
If God helped those who help themselves, those who help themselves wouldn't have to hire expensive lawyers.

The two examples below even recommend that a person breaking law–in order to save money–should honestly confess everything (obviously, not to a lawyer), so that it will not be necessary to hire a lawyer, which would force him to pay high fees:

An honest confession is not always good for the soul, but, in most cases, it's cheaper than hiring a high-powered lawyer. {An honest confession is good for the soul}
Honesty is the best policy, because good lawyers come high. {Honesty is the best policy}.

As can be seen from the two alterations above, being honest and hiring a lawyer are perceived to be two contradictory things. Either you are honest, and you are forgiven for everything, or you employ a lawyer; in other words, the quality of honesty is not considered to be one of a lawyer's stereotypical features.

Other basic features of the legal profession–skillful ability to manipulate, as well as cleverness, cunning and slyness–are presented sarcastically in the following anti-proverb:

Where there's a will, there's a way–out for the lawyers. {Where there's a will, there's a way}.

The mutation above is also an example of one of the most dominant themes reigning in American lawyer jokes: "Smart guy wins."

As has already been mentioned above, one of the tasks of lawyers (especially those who deal with criminal law) is to help people who do not know laws, or more than that, who do not respect them, and, therefore, break them. The anti-proverb below stresses that good lawyers–for high payment–are ready to falsify reality, in order to 'clear' their clients and, therefore, to help them to win their cases:

Ignorance of the law is no excuse, unless you can afford to hire a good lawyer. {Ignorance of the law is no excuse}.

I.2.5. "How to make crime pay: become a lawyer"

As we have seen from the examples quoted above, the overwhelming majority of Anglo-American anti-proverbs treating the lawyers speak about them in general. Two special breeds of lawyers are, however, mentioned in a number of our anti-proverbs: defense attorneys and lawyers who deal with marital law. Let us have a look at some representative examples.

Quite a few of anti-proverbs in our material deal with criminal defense lawyers, a breed of lawyer specializing in the defense of those charged with crimes. While the original proverb *Crime does not pay* means that although crime may be profitable for a while, it will

not pay in the long run, its transformations below express the opposite idea: crime does pay; what is more, it might pay you very well, especially if you are a lawyer defending criminals:

> How to make crime pay: become a lawyer.
> Crime pays–be a lawyer.

The following joke, employing a punch-line in a form of a proverb, enlarges the criminal lawyer's ignorance and incompetence to the extent that it leads to his clients' (unjustifiable) conviction (or even death sentence). And the fact his clients cannot reveal any secrets ("being almost invariably convicted"), helps the lawyer attract new clients whose fate might be similar to those who have never had a complaint about the way he has looked at their interests, and practice law for years without knowing it properly:

> A criminal lawyer whose clients, especially when tried for murder, were almost invariably convicted, boasted in the hearing of Montague Williams, "I have been forty years at the Bar, and I have never had a complaint about the way I have looked after my clients' interests." "That's because dead men tell no tales," retorted Williams. {Dead men tell no tales}.

Lawyers dealing with marital law are brought up in the following variations. The first one portrays an overcritical lawyer by indicating that a lawyer gets acquainted with all the negative deeds (naturally, very frequently enlarged) of their clients' spouses:

> No man is a hero to his wife's lawyer. {No man is a hero to his valet}.

While the original proverb–*Hell hath no fury like a woman scorned*–emphasizes that no one is angrier than a woman who has been rejected in love or otherwise offended, its transformation below modifies the original text. Such a fury becomes her lawyer. It is not surprising if we just think of how much lawyers hear about extra-marital affairs of their clients' spouses:

> Hell hath no fury like the lawyer of a woman scorned.

I.2.6. "Old female lawyers never die; they just lose their appeals"

After discussing the main stereotypical traits of American lawyer, according to these biased anti-proverbs, in the last section of the study let us focus on a few more features that lawyers possess. A feature typically associated with the legal profession is that lawyers feed on the troubles, misfortunes, and conflicts of others:

> Necessity knows no law, but it is intimately acquainted with many lawyers. {Necessity knows no law}.

The proverb transformations below and an American proverb *Lawsuits were invented to make lawyers rich* also support this statement:

> Clothes make the man, and suits make the lawyer. {Clothes make the man}
> It takes two to make a bargain...and a lawyer to write the contract. {It takes two to make a bargain}.

The following text illustrates such stereotypic traits of a lawyer as fighting nature, toughness and arrogance:

In court, wrangling between lawyers is nine points of the law. {Possession is nine points of the law}.

However tough lawyers are, they can't always win their suits, despite the fact that one of the dominant themes of anti-proverbs about lawyers is "Smart guy wins". The following proverb alteration–the only example in our corpus which emphasizes the female[28] gender and the age of a lawyer–is a pun on an *appeal* submitted in court by lawyers and the *sex appeal* of ageing female lawyers:

Old female lawyers never die; they just lose their *appeals*.[29] {Old soldiers never die, they just fade away[30]}.

It has to be pointed out here–and this is not surprising at all–that the figure of the honest, trustworthy or kind attorney hardly ever appears in our material. A rare exception, however, just proves the rule. The following proverb variation depicts a lawyer who, when he sees that there is no chance for winning a lawsuit, simply recommends his client to forget about his case, despite the fact that the lawyer will not be able to make any money on this case:

Let bygones be bygones...unless your lawyer thinks you have a good chance of winning a lawsuit. {Let bygones be bygones}.

[28] According to numerous examples from the corpus of Anglo-American anti-proverbs, some of the most stereotypical female features are vanity, female beauty and sexual attractiveness. Naturally, youth is an important aspect of women's physical attractiveness and sex appeal. Unfortunately youth does not last forever. For more on women in Anglo-American anti-proverbs, see T. Litovkina, A.: The Nature of Women as Revealed Through Anglo-American Anti-Proverbs. In: *Proverbium: Yearbook of International Proverb Scholarship*. 2011, 28 (in press).

[29] In order to understand ambivalent puns (as in the cited example) one needs an ability to view one situation from two, or sometimes more than two, different perspectives. Let us view two more ambivalent puns from my data, both of which are mutations of the proverb "*Old soldiers never die, they just fade away*". In both of the mutations the word "balls" may stay for two concepts: (1) a spherical object for use in a game or (2) testicles:
"Old rugby players never die. They simply have their *balls* taken away."
"Old golfers never die, they just lose their *balls*."

[30] The proverb "*Old soldiers never die, they just fade away*", which generated the largest number of parodies in my corpus of Anglo-American anti-proverbs (79), has provided a template for ridiculing a wide range of other professions and occupations (for example accountants, politicians, physicians, salesmen, etc.):
"Old accountants never die; they just lose their balance."
"Old physicians never die; they just lose their patients."
"Old politicians never die–they just run once too often."
"Old postmen never die. They just lose their zip."
"Old salesmen never die–they just get out of commission."
Good jokes never die; they only pass along. Example: The comedian's wife sued for divorce, claiming he tried to joke her to death. (for more on the mutations of this proverb see T. Litovkina–Mieder: *op. cit.* 244–248.

Many more stereotypical traits of lawyers' character and behavior could be discussed and exemplified in the present study but now I must conclude.

Summary

The present study has focused on the profession subjected to the greatest mockery in Anglo-American anti-proverbs (or proverb transformations), the profession of lawyer. In the present study the most stereotypic traits of lawyers and their behavior have been discussed, as illustrated by some representative examples of Anglo-American anti-proverbs. As has been demonstrated through a number of proverb transformations, the greatest anger and irritation are directed at the cost of lawsuits, the high income of lawyers, and their greed. Lawyers' ignorance and their skillful manipulation are also common themes. Lawyers are inveterate liars. Finally, the list of lawyers' vices encompasses a number of other negative qualities as well, including stupidity, aggression, cunning, and dishonesty. Lawyers most frequently appear in Anglo-American anti-proverbs together with doctors, and accountants. Representatives of all three professions are seen as hungry in their pursuit for money.

The present study has shown that, like traditional Anglo-American proverbs in general (for example, *A good lawyer, a bad neighbour; Lawyers, like painters, can easily change white into black; No matter who loses, the lawyer always wins*), the overwhelming majority of legal proverb parodies are also extremely demeaning to lawyers. It is not my task here to discuss if the stereotype of the lawyer in Anglo-American anti-proverbs accurately portrays the traits and behavior of American legal professionals. As one of the leading American folklorists, the late Alan Dundes, pointed out at the end of eighties:

> In the United States, as elsewhere, individuals acquire stereotypes from folklore....The stereotypes may or may not be accurate character analyses–they may or may not be in accord with actual, empirically verifiable personality traits. The point is that folk stereotypes exist, and that countless people make judgments on the basis of them. There is probably no other area of folklore where the element of belief is more critical and potentially more dangerous, not only to self but to others.[31]

Elsewhere in the same book, Dundes added: "Folklore does not create society; it only mirrors it. If the mirror image is unattractive, does it serve any purpose to break the mirror?"[32] A few years later Edward J. Bander emphasized that "law reflects, rather than molds, society. If a society is mean, craven and litigious, it is not the lawyers that are responsible–they simply fill the vacuum that could be sweetness and light with a mean spirit and acts of vengeance".[33]

Implications for Further Research

This study has focused on Anglo-American anti-proverbs that make fun of lawyers. It would also be important to discuss proverb mutations treating other professions and occupations (for example, politicians and doctors, accountants and policemen, teachers and writers,

[31] Dundes, A.: *Cracking Jokes: Studies of Sick Humor Cycles and Stereotypes.* Ten Speed Press, Berkeley, 1987, 116.

[32] *Ibid.* 38.

[33] Bander, E. J.: The Lawyer as Devil's Advocate. In: *The Lawyer and Popular Culture: Proceedings of a Conference.* Littleton, 1993, 178.

whores and housewives), and compare the stereotypical features associated with these professions and occupations with those attached to lawyers. Since proverbial language is said to reflect the system of values and conventions of a country, it would be useful not only to discuss American attitudes presented in anti-proverbs treating the legal profession, but to conduct cross-cultural comparison and contrasts involving the United States and other countries.[34] An intercultural comparison of Anglo-American legal anti-proverbs to legal anti-proverbs in other languages would be also of great interest and significance.[35]

[34] Legal anti-proverbs are not particularly popular in Hungary. In the corpus of over 7000 Hungarian anti-proverbs recorded by Anna T. Litovkina and Katalin Vargha only six proverb transformations about lawyers have been found. For more on Hungarian legal humor see Fenyvesi, Cs.: *A jog humora* (The Humour of Law). Pécs, 2003; Fenyvesi, Cs.: *A jog humora és rejtélyei* (The Misteries and the Humour of Law). Pécs, 2010; T. Litovkina, A.: Minden, amit tudni akartál a jog és a rendőrség humoráról, de nem volt kitől megkérdezned (Everything what you wanted to know about the Humour of the Law and the Police but had nobody to ask). Interview of Anna T. Litovkina with Csaba Fenyvesi, advocate, lecturer, editor of the book *Humour of Law*). In: T. Litovkina, A.–Barta, P.–Hidasi, J. (eds): *A humor dimenziói* (Dimensions of Humour). Budapest, 2010, 237–245.

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CONTENTS

STUDIES

ANDRÁS BRAGYOVA	Kant and the Constitutional Review Kantian Principles of the Neo-constitutionalist Constitutionalism	97
RÉKA FRIEDERY	Insight into a Special Relation: the European Parliament and the European Ombudsman	115
IVÁN HALÁSZ	Symbolic Elements in the Preambles to the Constitutions of the Visegrad Countries	126
KÁROLY KISTELEKI	Changes in the Hungarian Regulation of Citizenship and the Hungarian Concept of Nation	133
TAMÁS NÓTÁRI	*Translatio imperii*–Thoughts on Continuity of Empires in European Political Traditions	146
MICHAL ŠEJVL	The Changing Role of the State: The State as a Mirror of the Individual?	157
VÍT ŠŤASTNÝ	The Continuity and Discontinuity of the Titles of Supreme State Organs in the European Countries of the Communist Bloc with special attention to the Situation in Czechoslovakia	166

KALEIDOSCOPE

TEKLA PAPP	New trends of atypical contracts in Hungary	171

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ANDRÁS BRAGYOVA*

Kant and the Constitutional Review Kantian Principles of the Neo-constitutionalist Constitutionalism

Es ist süss sich Staatsverfassungen auszudenken.
Kant: Streit der Fakultäten[1]

Abstract. Kants political and legal theory is now thought to be one of the most important contributions to the theory of modern constitutionalism. The paper is an attempt to distil the fundamental principles of constitutional law as implemented in modern constitutional review from the writings of Kant. It examines the idea of the constitution as a social contract and its relation to popular sovereignty. Second, the principles of "republican constitution"–liberty, equality and independence (autonomy)–follow. These principles condense the essence of what we now call fundamental constitutional rights. Third, the transcendental maxim of legislation, that is, the publicity is analysed; the principle of the publicity of legislation is (under various names like equality, public reasoning and discussion, freedom of speech) fundamental for modern constitutionalism (or neo-constitutionalism). Constitutional courts are organs of the "public use of reason" so important for Kant and revived recently by Rawls. The last section is a discussion of the relationship of morality and constitutional government. Kant regarded the law as a coercive order a precondition for moral autonomy but he did not qualified constitutional principles "moral". Thus, the Kantian interpretation of constitutionalism does not support the moral reading or interpretation of the constitution; instead, the principles of the "lawful" constitution are based (like the maxims of morality) on practical reason.

Keywords: Kant, constitutional review, constitutionalism, constitutional rights

I. INTRODUCTION

Writing about the relationship of Kant and constitutional review of legislation as we know it today is literally an anachronism: Kant is not the theoretician of constitutional review, since in his age and for him it was simply non-existent.[2] Still, Kant has a lot to say for constitutional review and I hope this will become manifest from the following lines. Kant's political and legal philosophy was for a long time neglected as the symptom of his elderly

* D.Sc., judge, Constitutional Court of Hungary, H-1015 Budapest, Donáti u. 35–45; research professor, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30.
E-mail: bragyova@jog.mta.hu

[1] "It is a pleasure to invent constitutions for ourselves." Still, he continues: the attempt of the people to realise them shall be punished. (SA XI 366.)

[2] Fichte, a follower of Kant (at least he thought he was), in his *Natural Law* of 1796 deduces the necessity of constitutional review. See Fichte, J. G.: *Grundlage des Naturrechts* (Hrsg.: Medicus, F.), Leipzig, 1907, 175 skk.

spiritual weakness according to the familiar disrespectful remark[3] of the otherwise Kant-admirer Schopenhauer. Even the neo-Kantians as Stammler and implicitly Kelsen accepted this view. Nowadays they are regarded as a major part of his work. It suffices to mention the political philosophy of John Rawls, who relies on Kant, furthermore, the philosophy of Jürgen Habermas and Ottfried Höffe as well as of János Kis in Hungary.[4]

The recent rediscovery of the legal philosophy of Kant was undoubtedly supported by the widespread acceptance of what I propose to call substantive constitutional review. By substantive constitutional review I mean the examination of the *legal* validity of legal substance, i.e. legally binding, permitted, etc. conduct based on constitutional justifiability, while the standard of constitutional justifiability is substantiated by fundamental constitutional rights and other constitutional principles defining the substance of law.[5] Putting aside details of legal history, it is important that constitutional review is a relatively new development, since it appeared gradually in the form familiar today in Europe mainly after the II World War (and much earlier in the United States which remained a solitary phenomenon for a century or more). Present-day substantive (or content-based) constitutional review is conceptually closely related to the rational law cultivated also in the age of Kant, on which he delivered lectures at university.[6] In modern substantive constitutional review, which in the following I will call neo-constitutionalism[7], several issues, which in the age of Kant and in the following centuries for a long time were discussed as matters of natural or rational law, that is, philosophical matters "within the boundaries of pure reason", are in our days adjudged by constitutional courts as positive issues of constitutional law. Present-day constitutions incorporate "lauter Prinzipen a priori" [a priori principles] as legal principles and if the constitution is regarded as part of the legal system (which is the prerequisite of constitutional review), it will be also applied as positive law. A consequence of this is that during reasoning in constitutional review similar issues need to be adjudged by similar arguments like formerly the followers of the natural law school did. The followers of the rational law school including Kant–as the Streit der Fakultäten proves–examined these issues theoretically as philosophical ones (as issues of practical reason), whereas today in neo-constitutionalist constitutional review these issues need to be settled via legal reasoning.

[3] Schopenhauer, A.: Die Welt als Wille und Vorstellung I. In: Schopenhauer, A.: *Sämtliche Werke*. (Hrsg.: Freiherr von Löhneysen, H.-W.), Frankfurt am Main, 1986, I. 707. (The parody of the Kantian style). For a similar opinion see Arendt, H.: *Lectures on Kant's Political Philosophy* (ed.: Beiner, R.). Chicago, 1992, 8.

[4] See Kiss, J.: *Vannak-e emberi jogaink?* (Do We Have Human Rights?) Budapest, 1986 (3rd ed., Budapest, 2003).

[5] Ferrajoli, L.: *Diritto e ragione. Teoria del garantismo penale*. Bari, 2000, 904 skk.

[6] See data and resources on page XXI skk. in the foreword to the edition of *Metaphysik der Sitten*. In: Vorländer, K.: *Philosophische Bibliothek*. Hamburg, 1959. The course books used by Kant (Baumgarten, Achenwall) can be found in the volumes Akademie Ausgabe. Deutsche (formerly Königlich Preussische) Akademie der Wissenschaften zu Berlin. Berlin, 1900, (AA) XIX skk. *Cf.* Busch, W.: *Die Entstehung der kritischen Rechtsphilosophie Kants*. Berlin, 1979.

[7] This appropriate term in this sense is primarily applied in the legal literature of Neo-Latin countries. See, e.g. Carbonell, M. (ed.): *Teoría del neoconstitucionalismo. Ensayos escogidos*. Madrid, 2007.

What in Kant's age was subject only to the "Verfassungsrichterstuhl der Rechtsvernunft"[8] (the constitutional court of legal reason), in many legal systems in our days it is subject to the jurisdiction of constitutional courts, therefore, it is conceived as positive law. Simultaneously, a lot has changed: positive law has a greater role in the concept of *Rechtsvernunft*, hopefully not to the detriment of *Vernunft*. At any rate, legal reasoning and decision-making have more institutional, procedural and substantive constraints than philosophical and pure rational legal reasoning. At any rate the ultimate controlling role of practical reason in legal reasoning cannot be given up.[9]

The relationship between practical (including legal) reason and present-day constitutional review is not accidental: the theory of modern constitutionalism originates in the Enlightenment and Kant is the greatest philosopher of the Enlightenment. Therefore, it is the provisional negligence and not the re-discovery of Kant's legal philosophy that is astonishing. In Kant's legal and political philosophy we can find the fundamental principles of the modern constitutional state and neo-constitutionalist constitutional law. In the following, I will examine some of the related issues analysed by Kant, which are foundational in contemporary constitutional theory, as well. I will neither engage in a Kant exegesis, nor in the interpretation of Kant, but in the paraphrase of some of his thoughts.

The first issue to be examined will be the concept of the constitution as a social contract, the second one will be our meaning of the principles of the "republican constitution", then I will analyse the maxim of legislation and its relation to constitutional review. Finally, while examining the thinking of the greatest moralist of all the times, we cannot fail to mention the relationship of the constitution and morality. Needless to say, however, for order's sake let me mention that a great many of Kant's relevant thoughts will be disregarded.

II. THE CONSTITUTION AS A SOCIAL CONTRACT

For Kant, the concept of the constitution is not an idea of positive law, but a *Vernunftidee* [an idea of reason], that is, it is not subject to written law, or, in Kant's terms, empirical (or statutory) or positive law, in other terms to experience, therefore, it is not an issue pertaining to the faculty of law (that is, the jurisprudence of positive law). Accordingly, Kant does not apply the concept of the constitution in our terms. There is nothing special about this, since in that era and for a long time subsequently the constitution was not primarily a legal, but a normative political concept. The constitution became the object of empirical legislation, which is Kant's term for positive law, via the constitutional charters in Kant's age, at the end of the 18th century.[10] Written constitutions, such as the French constitution of 1791 were not legal constitutions: they were rather political principles derived from a political philosophy and written down in a solemn charter. This was entailed by the natural law or rather the rational legal conception prevalent in that age, according to which evident legal principles just as the rules of logic need not be, or as others think, must not be enacted as

[8] Kersting, W.: *Wohlgeordnete Freiheit*. Berlin, 1984, 222. (3rd ed., Paderborn, 2007); and Kersting, W.: Der Geltungsgrund von Moral und Recht bei Kant. In: Kersting, W.: *Politik und Recht*. Veilerwist, 2000, 304 skk. The following considerably differs from the construction of Kersting.

[9] This is the meaning of Alexy's so-called *"Sonderfallthese"*, according to which legal reasoning is a special case of practical reasoning as construed by Habermas, R. A.: *Theorie der juristischen Argumentation*. Frankfurt am Main, 1978 (1983), 32 skk., 263 skk.

[10] Troper, M.–Jaume, L. (eds): *1789 et l'invention de la constitution*. Paris–Brussels, 1994.

statute-law but at most they can be solemnly declared.[11] What in our days we designate as constitutional or fundamental rights, in the age of the Enlightenment they were valid not on grounds of positive law, but out of practical reason. According to Kant, positive law has always and only contingent content and has nothing to do with the validity of the necessary–and for this reason non-contingent–principles of law.[12] No matter how we conceive of the legal nature of the constitutions of the 18th–19th centuries, they were indisputably not designed to be applied by the judiciary, since such courts did not exist and that was no mere chance.[13]

For Kant, the concepts of the state and the constitution are of course related, since the constitution determines the form of government and the relation of state powers. However, its foundation is the "Ursprünlicher Vertrag". As he formulates: "Der Akt, wodurch sich das Volk selbst zu einem Staat konstituirert, eigentlich aber nur die Idee derselben [...] ist der ursprunglüche Kontrakt, nach welchem alle ... im Volk ihre aussere Freiheit ausgeben ... seine Freiheit überhaupt in einer gesetzlichen Abhängigkeit, d.i. in einer rechtlichen Zustand ... zu finden; weil diese Abhängigkeit aus seinem eigenen gesetzgebenden Willen entspringt." [The act, or rather its mere idea, by which a people constitutes itself as a state consists in the original contract, according to which the people resigns its external freedom, so that it should find its freedom in dependence on the law, i.e. in the condition of the law.] (SA VIII 434) Of course, the idea of the social contract is not the invention of Kant, whereas, the pure normative application of the social contract as a regulative idea may derive from him, at least in its radical form. Kant had excellent "anthropological" knowledge (see e.g. SA XII 399), he did not believe that any kind of contract constitutive of a society could have really obtained. On such grounds he associates the concept (idea) of the constitution with the idea of the social contract and defines the constitution as a *pactum unionios civilis* (SA XI 144). He literally sets forth in "Eternal Peace": "Verfassung ... welche aus der des ursprünglichen Vertrags hervorgeht" [constitution deriving from the original contract] (SA XI 204). As we see, Kant explicitly considers the constitution to be a social contract.

By conceiving the constitution as an idea, Kant regards the people which constitutes itself in the constitution as an ideal people. Since the people does not exist before (and without) the social contract, it cannot reason about the origin of the supreme power (SA VIII 437). Thereby, he articulates the foundational idea of constitutionalism: people's sovereignty dissolves in the constitution, since the *Volkswille* and the *Souverän* are qualified as mere *Gedankending*, which "keine objektive praktische Realität hat" [the people's will and the sovereign are mere thoughts, which do not have any objective practical reality] (SA VIII 461). Thus, the constitution absorbes the sovereignty of the people through transforming it into an idea. According to Kant, we can distinguish two elements in the constitution: the establishment of the political constitution or constitutional law, the rules of government and

[11] The term of déclaration clearly implies *the acknowledgement of the already existant* more explicitly than the Hungarian term of "nyilatkozat": The Declaration of Human and Civil Rights of 1789 as its text elucidates only openly acknowledges, but does not constitute the always existing (and persisting) rights. See Troper, M.: La déclaration de droits de l'homme et citoyen en 1789. In: Troper, M.: *Pour une théorie juridique de l'Etat.* Paris, 1994, 317 skk.

[12] This is how we can construe Kant's remark on the concept of law of lawyers in the *Kritik der reinen Vernunft*, as it is pointed out by Bódog Somló. Somló, F.: *Juristische Grundlehre.* 2nd ed., Leipzig, 1927, 52 skk.

[13] The *jury constituionnaire* as conceived by Sieyes has miscarried in practice. Pasquino, P.: *Siéyès et l'invention de la constititution en France.* Paris, 1998, 193.

MAGYAR
TUDOMÁNYOS AKADÉMIA
KÖNYVTÁRA

"the legal condition" (*Rechtszustand*), especially in the republican constitution (which I shall discuss separately). For Kant, the constitution is the foundation of the validity of the law (to use modern terms); therefore, the concept of the constitution is closely related to Kant's concept of law. This concept is dual: on the one hand, the contents of law ensures the reconciliation of the *external freedom* of individuals, which I shall examine in the next section. On the other hand, according to Kant, law is based on coercion ("Befugnis zu zwingen" SA VIII 338): without coercion no positive law can exist. However, coercion in this case means the *legitimacy* of the use of coercion, not its actual application.

The conception of the constitution as a social contract facilitates the understanding of the link between the constitution and people's sovereignty (as the substance of the constitution). Kant conceives the constitution not simply as the establishement of social life *unter Rechtsgesetzen*, that is, under the rules of law but he identifies the people with those who unite on the basis of such a contract. People's sovereignty is the criterion of the substance of the correct (just) constitution, but it cannot manifest itself in the practical activity of the people. The constitution as a social contract and popular sovereignty in the representative–according to Kant's and the contemporary general terminology: republican–constitution are essentially identical. Kant repudiates democracy, by which he means direct democracy, whereas, he considers representational and necessarily constitutional democracy to be a necessary element of a lawful (that is just) constitution.

These thoughts proved to be very productive in modern constitutional theory especially in the neo-constitutionalist school of thought in constitutional law, as well as in modern political philosophy, which is according to Rawls the theory of constitutional democracy.[14] In terms of constitutional law, the conception of the constitution as a social contract provides an acceptable theory, which is legally interpretable, that is, applicable in constitutional legal reasoning as to the interpretation of people's sovereignty under constitutional law. The construction of the popular sovereignty in modern constitutions as a social contract has many advantages. On the one hand, neither the people as the subject of the social contract, nor the social contract or the idea of the constitution are empirical concepts. This conception results in several important consequences as to the substance and interpretation of the constitution. The most important of these with regard to the modern neo-constitutionalist constitutional practice is that only such an interpretation of the constitution complies with the substance of the constitution, which also complies with the constitution construed as a social contract. That is, the ultimate criterion of truth as to the interpretation of the constitution consists in the fact whether the result of the interpretation is acceptable as the substance of the constitution as a social contract.[15]

Another advantage of the construction of the constitution as a social contract is that it clearly articulates that the constitutive and foundational concept of constitutional democracy is the equality of those living in unity of title in the constitutional state. It follows, then, that popular sovereignty and constitution are not simply normative but meta-normative concepts.

[14] Rawls, J.: *Political Liberalism*. New York, 1993, XXVII., 135. And see Kis, J.: *Alkotmányos demokrácia* (Constitutional Democracy). Budapest, 2000.

[15] Let's see an example instead of further explication. If I do not know whether I am a homosexual or not, whether I am a man or a woman, would I accept the discrimination of homosexuals or women under the constitution as the substance of a social contract, that is, such an interpretation of the constitution, according to which, e.g. the limitation of the political rights of women is constitutionally justifiable. Therefore, the ultimate standard of the correctness of the interpretation of the constitution is whether the result of the interpretation could be an independent constitutional norm.

That means that the popular sovereignty cannot correspond to any empirical-social fact: the constitutional people as a sovereign exists only in the constitution, or rather in its idea.[16] The notion of the constitutional people implies ideal unity of the titular of the constitutional powers (the *pouvoir constituant*) and each person subject to the constitutional law and order *ut singuli*. Which at the same time determines the constitutional relationship between the *collective people*, which can only be a majority, and *the people as a set of free individuals*. The collective people in the political constitution of constitutional democracy can manifest itself only in a voting and decision-making procedure: majority decision replaces unanimous decision which is impossible in practice. Consensus in modern constitutionalism is replaced by the parts of the constitution which are excluded from majority decision and not revisable by constitutional amendments. These include primarily fundamental rights (such as the complex of legal positions unconditionally due to each individual), which cannot be limited by majority legislation, furthermore, the fundamental rules of the constitution, without which the constitution could not persist. In this perspective, majority voting is but a technical device and not the essence of constitutional democracy.

In modern legal systems the constitution has two fundamental legal functions: the constitution is the legal foundation of the legality of the legal system (formally, the highest source of law): this is the minimally necessary constitution for the persistence of the legal system. The second, and in neo-constitutionalist legal systems the basic function of the constitution is the legal determination of the contents of the law. In this latter role, the constitution determines the mandatory and prohibited substance of the law: the norm-principles, which must justify the norms regulating the conduct of the individual in the legal system.[17] The constitutional norm-justifying principles, in particular the constitutional rights can be considered the content of the constitution as a social contract (even if they are simultaneously principles of political philosophy or of natural law). I construe fundamental rights or constitutional rights as the complex of legal positions guaranteed for each member of the society, which can be acknowledged as legal positions due to each person by all rationally thinking persons in a society. This elucidates the contrafactic character of the constitution as a social contract. The social contract theory is a thought experiment aiming at the justification of a social condition or complex of norms (the constitution in our case). It is a thought experiment questioning whether ideally rational and fully informed persons would accept the constitutional norms or the social condition established under the constitution.

The conception of popular sovereignty as a social contract demands constitutional justification in two distinct steps. The first step is the justification of *the content of the constitution*, that is, the constitutional rights and other *constitutional properties* of the society. A justification may consist in the Rawlsian abstraction from the social status of the

[16] János Kis attributes considerably more reality to the sovereignty of the people, than I do. See Kis, J.: Népszuverenitás. A klasszikus tan és kritikája (People's Sovereignty. The Classical Doctrine and Its Critique). *Politikatudományi Szemle*, 15 (2006) 1, 5 skk.

[17] For the sake of simplicity, I will not deal with the organisational parts of the constitutions determining the form of government, that is, the political constitution in the strict sense. If the constitution is part of the positive legal system, the same applies to its organisational rules and to its norm-justifying norms. Kant's explications about the political constitution do not add anything to that of Montesquieu (*trias politica*); therefore, they have only historical significance. We need to note that Kant was a subject of Frederick the Great, a fact he mentions with some irony [Weischedel, W. (Hrsg.): *Studienausgabe*. Frankfurt am Main, (SA) 1977. XI 267].

individual upon the selection of fundamental constitutional norms (behind "the veil of ignorance"),[18] or else in an ideal discourse-situation as proposed by Habermas. By the *constitutional properties* of a society I mean all the properties of a society which cannot be but unique and the same for each and every member in a society. Examples of constitutional property are the legal system, the form of government (a state can not be a monarchy and a republic at the same time), the system of ownership, territory, etc. The second grade of justification consists in the application of the social contract embodied in the constitution, which in neo-constitutionalist legal systems adopting constitutional review equals the legal construction of the constitution. Here I cannot engage in a detailed justification of theory set out in outlines above. Suffice it to say that the constitution does not consist of rules of conduct, but of norms about norms, therefore, constitutional review consists in the interpretation and application of constitutional norms in the examination of the constitutionality of the norms of the legal system.

III. PRINCIPLES OF THE REPUBLICAN CONSTITUTION: FREEDOM, EQUALITY AND "INDEPENDENCE"

Kant held that the *telos* of human history is the achievement of the constitutional state (vollkommene Staatsvervassung) (Ideen zu einer allgemeinen Geschichte in weltbürgerlicher Absicht. SA XI 33, 45) making possible the full expansion of the capabilities of mankind. Kant explicates in three of his works that a constitution of full value can be but the republican constitution (SA VIII 432 skk; SA XI 144 skk; 204). The Kantian republican constitution based on reason is very close to the neo-constitutionalist constitution, since the republican constitution is not a political constitution (it is not concerned primarily with the *forma imperi*). It is a legal constitution, which "aus dem reinen Quell des Rechtsbegriffs entsprungen" (derives from the pure source of the concept of law). Thus, Kant distinguishes the political constitution (though he does not designate it as such) from the legal constitution, which in his time existed only as rational or natural law. In Kant's age and for a long time afterwards, in terms of positive law, constitutions were at best mere political constitutions, whereas the legal constitution obtained as a political or natural legal principle.

The republican constitution is the constitution about the contents of the legal system. According to Kant, the essential content of the legal system is *a certain kind of freedom*: "Das Recht ist also der Inbegriff der Bedingungen unter denen die Willkühr des anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereignt werden kann." [Law is therefore the set of conditions, under which the freedom of one can be united with that of the others under the general laws Freedom.] (SA VIII 337) The other element of the concept of law, the distinctive feature of positive law, is the relationship with coercion (Befugnis zum Zwingen): law entails the limitation of freedom. The other element of the concept of positive law, what Kant designates as the publicity of law, is public law (öffentliches Recht=public law) "Inbegriff der Gesetze, die einen allgemeinen Bekanntmachung bedürfen, um einen rechtlichen Zustand hervorzubringen." (SA VIII 429). In our terms, the "lawful condition" for Kant can be described as the existence of the legal system, since the meaning of the Kantian "Gesetz" is norm in our terms.[19] Therefore, without the publicity (promulgation) of the norms of the legal system no positive law can exist. We need to note,

[18] Rawls, J.: *A Theory of Justice*. Oxford, 1971.

[19] See Stemmer, P.: *Normativität*. Berlin, 2008, 155.

however, that for Kant, certain principles of private law and constitutional law, not to mention morality, are *a priori* given for practical reason and as such, do not need publication at all.

The first principle of the republican constitution is freedom, so far as according to Kant, man has a single innate and simultaneously positive right: "*Freiheit* (Unabhängigkeit von eines anderen nötigenden Willkühr), sofern sie mit jedes anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann" [Freedom (independence from the coercive arbitrariness of others), so far as it can persist jointly with the freedom of everyone else on grounds of general laws] (SA VIII 345).[20] This concept of freedom is extremely interesting from the point of view of the neo-constitutionalist theory of constitutional review. As it is clear from the quotation, for Kant freedom includes several fundamental rights, such as equality, the protection of privacy and freedom of speech, which can be deduced from the Kantian concept of freedom from the outset. In other words, the Kantian concept of freedom implies the entirety of fundamental rights to be guaranteed for all in the lawful condition (that is, in the legal system of constitutional state). In terms of contemporary constitutional law, Kant here discusses fundamental constitutional freedoms or constitutional rights. These are "innate" rights, and as such that they are due to each person equally and that freedom (that is, fundamental rights) does not have to be "acquired" or "deserved" like ordinary rights under any legal system.

It is manifest so far that Kant considers constitutional freedoms, in other words fundamental rights, to be the legally necessary (by which Kant means obligatory) content of the legal system.[21] Modern constitutional review does the same: the constitutional review of legislation is a means to protect constitutional rights taken over from rational law or if one prefers, natural law.

In strict terms, we cannot claim that modern constitutional courts reviewing legislation "enforce" constitutional rights as mandatory contents of legal norms, since these *categorical legal principles* are meta-norms *about* the norms of conduct of the legal system. The determination of the standard of goodness or justifiability (frequently identified with justice) of legal norms used to be the function of natural law, also shared by Kant. For the rationalist thought the principles commanded by reason are categorical, as the famous categorical imperative is. Being categorical means that neither the mandatory force, nor its validity may rationally be challenged. (The categorical imperative is, according to Kant, synthetic a priori. See e.g. Grundlegung der Metaphysik der Sitten. SA VII 49, Kritik der praktischen Vernunft. SA VI 49, 67.) There are categorical, unconditional legal principles[22] included in the Kantian concept of freedom, that are valid without positive law-making as the standard of the correctness of law, but they do not form part of positive law. Constitutions regulating the content of legal order contain (mainly in the forms constitutional rights) the standard of justification of legal norms, not unlike the natural law. The relationship between the sub-constitutional law and the constitutional principles is conceptual and derivative. A good case demonstrating such a justificatory reasoning in constitutional law is justification the

[20] H. L. A. Hart formulates almost in so many words. Hart, H. L. A.: Are There Any Natural Rights? In: Waldron, J. (ed.): *Theories of Rights*. Oxford, 1984, 77 skk.–however, without mentioning Kant.

[21] According to Kant, the obligatoriness (Verbindlichkeit) of conduct consists in its normative necessity in present-day terms.

[22] On the term see Höffe, O.: *Kategorische Rechtsprinzipien*. Frankfurt am Main, 1995.

limitation of fundamental rights as applied in many European constitutional jurisdictions. Constitutional review essentially decides on the constitutional validity (admissibility) of norms including norms governing the conduct of citizens, not about the interpretation and application of norms of conduct or primary norms.

In Kantian constitutional theory, as mentioned above, the rational state establishes the legal condition (*Rechtszustand*) among its citizens. Legal freedom consists in lawful freedom and an equal subjection to law: legal freedom is protected by state coercion (SA VIII 338) through the enforcement of the law. This is the constitutional concept of freedom in the 18th century prevalent until the mid-20th century, classically formulated by Montesquieu: anybody subject only to law is free.[23] According to the modern concept of law under constitutional law, law *as expression de la volonté générale* has two basic properties: it is a general rule, and is deemed to be accepted by people through its adoption by a representative organ, like the Parliament. This conception does not distinguish the between constitution and the ordinary law, thus it excludes by virtue of conceptual necessity the possibility of an unconstitutional law. The constitution is a set of rules about the law-making, including the sources of law; any law adopted in a regular procedure is necessarily constitutional.[24] This constitutional theory locates the guarantee of the correctness of the law in the legislative procedure: the law-making procedure (its publicity and discursive nature) is regarded as sufficient to ensure a reasonable outcome. Today, the main argument against modern, especially neo-constitutionalist constitutional review is the reasonableness of the legislative procedure, and the argument that the legislation is better suited for the proper interpretation of the constitutional rights than the judicial procedure of constitutional review.[25] This argument, to be sure, does not contradict to the maxim of legislation, which Kant describes as a "blosse Idee der Vernunft" [mere idea of reason] (SA XI 153).

According to Kant, the third element of the republican constitution following the equality of citizens is what he calls *Unabhängigkeit*, which is especially interesting from our point of view. Kant, like the French constitution of 1791, distinguished active and passive citizens and secured political rights exclusively for citizens with self-sufficient economic-social existence. On the basis of his examples, it is obvious that only citizens who are their own masters (*sui iuris*) owing to their property or by virtue of their profession may be *citoyen* with the right to vote in legislation or the elections. However, they are to be considered equal whatever the difference among their properties may be (SA XI 150; as well as VIII 432). Kant was not an early adherent of the welfare state; rather, in his notes he

[23] Montesquieu: *De l'esprit des lois*, XI. 3 (ed. Pléiade II. 395.): "La liberté est le droit de faire tous que les lois permettent". *Cf.*: Bragyova, A.: Alkotmány és szabadság: a szabadság alkotmányos fogalma (The Constitution and Freedom: the Constitutional Concept of Freedom). *Fundamentum*, 7 (2003) 3–4, 5 skk. and Bragyova, A.: The constitutional concept of the freedom of the individual. *Archiv für Rechts- und Sozialphilosophie (ARSP)*, 91 (2005), 379–408.

[24] Jellinek, G.: *Gesetz und Verordnung*. Tübingen, 1887 and Carré de Malberg, R.: *La loi, expréssion de la volonté générale*. Paris, 1931.

[25] In modern Anglo-Saxon literature, the most famous defendant of this view is Jeremy Waldron (e.g. *The Dignity of Legislation*, Cambridge, 1999 and *Law and Disagreement*, Oxford, 1999). These views were already discussed in 19th century and later French and German literature. A characteristic opponent of constitutional review is Lambert, E.: *Le gouvernement des juges*. Paris, 1921, especially, 224 skk. In recent continental theory, Habermas and his followers, e.g. Ingeborg Maus are sceptical as to substantive constitutional review. See Maus, I.: *Zur Aufklärung der Demokratietheorie*. Frankfurt am Main, 1992.

appears to be (one could say) a forerunner of Hayek: "Die Wohltätigkeit kann nur auf Kosten der Unterhanen ausgeübt werden." [Public welfare is possible exclusively at the expense of the subjects.] (AA 23. 354) Here I cannot discuss the relationship of the welfare and the constitutional state; suffice it to say that the welfare state is the consequence of the radical implementation of the Kantian principles of the constitutional state. The principle of equality and the maxim of legislation (to be discussed below) and the idea of the constitution as a social contract make the welfare state conceptually inevitable. The freedom and the autonomy of the individual depend on social conditions: those not possessing the conditions of freedom and autonomy could claim, on the basis of the principle of equality the same conditions others have. Not for Kant, since as he says independence is in part (but only partially) *acquired* and not innate right, like freedom. At the same time, it is problematic to postulate a rational individual who would accept that his independence (social non-dependence) is subject to contingency, in Kant's terms, empirical social circumstances. In today's constitutional democracies, the equality and independence of the citizen has become inseparable, while in Kant's age they were still separable.[26]

Kant and generally the Enlightenment were not democrats in our terms. They accepted the representative system based on the separation of legislation and executive power (which Kant as the authors of the Federalist Papers[27] call republican), but they did not accept democracy based on the participation of the empirical people as a whole. The requirement of *Unabhängigkeit* [by the German term Kant means personal and financial *non*-dependence (*sibisuffitientia*)] excludes a great part of the empirical people from among active citizens. Modern constitutional democracies are in an ideal case and in Kantian terms simultaneously republican and democratic constitutional systems, which Kant and his contemporaries held impossible. Nevertheless, Kant's is right in claiming that constitutional democracy can exist only as representative democracy; however, representative democracy presupposes the social freedom of the individual, which requires the guarantee the minimum of the social-economic independence of the individual (*pace* Kant, who regarded external freedom as independence from others' coercion). In other words: constitutional democracy (and here one must agree with Kant) requires the freedom of the *cives* as individual not subject to the power of others, which simultaneously requires a kind of "social democracy" (to use Tocqueville's term). Today, an influential trend of modern liberalism, called republicanism postulates that freedom is grounded on the non-subjectedness to the power of others.[28] The same is implied by Kant's concept of "non-dependence". True in Kant's case it lead , to the exclusion of those subject to the power of others (such as wage workers and servants) from among active citizens. Still it is possible to argue on the same ground in the contrary direction as many supporters of modern constitutional welfare rights in fact do.

IV. THE MAXIM OF LEGISLATION AND THE CONSTITUTIONALITY OF THE LAW

[26] Luf, G.: *Freiheit und Gleichheit. Die Aktualität im politischen Denken Kants.* Wien, 1978. 150 skk.

[27] Wright, B. F. (ed.): *The Federalist.* Cambridge, 1972, 133, 150. (No. 10.,14.; the author of both is Madison, J.).

[28] See Pettit, Ph.: *Republicanism.* Oxford, 1997 and Spitz, J-F.: *La liberté politique.* Paris, 1995.

In the former section we saw that the freedom of the individual in a constitutional state consists in her being subject exclusively to general and public rules of law. Therefore, the procedure of legislation, the content of the law and its general validity are fundamental in maintaining constitutional freedom. The freedom (autonomy) of the individual can be exercised so that it should not conflict with others, thus, equal individual autonomy for everybody can be guaranteed only by equal limitations imposed upon each others' freedom– and this is the function of the legal order. Also, this is the source of the maxim of legislation. By the concept of the maxim Kant means "the subjective principle of action" (*Willkühr* =choice, empirical will), which the actor makes the rule of his own action (Rechtslehre Einleitung IV, SA VIII 332). Therefore, the maxim of legislation as the principle determining and justifying all actions is either correct or incorrect. The maxim of the law is identical with the principles justifying legislation as an action. On these grounds we can analyse Kant's explications on the maxim of legislation.

According to this maxim, the legislator has to make law (=norm), which *could* derive from the whole people and which can be regarded by each subject (at law), as if he approved of it. "Denn das ist das Probierstein der Rechtsmässigkeit eines jeden öffentlichen Gesetzes. [The criterion of the lawfulness/correctness of all public law.] (SA XI 244) In *Zum ewigen Frieden* Kant formulates the transcendental formula of public law, that is, law-making to be proclaimed and applying to all,[29] which he designates as the principle of publicity. As he sets forth: "all actions related to others' rights are unlawful (*unrecht*), if their maxim does not tolerate publicity". Thereby, Kant unites the idea of the social contract with the concept of the rational justifiability of the norm (long before Habermas and Rawls). As for Kant, the law is lawful, i.e. correct, if it complies with the maxim of legislation and the transcendental formula of publicity,[30] otherwise lawful law would be a tautology.

For Kant, the ultimate identity of the two formulas, i.e. rational admissibility and publicity derives from the concept of reason. Kant associates rationality with publicity. The fundamental concept of Kant's philosophy is reason (Vernunft), the use of which is generally public, just as in science.[31] The society can never be deprived of the right of the public use of reason, i.e. thinking as he formulates in his writing "An Answer to the Question: What Is Enlightenment?" (SA XI 55). The consent of the subject (of law) is not a real consent–this is provided by the participation in the law-making of the representative organ (Parliament). The standard (criterion) of the justifiability of the law is that the rational subject at law would have made (adopted, accepted) the same law if he had the necessary knowledge.[32] This reformulated maxim of legislation is closely related to the discourse theory of Habermas, according to which rationality is identical with the norm (or other statement) acceptable in the ideal discourse-situation. The law (the legal norm) is rationally acceptable,

[29] Das öffentliche Recht ist der Inbegriff öffentlicher Gesetze (d.i. solcher die durch einen machthabenden Gesetzgeber allen denen eine Pflicht obliegt verkündigt werden). AA 23. 347. [Public law implies the entirety of public laws to be mandatorily proclaimed by the legislative power.]

[30] The transcendental nature of the formula postulates that its validity does not depend on empirical circumstances, which could influence the decision of the legislator, such as economic or practical, etc. considerations, but it needs to be applied to these.

[31] As many have noticed, Kant usually draws a parallel between the activity of reason and that of the judge or the legislator, but we must restrict ourselves to a note. This by all means implies the publicity or public justifiability of judgement (by which Kant also means cognitive statements).

[32] There is a slight difference between the two formulas, since according to the latter one, several admissible versions are possible.

if the participants of the ideal discourse, which excludes coercion and is conducted under ideally good conditions, would have adopted it as a reasonable norm. Clearly, the main difference between the concepts of reason of Kant and Habermas is that Kant examines the rationality of arguments, whereas Habermas examines the procedure of reasoning, i.e. the relationship of arguments and compares the force of arguments, which in an ideal case facilitates the success of "zwanglose Zwang des besseren Arguments" [the forceless force of the better argument].

In modern political and legal philosophy, the discourse theory of Jürgen Habermas and the political liberalism of John Rawls are directly and admittedly related to Kant's principle of publicity. In *Political Liberalism*, Rawls applies the anglicised term of public reason and considers the constitutional court–in the form the US Supreme Court–as its main forum. Habermas considerably departs from Kant (and in this repect, from Rawls too), since he defines the public use of reason to be a social institution (procedure). The difference between the two views is manifest in their attitude towards majority decision-making, and its proper roel in modern constitutional democracy. The Kantian standard is counterfactual: the reason examines whether the subjects would have adopted a norm. This is the requirement of the rational justifiability of a norm, the decision on which depends on the correct use of reason. In the discourse theory of Habermas, especially in *Faktizität und Geltung*, discourse consists in communicative action and as such, embedded in a social context. On the other hand, the concept of the ideal discourse situation is as normative as Kant's maxim of legislation. According to Habermas, "Gilt nur das Recht als legitim, das aus der diskursiven Meinungs- und Willensbildung gleichberechtigter Staatsbürger hervorgeht".[33] [Only the law is legitimate, which derives from the discursive formulation of the opinion and will of equal citizens.] In the same work, Habermas expounds: "Discourse theory explains the legitimacy of the law via the legally institutionalised procedural and communicational conditions."[34] Habermas also needs to explain what Kant does not: in a procedural democracy protecting a set of fundamental rights (Habermas calls this "System der Rechte"), especially the rights of minorities? Habermas also accepts the principle of publicity, since in void of modern communicational rights it is impossible to make legitimate law (Kant calls this *rechtsmässig*), however, he regards both the principle of publicity and people's sovereignty as discourse and procedure.

From the point of view of constitutional theory, the relationship between rationality and public justification is the most important. In politics, the use of reason is collective and public: constitutional rights and constitutional decision-making procedures, such as political participation rights, elections, legislation and the entirety of communicational rights as safeguards of the freedom of the social communication process as a whole facilitate political decision-making based on public reasoning and debate. It is a crucial issue in the justification of constitutional review whether discursive democracy as a procedure–including the principle of publicity, which, like its counterpart, the categorical imperative is formal in the sense of being devoid of content–is sufficient to guarantee the constitutional rights, freedom and equality, which are also foundational for Kant. Majority decision cannot be deduced from the principles of discursivity and publicity, but it's a practically necessary procedural rule (at least as *second best*) in the legislative procedure. This is expressly acknowledged by Kant in *Gemeinspruch* (SA XI 152–153). In practice, democratic collective self-legislation

[33] Habermas, J.: *Faktizität und Geltung*. Frankfurt am Main, 2. Auflage, 1992, 492.

[34] *Ibid.* 499.

(*Selbstgesetzgebung*)[35] is based on the majority principle, although the theory of discursive democracy requires considerably more than the (political) majority of legislation in the interest of the establishment of democratic legitimacy. Although, "the democratically legitimate formation of opinion and will" is impossible without constitutional rights, and it is based on constitutional rules of procedure, they are *ex definitone* insufficient to protect the rights of the individual against the majority. Thus, a discursive-rational procedural constitutional democracy also needs the judicial protection of the constitution. It is impossible to justify satisfactorily procedural rules by other procedural rules, nor can the content of the law be justified by the correctness of the law-making procedure. The constitution understood as a social contract in Kantian terms is capable to justify both.

Constitutional democracy is impossible without appropriate institutions and rules, thus the constitution conceptually (and historically) precedes democracy. Trivially, democracy is a constitutional regime: it cannot exist but through democratic constitutional norms. The function of ensuring the impartial observation of procedural rules rationally cannot be entrusted exclusively to the participants of the procedure. The procedural justification of constitutional review is based on this insight. For Habermas, the principle of publicity is a subsidiary principle in terms of the judicial construction of the constitution since the *content-based* criteria of legitimate, i.e. constitutionally valid law are to be found in the set of fundamental rights (*System der Rechte*). Fundamental constitutional rights are legal positions of the individual defining for the legislator part of the content of law entailed by the maxim of legislation. In this sense, fundamental rights are a sort of positive natural law not subject to legislative disposal not guaranteed by the procedure of constitutional democracy.[36] For those who are familiar with neo-constitutionalist or just modern constitutional law, the requirement of "rational (i.e. public) justification" is not a philosophical, but a legal dogmatic term. In applying the constitutional equality rule most constitutional courts use the principle of public justifiability as a test of reasonableness of classification by the legislator.[37]

Constitutional review is a lawful way to exercise the right of resistance against government. Kant rejected the right to active resistance against the *"unrechtmässig"* (unjust or unlawful) power; even if it infringed the maxim of legislation.[38] But he did not reject resistance through public argument and reasoning. As he wrote in the *Dispute of the Faculties*: "Why hasn't any sovereign dared to say that he didn't recognise any right of the people against himself?" (SA XI 359). The answer is: because the principle of publicity is an indispensable element of the legitimacy of legislation. Since the principle of publicity necessarily includes the possibility of public *räsonnieren*, we can infer that Kant recognises *resistance via reasoning*. Kant, who always expressed his appreciative views about Hume's

[35] Grundlegung der Metaphysik der Sitten [Groundwork of the Metaphysics of Morals] (SA VII 63).

[36] Maus, I.: Freiheitsrechte und Volksouverenität, *Rechtstheorie*, 26 (1995) 507–562. Here for lack of space we cannot introduce the immanent limitations of procedural democracy. For a part of the relevant literature see Bragyova, A.: Alkotmánybíráskodás és demokrácia (Constitutional Review and Democracy). *Acta Juridica et Politica*, 55 (1996), 135 skk.

[37] Bragyova, A.: Egyenlőség és alkotmány (Equality and the Constitution). In: Lamm, V. (ed.): *Van és Legyen a jogban. Tanulmányok Peschka Vilmos tiszteletére* (Is and Ought in Law. Studies in Honour of Vilmos Peschka). Budapest, 2000.

[38] Spaemann, R.: Kants Kritik der Widerstandrechts. In: Batscha, Z. (Hrsg.): *Materialen zu Kants Rechtsphilosophie*. Frankfurt am Main, 1976, 347.

works and called him "a man of sharpest wit" in the *Prolegomena* (SA V 116), might have agreed with the statement of Hume, according to which "[i]t is ... only on opinion that government is founded."[39] He understood very well that the greatest limitation of political power is publicity or, in modern terms, public opinion. Thus, we can understand Kant's explications, namely, that resistance has one lawful means, which he calls *"Freiheit der Feder"* (SA XI 161, XII 409) and this means the freedom of the press, naturally, the reasoning press. The freedom of the pen is "das einzige Palladium der Volksrechte" [the only safeguard of people's rights] (XI 161), which as a freedom is the control (Prüfung) of the scientific propositions in science and of "the correctness of the judgement" of the state power, the monarch in politics (XII 409). Thus, according to Kant, there is no monarch, or *a fortiori* any political power and decision-maker, that would not be in need of the constant criticism of "the correctness of its judgement".

For Kant, the "freie Rechtslehrer, d.i. die Philosophen" [free legal scholars, i.e. philosophers] (SA XI 363) are to protect natural rights by public reasoning which they address to the state with due veneration (*ehrerbietig*). In Kant's age, the protection of what we now call fundamental rights devolved on *free* legal scholars, who–according to the *Streit der Fakultäten*, where he claims that only the lower, that is, the philosophical faculty is free, whereas the others, such as the faculty of law is bound by positive regulations (SA XI 280–287)–could only be philosophers, not lawyers. This is a consequence of the Kantian idea of rational law: the constitutional rights constitutive of the positive legal system in neo-constitutionalism were generally not considered to be positive legal rights in the 18th–19th (and in a large part of 20th) centuries, even though they were incorporated into the constitution.[40] It was publicity–public opinion–that protected the constitutional rights, which corresponded to the judgement of the educated general public emerging in the age of Kant.[41]

The modern public sphere (analysed masterfully in well-known book of Habermas),[42] is far cry from the reasoning public consisting mainly of the educated middle and upper classes of the 18th century. The ideal discourse situation of Habermas–closely related to the Kantian principle of publicity, since ideal discourse consists in the public use of reason–cannot be identical with modern political public, let alone the empirical public opinion. Therefore, modern constitutional review can be regarded as the forum of the public use of reason[43] which enforces the maxim of legislation, if the empirical political legislator failed to do so. Hence, it is reasonable to claim that modern constitutional review consists in the institutionalisation of publicly reasoning resistance, which is always permissible in Kant's terms and which we can designate as reasoning resistance. This conception derives directly from the principle of publicity presented above. This is a forceful corroboration of the procedural justification of constitutional review, which can be accepted by Habermas as well as the democrats rejecting constitutional review.

[39] Hume, D.: Essays. In: *The Philosophical Works of David Hume*. Edinburgh, 1826, Vol. III, 31.

[40] This is summarised perfectly in Duguit, L.: *Traité de droit constitutionnel*. Paris, 2nd ed., Tome III., 1923, 566 skk.; and Troper: *op. cit.*

[41] Tönnies, F.: *Kritik der öffentlichen Meinung*. Berlin, 1922.

[42] Habermas, J.: *Strukturwandel der Öffentlichkeit*. 1962 (new ed.: Frankfurt am Main, 1990); on the principle of publicity: 178 skk.

[43] In this issue, Rawls is more far-reaching than Habermas, who is more trustful with regard to procedural-discursive democracy. See, e.g. Rawls, J.: *Political Liberalism*, *op. cit.* 212 skk.

As it is clear from the Hufeland-review (SA XI 809), Kant concurred with Hobbes that nobody is obliged to obey coercion. Therefore, the state needs to be able to crush physical opposition by force or convince the subjects about the "legality" of its power (legitimacy in our terms). A state or government bound to protect and observe fundamental rights can use only limited force against its subjects (citizens); therefore, it can exist for a longer period only if the citizens bear at least benevolent indifference towards it. Of course, the machinery of the power of the state can function further on without this, but only as long as coercion (and the efficiency of the threat of its application) actually enables it to do so. Therefore, the legitimacy of the constitutional state is positively based on the limitation of the lawful use of force thus giving the priority to the communicative power against the coercive one.

V. CONSTITUTION AND MORALITY

To conclude, I wish to discuss the question of constitution and morality with the help of Kant. According to the idea of the constitution in Platonic terms (that is, in reality never perfectly realised) which is in accordance with the natural rights of man, everybody bound by the law (norm) is simultaneously a legislator on equal footing with others. For Kant this is the *respublica noumenon*, the transcendental norm of all constitutions (SA XI 364). The realisable form of the *respublica noumenon*, i.e. the *respublica phaenomenon* is the republican constitution. The republican constitution is conceived as a version of the state ("Vereinigung einer Menge der Menschen unter Rechtsgesetzen") [the association of men under of law] (SA VIII 431), in which the constitution is "oberste formale Bedingung (conditio sine qua non) aller übrigen äusseren Pflicht" [the principal formal condition of all external obligations] (SA XI 144). In my terms, the legal system for Kant primarily and practically consists in the inevitable limitation of freedom of conduct, the primary objective of which is the protection of the external freedom of the individual (including property). The constitution and the legal system are morally necessary for the individual primarily because they establish the external conditions of moral life: the "bürgerliche Gesellschaft" [civil society] cannot exist without a *Staatsverfassung* [a constitution] (SA XII 687).

Kant's conception of mankind was sufficiently pessimistic so that he could not conceive a society without legal force and political power. Therefore, the political society, i.e. the constitutional *Rechtszustand* is not based at all on the morality of the participants, but on practical necessity and rationality. Therefore, "Das Problem der Staatseinrichtung ist, so hart wie es auch klingt, selbst für ein Volk von Teufeln (wenn sie nur Verstand haben), auflösbar." [The problem of the foundation of the state, however harsh it may sound, can be solved by even a people (if it has understanding) consisting of devils] (SA XI 224). The foundation of the existence of the state (for Kant, that implies the law and order and public laws) is not a moral or other high motive, which devils would lack, but it is practical necessity conceivable merely by understanding (Verstand) and not by reason (Vernunft) including also the moral a priori. Therefore, law accounts for not the morally, but the practically necessary conduct, which "Mechanism der Natur durch selsbsüchtige Neigungen … von der Vernunft zu Mittel gebraucht werden kann… (SA XI 225)." "Die Natur will unwiderstehlich, dass das Recht zuletzt die Obergewalt enthalte." [Nature irresistibly wants law to possess the supreme power]. Let me add that Kant's works on legal philosophy mostly deal with a part of the *metaphysics* of law–the title of his legal theory is Metaphysische Anfangsgründe–and by metaphysics Kant means a priori knowledge. Besides, Kant admits the legitimacy of "purely empirical legal theory", undoubtedly with

the limitation that it resembles the wooden head in the tale of Phaedrus, namely, it can be beautiful but unfortunately it does not have a brain (SA VIII 336). In one of his reflections, he clearly distinguishes the empirical-political (we could say contingent) elements from the rational ones (deriving from reason) in constitutions. As he formulates that: "Staatsklugheit ist blos auf empirische Prinzipien gegründet, Staatsrecht auf rationale. Man vermengt die Bedingungen der ersten bei dem Begriffe einer Staatsverfassung überhaupt mit dem letzteren." (R. 6855. AA XIX 181) [The theory of governance is based on purely empirical principles, whereas constitutional law is based on rational ones. In case of the general concept of the constitution of the state, the conditions of the first one are united with these of second one.]

Kant's work on the philosophy of religion, *Die Religion innerhalb der Grenzen der blossen Vernunft* (Religion within the Limits of Reason Alone) is most instructive from the present point of view, since here Kant's standpoint is clearly expressed: the legal condition (*rechtlich-bürgerlicher* or political *Zustand*) is at the same time an *ethical state of nature*. In the state of nature everybody is simultaneously one's own legislator and judge (SA VIII 753): in the legal order the state of nature persists with regard to morality. We can add that if it did not persist, the autonomous moral life in Kant's terms would be impossible. Since moral virtues are duties towards ourselves, exclusively we can be our own judges in these issues. According to Kant, the State is not a moral, but a legal community; therefore, the constitutional State cannot be a moral community either. This precludes the moral interpretation not only of the constitution, but of law altogether. For Kant, the moral community (ethisches gemeines Wesen) can only be conceived as "Volk Gottes" (the people of God) "und zwar nach Tugendgesetzen" (viz. only on grounds of moral laws) (SA VIII 757) where there is no place for external force. Religion consists in the recognition of our duties as divine commandment (SA VIII 762, 788), whereas virtue consists in the voluntary fulfilment of moral duties (SA VIII 526). It is only God who knows whether the individual was guided in the voluntary accomplishment of his moral duty by the motive of the respect for moral duty alone, or by also something else (and for Kant the conduct is not moral in the latter case).

Thus, according to Kant, the constitution establishes merely a *Rechtszustand*, but not an "ethical" community based on virtue. The establishment of an ethical community, the moral constitution proper cannot be the objective of the constitution. Moreover, Kant warns against the legal enforcement of virtue (moral conduct) in the following paragraph of *Religion innerhalb*..."Wehe aber dem Gesetzgeber, der eine auf ethische Zwecke gerichtete Verfassung durch Zwang bewirken wollte. Denn würde dadurch nicht allein gerade das Gegenteil der ethischen bewirken, sondern auch seine politische Untergraben und unsicher machen". [Woe is the legislator, who intends to implement a constitution directed at ethical objectives by force. In doing so, he would achieve not only just the opposite of the ethical, but he would also undermine and shake the political constitution.] (SA VIII 754) As he explicates, it is the legal force that protects (external) freedom and thereby maintains the ethical natural state, necessary for the existence of autonomos moral life. However, the ethical natural state differs basically from the legal natural state, to which the command of *exeundo est e statu naturali* applies. For Kant "alle politischen Bürger" exist in an ethical state of nature (*ethischer Naturzustand*) which is at the same time the constitutional-legal condition.

Thus, for Kant, the constitutional-legal condition is *simultaneously* moral state of nature: the moral, but not the legal, freedom of each and every person is complete in this condition. The legal meaning of constitutional rights, the *Rechtszustand*, as we have seen is

triadic for Kant: freedom, equality and independence for the propertied citizens (*cives*). These rights are political in the sense that they can be construed exclusively as constitutional rights, as part of a social contract. In other words, these are not moral rights but the constitutional properties of a society based on legal principles, which establish the external conditions of moral and social autonomy. Nevertheless, these attributes are not moral for at least two reasons. First, the constitutionally guaranteed freedom of the collectivity of individuals promotes the coordination of their conduct *affecting others* under general coercive laws. In morality, however, everyone is simultaneously legislator and judge: this is the ethical state of nature guaranteed in a constitutional condition of the law. The intervention of the legislator, which transforms moral duty into legal duty, inevitably destroys the moral nature of the conduct, since it is not any more based on autonomous (inner) legislation.[44]

At the same time, for Kant, not all constitutions are just (*rechtsmässig*). It is helpful as to the translation of the terms *rechtens* or *rechtsmässig* that Kant frequently adds the Latin equivalent of the terms: *iustum*. It is altogether clear that Kant does not refer to any kind of positive lawfulness in connection with the "lawful" constitution, but he means a constitution which corresponds to reason and is based on the practical use of reason. In this constitution it is primarily the transcendental principle of publicity that can guarantee the agreement between morality and public law (SA XI 244 ff.). This principle, which I discussed in the previous section, is simultaneously ethical (pertaining to the doctrine of virtues) and legal (affecting the rights of man). In the quoted place Kant discusses the people's right to resistance, which cannot be positive law from the outset.[45] Therefore, the content of the constitution *may be* in harmony simultaneously with morality and law, but the constitution itself is not a moral institution. The combined effect of the principles of the republican constitution and the transcendental formula of publicity facilitates that in the modern constitutional state the legal system be rational without being exclusively or primarily a moral state. The idea of law, which consists in guaranteeing external freedom for each individual, is incompatible either with the legal enforcement of morality or with individual happiness as an objective of the state (Antropologie in pragmatischer Hinsicht SA XII 686). Both of these would limit the autonomy of the individual to a greater extent than absolutely necessary. One is tempted to say that the moral principles determine the proper scope of the law: it ought not invade into the properly moral sphere of individuals, the latter being reserved for the working of autonomous moral life.

Thus, the principles of the republican constitution are legal, not moral principles. The modern, especially the neo-constitutionalist constitutional state may closely resemble what Kant considered to be "the constitution in accordance with man's natural rights" (Streit der Fakultäten SA XI 360). Modern constitutions usually include the principles of the Kantian republican (lawful, that is, just) constitution as constitutional rights, and principles. If so, the constitutional rights can hardly be regarded as moral principles in Kantian terms, since the constitution is not a moral institution, either. Simultaneously, Kant identifies a close relationship between morals (*Sitten*) and the principles of the constitutional state. This relationship, however, does not pertain to morality but it is part of the practical reason. For Kant, as we saw, the principles of the republican constitution can be recognised and accepted

[44] For a similar view: Dreier, H.: Kants Republik. In: Gerhardt, V. (Hrsg.): *Kants Streit der Fakultäten*. Berlin, 2005, 134 ff.

[45] Scheffel, D.: Kants kritische Verwerfung des Revolutionsrechts. In: Brandt, R. (Hrsg.): *Rechtsphilosophie der Aufklärung*. Berlin, 1981, 178 skk.

through (the necessarily collective) use of reason, just as morally correct conduct can be recognised by the use of reason. Therefore, the legal nature of constitutional rights is not based on their moral content but on practical rationality.

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Nearly all the works of Kant quoted above are available in several excellent English editions. Still, I quote Kant's works from the standard German editions, giving my own translation. I do so not by reason of disrespect for the translators, but simply because I used these texts. The quoted passages are easily identifiable and controllable in the standard English translations. The German texts are quoted from the *Studienausgabe*, except when the quoted text cannot be found there; in that case I quote it from the Akademie-Ausgabe.

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RÉKA FRIEDERY*

Insight into a Special Relation: the European Parliament and the European Ombudsman

Abstract. According to Arts. 20 (ex Art. 17 TEC) and 24 (ex Art. 21 TEC) of TFEU, European citizens are entitled to apply to the European Ombudsman. This right, stemming from European citizenship, is furthermore explained in Art. 228 TFEU (ex Art. 195 TEC), stating that any citizen of the Union or any natural or legal person residing or having its registered office in a Member State can complain in instances of maladministration in connection with the activities of the Union institutions, bodies, offices or agencies.[1] The European Parliament, as one of these institutions, represents next to the Council of the European Union the legislative power of the EU. From this starting point, the study aims to analyze the type of relation between an institution with decades-long history and an office with a history not much more than a decade and a half.

Keywords: European Parliament, European Ombudsman, petition, complaint, independence

The establishment of the European office was the result of a long way, formed among many by the attitude of the European Parliament and its Committee on Petitions.[2] If we try to describe the relationship between the European Ombudsman and the Parliament, the word "specific" seems to be the most adequate: the relation has more levels and these levels with connecting and complementing each other create its special nature and this can be approached or characterized from more sideways.

1. The petition and the complaint

Before the establishment the Office of the European Ombudsman by the Maastricht Treaty, the Committee on Petitions made an attempt to draw up a definition for the petition in the Resolution on the deliberation of the Committee on Petitions during the parliamentary year 1993–1994, declaring that petitions are all complaints, requests for an opinion, demands for action, reactions to Parliament resolutions or decisions by other Community institutions or bodies forwarded to it by individuals and associations.[3] The necessity of further specification led the Committee to engage again in the issue and as a result, with little change in the prior

* Ph.D., Research Fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30.
E-mail: friedery@jog.mta.hu

[1] Except the Court of Justice of the European Union acting in judicial role.

[2] See more Friedery, R.: The Role of the European Ombudsman in Dispute Solving. *Acta Iuridica Hungarica*, 49 (2008) 4, 359–376; Friedery, R.: Az Európai Ombudsman Hivatalának történelmi és intézményi aspektusai (Historical and Institutional Aspects of the Office of the European Ombudsman). In: Balogh, M. (ed.): *Diszciplínák határain innen és túl* (Within and Beyond the Borders of Disciplines). Budapest, 2007, 125–139.

[3] Report on the amendment of Rule 161 of Parliament's Rules of Procedure, 16 December 1997, Committee on the Rules of Procedure, the Verification of Credentials and Immunities (Rapporteur: Brian Crowley). http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference= A4-1997 -0416&language=EN#top

definition, a petition was to be regarded as a requests for intervention, for action, for change of policy or for an opinion, submitted to the Parliament by any citizen of the Union and any natural or legal person residing or having its registered office in a Member State, individually or in association with others.[4]

The TFEU and the Ombudsman's Statute offer also a guide to make a difference between the petition and the complaint. If we compare Art. 228 TFEU (ex Art. 195 TEC) to Art. 227 TFEU (ex Art. 194 TEC) then the difference between the complaint and the petition can be clearly noticed. The former stipulates that the Ombudsman is entitled to receive complaints about alleged maladministration in connection with the activities of the Union institutions, bodies, offices or agencies, the latter states that the European Parliament can be petitioned on matters belonging to the Union's fields. Thus, in the case of the petitions the complained activity must relate to the fields of the European Union,[5] while in the case of the Ombudsman this phrase cannot be seen[6]. This constitutes the main difference between the two non-judicial dispute resolution forums; it is possible to address a petition to the European Parliament in connection with Member States' authorities. The right to petition is of more general nature, whereby complaints can be in connection only with maladministration performed by Union institutions, bodies, offices and agencies. The Ombudsman helps to shed light on maladministration, the Committee on Petitions has the task to give adequate answer to complaints or opinion of natural or legal person in connection with the Parliament's resolution or decision of institutions and bodies. Art. 228 TFEU (ex Art. 195 TEC) states that a complaint can be lodged not only directly to the European Ombudsman but as well through a Member of the European Parliament: because there is no need for individual or direct interests to lodge a complaint, the person affected can persuade a Member of Parliament or other person fulfilling the personal requirements to refer the complaint on his or her own name to the Ombudsman.[7;8] This possibility earns significance in cases, where the complainant does not fulfil the personal requirements, e.g. is not a European citizen. Contrary to this–although the subjects of the provisions are the same, thus any citizen of the Union or any natural or legal person residing or having its registered office in a Member State–, the person addressing the petition has to be directly affected by the matter and has to address the petition directly to the Parliament, thus has no options as in the case of the complaint.

The procedures of the Committee on Petitions and the Office cannot be regarded as each other rivals. A basis for the co-operation is, when the lodged complaint regarding its content can be considered more a petition and vice versa. Hence, in this kind of cases the office will transmit the complaints toward the European Parliament's Committee on

[4] Resolution on the deliberations of the Committee on Petitions for the parliamentary year 1996–1997 (Rapporteur: Roy Perry). http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A4-1997-0190&language=EN

[5] According to Art. 227 TFEU (ex Art. 194 TEC) "...have the right to address ... a petition to the European Parliament on a matter which comes within the Union's fields of activity".

[6] According to Art. 228 TFEU (ex Art. 195 TEC) "...empowered to receive complaints.. concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies...".

[7] In the first Annual Report of 1995, 8 from the 298 registered complaints had been lodged through a Member of Parliament.

[8] Thus, complaints can be lodged *actio popularis* with the condition that both the complainant and the subject of the complaint can be identified.

Petitions, and the petitions, which are essentially complaining about maladministration, are automatically forwarded to the Ombudsman's Office.[9] The necessity of a successful co-operation between the two comes from cases when it is not clear to which body should citizens turn to, what the difference is between the two procedures. Since in the relevant legislation this procedure is only an option, a possibility and not a duty for the Ombudsman, it is not automatically made: the Ombudsman can only make use of the transfer if the complainant also agrees with it,[10] and the Committee on Petitions must follow this way, too.[11;12] We should point out that if a complaint has already been investigated as a petition by the Committee, it is usually not justified for a further investigation by the Ombudsman, only when new evidence has been submitted in the meantime,[13] but the Ombudsman's inquiry as an additional procedure is only in the latter case possible.

The relationship between the Parliament and the Ombudsman is even more toned: the Parliament even helps the Ombudsman to carry on the inquiry. This stems from the provisions that EU institutions, bodies, offices and agencies are required–such as the Parliament–to supply the Ombudsman with the requested information and must guarantee the access to their documents necessary for the Ombudsman. National institutions and bodies are also obliged to provide at the request of the Ombudsman with all the information which could clear the EU institution from maladministration. In this case access can be granted only after the concerned Member State had been notified, with exceptions when the information required is subject to law, or to secrecy falling under administrative decision, or fall under provision which cannot be made public. If the Ombudsman does not receive the requested help, or the request is refused, the Ombudsman can notify the European Parliament, which steps in using its political power to requests the necessary information for the Ombudsman. Furthermore, with the aim to share information of common interest, the Committee on Petitions–where it finds it necessary–invites the Ombudsman to attend the meetings of general and specific nature and to discuss matters of common interest.

[9] Soon after the beginning, during the year 1996, 10 petitions were handed over to the Office and 5 complaints were given to the Committee of Petitions, in both cases with the consent of the complainant. The European Ombudsman suggested in further 42 cases that they should turn to the Parliament.

[10] Art. 2(3) of the Decision of the European Ombudsman adopting implementing provisions, adopted on 8 July 2002 and amended by decisions of the Ombudsman of 5 April 2004 and 3 December 2008. Furthermore Implementing Provisions.

[11] See case 441/2002/ME, in which he advised that the submitted complaint should be forwarded to the Parliament. Indeed, the complainant alleged that the decision of the Council of the European Union limited his access to and the use of vitamins and minerals. Since the complaint contained no maladministration, but concerned the merit of Community legislation, therefore, the Ombudsman rejected it, but suggested to be referred as petition. See The European Ombudsman: *Annual Report 2002*. Luxembourg, 2003, 18.

[12] The Ombudsman acted similarly in case 2881/2004/JMA, where a group of complainants sent an open letter to the El Triangle newspaper in Barcelona about alleged discrimination, alleging that the European Constitution did not recognize the Catalan language as official. However, the complaint related to a proposal for amending the Treaties, and according to the Ombudsman it was not related to maladministration thus, it fell outside the scope of his mandate and was forwarded to the European Parliament as petition. See The European Ombudsman: *Annual Report 2004*. Luxembourg, 2005, 39.

[13] The European Ombudsman: *Annual Report 2000*. Luxembourg, 2001, 21.

2. Subject of inquiry: the maladministration

In the provisions regarding the European Ombudsman, we cannot find any further specification what they understand under the term of maladministration. It is only referred to in the Treaty and the Statute to the extent that the Ombudsman examines instances of maladministration. It is established that maladministration occurs, when an EU institution does not act in accordance with the Community law, or neglects or fails to take account the principles and rules created by the European Court of Justice and the Court of First Instance. The uncertainty surrounding of the definition of maladministration made the European Ombudsman further clarification,[14] and the definition was also adopted by a 1998 European Parliament decision. However, cases of maladministration cannot be listed exhaustively, which is proved by the complaints handed to the Ombudsman office. Indeed, a wild variety of situations must be taken into careful consideration, whether they have exhausted instances of maladministration or not.[15] Regarding the European Parliament, limits of maladministration can be determined by the European Parliament's political power. The classical Ombudsman offices have been established within the frame of the parliament to control the administration, and not for the supervision of the parliament's legislative or other work. Although the situation cannot be fully compared to the European level, the activities of the European Parliament cannot be considered as administrative activities, thus complaints in connection with the European Parliament's and its Committee on Petitions' political activity are to be considered inadmissible. Therefore, for example in complaint 420/9.2.96/PLM/B the alleged maladministration, namely poor administration by the Committee on Petitions the handling of the petitions was more of a political issue than maladministration: as the right to petition laid down in the Treaty has a constitutional value, the Parliament's responsibility is to organize its services thus it can perform its institutional functions.[16] Similarly, the decision of the European Parliament about the French nuclear tests in the Pacific was inadmissible because it concerned a political decision.[17]

As we cannot see a clear division of legislative and executive powers at European level, so the European office does not meet the traditional image of Ombudsman ordered to the legislative power,[18] and although basically he is a Parliamentary Ombudsman, the supervision is extended as well to the Parliament. Nevertheless, this control is limited: as complaints in connection with activities or decisions with rather political than administrative nature are not considered to be admissible, hence the Committee on Petitions cannot be supervised by the Ombudsman as its activities belong to the Parliament's political actions.

[14] First in the annual reports of 1995 and 1997.

[15] See more Friedery, R.: A hivatali visszásság, a maladministration az európai ombudsman nézőpontjából (Maladministration from the point of view of the European Ombudsman). *Új Magyar Közigazgatás*, (2009) 10–11, 20–28; Friedery, R.: Az európai ombudsman tevékenységét érintő hatásköri kérdések (Questions Regarding the Mandate of the European Ombudsman's Procedure). *Állam- és Jogtudomány*, 49 (2008) 4, 473–495.

[16] See complaint 420/9.2.96/PLMP/B in The European Ombudsman: *Annual Report for 1996*. Luxembourg, 1997, 14.

[17] See The European Ombudsman: *Report for the year 1995*. Luxembourg, 1996, 9.

[18] Meese, J. M.: *Das Petitionsrecht beim Europäischen Parlament und das Beschwerderecht beim Bürgerbeauftragten der Europäischen Union*. Frankfurt am Main, 2000, 182.

3. The decision-making of the Ombudsman

In cases, where the Ombudsman finds maladministration at the end of the inquiry and there is still a possibility to redress the maladministration by the institution, body, office or agency concerned, or the maladministration is of general nature or more serious, the Ombudsman informs the institution concerned and the complainant about his finding with a report and a draft recommendation. The institution concerned has three month to explain its position in a detailed opinion. If the Ombudsman's draft recommendation is not accepted within the time-frame, it is refused, or the institution concerned cannot find any other acceptable solution, or the Ombudsman does not find the detailed opinion satisfactory then the Ombudsman has authority to make a special report.[19] This report is submitted to the European Parliament, the concerned institutions and the complainant, in which the instance of maladministration is reviewed and a recommendation[20] can be laid down, too. In this case emphasis is on the European Parliament, because it can help to resolve the situation: using the decisions of the Parliament to accept the recommendation and call upon the institution to solve the problem.[21] The significance of the aforementioned is strengthened by the fact that the competence of the European Ombudsman is quite limited, because an Ombudsman decision has no binding power.[22] This means that if there is no problem-solving solution between the concerned institutions and the complainant, the Ombudsman turns to the last and most significant means: using the help of another institution. The importance of a special report is that the concerned institution's political adjudication is at stake. The first special report–concerning the public access of documents–was submitted to the Parliament in 1997 and the case ended successfully.[23] The special report has no legal effects "...vis-à-vis third parties within the meaning of Art. 173 of the Treaty (ex Art. 230 TEC) and is not binding to the Parliament", as stated by the Court of First Instance in Case T-103/99. Indeed, the Parliament is "...free to decide, within the framework of the powers conferred on it by the Treaty, what steps are to be taken in relation to it".[24] Therefore, the Parliament can freely decide to adopt a decision about the Ombudsman's recommendation, namely, adopting a decision the Parliament calls upon the concerned institution to settle the case.

However, the European Ombudsman has another reporting obligation, similarly to his other European counterparts. According to Art. 228 of TFEU (ex Art. 195 TEC) and Art. 3(8) of Decision 94/262 of the European Parliament, the Ombudsman has to submit an annual report at the end of each annual session in connection with the outcome of the inquires. Neither this report has binding effect to the Parliament, but in the frame of the

[19] See more special reports on http://www.ombudsman.europa.eu/cases/specialreports.faces.

[20] Art. 8(4) of the Implementing Provisions.

[21] For example in case 713/98/IJH, after submitting a special report, the European Parliament called on the European Commission to hand over data requested before by the complainant.

[22] See Case C-167/06 P *Komninou and Others v. Commission* [2007] ECR I-141, para. 44.

[23] Special Report by the European Ombudsman to the European Parliament following the own initiative inquiry into public access to documents (616/PUBAC/F/IJH) http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/378/html.bookmark

[24] See Case T-103/99 *Associazione delle Cantine Sociali Venete v. Ombudsman and Parliament* [2000] ECR II-4165, para. 50.

annual report the Ombudsman has the opportunity to give general observations regarding the conduct of the institutions'.[25; 26]

4. Election and dismissal

According to Arts. 228 of TFEU (ex Art. 195 TEC) and 194 of the European Parliament's Rules of Procedure, the Ombudsman is elected by the European Parliament. I must draw the attention to an earlier inconsistency, namely, that there was an election and a nomination procedure as well. First, the office had been filled by an election procedure, and after winning the election procedure the candidate was appointed by the European Parliament. Therefore, some authors have mentioned the European Ombudsman as an elected official, while others as an appointed one, since the Ombudsman was both elected and appointed. This quite inconsistent rule has been abolished by the Lisbon Treaty, since it amended the relevant article: according to the amendment the Ombudsman is elected by the Parliament, and thus the election procedure is not followed by a separate appointment.

The amendment of the Lisbon Treaty has not only resolved the contradictions between the two terms, but the new wording reinforces the independence and the legitimacy became stronger. That is to say, the appointment carries dependency between the appointed and the appointer, as opposed to a democratic election.

Art. 228 of the TFEU (ex Art. 195 TEC) does not rule any specific requirements for the person holding the office. However, with a closer look, a number of conditions can be seen as a guarantee of impartiality and knowledge necessary for the performance of this duty. First, only EU citizen can take the office of the European Ombudsman, who must possess a full range of civil and political rights, as well as every guarantee of independence. This person is necessary to meet the conditions for the exercise of the highest judicial position in his or her country, or have the acknowledged competence and experience to take on the duties of the European office.[27]

From the point of view of the wording, the phrase "or" implies the possibility that it is not necessary to have legal qualification for the position if the person concerned has sufficient expertise and experience. Nonetheless, this expertise and experience has to be that thorough, which allows decision-making and task completing in complex legal issues. The requirement of expertise is underlined as well by the fact that so far only such persons have been elected to head the office, who, as national ombudsmen had gained sufficient experience.[28] Analyzing their professional life, we shall draw attention to the fact that while Söderman[29] gained wide experience thanks to its position in various fields of the

[25] See the annual reports on http://www.ombudsman.europa.eu/activities/annualreports.faces.

[26] See Case T-103/99, para. 50.

[27] Art. 6(2) of the Statute.

[28] Jacob Söderman was a Finnish Ombudsman before the appointment, while the incumbent Nikiforos Diamandouros was before the first Greek Ombudsman.

[29] The course of life of Jacob Söderman shows that an Ombudsman with experiences in different areas of the administration was elected: Minister of Justice in 1971, Member of Parliament in 1972–82, Head of Labour Safety, Department in the Ministry for Social Affairs and Health in 1971–1982, Governor of the Province of Uusimaa 1982–89, Parliamentary Ombudsman of Finland 1989–95. Of course, other positions in public or educational life were occupied by him, but basically he is a practical expert. Since September 2007 he works as a Member of the Finnish Parliament.

administration, and Diamandouros[30] made notable career in the academic life. In short, while the first European Ombudsman received the office as practical expert, the second as academic professional.

The provisions regarding the appointment and removal following the election can be found in the TFEU and the Rules of Procedures of the European Parliament.[31] At the early stages the provisions regarding the election soon proved to be in need of amendment, for example the candidate elected by simple majority of the Committee on Petitions should have been presented to the full meeting, but the election twice failed, hence the appointment of the Ombudsman had to wait until June 1995. Indeed, these election rules went over many changes. The then President of the European Parliament on 14 November of 1994 raised the question of amendment of the provisions regarding the Ombudsman's appointment. As a result, the Committee on the Rules of Procedure, the Verification of Credentials and Immunities decided to recommend the amendment of Art. 159, and having finished the draft it was submitted to the Parliament on 29 November.[32] The Parliament returned the report on its 14th December meeting to the Committee, which then prepared and presented a second draft.[33] This second report was repeatedly returned to the Committee on 14 March 1995,

[30] Diamandouros was in 1980–1983 Director of Development at Athens College, in 1983–1988 Program Director for Western Europe and the Near and Middle East at the Social Science Research Council, New York, in 1988–1991 Director of the Greek Institute for International and Strategic Studies, in 1995–1998 Director and Chairman of the Greek National Centre for Social Research (EKKE), has been Professor of comparative politics at the Department of Political Science and Public Administration of the University of Athens since 1993. In 1999 and 2000, he was appointed member of Greece's National Commission on Human Rights and the National Council for Administrative Reform, respectively, from 1998 to 2003 the first National Ombudsman of Greece.

[31] While the Maastricht Treaty setting up the office was signed on the 7 February in 1992 (entered into force in November 1993), the Statute of the Ombudsman was adopted by the Parliament only on the 9 March of 1994.

[32] The report suggested the following amendments. According the amended Art. 159(4) the committee submits its *candidates* for vote *in the order of votes obtained in committee* instead of choice of *candidate*. The new subsection (6) says that in electing the Ombudsman the Parliament shall apply the provisions of Rule 14(1) by analogy instead of a secret ballot held on the basis of a majority of the votes cast. Subsections (5) and (8) were deleted, namely the vote shall be put *on the agenda* for the part-session following the forwarded proposal, and in case of negative vote the committee makes a *new proposal* or the President of Parliament issues a *further call* for nominations. See more *Report on the amendment of Rule 159 of the European Parliament's Rules of Procedure concerning the appointment of the Ombudsman.* Committee on the Rules of Procedure, the Verification of Credentials and Immunities, 29 November 1994 (A4-0085/94) PE 210.749.

[33] According to the amendments

– the President of Parliament shall not only after his election but in the cases referred to in Rule 159(10) call for nomination,

– the call is to be published in the Official Journal of the European Communities,

– the nominations must include all supporting documents,

– three to five nominations shall be selected and then submitted in alphabetical order by the committee, except when there is only three or less nominations, in this cases these are automatically submitted to Parliament,

– regarding the before mentioned, the proposals are to be placed on the agenda for the part session,

– only the two candidates obtaining the largest number of votes can continue after the first ballot, and in the event of a tie the older candidate shall be elected,

which then submitted a third report[34] proposing the amendments. The Parliament finally adopted a decision on May 16 amending the Rules of Procedure.[35]

Following the amendments of the election process, Jacob Söderman, the first European Ombudsman was elected in June 1995 and then re-elected in 1999, whereas after his retirement on 1 April 2003 Nikiforos Diamandouros took charge of the office for the remaining time of the parliamentary term. Then, at the start of the new parliamentary term, Diamandouros was elected as the new European Ombudsman on 11 January 2005.

Another aspect of the relation between the Office and the Parliament is that the Ombudsman's term of office has the same duration as of the Parliament, and the election takes place after every parliamentary election. Although the procedure for electing the Ombudsman is a little complex, it includes many elements of transparency,[36] and this underlined for example by the provision that at the beginning of each parliamentary term the President of the European Parliament calls for the nomination of the Ombudsman either immediately after his election, or at the case of death or dismissal of the Ombudsman, and for the submission of nominations sets a time-limit.[37]

According to the regulations the candidate must have the support of the representative of at least forty Member State, who are nationals of at least two Member States, and one representative can support only one candidate. To meet the criteria of openness and transparency, there are other guarantying provisions. The hearings are public for representatives. Thereafter, a list of the formal nominations in alphabetical order is to be submitted to the Parliament. After the secret vote, the majority of the votes decides and the vote may consist of three rounds, in cases if it fails to elect a candidate with an absolute majority in the first two rounds. In the third round only the two candidates with the most votes in the second round can be voted.[38] In this case the simple majority of the present representatives decide, however in tie vote the older candidate prevails. Before the vote begins, the President must ensure that at least half of the Members of Parliament is present. Before the Lisbon Treaty, the Ombudsman was appointed by the qualified majority of the Parliament following the parliamentary elections. Because of the nature and the extent of the preparatory work regarding the appointment, the Committee on Petitions carried out a large amount of these works.[39]

– the nominations received to the call are automatically to be considered admitted to the selection process until the renunciation of the person. See more *Second report on the amendment of Rule 159 of Parliament's Rules of Procedure concerning the appointment of the Ombudsman.* Committee on the Rules of Procedure, the Verification of Credentials and Immunities, 21 February 1995 (A4-0024/95) PE 211.013/fin.

[34] *Third report on the amendment of Rule 159 of Parliament's Rules of Procedures concerning appointment of the Ombudsman.* Committee on the Rules of Procedure, the Verification of Credentials and Immunities, 25 April 1995 (A4-0094/95).

[35] Decision amending Rule 159 of Parliament's Rules of Procedure concerning appointment of the Ombudsman, 16 May 1995 (Official Journal 1995 C 151, 33).

[36] Picrucci, A.: Les recours au médiateur européen. In: Epaminondas, M. A.: *European Citizenship.* Maastricht, 1994, 114.

[37] Rule 204 of the Rules of Procedure of the European Parliament.

[38] *Ibid.* Rule 205(5).

[39] During Diamandouros's first electoral procedure in 2005, in the first round 564 voted in support for him from the 609 votes cast, thus it can be said that the representatives were convinced by his substitute for Söderman following the his retirement. OJ L21, 1.25.2005, 8.

The duties of the Ombudsman can be ceased when the current term of office expires, namely, with the entry into office of the new Ombudsman. This occurs when the Ombudsman is not re-elected to a new parliamentary term.[40] If the mandate is terminated prematurely, for the remaining parliamentary term the Parliament appoints the successor within a three-month time-limit. Except for the case of dismissal, the Ombudsman will remain in office until his successor takes office.[41] Resignation, the event of death and dismissal can also lead to the duties to be ceased. To the request of the European Parliament the Court can dismiss the Ombudsman if he no longer fulfils the conditions, or is guilty in serious misconduct, and did not voluntarily resign. That is, according to Rule 206 of the Rules of Procedure of the European Parliament, one tenth of the representatives can request the dismissal. The request of the members is forwarded to the relevant committee, whose members will decide whether there are any well-founded grounds for dismissal. If there are, a report will be submitted to the Parliament and released to vote. However, before the vote, at his request, the Ombudsman can express his own views. Before the secret-ballot, the President of the Parliament ensures that half of the Parliament's component members are present. If they decide to remove the Ombudsman from the office, the Ombudsman resigns. Nonetheless, it can happen that the Ombudsman does not resign voluntarily then the President applies to the Court of Justice regarding the dismissal. So thus we can see in the case of the dismissal that after a vote of confidence, where the majority is in favour of the dismissal, the Ombudsman has the option of voluntary departure, namely to resign, and if the Ombudsman does not take this possibility, the drastic way follows.

5. Aspects of independence

Although it is generally accepted that the complete independence and impartiality is of great importance in every Ombudsman's position, independence is in particular emphasized in the case of the European Ombudsman,[42] which is toned down by the fact that the power of the Ombudsman is always granted by some other body. The European Ombudsman's independence can be seen as a coherent one, whose elements are following: independence laying in the person of the Ombudsman, independence of the office staff, independence of the office from budgetary side.

5.1. Independence of the Ombudsman

According to Art. 228 of the TFEU (ex Art. 195 TEC) the European Ombudsman carries out his duties in complete independence, furthermore Art. 9 of the Ombudsman's Statute declares that the Ombudsman shall be completely independent. These provisions are taken into practice, when the Ombudsman takes an oath before the Court of Justice to perform his duties with complete independence. The rules limiting the scope of activity ensure the realization of the impartiality requirement: during the term of office the Ombudsman is not permitted to hold any political or administrative office, or engage in other occupations gainful or not, thus cannot engage any educational position, and following the election the Ombudsman must refrain from any other activities incompatible with this position.

[40] Both Jacob Söderman and Nikiforos Diamandouros were re-elected.

[41] Art. 7 of the Statute.

[42] Gregory, R.: The European Union Ombudsman. In: Gregory, R.–Giddings, Ph. (eds): *Righting Wrongs: The Ombudsman in Six Continent.* Amsterdam, 2000, 159.

The requirement regarding independence is underlined by the provisions that the duties are performed with complete independence, in the general interest of the Communities and of the citizens of the Union, namely, the Ombudsman can neither seek nor accept instructions from any government or other body, and must refrain from any action incompatible with the nature of his duties. Whereas the Ombudsman acts in the general interest, accordingly, independence is essential for the undiminished confidence towards the fair procedures of the Ombudsman.

It is very important to mention whether the independence is not affected by the possibility of election and re-election. Theoretically, it is possible that the Ombudsman–in order to be re-elected–tries to please to the Parliament during the official activities. On one hand, however, this is contradicted by the facts that in person an active official determined in many topics and subject matters took up the role as European Ombudsman as seen before in different cases, and his successor follows this path as well–both of whom had national experiences in this kind of work. On the other hand, the position of the European Ombudsman differs from several national Ombudsmen, because the supervision of the Parliament falls within the competence of this body. Furthermore, abandoning the nomination process by the European Parliament, strengthened the democratic nature. Here, we should point out that although the Ombudsman can be dismissed by the Parliament, it is only possible in cases of serious misconduct or the conditions for the performance of duties are not fulfilled any longer.

5.2. Independence of the Office

At the initial establishment of the office, the independence of the staff had not been sufficiently guaranteed, hence Section I regarding the European Parliament in the European Communities' budget planned for the financial year 1995 provided that staff engaged in investigation of cases in accordance with Art. 228 of TFEU (ex Art. 195 TEC) is employed on temporary basis, while the rest of the staff is ordered by the Secretary-General of the European Parliament. The European Parliament had already held the view that in order to maintain the independence and effectiveness of the Ombudsman's activities the entire staff should be assigned to the Office during the period of the Ombudsman's mandate and the EU's three institution should record in a joint statement principles governing on one hand for the staff employed by the Ombudsman, on the other hand for the status of temporary or contract staff conducting inquires, in a way to ensure the effectiveness and independence of the Ombudsman.[43]

The institutional independence is strengthened by several provisions. The current legislation states that the Ombudsman may specify the internal structural and internal rules of procedure. Furthermore the Ombudsman is assisted by a secretariat, and the principal officer is appointed by him. In matters concerning the staff, the Ombudsman has the same status as the institutions within the meaning of Art. 1 of Staff Regulations of Officials of the European Communities.[44] The secretariat's officials and servants are subject to the rules and regulations applicable to officials and other servants of the European Communities, and their number per year is approved as part of the budgetary procedure. Those officials of the European Communities and of the Member States, who are appointed to the secretariat, are

[43] European Parliament Resolution on the role of the European Ombudsman appointed by the European Parliament, 14 July 1995. OJ 1995 C 249, 226.

[44] Art. 11(4) of the Statute.

to be seconded in the interests of the service and are guaranteed to automatic reinstatement in their institution of origin.[45] The secondment is a decision by the institution of origin, which can be a Community institution or body or an institution from the Member States. The obligation to reinstate a certain official is therefore for the institution of origin. As far as the Community institutions are concerned, the secondment is foreseen in the staff regulations and the obligation for the administration is therefore clear. For institutions in the Member States, the Ombudsman could merely ensure, in the exchange of letters foreseen in the enclosed provisions, that the guarantee foreseen in the Statute of the European Ombudsman is offered to the official in question.[46]

5.3. Budgetary independence

In the preliminary period after the nomination of the first Ombudsman in 1995 and 1996, the Parliament made provision for the Office's staff and material needs, which support was based on an agreement between the Parliament and the Ombudsman of 22 September 1995. From the financial year 1997 all operating costs of the Ombudsman's secretariat was covered by its own budget; but the European Parliament still provided the assistance necessary for avoiding unnecessary duplication of staff and expenditure. In the first annual report of the Office in 1995, the office's budget was annexed to the Parliament's budget and regarded as "a guarantee of independence of the Ombudsman and which should be treated in the same way"[47]. The Statute originally provided that the Office's budget is annexed to the Parliament's one in the budget of the European Union, however, the Council later on agreed with a proposal suggesting the Ombudsman's budget shall be wholly independent, and after the decision from 1 January 2000 the budget can be find in a separate chapter in the Union's budget, currently in Section 8.

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As shown in the study the complex nature of the relation means that the Parliament is represent almost in every momentum of the Office's life. The Office can be regarded as the extended arm of the Parliament, as a complementary of its control mechanism. However, as the analyzed aspects clearly underline, this complementary function does not mean dependent role but a co-ordinate relation, which is among others mostly strengthened by the fact that the Parliament was put under the Ombudsman's mandate, contrary to several examples in Member States.

[45] *Ibid.* Art.11(3).

[46] The European Ombudsman: Rules applicable to the secondment of officials and agents from international, national, regional and local public administrations and bodies to the European Ombudsman and to the secondment of the European Ombudsman officials and of temporary agents to international, national, regional and local public administrations and bodies. The document was made available for research by the Office of the European Ombudsman.

[47] The European Ombudsman: *Report for the year 1995*. Luxembourg, 1996, 6.

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IVÁN HALÁSZ*

Symbolic Elements in the Preambles to the Constitutions of the Visegrad Countries**

Preambles play an interesting role in the history and development of modern constitutions. So far, their conditions, function and legal relevance have raised considerable public debate. Although the aim of this article is not to describe these preambles in details, it is necessary to give a brief overview and point out some of their general characteristics. The term *preamble* comes from the Latin word *preambulare*, meaning 'going ahead'. Therefore, a preamble precedes the constitution as an introduction or a kind of foreword.[1] A constitution may or may not have a preamble, its presence being an option and not a must. Hungarian history has known many important documents of public law with preambles: the Golden Bull of 1222, or Law No. I. of 1920, which was supposed to restore traditional constitutionalism and provisionally regulate the realisation of supreme power in the state. Further examples are Law No. I. of 1946, which declared the Hungarian Republic, and Law No. XX. of 1949 (the Hungarian Constitution).

There are three main theories about the nature and function of preambles. The first one completely denies the legal significance of preambles. The second one suggests that preambles offer a basis from which legal obligation can be directly derived. According to the third theory, a preamble can help interpret the constitution. Hungarian legal tradition chiefly represents the last view: the preamble is used as an aid to the interpretation of law, rather than as a set of independent normative regulations. However, the guidelines of the preamble are supposed to be strictly followed in practice.[2]

* Ph.D., senior research fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30; associate professor, Corvinus University of Budapest, Faculty of Public Administration, H-1118 Budapest, Ménesi út 5.
E-mail: halasz@jog.mta.hu

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[1] Sulyok, M.–Trócsányi, L.: Preambulum (Preamble). In: Jakab, A. (ed.): *Az Alkotmány kommentárja* (Commentary ont the Constitution). Budapest, 2009, 84.

[2] *Ibid.* 90–91.

Not all modern constitutions are preceded by a separate introduction or preamble. For instance, the present Italian Constitution and the present Romanian Constitution do not have any preamble. Most European constitutions, however, include an introduction of some sort. Their function is to determine the historical and political basis and context which brought forth the given constitution. They also define the place the new law, which is just about to come to life, is supposed to occupy in the country's traditions of public law. Thus, preambles express the constitutional identity of the country, or at least specify what elements this identity relies on.[3]

Most Central and Eastern European constitutions after 1989 have a preamble. In most cases, these introductions explicitly state the principles the new law relies on, the people on behalf of whom constitualisation is taking place, as well as the circumstances that surround the process. Several new democratic constitutions contain a considerable historical introduction, which usually specifies which are the traditions of the state that the constitution maker considered important. This is a common practice, especially among those states which recovered their independence as a state or were born in the years following the regime change. However, there is no pattern or aid to interpretation that would define precisely what a proper modern democratic preamble is supposed to include. Such is the case of Central Europe and especially the Visegrad region: although these countries have a very similar historical background, the structure and the content of their preambles differ markedly.

The present Hungarian Constitution, adopted in 1989, does not contain any historical narrative except for a reference to the promotion of peaceful historic transition. However, this appears to be an aim to achieve rather than a historical explanation.[4] There is no attempt to specify the sources of legislative power. Although the Hungarian Constitution is based on the principle of the people's sovereignty, which is explicitly stated among its normative regulations, the preamble refers neither to the people as the source of power nor to the Hungarian political community. However, the scope of power delegated to the constitution maker is clearly specified: it is confined to the creation of a provisional constitution.[5] Nevertheless, the preamble of the Hungarian Constitution precisely defines its values and its goals to achieve, that is, multi-party system, parliamentary democracy, social market economy, constitutional state and peaceful political shift.

Compared to the Preamble to the Hungarian Constitution, the introductory sentences of the other three Visegrad constitutions contain considerably more information as well as more symbolic and identity-related elements. These documents seem more elaborated in this respect. It is hardly surprising: whereas the Hungarian Constitution underwent major amendment (modification) in 1989, the other three documents came to life later and under more favourable circumstances–that is, avoiding that hectic shift called regime change. Another important factor is that the Czech, the Polish and the Slovak constitutions are not simply amendment acts but, formally, new constitutions.

All three preambles mentioned specify precisely on behalf of whom constitualisation is taking place. The Czech Constitution starts with the following phrase: *"We, the citizens of the Czech Republic in Bohemia, Moravia, and Silesia."* There are two important elements in this formula. The entire group of citizens is considered as the source of state power in the

[3] Garlicki, L.: *Polskie prawo konstytucyjne* (Polish constitutional law). Warszawa, 1999, 41.

[4] Sulyok–Trócsányi: *op. cit.* 93.

[5] *Ibid.* 92.

Czech Rebulic. The process of determining the constitutional foundations of the Czech state is thus characterised by clear preference for the civic principle instead of the ethnic principle. Secondly, the way the preamble presents the territorial division of the country is the provincial pattern of the historical Czech state. The commentary of the constitution affirms that the reason for using this pattern is to emphasize the historical roots and not to foreshadow the administrative and territorial division which is later introduced.[6] We have to bear in mind that the Moravian regionalist interests were represented in the Czech legislation in the first part of the 1990s. Before 1992, one of their aims was to transform the Czechoslovak Federation, which had two members, into a tripolar structure, that is, to create a provincial state instead of the federal state. Later, when the independent Czech Republic carried out an administrative reform to create the level of regions, they made serious attempts to influence decision makers to take the borders of the ancient Czech provinces into account. However, Moravian regionalists failed to achieve their goal and later they lost the opportunity to take part in legislation. The fact that the preamble contains this formula was probably meant to be a gesture towards these forces in 1992.

The preamble to the Slovak Constitution sparked off wider and more heated debate in 1992. The preamble begins with the following phrase: *"We, the Slovak nation..."* The coalition of governing parties chose this formula to express the Slovakian nation's wish to pursue their right to self-determination, whose subject, inevitably, needed precise definition. However, Slovakia cannot be considered uniquely as the home of the Slovak nation. Firstly, there are several national and ethnic minorities in the country, so much so that Slovakia seems to be ethnically and culturally the most heterogeneous state of the Visegrad region. This is an area with important minority groups that have maintained their own separate national identity. Secondly, the term "nation" is used in the Slovak political and social discourse exclusively in a cultural and linguistic sense, both by majority and minority citizens. Most people are reluctant to accept the notion of a politically defined state-nation. Nevertheless, there were many liberal Slovak intellectuals, who together with the political representatives of the Hungarian minority, argued against defining the political community, which was just about to accept their constitution, as the Slovak nation. This dilemma appeared in social and political journalism as the so-called *"debate of the followers of ethnic and civic principle"*. The final text of the preamble can be interpreted as a compromise between the two concepts: although it begins with the formula *"we, the Slovak nation"*, the *"members of national minorities and ethnic groups living on the territory of the Slovak Republic"* are mentioned as well. As a sort of summary, the closing lines of the preamble refer to a broader group of citizens, and thus a common platform is created: *"we, citizens of the Slovak Republic, adopt through our representatives the following Constitution"*.

Unlike the Slovakian Constitution, which interprets the term "nation" culturally and linguistically, the preamble to the present Polish Constitution, adopted in 1997, uses the notion of 'Polish nation' in the sense of a political state-nation: *"We, the Polish Nation–all citizens of the Republic"*. It is true that at several places the entire context of the preamble makes both direct and indirect allusions to the historical, religious and cultural traditions of the Polish nation. However, the term 'nation' is used in the political sense, referring to the state.

[6] Pavlíček, V.–Hřebejk, J.: *Ústava a ústavní řád České republiky. I. díl Ústavní systém* (Constitution and constitutional order of Czech Republic. I. Constitutional System). Praha, 1998, 47.

The next question of central importance and symbolic value is how each Visegrad preamble relates to the former statehood and state traditions of the nation that brought them to life. Which traditions are emphasised and which are neglected? The answer varies substantially from country to country. Whereas two of the states (Poland and Hungary) underwent mere regime change in 1989, while all the other important attributes of the state (territory, population, name, etc.) remained the same, Czechoslovakia ceased to exist on 31 December, 1992 and two successor states emerged: the Czech Republic and Slovakia. But even these two states are in a slightly different situation: the roots of independent Czech statehood date back much further in time than the roots of independent Slovak statehood. The way the two constitutions relate to the former Czechoslovak statehood is not entirely obvious. We might even say their relationship to the former statehood is rather obscure. However, this relation is firmly linked to the way they relate to the nations' right to self-determination.

The Czech Constitution was adopted in December, 1992. Its preamble interprets the historical moment of constitualisation as a time when the independent Czech state is supposed to revive. However, it fails to mention if the Czech nation wishes to pursue its right of to self-determination in this particular moment. This seems logical: both the text and the context of the preamble suggest that in 1992 the Czech members of parliament involved in the process constitutionalisation did not entirely refuse the former Czechoslovak statehood. On the contrary, they tried to remain loyal to *"all good traditions of the ancient statehood of Czech Crown's Lands and the Czechoslovak State"*. The Czechs kept the former Czechoslovak state flag, even though the Constitutional Law No. 542 of 1992 on the dissolution of the Czech and Slovak Republic allows neither of the successor-states to use the symbols of the former federation. This, again, clearly signals their loyalty to the democratic Czechoslovak heritage. The Slovak party expressed indignation over this infringement of the law, but in no more than a few weeks they withdrew. In order to justify the legality of this step, Czech lawyers argued that their country did not infringe international public law, as the Czechoslovak flag had lost its "owner" and was not taken by any other legal subject. Thus, any country was allowed to use it.

The Czech rule of law and system of symbols reflect Czechoslovak statehood in other ways as well. For instance, the highest Czech state award is still the Order of the White Lion, which was established in 1922 and used to be the highest Czechoslovak state award. However, it is important to note that the lion is traditionally an essential element of the heraldry and system of symbols of the Czech state–and not of the Slovak state. The statehood of the two 'ancestors' mentioned in the Czech preamble is firmly linked to the two Czech national holidays as well. One of them, 28 October, the day on which the independent Czechoslovak state was founded in 1918, is still considered as a sort of "Independence Day". The other, 28 September, was introduced in 2000 following a period of hot debate. Officially, this holiday is supposed to be a commemoration of Czech statehood, but in reality people celebrate the Czech patron Saint Vaclav and his cult. The criticism was directed not so much against the religious content of the holiday, as against the meaning that was connoted to the cult from the 20th century. Between 1939 and 1945 the German Nazi occupants and their local allies tried to use this cult to strengthen Czech–German relations and to emphasize the subordination of Czech territories, which cast shadow upon the Saint's memory. Finally, it is important to note that 1 January is not only New Year's Day in the Czech Republic, but also the day of the independent Czech state, even if citizens are not perfectly aware of the fact. However, the state lies equal emphasis on the two "Independence Days", 1 January and 28

October. This is unmistakably signalled by the fact that these are the two days of the year when the Czech head of state hands out merit awards.[7]

Slovakia developed a rather different relationship to Czechoslovak statehood. The new Slovak Constitution was adopted in 1992, and, of course, the Slovak Republic was one of the successor-states of the former Czechoslovakia, both from a legal point of view and in the practice as well. The country was neither able, nor explicitly willing to refuse what it considered positive from its Czechoslovak heritage, however, this attitude was not mentioned in the text of the preamble. Unlike the Czech document, the introduction to the present Slovak Constitution does not refer to the tradition of the Czechoslovak statehood at all. The only historical heritage mentioned is that of the Great Moravian Empire, far away in time and rather difficult to interpret from a legal point of view. Interestingly enough, the Slovak preamble is the only document among the Visegrad preambles to refer to the principle of natural law and claim the nation's right to self-determination. This implies that the Slovak constitution maker had the subjective feeling of fulfilling the Slovak nation's old wishes and, having pursued their right to self-determination, creating the independent Slovak statehood. This is supposed to be different from the former Czechoslovak statehood, which the Slovak nation greatly benefited from, but did not consider entirely as theirs. This subtle difference between the two states' preambles faithfully reflects their relationship to the former federal statehood. The Czech party, which formed the majority of the Czechoslovak federation, unequivocally identifies with its statehood, while the Slovak party (the former minority) takes a somewhat ambiguous attitude. This is expressed, for instance, in the fact that 28 October, the Czechoslovak "Independence Day" is not a bank holiday in Slovakia, only a day of commemoration.

Nevertheless, it seems obvious for every true professional and intellectual in Slovakia, that modern independent Slovak statehood is not very closely linked to the Great Moravian statehood of the 9th century, as far as everyday state practice, public mentality and the society's deep reflexes are concerned. Czechoslovak state traditions of the period between 1918 and 1992, and in some aspects Hungarian state traditions before 1918 seem far more relevant. During the 18th and 19th centuries, however, Great Moravian statehood became firmly rooted in Slovak historical and political public consciousness, interwoven with nationalist feelings, as the forerunner and the archetype of real Slovak statehood. During World War II the independent Slovak state lived in the shadows of Nazi Germany, and collaborated with it intensively. In 1992 most of the political forces that operated democratically refused to accept this heritage, and those who supported the idea did not have the possibility to formulate it in the preamble to the constitution.

The Polish Constitution was adopted in 1997 as the final point of a process that begun in 1989 and led to major changes in public law. A text of considerable length, the preamble to the Polish Constitution is the most commonly cited preamble in Europe. It is considered exemplary in several countries, especially by political forces that are predominantly conservative. This is largely due to the *invocatio Dei,* formulated subtly but rather explicitly by the Polish constitution maker. The Constitution represents both those who *"believe in God as the source of truth, justice, good and beauty as well as those not sharing such faith but respecting those universal values as arising from other sources".* The constitutional

[7] Halász, I.: A Cseh Köztársaság állami és nemzeti szimbólumai (State and National Symbols of the Czech Republic). In: Glatz, F. (ed.): *Állami és nemzeti jelképek az Európai Unióban* (State and National Symbols in the European Union). Budapest, 2005, 57–58.

power to have recognized *"their responsibility before God"* or *"their own consciences"* while drawing up the Constitution.

However, other elements of the Polish preamble have received less attention. For instance, bits and pieces of the tradition inherited from the former statehood are considered positive in the preamble. Two of them are emphasized, the First and the Second Republic,[8] while the period of the People's Republic of Poland is explicitly ignored.[9] The document mentions the enormous sacrifices and fights that lead to the achievement of independence, and it interprets 1989 as a sort of new beginning for the country *("having regard for the existence and future of our Homeland, which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate")*. Interestingly enough, Article 1 of the normative text declares that the present Polish Republic has a value for each and every citizen, and the preamble defines the republic explicitly as the Third Republic.

We can draw the conclusion that the preambles to the constitutions of the Visegrad countries do not generally refrain from selecting bits and pieces from their historic heritage. They also tend to prefer certain traditions of their nations' history of statehood to others, or even let some of them fall into oblivion. However, this should not lead to the restriction of historical and other scientific research and evaluation. This is clearly expressed in the so called 'Prague Commentary' on the present Czech Constitution, written by the professors of the Faculty of Law at Charles University. The authors argue that 'The text of the Constitution cannot be legally required to evaluate history, as this would contradict people's natural right to free thought and research. Consciousness and belief concerning science and worldview do not belong to the competence of the state.[10] Sometimes law-makers, in a burst of enthusiasm, fail to respect this and commemorate great figures–or even objects–of history in a law. This has happened recently to two Czechoslovak founding fathers and later presidents, Tomáš G. Masaryk and Edvard Beneš in the Czech Republic or to Andrej Hlinka, vicar and leader of the People's Party in Slovakia. From a certain aspect, the law on the Holy Crown of Hungary is an example of the same phenomenon.

Another interesting point is what other historical, political or cultural symbols can be found in the preambles of Central Europe, as they are of communicative value. For example, at least two constitutions in the Visegrad region have introductions that implicitly or explicitly allude to Christian traditions. The Polish preamble finds the nation's cultural roots in Christian traditions and in universal human values. The preamble to the Slovak Constitution refers to the spiritual heritage of Cyril and Method, Slavic missionaries and saints, the cult of whom started to strengthen among Western Slavic–especially Czech, Moravian and Slovak–believers of Central Europe from the 18th century. In the Slovakian social and cultural context this heritage carries an essentially Christian, Slavic and nationalistic message. The Czech preamble does not contain such direct references to Christian roots. The tradition of Saint Vaclav, linked closely to medieval Czech statehood, is not mentioned in the document at all. This is easy to understand, especially if we bear in mind that Czech society has one of the most secularised and laic self-perceptions in Europe. Thus, it is rather surprising that even without considering Christmas and Easter, three of the

[8] The term "First Republic" refers to the old aristocratic Poland, which ceased to exist during the partitions at the end of the 18th century. Polish public opinion usually considers the period between the two World Wars as the Second Republic.

[9] Garlicki: *op. cit.* 42.

[10] Pavlíček–Hřebejk: *op. cit.* 46.

bank holidays have very strong Christian background: on 5 June they celebrate Cyril and Method, Slavic missionaries symbolizing the beginnings of Slavic literacy, while on 6 June the execution of Jan Hus, preacher and religious reformer is commemorated. 28 September, already mentioned, has been serving as the "Independence Day" of the Czech nation since 2000, although it is closely related to the cult of Saint Vaclav. These holidays all convey some other message as well, alternative and more profane, but it is undoubtedly true that the roots of these holidays are Christian saints or religious reformers.[11]

The fight for political independence and the struggle that led to the birth of the nation or state are referred to by the Polish preamble and the Slovak Constitution only, while the Czech and the Hungarian documents ignore the question. 1989, the daybreak of a new epoch, is mentioned in the Polish and in the Hungarian preambles. It is referred to as a peaceful shift that marks a new historical beginning. The introductions to the Czech, the Polish and the Slovak constitutions suggest that these states consider themselves the members of the big family of nations or mankind, and they respect the norms of coexistence that these communities have established. Of course, all of these documents reflect their era: an epoch which had a tendency to extend rights, and was open to universal human rights as well as to democratic values. This conveys important political and legal message, but less symbolic significance that is rooted in the nation's past and culture.

[11] For more details see Halász: *op. cit.* 57–60.

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Károly Kisteleki*

Changes in the Hungarian Regulation of Citizenship and the Hungarian Concept of Nation

The population living in the territory of the state is divided into citizens and aliens based on the legal fact of (non-)belonging to that state. Regarding belonging to the state, *in a narrower sense* those are considered citizens who participate in the exercise of state power, that is, who have political rights. In this sense, so far as the history of the development of Hungarian citizenship before 1848 is concerned, membership in the Holy Crown implied belonging to the "body of the state".

Before expanding on the demarcation of the scope of "the population constituting the state" legally determined by the doctrine of the Holy Crown, we'll briefly outline the Hunnish–Hungarian theory of medieval Hungarian national consciousness as elaborated by Simon Kézai. As Jenő Szűcs proves in a convincing argument, apart from the cult of Attila fostered by the House of Árpád, Kézai "imported" every element of the Hunnish–Hungarian identity from Western Europe and he created the entire conceptual construct and theory independently. Accordingly, Kézai posited the idea of two "nations": one of them is the people with Hungarian language and culture sharing the belief in a common origin related to the category of "nationality", the other one is the nobility constituting the "politically organised society", which was both Hungarian and alien with respect to nationality. Simon Kézai interwove these two elements so that originally every Hun-Hungarian was included in the politically organised society, therefore, nationality and political society were linked up. Nevertheless, those who did not answer conscription commanded by the community were excluded from the political community and thrust into servitude, whereas, compliant "nobility" constituted the rightful part of the Hungarian nation, that is, the nobility was equivalent to the nation.[1] This theory was adopted by the most important work of medieval Hungarian judicial practice, scilicet, Tripartitum by István Werbőczy, which makes the division of the society into nobles and servants legally relevant.[2]

Thereby, who belonged to the Holy Crown, that is, who were classified legally as belonging to the scope of "politically organised people" in medieval Hungary? Within the "corporation" of the Holy Crown, the head of the corporation was the king, whereas, the estates constituted the members. The members of the Holy Crown encompassed the nobility

* Ph.D., Section Secretary, Hungarian Academy of Sciences, Section of Economic and Legal Studies, H-1053 Budapest, Nádor u. 7.
E-mail: kisteleki.karoly@office.mta.hu

[1] Szűcs, J.: *A magyar nemzeti tudat kialakulása* (The Evolution of Hungarian National Consciousness). Budapest, 1997, 432.

[2] Magyar Törvénytár (The Hungarian Statute Book). *Tripartitum by István Werbőczy.* Budapest, 1897, 58–59 (Arts 1–6, Title 3, Part I). During the critical analysis of the opinions of classic Hungarian legal scientists, Gábor Hamza stated regarding the legal relevance of the Tripartitum that it does not fall under the scope of acts, decrees or statutes, but *it is definitely classified as customary law ("consuetudo")*. See Hamza, G.: Werbőczy Hármaskönyvének jogforrási jellege (The Legal Source Character of Tripartitum by Werbőczy). *Jogtudományi Közlöny*, 48 (1993) 1, 33.

(the magnates, prelates and the lesser nobility), the burghers of free royal towns endowed with corporate nobility supplemented by the members of the Jász-Kun (Jazygian-Cumanian) districts and of the Hajdú (Heyduck) towns, *whereas, villeins ranked as commonalty were not included in this scope.*[3]

Before the legal regulation of Hungarian citizenship under a separate act in 1879, Hungarian national status had been acquired *by birth, naturalisation and by so-called reception without a formal procedure.* Regarding acquisition by birth or descent, it can be stated that Hungary was a country that followed the principle of *ius sanguinis*. Furthermore, *the broader construction* of nationality and the bonds of the subject also encompassed *the patriots* (*"indigenas"*)[4] regarded as members of the Hungarian Holy Crown. According to their particular rights and duties, they were distinguished from *aliens*,[5] that is, exclusively an *indigena* could be granted nobility, prelacy or could hold state office.

Naturalisation appeared in Hungarian legislation for the first time under Statute 50 of 1542 and the procedure of naturalisation was regulated by Statute 77 of 1550. Accordingly, naturalisation was effected in the form of "végzemény" (ruling) by the King and the Diet jointly, when the Diet was sitting. However, when the Diet was not sitting, the King was empowered to confer *indigenatus*, thereby, Hungarian nobility. However, in this case the naturalised person had to apply subsequently to the Diet for enactment. This was followed by *the oath of the naturalised person*, which *had to be taken before the Diet* or in case of the absence of the Diet, *before the Chancellor*. The text and location of the oath and the name of the oath-taker were placed on record. Subsequently, the would-be-indigena had to pay *naturalisation fee* determined by law to the national money-chests.[6] Then the naturalised person could take out *the royal patent* (*"diploma indigenatus"*) from the Royal Hungarian Chancellery.

When assessing the enumerated procedural instruments, it can be stated that *enactment, oath taking and the payment of the prescribed fee were considered to be conditions of the validity of naturalisation, whereas, letters patent were mere means of certifying indigenatus.* The effect of the acquired "country membership" entailed that the person concerned enjoyed

[3] According to Werbőczy (Title 4, Part II): "Who are regarded as people and who are regarded as commonalty? Here *the name and designation of people refers exclusively to the prelates, barons, other magnates and other nobles, not to the non-nobles.* [...] Just as genus differs from species, commonalty shall differ from the people. Namely, the designation of people encompasses all nobles ranging from magnates to lower ranks and even to the non-nobles, however, *the designation of commonalty refers merely to the non-nobles*". See Werbőczy: *op cit.* 230–231.

[4] The designation is explained by Ágoas Ekmayer: "The sheer designation of *indigena* in our country sometimes means a native Hungarian, other times a hosted Hungarian". Ekmayer, Á.: A honfiúság (indigenatus) Magyarországban [Patriotism (indigenatus) in Hungary]. *Jogtudományi Közlöny*, 1867, 29.

[5] *Ibid.* 32.

[6] The extent of this for laymen was 1,000 lions (Act 26 of 1688), later 2,000 lions (Act 41 of 1741, Act 69 of 1790–91), for clergymen it cost 1,000 lions in case of a larger benefice (Act 17 of 1741) or 200 lions in case of a smaller benefice (Act 70 of 1790). According to Act 37 of 1827, the naturalisation fee always had to be paid in lions and according to Act 17 of 1830, before payment, the future *indigenatus* could not be enacted. Ekmayer: *op. cit.* 39.

all rights emanating from Hungarian nobility and if the person had been a peer in his former country, he automatically became a member of the Table of Magnates in Hungary, as well.[7]

In the other case of the acquisition of Hungarian nationality, the alien became merely a patriot (*indigena), but was not granted nobility ("indigenatus successivus")*. This is called *reception without formal procedure* (*"tacita receptio"*), which ensued owing to permanent settlement in Hungary, long-lasting residence, becoming enlisted as resident and tax payer of a town or a chartered community and owing to holding public office.[8] *The acquisition of civic rights in a town* was generally not regulated under contemporary Hungarian statutes. Exclusively municipal statutes contained relevant regulations, which required the petitioner to certify his legal birth, his record, "good morals", in addition, in some places even marriage was specified as a prerequisite (e.g. Kassa, Kolozsvár, 1537), in other places, membership of a guild or the possession of realty was necessary (e.g. Kolozsvár, Fiume, Kassa 1607).[9] The town council could recognise aliens as burghers, who, having met the previous requirements were obligated to pay so-called burgher-money and take an oath.[10]

In case of aliens with a *villein status*, it sufficed if the lord of the land permitted the villein to settle down in the villein community either in words or in writing. This amounted to the *tacita receptio* of Hungarian nationality, which as a matter of course entailed rights deriving from serfhood.[11]

[7] The latter right became so narrowly circumscribed under Acts 49, 50, 51 of 1840 that naturalisation was linked up with membership in the Table of Magnates exclusively if the Diet had specifically conferred sitting and voting rights on the person.

[8] Ekmayer: *op. cit.* 40.

[9] Csizmadia, A.: A magyar állampolgársági jog fejlődése (The Development of Hungarian Citizenship Law). *Állam és Igazgatás*, (1969) 12, 1078.

[10] *Ibid.* 1077–1078.

[11] At the time of the resettlement of desolate lands abandoned during the wars against the Ottomans, this process was intensified by a spontaneous internal migration and immigration on the one hand, and a deliberate governmental colonisation on the other hand. Recent research estimates that the population of Hungary at the beginning of the 18th century totalled at 4–4.5 million. At that time, the density of the population was 18.4 person/square kilometre in the territory of the former royal Hungary, 18.6 person/square kilometre in Transylvania, whereas, 8.4 person/square kilometre in the territory under the former Ottoman rule. Owing to the internal and external migration and to the colonisation organised by Hungarian landowners and government substantiated by Act 103 of 1723 promising exemption from tax for 15 years for immigrant craftsmen and for 6 years for ploughmen, at the end of the century, the census of 1785 ordered by Joseph II with the correction of 1787 established a population of 8.5 millions in the country. However, recent research with respect to some corrections estimates that the number of the population was 9.9 million by 1790. On the basis of the estimates regarding the ethnic composition of that population, it can be stated that Hungarians, who had composed 80–90% of the population of the country before the Ottoman rule, became a minority in their own homeland. At the beginning of the 18th century, the proportion of Hungarians was 50–55%, which decreased to about 42% by 1790. At the same time, the proportions of other nationalities were as follows: 16% for Romanians, 10–10% for Germans and Slovaks, 9.5% for Croats, 7% for Serbs, 3.5% for Ruthenes and 2% for other ethnic groups. See Barta, J. Jr.: *A tizennyolcadik század története. Magyar századok-sorozat* (The History of the 18th Century. Hungarian Centuries Series). Budapest, 2000, 153–159; Kosáry, D.: *Újjáépítés és polgárosodás 1711–1867. Magyarok Európában III.* (Reconstruction and Bourgeoisification 1711–1867. Hungarians in Europe). Budapest, 1990, 55–59.

The French "Declaration of Rights of the Man and the Citizen" of 1789 highlighted the issue of civil equality before the law and indirectly even the claim to the establishment of a uniform citizenship status. This idea was embraced by the Hungarian Jacobins, whose prominent figure, Joseph Hajnóczy *framed a constitutional draft* during the Diet of 1790–91 and it dealt with the issue of Hungarian nationality.[12] However, the draft of 1791 was not debated at that time, therefore, the demand for the legal regulation of citizenship was formulated again in the *Reform Era*. This era was the age when nations acquired self-consciousness, which implied the fundamental need for the definition of citizenship. In France it was the Code Civil, in the territories of the Habsburg Empire, it was the Austrian Civil Code that regulated the conditions of the acquisition and loss of citizenship. In these states, citizenship was a matter of *civil law*. In Hungary, however, the issue was dealt with within the confines of *public law* and this persisted as a basic characteristic of the Hungarian regulation. The related draft laws were submitted to two sessions of the Diet in 1843–44 and 1847–48, but they were not adopted.

Following the 1848–49 Revolution and War of Independence, after 1853 the relevant citizenship clauses of personal law under the Austrian Civil Code became operative in Hungary.[13] According to *the naturalisation practice* pursuant to the respective legal regulations,[14] the Minister of the Interior issued the letter of naturalisation for the petitioner, who had taken an oath, if the petitioner had certified that he was not a subject of another state and that he had had residence in Hungary for 5 years, had paid tax regularly and there was no objection against him in terms of morals, wealth and politics.

Finally, it was in 1879 that Hungarian legislature considered the issue of citizenship ripe for a definitive regulation. The debate of the draft law in the Lower House took merely one month, then the bill submitted to and adopted by the Table of Magnates was sanctioned by Francis Joseph on 20 December 1879.

The first Supplementary Law of Hungary on Citizenship enacted as Act 50 of 1879 entered into force on 5 January 1880. The act admitted five manners of *the acquisition* of citizenship: descent, legitimation, marriage, naturalisation and residence in the country.[15]

Accordingly, every person of legal birth, whose father was a Hungarian citizen, furthermore, even the illegitimate child of a Hungarian female citizen disregarding whether the place of birth was or wasn't Hungary could acquire citizenship *by descent*.

The title of acquisition was *legitimation*, if the child was illegitimate and his mother was non-Hungarian, but his father was a Hungarian citizen.

[12] Csizmadia, A.: *Hajnóczy József közjogi munkái* (The Works of József Hajnóczy on Public Law). Budapest, 1958, 71–72.

[13] Haller, K.: *Az Osztrák Általános Polgári Törvénykönyv jelenleg még érvényes alakjában* (The Austrian General Civil Code in Its Effective Form). Budapest, 1897, 23–24.; Eöttevényi Nagy, O.: *Osztrák közjog* (Austrian Public Law). Budapest, 1913, 46–47.

[14] These include Act 42 of 1870 and Act 36 of 1872.

[15] According to some views, the titles of the acquisition of Hungarian citizenship also included regainment and acquisition under established customary law (tacitly). Berényi, S.–Tarján, N.: *A magyar állampolgárság megszerzése és elvesztése (honosság, letelepülés, kivándorlás, útlevélügy). Az 1879. évi 5. törvény-czikk és az ezzel kapcsolatos törvények s rendeletek gyűjteménye és magyarázata* [Acquisition and Forfeiture of Hungarian Citizenship (National Status, Settlement, Emigration and Free Pass Issues). Act 50 of 1879 and the Digest and Reasoning of Related Acts and Decrees]. Budapest, 1905, 23.

An alien woman, who got married to a Hungarian citizen entered the bonds of the Hungarian state by virtue of *the bonds of marriage.*

Two types of *naturalisation* were distinguished: *ordinary and extraordinary naturalisation. Ordinary naturalisation* could commence exclusively by petition and the competent authority was either the Minister of the Interior or the Governor of Croatia. The conditions were as follows: the petitioner had to be entitled to petition, his admission to a native community had to be anticipated,[16] continual residence in the country and being enlisted as a tax-payer for 5 years, capacity for supporting his family and himself and correct conduct. However, the political rights of such a naturalised person were limited, because he was eligible to the Lower House only after 10 years and could be granted membership in the Table of Magnates only by the legislature and he could not be a Keeper of the Crown. In contrast, the person *naturalised by a royal charter* as an award for extraordinary merits was immediately eligible to the Lower House.

Residence in the country resulted in the recognition of citizenship, if the person had been living in Hungary and had been enlisted as a tax-payer of a Hungarian community for at least 5 years before 8 January 1880.

The ways of termination and forfeiture of citizenship included legitimation, marriage, absence from the country, release and administrative decision. The citizenship of an illegitimate child (with a Hungarian mother) was terminated *by legitimation*, if he had been legitimated under the law of the country of the alien father and subsequently he did not live in Hungary. If a Hungarian woman got married to an alien man, she forfeited citizenship *via marriage.* Hungarian citizenship was also forfeited under the *absence clause*, if a person had resided continuously beyond the borders of the Hungarian state for 10 years in void of the mandate of Hungarian Government or the Austro–Hungarian joint ministers. The forfeiture pertained to the wife and minor children of the absent man, as well. A petitioner could be *released* from the bonds of the state pursuant to a procedure initiated upon petition on condition that he had complied with compulsory military service. Furthermore, the person had to certify that he had the capacity of disposition or that his father or guardian had assented to his release via the permission of the court of guardians, that he did not have accrued rates and taxes and there was no ongoing criminal action or effective sentence against him in Hungary. In case all these requirements were met, the Minister of the Interior authorised to issue the releasing document could not deny the fulfilment of the petition, so the released person forfeited Hungarian citizenship. The forfeiture affected the wife and minors of the released person.

The act also regulated the possibility of *re-naturalisation* in case the forfeiture of citizenship was caused by absence or release. Such a person could be re-naturalised even without residence in the country, if he applied for Hungarian citizenship after his return and he could regain it without the examination of other conditions.

In the interest of *the settlement of Bucovinian Székelys and Csángós* and the increase of the proportion of ethnic Hungarians in the multinational country, Act 4 of 1886 on the

[16] This condition was set forth under an effective act, i.e. Act 18 of 1871, the first act on communities, Art. 6 of which stipulated that "each Hungarian citizen has to belong to the bonds of a community".

Naturalisation of Re-Settlers En Masse[17] stipulated that re-settlers en masse could acquire Hungarian citizenship free of charge pursuant to the regulations of re-naturalisation and via the establishment of their community residency ex officio.[18]

If a Hungarian citizen *entered the service of another country without the permission of the competent authority* (Minister of the Interior, the Governor of Croatia and Slovenia, the Authority of the Military Frontiers) and did not quit such service against the order of the authority within the specified period, *his citizenship was forfeited according to the administrative decision of the competent authority* by virtue of Act 50 of 1879.

Besides the legal consequences of the acquisition and forfeiture of citizenship, the act declared *the recognition of dual (or multiple) citizenship.* Last but not least, it contained legal technical regulations regarding the conduct of the procedures related to citizenship. The essential provisions of the statute remained in force until 1948, that is, almost for seven decades.

Due to the amendments of the 20th century, *essential* changes were effected in our first supplementary law on citizenship due to various aspects of political tendentiousness. Owing to such an intention, *discrimination* clauses affecting the opponents of the timely political system were incorporated into the regulations, whereas, partly to counteract this, the claim for *indemnity* was also introduced into citizenship law.

The *discriminative* regulations were connected to the *forfeiture* of citizenship. Among these we should emphasise *deprivation*, which was clearly a political-regime-specific invention. Firstly, we have to mention Act 4 of 1939 on the Limitation of the Economic Expansion of Jewry usually quoted as *the second anti-Jewish act* in Hungarian legal history. Here the limitations introduced against Jewry were definitely *based on race.*[19] Article 3 of this act prescribed on the one hand that *Jews could not acquire Hungarian citizenship* by naturalisation, marriage or legitimation, on the other hand, it stipulates measures in order *to repeal* the valid citizenship of Jewish persons, which was practically equivalent to deprivation. Act 13 of 1939 already applies the term of *deprivation formally*, as well. The prescriptions of Article 8 unequivocally demonstrate the legislative power of political judgement, namely, the political regime in power targeted the regulations pertaining to deprivation chiefly at communists and persons involved in the labour movement declared to be its primal enemies. We have to put special emphasis on the section which deprives of citizenship the individual who leaves for abroad via the violation or evasion of the law pertaining to abandonment of the territory of the country, which constitutes the legal case of the infamous *defection*, which proved to be the most viable reason for deprivation.

[17] According to Ferenc Ferenczy, Act 4 of 1886 introduced the institution of "re-reception" for re-settlers en masse. Ferenczy, F.: *Magyar állampolgársági jog* (Hungarian Citizenship Law). Gyoma, 1928, 58.

[18] Tarczay, Á.: *A magyar állampolgárság viszonya a magyar nemzetiséghez és a lakóhelyhez–a jogtörténetben és jelenleg* (The Relation of Hungarian Citizenship to Hungarian Nationality and Residence–in Legal History and at Present). http://www.kettosallampolgarsag.mtaki.hu/tanulmanyok/tan_30.html

[19] The first anti-Jewish act was Act 15 of 1938, which *on the basis of religion* limited the number of Israelites among the employees to 20 in the areas of business and trade and in the chambers of journalists, engineers and doctors. According to estimates, about 15,000 people lost their jobs pursuant to the act. Romsics, I.: *Magyarország története a XX. században* (Hungarian History in the 20th Century). Budapest, 2000, 194–195.

This is proven later by the so-called *popular democratic acts*, which were inclined to apply this provision and thereby demonstrated that there *was no insuperable difference among the legal technical solutions of various political systems, since they were equally useful for various governments in power.*

After World War II, the statutes regulating the legal institution of citizenship proliferated and besides three new supplementary laws, these were exclusively discriminative or indemnificatory.

The scope of *discriminative* statutes primarily encompasses *decrees that expatriated ethnic Germans and deprived them of Hungarian citizenship,*[20] as well as those acts of 1947 and 1948 which confirmed strengthening *political discrimination*, which were adopted to deprive certain individuals residing abroad of their Hungarian citizenship.[21]

Act 15 of 1946 on the Exchange of the Population between Hungary and Czechoslovakia qualifies as a discriminative act on citizenship because of the relocation of ethnic groups. According to the agreement, every Slovak and Bohemian person with permanent residence in Hungary who declared the intention of relocation shall be relocated and on the day of relocation the person shall forfeit Hungarian citizenship and *shall become a Czechoslovak citizen on the basis of the fact of relocation*. In a similar manner, ethnic Hungarians with permanent residence in Czechoslovakia were relocated to Hungary *in the same number as* Slovaks and Bohemians were relocated from Hungary to Czechoslovakia. *They lost their Czechoslovak citizenship* under Decree 33 of 1945 of the Czechoslovak President.[22] Apart

[20] Statute 9.550 M.E. of 1945 on the Repeal of the Naturalisation and Re-naturalisation of German Citizens; Statute 12.330 M.E. of 1945 on the Relocation of the German Population from Hungary to Germany. Nevertheless, the issue of the citizenship of expatriated ethnic Germans was open to discussion until 16 July 1946, when Statute 7.970/1946 M.E. was issued. Accordingly, Hungarian citizens relocated to Germany lost their Hungarian citizenship on the day they left Hungary. This also affected people who had been relocated to Germany before the statute came into force.

[21] Under Act 10 of 1947 *Government could deprive* anybody of Hungarian citizenship *who was staying abroad* and *an investigation was ongoing against him because of a crime* defined under *Act 7 of 1946* on the Criminal Legal Protection of the Democratic Political System and the Republic, if he failed to return to the territory of Hungary upon the call of Government within 30 days (within 60 days in case of residing beyond Europe) as of notification and failed to appear before Hungarian authorities. Under Act 26 of 1948 Government could deprive anybody of Hungarian citizenship who failed to return to the territory of Hungary *upon the call of Government within 30 days from the publication of the call in the Hungarian Bulletin (within 60 days in case of residing beyond Europe) and failed to appear before Hungarian authorities*. In this case, the law-maker ignored any reference to the facts of the case of conduct, thereby, the scope of discretion of the authority completely dissolved. The deprivation of citizenship came into force via *the failure to return upon a call with whatever content*. The part of the statute on *confiscation* manifests the further extension of negative discrimination. The property of the person whose Hungarian citizenship had been repealed after 22 December 1944 (under Article 8 of Act 12 of 1939 or Article 9 of Act 14 of 1939 or Act 10 of 1947) had to be confiscated. If the effect of the deprivation pertained to the wife and children of the deprived person, their property had to be confiscated, as well.

[22] Under this decree, people who had acquired German and Hungarian citizenship by virtue of the Treaty of Munich and the Vienna Awards *were not granted Czechoslovakian citizenship*, although these treaties had been meanwhile annulled, therefore, these persons became stateless. On the basis of unequivocal ethnic discrimination, the decree did not grant Czechoslovakian citizenship to ethnic Germans and Hungarians *not concerned* by the Treaty of Munich and the Vienna Awards, but living in former Czechoslovakian territories, either. Then the Czechoslovakian Government redressed the

form these people, Czechoslovakia was also entitled to expatriate Hungarians accused of war crimes.[23] The Hungarian Government confined itself in an agreement to admit these relocated people and to *recognise them as Hungarian citizens on the basis of the fact of relocation.*[24]

These antecedents led to the re-codification of citizenship law, consequently, Act 60 of 1948 as comprehensive supplementary law regulated the issue. To expand on the discriminative rules of the act, we state that citizenship could be forfeited *by marriage, legitimation, acknowledgement or ascertainment of paternity, release or deprivation.* Pursuant to this act, the institution of forfeiture by reason of absence from the country or foreign nationality was ultimately terminated. The act affirmed the force of the provisions of Act 26 of 1948 regarding confiscation. On the whole, it can be stated that Act of 60 of 1948, scilicet, the second Hungarian act on citizenship stabilized the discriminative regulation.

Under Act 5 of 1957, our third uniform act on citizenship, the scope of discriminative regulations was narrowed in comparison with the former acts. Hungarian citizenship could be forfeited on grounds of two titles: *release upon petition* and *deprivation.* According to the new regulation, deprivation concerned the person who *was staying abroad and seriously breached the fidelity of citizens,*[25] or who was *validly convicted by a Hungarian or foreign court by reason of a serious crime.* The effect of deprivation did not automatically pertain to the spouse and children, only if they were also staying abroad and the decision on forfeiture specially ordered it. Concerning the issue of deprivation, instead of Government, the Presidential Council of the Democratic People's Republic (NET) was authorised to make the decision, whereas, *confiscation* was not bindingly prescribed by law, but it was *subject to the discretion* of the NET.

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consequences of the disfranchising decree *under Act 245 of 25 October 1948, which restored the Czechoslovakian citizenship of ethnic Hungarians* on the day of taking an oath of citizenship. See Sutaj, S.: A magyar kisebbség Csehszlovákia világháború utáni politikájában (The Hungarian Minority in the Post-World-War Politics of Czechoslovakia). In: Popély, Á.–Sutaj, S.–Szarka, L.: *Benes-dekrétumok és a magyar kérdés 1945–1948. Történeti háttér, dokumentumok, jogszabályok* (The Benes-Decrees and the Hungarian Issue 1945–1948. Historical Background, Documents and Statutes). Máriabesnyő–Gödöllő, 2007, 42–43.

[23] *The exchange of the population took place from April 1947 to the summer of 1949.* Meanwhile, the Hungarian Government made enormous efforts related to the implementation of the agreement, which was disadvantageous from a Hungarian viewpoint, to enforce the parity of persons and property and to prevent the Czechoslovaks from exploiting the exchange of the population in the interest of the complete liquidation of Hungarians in Slovakia. Despite constant Hungarian protests, the enforcement of equal rates failed: 76,616 relocated Slovakian Hungarians left behind 16,000 acres and 15,700 houses in Slovakia, whereas, 60,257 relocated Slovaks left behind only 15,000 acres and 4,400 houses in Hungary. Sutaj: *op. cit.* 26.

[24] László Szarka draws attention to the fact that the agreement extraordinarily disadvantaged Hungary, because it authorized the Czechoslovak state to enlist Slovaks in Hungary and gave plenty of rope for the appointment of Hungarians in Czechoslovakia as subjects of the exchange of population. Szarka, L.: A csehszlovákiai magyar kisebbség felszámolását célzó dekrétumok és rendeletek (Decrees and Ordinances Targeting the Liquidation of the Hungarian Minority in Czechoslovakia). In: Popély–Sutaj–Szarka: *Benes-dekrétumok... op. cit.* 23.

[25] The act came into force on 1 October, 1957 and as a matter of course it concerned the people who had fled from the country by reason of the consequences of the suppression of the Revolution of 1956.

The regulations concerning *indemnification* were introduced under Act 33 of 1921, which ratified the Trianon Peace Treaty[26] in Hungarian legislation. Indemnification was regulated under Art. 63 by the institution of *"option"*. Accordingly, persons over the age of 18 forfeiting their Hungarian citizenship and acquiring new citizenship under Article 61 shall be entitled to opt for Hungarian citizenship within a period of one year as of coming into force of the treaty (from 26 July 1921 to 26 July 1922), if their residency had formerly been in the territory of Hungary. If an individual failed to opt within the specified year, the acquisition of Hungarian citizenship was feasible by *re-naturalisation because of the term of preclusion.*[27] If the person had forfeited citizenship due to other factors, he could regain Hungarian citizenship by *naturalisation* following 26 July 1922.

The right of option stipulated by the act enacting the Trianon Peace Treaty could not settle the issue ultimately. The term of one-year specified for option was too short to administer the cases in such a large volume and the procedure of re-naturalisation as regulated under Act 50 of 1879 resulted in unfair and protracted procedures.

All these factors urged the Hungarian legislature to pass Act 17 of 1922 as an instrument of indemnification. Under Article 24, the act permitted the re-acquisition of Hungarian citizenship terminated by the Trianon Peace Treaty via preferential procedures. According to the act, the person *who had forfeited Hungarian citizenship* without release or an administrative decision *after the outbreak of the World War I* (26 July, 1914) *and was living or intending to settle down in Hungary* could be exceptionally *re-naturalised at request by the Minister of the Interior* in default of the requirements specified under Article 38 of Act 50 of 1879 (on re-naturalisation), if the petitioner had *reached the age of 18, was not incapable of action and if re-naturalisation was justified by circumstances worthy of appreciation.* Taking advantage of the option under the provision of 1922, about 350,000 ethnic Hungarians moved to Hungary, even though it was not easy to obtain permission to immigrate because Hungary was not prepared to handle immigration of such scale.

However, the weakest point of the indemnification regulation was related to *community residency*, which wasn't originally linked up with citizenship, but with *community self-government.* This is what community residency developed from, which was incorporated in domestic law under Act 13 of 1871, which established relationship between individuals and their communities on the basis of *public law.* According to Article 6, each citizen had to

[26] The Trianon Peace Treaty binding Hungary was signed in the Great Trianon Palace of Versailles on 4 June 1920. Consequently, the territory of Hungary decreased from 283,000 square kilometres to 93,000 square kilometres and the population decreased from 18.2 million to 7.6 million. According to the data of the census of 1910, 3,320,058 native Hungarians resided beyond the borders of Hungary, within this scope, 1,664,000 native Hungarians resided in Romania, 1,072,000 in Czechoslovakia and 465,000 in the Serb-Croat-Slovenian Kingdom. Szarka, L.: Magyarország és a magyar kisebbségek ügye a párizsi béketárgyalásokon: határkijelölés, népszavazás, kisebbségvédelem (Hungary and the Issue of Hungarian Minorities at the Paris Peace Talks: Demarcation of Borders, Referendum and Minority Protection). In: Bárdi, N.–Fedinec, Cs.–Szarka, L. (eds): *Kisebbségi magyar közösségek a 20. században* (Hungarian Minority Communities in the 20th Century). Budapest, 2008, 27.

[27] The original requirements of re-naturalisation were: disposing capacity, belonging to a Hungarian community, continual residence in the country for 5 years, proof of proper housing and living circumstances, continual payment of taxes for 5 years, correct conduct. Obviously, these requirements could not be met by a person who had lost Hungarian citizenship *under the changed circumstances*, therefore, Act 17 of 1922 granted exemption from these conditions.

belong to the bond of a community, whereas, Act 50 of 1879 stipulated that individuals to be naturalised had to belong to the bond of a community or admission to a community had to be anticipated. Thereby, *exclusively Hungarian citizens could gain community residency and each Hungarian citizen had to belong to the bond of a community.*

In practice, however, deadlocks occurred in several cases. Namely, a lot of communities recognised exclusively the residency of Hungarian citizens and issued certificates on residency merely for them. Therefore, the petitioner could not request naturalisation, since he could not certify his community residency, for which in turn he could not apply, because he was not a Hungarian citizen.[28]

Subsequently to the Trianon Peace Treaty, the Minister of the Interior became *the only legal authority* that could *make final decisions* on community residencies via the exclusion of recourse. However, this provision could not solve the problems entailed by the new situation related community residency, either.

In legal technical literature the opinion that community residency should be replaced by *permanent or temporary residence* gained ground.[29] Thus, Hungarian legislation adopted according measures upon the settlement of the citizenship of persons living in the territories re-annexed pursuant to the Vienna Awards (1938–1940).[30]

Act 6 of 1939 stipulated in connection with the re-annexed territories of Upper Hungary and Sub-Carpathia that those who were undoubtedly Hungarian citizens on 26 July 1921 according to Hungarian law effective at that time and became Czechoslovak citizens under the Trianon Treaty regained Hungarian citizenship legally without an administrative decision as of 15 March 1939, if their domiciles had been in the re-annexed territories of Upper Hungary and Sub-Carpathia since 15 March 1929. Therefore, *the legal basis of the reacquisition of citizenship* was no longer community residency, which had caused confusions, but the *domicile*. While the quoted act prescribed a period of 10 years for the recognition of the existence of the domicile, this restriction was no longer contained under Act 26 of 1940 on the Unification of Re-Annexed Eastern and Transylvanian Territories with Hungary pursuant to the Second Vienna Award (30 August 1940). Accordingly, Romanian citizens who had domiciles in the above-mentioned territories on 30 August 1940 acquired Hungarian citizenship without administrative measures. Ethnic Hungarians with Romanian citizenship who had domiciles in the territory of Romania subsequently had the

[28] Besnyő, K.–Horváth, J.: *A magyar állampolgárság megszerzése és elvesztése. Gyakorlati útmutató az állampolgársági ügyek intézéséhez* (The Acquisition and Forfeiture of Hungarian Citizenship. A Practical Guide to the Administration of Matters of Citizenship). Budapest, 1985, 33–34.

[29] See, for instance, Kuthi, S.: Magyar állampolgárság (Hungarian Citizenship). *Jogtudományi Közlöny,* 64 (1929) 24, 239–240; Rácz, K.: Az állampolgárság kérdéséhez (On the Issue of Citizenship). *Jogtudományi Közlöny,* 65 (1930) 14, 131–132.

[30] As a consequence of the first Vienna Award (2 November 1938), Hungary regained some parts of its former territory in Upper Hungary. The treaty was ratified under Act 34 of 1938 in Hungarian legislation. The act referred the issues of citizenship and option to a joint committee composed of Hungarians and Czechoslovaks. On the basis of its work, Hungary acquired Sub-Carpathia from former Czechoslovakia by reason of the German invasion in March 1939. Issues of citizenship related to the two territories were jointly regulated under Act 6 of 1939, which came into force on 23 June 1939.

right *to opt for* Hungarian citizenship.[31] *Act 20 of 1941* enacting the re-annexation of territories acquired from the Yugoslav Kingdom settled the issue in a similar manner.

However, as a consequence of our part played in World War II, these re-annexed territories were lost again and the acts settling the issues of citizenship were annulled, therefore, the legal status of a great number of people became questionable.

The citizenship problems originating in the Trianon Peace Treaty were generally regulated by the second citizenship act, scilicet, Act 60 of 1948. This conferred citizenship on those individuals including their spouses and descendants *who remained Hungarian citizens upon the entry into effect of the Trianon Peace Treaty* (26 July 1921) or *took opportunity/exercised the right of option* pursuant to the treaty. Furthermore, the act offered another possibility, that of *preferential naturalisation.* That could be requested from the Minister of the Interior by *any person born within the borders of historical Hungary*, whose domicile was in Hungary on 15 September 1947,[32] who was staying here at the time of the submission of the petition for naturalisation, besides, the naturalisation was justified by circumstances worthy of appreciation.

Act 61 of 1948 cancelled community residency and stipulated accordingly that if any law referred to community residency, it should be understood as domicile in case of Hungarian citizens living in Hungary and as last residence in Hungary in case of persons living abroad.

A further scope of indemnificatory regulations consists of statutes which *annulled the detrimental legal consequences of deprivation.* Such indemnification was applied for the first time by the Socialist Government in connection with the persons discriminated against for opposing the Horthy-regime.[33]

Owing to the political transformation in 1989–1990 the people who had been deprived of Hungarian citizenship under the Communist Regime after 1945 were restituted in compliance with the intention to guarantee indemnification.[34]

Act 55 of 1993 is our fourth citizenship law, which regulates special citizenship procedures already in detail and lays down the basic rules concerning data protection and

[31] The people who acquired Hungarian citizenship in the territories re-annexed pursuant to the Vienna Award, however, intended to become Romanian citizens, could acquire this by option within a six-month term. They had to leave the Hungarian territory within one year and Romania was obliged to admit them.

[32] The date of entry into effect of the Paris Peace Treaty.

[33] Ordinance 285 M.E. of 1945 regulated the restitution of the convicted or disadvantaged by reason of leftist political conviction and activity, but it was pursuant to Ordinance 9.590 M.E. of 1945 promulgated eight months later that redressed prejudices in a more precise and ampler manner. Regarding the same people, the mentioned regulation was put into force under Act 60 of 1948 with a temporal limitation, that is, the restoration of the legal effect of citizenship pertained to people who returned to Hungary before 15 September 1948. Finally, Ordinance 200 M.E. of 1945 promulgated on 6 February 1945 annulled the anti-Jewish acts and decrees.

[34] Act 27 of 1990 annulled every particular decision on deprivation made under Act 10 of 1947, Act 60 of 1948, Act 26 of 1948 and Act 5 of 1957. The appointed persons re-acquired their Hungarian citizenship via a statement addressed to the President of the Hungarian Republic as of the date of making the statement. Act 32 of 1990 completed the provisions of the previous act by declaring that the people deceased meanwhile had to be regarded as if they had not lost their Hungarian citizenship as a consequence of forfeiting measures. In a similar manner, our fourth act on citizenship, Act 55 of 1993 among its closing provisions extends the repeal of the particular decisions on deprivation to release effected between 15 September 1947 and 2 May 1990.

the protection of privacy. *This act provides among the fundamental principles* (para. 2 of Art. 1) that nobody can be *deprived arbitrarily* of their citizenship and of the right to the change of citizenship. With this significant statement the law-maker hopefully put an end to the tendency encompassing the legislature of the 20th century, in the spirit of which the legal institution of citizenship was applied for the purposes of political *discrimination* and in turn inevitable *indemnification*. In compliance with international practice, this act already contains the basic principles of citizenship law, which up to this point had been missing from Hungarian law. Our fourth citizenship law was first amended by Act 32 of 2001, then by Act 56 of 2003.

In connection with Hungarian citizenship law, we believe it is important to expand on the concept of the Hungarian nation from the perspective of the state, furthermore, from the viewpoint of the political and cultural concepts of the nation. The nobility/aristocrats of the Hungarian Reform Era in the 19th century defined the Hungarian people on the one hand as a cultured nation in contrast with the Habsburg, on the other hand as a political or nation state as opposed to the various ethnic groups in Hungary.[35] As a consequence of the Trianon Peace Treaty, the Hungarian nation state was born, but one-third of the cultured nation was excluded from this framework. After 1949 the state of "Proletarian Dictatorship" did not solve the problems originating in these two conceptions and in the spirit of internationalism, "nation" as an issue became taboo for a long time.[36]

In the recuperation of the cultural concept of the Hungarian nation, the unassimilated nature of the massive shock caused by the Trianon Peace Treaty between 1945–1989 plays the main part and in the protracted polemics this concept mingles with the political concept of the nation, which is reflected in the statutes. Upon examining the Hungarian Constitution, we can state that basically the categories of the political nation are specified, whereas, the cultural concept of the nation is applied mainly in a complimentary manner both in the Constitution and in Hungarian public law, implying that the Hungarian state supports the individuals belonging to the cultural nation by helping with naturalisation and offering them support and advantages.[37]

In the effective act on citizenship (Act 55 of 1993), the elements of the cultural conception of the nation are relevant. The law-maker facilitated preferential naturalisation, meaning that if other requirements are met, continual residence for 8 years is not necessary, merely one-year continual residence is required, if the petitioner is a non-Hungarian citizen, but claims him/herself to be of Hungarian nationality and had an ascendant with Hungarian citizenship. These are not disjunctive, but conjunctive requirements. Therefore, for preferential naturalisation claiming oneself to be Hungarian shall not suffice officially, but one has to have a Hungarian citizen among one's ascendants. On the other hand, the conjunctive conditions are valid reversely, as well. Preferential naturalisation can be requested by the descendant of a former Hungarian citizen, who claims her/himself to be Hungarian. Thus, under the act on citizenship the cultural and linguistic conception of the nation has been reinforced after 1993.[38]

[35] Szűcs: *op. cit.* 430–431.

[36] Halász, I.: *Állampolgárság, migráció és integráció* (Citizenship, Migration and Integration). Budapest, 2009, 124.

[37] Majtényi, B.: *A nemzetállam új ruhája* (The New Garment of the Nation State). Budapest, 2007, 52.

[38] Halász: *op. cit.* 121.

The latest amendment to Hungarian citizenship law was effected in May 2010 basically in the spirit of the cultural conception of the nation. First and foremost, the act sets forth that the child of a Hungarian citizen shall gain Hungarian citizenship not only by birth, but also by descent. After 1 January 2011, a non-Hungarian citizen can be naturalised preferentially, if one ascendant was a Hungarian citizen or her/his Hungarian origin is plausible and if s/he certifies the knowledge of Hungarian language, clean record and that this naturalisation shall not infringe either the public or national safety of Hungary. These procedures shall commence at individual requests, not collectively or automatically. Applications shall be submitted to the local registry or the Hungarian consulate, or to the authority in charge of the administration of citizenship procedures appointed by the Hungarian Government.

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TAMÁS NÓTÁRI*

Translatio imperii–Thoughts on Continuity of Empires in European Political Traditions

I. The myth of world epochs in Antique

The symbolic description of the large epochs of the world following each other appears first, in European literature, in the didactic epic, that is, instructive poem, entitled *Erga kai hēmerai (Works and Days)* of Hesiod, who lived approximately between 740 and 670 BC,[1] in which he divides world history into five large epochs–it should be noted: without allocating them to any specific empires.[2] People of the golden age lived life similar to gods;[3] the world was governed by Kronos together with those living on the Olympos.[4] After that, Zeus created man of the silver age: the childhood of the members of this *genos* lasted one

* Dr habil., Ph.D., Research Fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H–1014 Budapest, Országház u. 30, Associate Professor, Károli Gáspár University Faculty of Law and Political Science, Department of Roman Law, H–1042 Budapest, Viola u. 2–4.
E-mail: tamasnotari@yahoo.de

[1] On Hesiod's *Erga kai hēmerai* see Steitz, A.: *Die Werke und Tage des Hesiodos nach ihrer Composition geprüft und erklärt.* Leipzig, 1869; Kirchhoff, A.: *Hesiodos' Mahnlieder an Perses.* Berlin, 1889; Hays, H. M.: *Notes on the Works and Days of Hesiod.* Chicago, 1918; Buzio, C.: *Esiodo nel mondo Greco.* Milano, 1938; Krafft, F.: *Vergleichende Untersuchungen zu Homer und Hesiod.* Göttingen, 1963; Troxler, H.: *Sprache und Wortschatz Hesiods.* Zürich, 1964; Blusch, J.: *Formen und Inhalt von Hesiods individuellem Denken.* Bonn, 1970; Edwards, G. P.: *The Language of Hesiod in its Traditional Context.* Oxford, 1971; Bona Quaglia, L.: *Gli "Erga" di Esiodo.* Torino, 1973; Neitzel, H.: *Homer-Rezeption bei Hesiod.* Bonn, 1975; Pucci, P.: *Hesiod and the Language of Poetry.* Baltimore, 1977; Rowe, J. C.: *Essential Hesiod.* Bristol, 1978; Lamberton, R.: *Hesiod.* New Haven, 1988; Hamilton, R.: *The Architecture of Hesiodic Poetry.* Baltimore, 1989. See also Paulson, J.: *Index Hesiodeus.* Lund, 1890 (reprint: Hildesheim 1970); Hofinger, M.: *Lexicon Hesiodeum cum indice inverso.* Leiden, 1975; Minton, W. W.: *Concordance to Hesiodic Corpus.* Leiden, 1976.

[2] On legal philosophy in Hesiod' ouvre see Fontenrose, J.: Work, Justice, and Hesiod's five Ages. *Classical Philology*, 69 (1974), 1–16; Reitzenstein, R.: Altgriechische Theologie und ihre Quellen. *Vorträge der Bibliothek Warburg IV*, 1924–1925, 1–19; Gagarin, M.: Dikē in the "Works and Days". *Classical Philology*, 68 (1973), 81–94; Palmer, L. R.: The Indo-European Origins of Greek Justice. *Transactions of the Philological Society*, 49 (1950); Gagarin, M.: Dikē in the Archaic Greek Thought. *Classical Philology*, 69 (1974), 186–197; Nótári, T.: Hesiod und die Anfänge der Rechtsphilosophie. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae-Sectio Iuridica*, 47 (2006), 341-361.

[3] Hesiod, *Erga* 109–126.

[4] On the myth of ages in Hesiod's *Works and Days* see Accame, S.: L'invocazione alla Musa e la „Verità" in Omero e in Esiodo. *Rivista di Filologia e di Istruzione Classica*, 91 (1963), 257–281; Erbse, H.: Die Funktion des Rechtsgedankens in Hesiods Erga. *Hermes*, 121 (1993), 12–28; Munding, H.: Die böse und die gute Eris. *Gymnasium*, 67 (1960), 409. sqq.; Kühn, J.: Eris und Dikē. *Würzburger Jahrbücher*, 2 (1947), 259–294; Friedländer, P.: Prometheus–Pandora und die Weltalter bei Hesiod. In: *Studien zur antiken Literatur und Kunst.* Berlin, 1969, 65–67; von Fritz, K.: Pandora, Prometheus, and the Myth of the Ages. *Review of Religion*, 11 (1947), 227–260.

hundred years, during this time they were brought up by their mother, however, after having crossed the border of adolescence they lived for a very short time only.[5] Having destroyed the people of the silver age Zeus created a new *genos* of copper, which Zeus did not need to destroy because they destroyed each other.[6] Here, the line of ages characterised by metals discontinues since Zeus created the divine order of heroes fighting in Thebes and under Troy. After introducing the age of *hērοi*,[7] Hesiod continues the enumeration of epochs marked by the line of poorer and poorer metals. He divides the iron age into two phases, the first one is his own age,[8] the second phase will come in the future when Zeus will wipe out this race, too; Hesiod makes the description of the latter age palpable by apocalyptic motifs– for example, by the image of children coming to the world with grey hair.[9]

All this has seemed to be necessary to tell us here because authors of the Middle Ages were quite well-versed in classical literature and their thinking was affected to a great extent by the epoch myth emerging in several forms in Greek and Roman literature, sometimes interwoven with political motifs (let us think of Augustus's golden age mentioned by Vergil).[10] The eschatological narrative, already about empires, which can be read in the

[5] Hesiod, *Erga* 127–142.

[6] Hesiod, *Erga* 143–155.

[7] Hesiod, *Erga* 156–173.

[8] Hesiod, *Erga* 174–177.

[9] Hesiod, *Erga* 178–201.

[10] On the political context of Vergil's *Aeneid* and the tendencies of legitimation of the Principate see Heinze, R.: *Virgils epische Technik.* Leipzig, 1915; Bailey, C.: *Religion in Virgil.* Oxford, 1935; Büchner, K.: *Der Schicksalsgedanke bei Vergil.* Freiburg im Breisgau, 1945; Brown, E. L.: *Numeri Vergiliani: Studies in Eclogues and Georgics.* Brussels, 1963; Boyancé, P.: *La religion de Vergil.* Paris, 1963; Otis, B.: *Virgil. A Study in Civilized Poetry.* Oxford, 1963; Commager, S. (ed.): *Virgil–A Collection of Critical Essays.* New York, 1966; Segal, C. P.: Aeternum per saecula nomen, the golden bough and the tragedy of history, I–II. *Arion*, 4 (1965), 615–657; 5 (1966), 34–72; Wallace-Hadrill, A.: The Golden Age and Sin in Augustan Ideology. *Past and Present*, 95 (1982), 19–36; Kühn, W.: *Götterszenen bei Virgil.* Heidelberg, 1971; Pötscher, W.: *Vergil und die göttlichen Machte. Aspekte seiner Weltanschauung.* Hildesheim–New York, 1977; Monti, R. C.: *The Dido Episode and the Aeneid. Roman Social and Political Values in the Epic.* Leiden, 1981; Williams, G.: *Technique and Ideas in the Aeneid.* New Haven–London, 1983; Hardie, Ph. R.: *Virgil's Aeneid: Cosmos and Imperium.* Oxford, 1986; Wiltshire, S. F.: *Public and Private in Vergil's Aeneid.* Amherst, 1989; Zetzel, J. E. G.: Romane Memento: Justice and Judgement in Aeneid 6. *Transactions of the American Philological Association*, 119 (1989), 263–284; Kennedy, D.: "Augustan" and "Anti-Augustan". Reflections on Terms of Reference. In: Powell, A. (ed.): *Roman Poetry and Propaganda in the Age of Augustus.* Bristol, 1992, 26–58; Ziolkowski, Th.: *Virgil and the moderns.* Princeton, 1993; Gurval, R. A.: *Actium and Augustus: the politics and emotions of civil war.* Ann Arbor, 1995; Boyle, A. J. (ed.): *Roman Epic.* London–New York, 1993; Wifstrand Schiebe, M.: *Vergil und die Tradition von den römischen Urkönigen.* Wiesbaden, 1997; Zwierlein, O.: *Die Ovid- und Vergil-Revision in tiberischer Zeit, I.* Berlin–New York, 1999; Giebel, M.: *Vergil.* Reinbek, 1999; Grimal, P.: *Vergil. Biographie.* Düsseldorf–Zürich, 2000; Tarrant, R.: *Virgil and the Augustan Reception.* Cambridge, 2001; Perkell, Ch.: The Golden Age and Its Contradictions in the Poetry of Vergil. *Vergilius*, 48 (2002), 3–39; Adler, E.: *Vergil's empire: political thought in the Aeneid.* Maryland, 2003; Syed, Y.: *Virgil's Aeneid and the Roman Self: Subject and Nation in Literary Discourse.* Ann Arbor, 2005; Holzberg, N.: *Vergil. Der Dichter und sein Werk.* München, 2006; von Albrecht, M.: *Vergil. Bucolica, Georgica, Aeneis. Eine Einführung.* Heidelberg, 2006; Reed, J. D.: *Virgil's gaze: nation and poetry in the Aeneid.* Princeton, 2007.

Bible, in the *Book of Daniel*, endowed with specific political content by Christian authors and Church Fathers, also constituted one of the principles of medieval theory of the state.[11]

II. The system of empires in the Old Testament

In the *Book of Daniel*, Nebuchadnezzar II,[12] king of Babylon saw a statue in his dream, whose head was of gold, chest and arms of silver, belly and sides of brass, legs of iron and clay. One of the prisoners, Daniel interpreted the dream: the metals making up the statue mean four consecutive empires, the divided, partly strong and partly unstable condition of the last empire is implied by the legs of the statue being partly of iron, partly of clay.[13]

The decline characterised by the line of poorer and poorer metals is in harmony with Hesiod's *Erga kai hémerai* ages, and it is only seemingly contradictory that while Hesiod considers his own age iron age, Daniel names Nebuchadnezzar's age goldenage since the *Book of Daniel* was created in the 2nd century BC, so, he brings up Nebuchadnezzar's rule as an idealised epoch of bygone days. As a matter of fact, as these texts cannot be directly deduced from each other, we can presume more of a common source in their background.[14]

[11] On the influence of Hesiod on Ancient and Medieval literature see von Fritz, K.–Kirk, G. S.–Verdenius, W. J. et al.: *Hésiode et son influence*. Vandoevres–Genf, 1962.

[12] On Nebuchadnezzar see Tabouis, G. R.–Hanotaux, G: *Nebuchadnezzar*. New York, 1931; Wiseman, D. J.: *Nebuchadrezzar and Babylon: Schweich lectures in biblical Archaeology*. Oxford, 1991; Janssen, E.: *Juda in der Exilszeit*. Göttingen, 1956; Jursa, M.: *Die Babylonier*. München, 2004; Edzard, D.-O.: *Geschichte Mesopotamiens*. München, 2003; Sals, U.: *Die Biographie der "Hure Babylon"*. Tübingen, 2004; Wullen, M. (Hrsg.): *Babylon. Mythos und Wahrheit, I–II*. München, 2008.

[13] Daniel 2, 31–45. On Daniel's Book see Haevenrich, H. A. Ch.: *Kommentar über das Buch Daniel*. Hamburg, 1832; Charles, R. H.: *A Critical and Exegetical Commentary on the Book of Daniel*. Oxford, 1929; Porteous, N. W.: *Das Danielbuch*. Göttingen, 1962; Collins, J. J.: *The Apocalyptic Visions of the Book of Daniel*. Missoula, 1977; Ginsberg, H. L.: *Studies in Daniel*. New York, 1949; Collins, J. J.: *Daniel–A Commentary on the Book of Daniel*. Minneapolis, 1993; Koch, K.: *Deuterokanonische Zusätze zum Danielbuch*. Neukirchen–Vluyv, 1987; van den Wounde, A. S. (ed.): *The Book of Daniel in the Light of New Findings*. Leuven, 1993; Koch, K.: *Die Reiche der Welt und der kommende Menschensohn. Studien zum Danielbuch*. Neukirchen–Vluyv, 1995; Yarbro Collins, A.: *Cosmology and Escathology in Jewish and Christian Apocalypticism*. Leiden, 1996; Collins, J. J.–Flint, P. W. (eds): *The Book of Daniel. Composition and Reception, I–II*. Leiden, 2001.

[14] On the sources and the impact of the *Book of Daniel* see Baldry, C. H.: Who Invented the Golden Age? *Classical Quarterly*, 46 (1952), 83–92; Collins, J. J.: Current Issues in the Study of Daniel. In: Collins–Flint (eds): *The Book of Daniel. op. cit.* I. 1–15; van Henten, J. W.: Daniel 3 and 6 in the Early Christian Literature. In: Collins–Flint (eds): *The Book of Daniel. op. cit.* I. 149–170; Koch, K.: *Europa, Rom und der Kaiser vor dem Hintergrund von zwei Jahrtausenden Rezeption des Buches Daniel*. Göttingen, 1997; Kratz, R. G.: *Translatio Imperii. Untersuchungen zu den aramäischen Danielerzählungen und ihrem theologiegeschichtlichen Umfeld*. Neukirchen–Vluxn, 1987; Eshel, E.: Possible Sources of the Book of Daniel. In: Collins–Flint (eds): *The Book of Daniel. op. cit.* II. 387–394; Rowland, Ch.: The Book of Daniel and the Radical Critique of the Empire. An Essay in Apocalyptic Hermeneutics. In: Collins–Flint (eds): *The Book of Daniel. op. cit.* II. 447–467; Oelsner, J.: Kontinuität und Wandel in Gesellschaft und Kultur Babyloniens in hellenistischer Zeit. *Klio*, 60 (1978), 101–116; Tcherikover, V.: *Hellenistic Civilization and the Jews*. New York, 1975.

III. The line of empires and the thought of *translatio imperii* in ancient Rome

In his work entitled *Apologeticum* written at the turn of the 2nd and 3rd centuries AD (which responds to the arguments brought up by pagans against Christians and tries to refute that Christians endanger the existence of the state of Rome), Tertullian formulates a peculiar concept of the theory of the state regarding the thought of *translatio imperii.*[15] All this took place because the arguments claimed that Christians, by not respecting Roman gods, committed *crimen laesae maiestatis*[16] and, drawing gods' anger, thrust the whole empire into destruction.[17] Tertullian emphasises that Christians are loyal subjects of the empire since they pray for the emperor and the empire,[18] accepting Apostle Paul's statement (written to the Corinthians) that all power comes from god *(omnis potestas a Deo).*[19] The wish attached to the permanence of the empire by Christians is an honest aspiration–Tertullian stresses–as termination of the Roman Empire would bring along the coming of the end of the world.[20] That is, in his work he creates a kind of political theology based on the ideology of survival of the empire and the chain of consecutive empires. He expounds the content of what can be read in the *Book of Daniel,*[21] and he identifies the last one from among the four consecutive great empires with Rome. To this he connects what is described in Apostle John's *Apocalipse*, which asserts that the end of the world will be preceded by the fall of the great empire, "Babylon", which breaks the Antichrist free of his chains.[22] That is, he presents the fact that Rome as the last one possesses *regnum* (i.e. domination of the world, which can be possessed at one time only by one empire) as the criterion of its survival, the survival of the world. By that he as it were turns emperor Augustus's *"Roma est aeterna"* ideology around; at the same time, in the mirror of its own religious beliefs,

[15] On Tertullian see Beck, A.: *Römisches Recht bei Tertullian und Cyprian: eine Studie zur frühen Kirchenrechtsgeschichte.* Halle, 1930; Roberts, R. E.: *The Theology of Tertullian.* London, 1924; Stirnimann, J. K.: *Die Praescriptio Tertullians im Lichte des Römischen Rechts und der Theologie.* Freiburg, 1949; Lehmann, P.: Tertullian im Mittelalter. *Hermes*, 87 (1959), 231–246; Fredouille, J.-C.: *Tertullien et la conversion de la culture antique.* Paris, 1972; Barnes, T. D.: *Tertullian: A Historical and Literary Study.* Oxford, 1985; Ecker, G.: *Orator Christianus. Untersuchungen zur Argumentationskunst in Tertullians Apologeticum.* Stuttgart, 1993; Osborn, E.: *Tertullian. First Theologian of the West.* Cambridge, 1997; Adkin, N.: Tertullian and Jerome Again. *Symbolae Osloenses*, 72 (1997), 155–163; Randazzo, S.: Per la storia del diritto associativo tardoclassico: la testimonianza di Tertulliano. In: *Atti dell'Academia Romanistica Constantiniana 15.* Napoli, 2005, 95–105.

[16] Bauman, R. A.: *The Crimen Maiestatis in the Roman Republic and the Augustan Principate.* Johannesburg, 1967; Keaveney, A.–Madden, J. A.: The Crimen Maiestatis under Caligula: the evidence of Dio Cassius. *Classical Quarterly*, 48 (1998), 216–220; Fleissner, D.: *Die rechtshistorische Entwicklung des crimen laesae maiestatis mit einem Ausblick auf seine Nachwirkungen im geltenden österreichischen Strafrecht.* Diss. Wien, 2008; Frýdek, M.: Crimen maiestatis. In: *Československé trestní právo v proměnách věku.* Brno, 2009, 22–34.

[17] Tertullianus, *Apologeticum* 1, 4. sqq.; 2, 8. sqq.

[18] Tertullianus, *Apologeticum* 39, 2.

[19] Paulus, *Ad Corinthos* 1, 3, 11.

[20] Tertullianus, *Apologeticum* 32, 1. sqq.

[21] Daniel 2, 31. sqq.; 7, 1. sqq.

[22] Iohannes, *Acocalypsis* 17. 9.

highly appreciates the Roman Empire since he provides it with a role in the history of salvation.[23]

For lack of space, it is not possible to touch upon all the places where the ideology of *translatio imperii* occurs in Roman literature; therefore, I highlight two examples only. Iustin, who wrote the summary of Pompeius Trogus's *Philippica* at the turn of the 3rd and 4th centuries AD, unambiguously speaks about four empires, that is, the Assyrian, Persian and Macedonian (Alexander the Great's) empire is followed, as it were as the crowning of history, by the Roman Empire.[24] Impact, much larger than by Iustinus, was produced on the empire-philosophy of the Middle Ages and through that the modern age by the translator of the *Vulgata*, Hieronymus of Stridon,[25] who in his comments on the *Book of Daniel* associated the above-mentioned empires with clear historical-political content: that is, he considered Rome the crowning of world history after Babylon, Persia and Greece (Hellas), and connected the fall of Rome with the coming of the end of the world. It was owing to Hieronymus's immeasurably great impact, among others, that both in the west and the east for more than one thousand years several state formations had striven to prove their legal and organic continuity with the Roman Empire, and make it the basis of their power ideology.[26]

[23] Suerbaum, W.: *Vom antiken zum frühmittelalterlichen Staatsbegriff: Über Verwendung und Bedeutung von res publica, regnum, imperium und status von Cicero bis Jordanis.* Münster, 1961, 112. sqq.; Kölmel, W.: *Regimen Cristianum. Weg und Ergebnisse des Gewaltenverhältnisses und des Gewaltenverständnisses (8. bis zum 14. Jahrhundert).* Berlin, 1970, 35. sq.; Strobel, K.: *Das Imperium Romanum im '3. Jahrhundert'. Modell einer historischen Krise?* Stuttgart, 1993, 88. sqq.; Bähnk, W.: *Von der Notwendigkeits des Leidens: die Thologie des Martyriums bei Tertullian.* Hamburg, 2001, 40. sqq.

[24] On Iustin and Pompeius Trogus see Ferrero, L.: *Struttura e Metodo dell'Epitome del Guistino.* Torino, 1957; Seel, O.: *Die Praefatio des Pompeius Trogus.* Erlangen, 1955; Alonso-Nuñez, J. M.: An Augustan Word-History. The Historiae Philippicae of Pompeius Trogus. *Greece and Rome*, 34 (1987) 1, 56–72; Idem: Drei Autoren von Geschichtsabrissen der römischen Kaiserzeit: Florus, Iustinus, Orosius. *Latomus*, 54 (1995), 346–359; Idem: *La Historia Universal de Pompeyo Trogo.* Madrid, 1992; Richter, H.-D.: *Untersuchungen zur hellenistischen Historiographie. Die Vorlagen des Pompeius Trogus für die Darstellung des nachalexandrinischen hellenistischen Geschichte (Iust. 13–40).* Frankfurt, 1987; Syme, R.: The Date Justin and the Discovery of Trogus. *Historia*, 37 (1988), 358–371; Yardeli, J. C.: *Justin and Pompeius Trogus. A Study of the Language of Justin's Epitome of Trogus.* Toronto, 2003.

[25] Fremantle, H. W.: *The Principle Works of St. Jerome.* London, 1893; Grützmacher, G.: *Hieronymus. Eine biographische Studie zur alten Kirchengeschichte, I–III.* Leipzig, 1901–1918; Cavallera, F.: *Saint Jérôme. Sa vie et son oeuvre, I–II.* Paris, 1922; Feder, A.: *Studien zum Schriftstellerkatalog des heiligen Hieronymus.* Freiburg im Breisgau, 1927; Eiswith, R.: *Hieronymus' Stellung zur Literatur und Kunst.* Wiesbaden, 1955; Wiesen, D. S.: *Saint Jerome as a Satyrist. A Study in Christian Latin Thought and Letters.* Ithaca, 1964; Kelly, J. N. D.: *Jerome: His Life, Writings, and Controversies.* London, 1975; Rebenich, S.: *Hieronymus und sein Kreis.* Stuttgart, 1992; Rebenich, S.: *Jerome.* London–New York, 2002; Fürst, A.: *Hieronymus. Askese und Wissenschaft in der Spätantike.* Freiburg–Basel–Wien, 2003; Hale Williams, M.: *The Monk and the Book: Jerome and the making of Christian Scholarship.* Chicago, 2006.

[26] Quirin, H.: *Einführung in das Studium der mittelalterlichen Geschichte.* Stuttgart, 1991, 49; Goetz, W.: *Translatio imperii. Ein Beitrag zur Geschichte des Geschichtsdenkens und politischen Theorien im Mittelalter und in der frühen Neuzeit.* Tübingen, 1958, 17–36.

IV. The thought of *translatio imperii* in Eastern Europe–*Constantinople/Byzantium as Second Rome,* and *Moscow as Third Rome*

Byzantium (Byzantion) was founded cca. 660 BC by settlers of Megara, and its name was given after its first mythic ruler, king Byzas (according to the myth, after the son of the god of the sea, Poseion and Creossa). Throughout the Roman rule it enjoyed the status of free city, however, it obtained significance in world history in the 4th century AD when emperor Constantinus decided to found a second capital.[27] After some cogitation, he chose Byzantium–actually, Thessaloniki, Sardica (the present Sofia) and Troy could have been also taken into consideration: it would have supported Troy that according to the legend the Romans came from Troy.[28] The city was consecrated on 11 May 330: the consecrated Konstanitinoupolis, that is, "the City of Constantine" officially became the "new Rome" *(nea Rhōmē)* and "second Rome" *(deutera Rhōmē).*[29] Reference to the empire by the name *"Byzantium"* is actually the intellectual product the modern age; the inhabitants of the empire considered themselves Romans *(Rhōmaioi)*, and their ruler was *basileus tōn Rhōmaiōn*, so his country was "the Roman Empire" itself.[30] The thought of Constantinople

[27] From the recent literature on Constantine see Vogt, J.: *Constantin der Große und sein Jahrhundert.* München, 1960; Barnes, T. D.: *Constantine and Eusebius.* Cambridge, 1981; Weiß, P.: Die Vision Constantins. In: Bleicken, J. (Hrsg.): *Colloquium aus Anlass des 80. Geburtstages von Alfred Heuß.* Kallmünz, 1993, 143–169; Bringmann, K.: Die konstantinische Wende. Zum Verhältnis von politischer und religiöser Motivation. *Historische Zeitschrift*, 260 (1995), 21–47; Clauss, M.: *Konstantin der Große und seine Zeit.* München, 1996; Bleckmann, B.: *Konstantin der Große.* Reinbek, 1996; Mühlenberg, E. (Hrsg.): *Die Konstantinische Wende.* Gütersloh, 1998; Odahl, Ch. M.: *Constantine and the Christian Empire.* London, 2004; Brandt, H.: *Konstantin der Große. Der erste christliche Kaiser.* München, 2006; Girardet, K. M.: *Die konstantinische Wende.* Darmstadt, 2006; Herrmann-Otto, E.: *Konstantin der Große.* Darmstadt, 2007; Lenski, N. (ed.): *The Cambridge Companion to the Age of Constantine.* Cambridge, 2006; Schlange-Schöningen, H. (Hrsg.): *Konstantin und das Christentum.* Darmstadt, 2007; van Dam, R.: *The Roman Revolution of Constantine.* Cambridge 2007; Veyne, P.: *Als unsere Welt christlich wurde. Aufstieg einer Sekte zur Weltmacht.* München, 2008; Girardet, K. M.: *Der Kaiser und sein Gott. Das Christentum im Denken und in der Religionspolitik Konstantins des Großen.* Berlin–New York, 2010.

[28] Erskine, A.: *Troy between Greece and Rome: local tradition and imperial power.* Oxford–New York, 2001.

[29] Gibbon, E.: *The History of the Decline and Fall of Roman Empire, I–VIII.* Oxford, 1827. II. 34. sq.; Browning, R.: *The Byzantine Empire.* London–New York, 1980; Gregory, T. E.: *A History of Byzantium.* New York, 2009, 63. sq.

[30] On the ideological basis of the Byzantinan State see Bury, J. B.: *The Constitution of the Later Roman Empire.* London, 1909; Hungaer, H.: *Prooimon. Elemente der byzantinischen Kaiseridee in den Arengen der Urkunden.* Wien, 1964; Ahrweiler, H.: *L'ideologie politique de l'Empire byzantin.* Paris, 1975; Ostrogrosky, G.: *Zur byzantinischen Geschichte. Ausgewählte kleine Schriften.* Darmstadt, 1973; Hunger, H. (Hrsg.): *Das byzantinische Herrscherbild.* Darmstadt, 1975; Anastos, M. V.: Vox populi voluntas Dei and the Election of the Byzantine Emperor. In: *Studies in Byzantine Intellectual History, III.* London, 1979; Simon, D.: Princeps legibus solutus. Die Stellung des byzantinischen Kaisers zum Gesetz. In: Nörr, D.–Simon, D. (Hrsg.): *Gedächtnisschrift für Wolfgang Kunkel.* Frankfurt am Main, 1984, 449–492; Čičurov, I.: Gesetz und Gerechtigkeit in den byzantinischen Fürstenspiegeln des 6.–9. Jahrhunderts. In: Burgmann, L.–Fögen, M. Th.–Schminck, A. (Hrsg.): *Cupido legum.* Frankfurt am Main, 1985; Cheynet, J.-C.: *Pouvoir et contestations a Byzance (963–1210).* Paris, 1990; Fögen, M. Th.: Das politische Denken der Byzantiner. In: Fetscher, I.–Münkler, H. (Hrsg.): *Pipers Handbuch der politischen Ideen, II.* München–Zürich, 1993, 41–85; Haldon, J.: *Das byzantinische Reich. Geschichte und Kultur eines Jahrtausends.* Düsseldorf, 2002.

being a *"New Rome"* is from first to last present in Byzantine ideology, the most important legitimisation sources include the 3rd canon of the second general council *("The honorary priority after the bishop of Rome shall be given to the bishop of Constantinople since it is the new Rome.")* and the 28th canon of the fourth general council *("We too shall resolve and vote for the same on the privileges of the most sacred Church of the same Constantinople, New Rome; because the fathers justly granted privileges to the throne of the old Rome as that city ruled.")*.

The investigation of the theory of *Moscow as "Third Rome"* clearly reveals that the thought of *"Third Rome"* did not appear in the official ideology through the title of tsar used by Ivan III first in 1473 (one year after he married Sophia Palaiologa, niece of the emperor of Byzantium, through his representative, in the presence of Pope Sixtus IV in Rome). This was formulated first by Filofei, a monk of Pskov, between 1522 and 1524, in his letter written to Mihail Grigoryevich: *"I would have you know, my god-loving lord, that all Christian tsardom has come to its end, and has been united in our ruler's sole tsardom in accordance with the books of the prophets, that is, in the Russian tsardom: since two Romes have fallen, the third one still exists, and there will be no fourth Rome"*.[31] In Moscow, a metropolitan was elected for the first time in 1448, however, it became the seat of the *patriarchate* only in 1589 and that is how the Patriarch of Moscow became, in accordance with the so-called *Constitutional Charter* adopted at the synod of that time, the fifth in the order of patriarchs. And, albeit, the *"Third Rome"* theory was not accepted by orthodox canon law, it lived all the more vividly in the realm of state ideology and folk belief, and produced significant impact up to 1917.[32]

V. The thought of *renovatio imperii* in Western Europe–*Sacrum Romanum Imerium*

Charlemagne, through being crowned emperor on 23th December 800, raised *Imperium Romanum* from the dead *(renovatio imperii)* also on the level of official ideology, and, at the same time, disputed that the *basileus* had the right of continuity of the Roman Empire.[33]

[31] See also van den Bercken, W.: *Holy Russia and Christian Europe. East and West inthe Religious Ideology of Russia.* London, 1999, 146. sqq.

[32] On the idea of Moscow as the third Rome see Lettenbauer, W.: *Moskau das dritte Rom. Zur Geschichte einer politischen Theorie.* München, 1961; Meyendorff, J.: *Byzantium and the Rise of Russia. A Study on Byzantino-Russian Relations in the Forteenth Century.* New York, 1989; Idem: *Rome, Constantinople, Moscow. Historical and Theological Studies.* New York, 1996; Marshall, P.: Moscow, the Third Rome: the Origins and Transformations of a "Pivotal Moment". *Jahrbücher für Geschichte Osteuropas*, 49 (2001), 61–86.

[33] From the recent literature on Charlemagne see Abel, S.–Simson, B.: *Jahrbücher des Fränkischen Reiches unter Karl dem Großen, I–II.* Berlin, 1969; Braunfels, W. et al. (Hrsg.): *Karl der Große. Lebenswerk und Nachleben I–IV.* Düsseldorf, 1967; Langston, A. L.–Buck, J. O. (eds): *Pedigrees of Some of the Emperor Charlemagne's Descendants.* Baltimore, 1974; Epperlein, S.: *Karl der Große. Eine Biographie.* Berlin, 1982; Butzer, P. L. et al. (Hrsg.): *Karl der Große und sein Nachwirken. 1200 Jahre Kultur und Wissenschaft in Europa, I–II.* Brepols, 1997; Kerner, M.: *Karl der Große. Entschleierung eines Mythos.* Köln, 2000; Godman, P.–Jarnut, J.–Johanek, P. (Hrsg.): *Am Vorabend der Kaiserkrönung. Das Epos "Karolus Magnus et Leo Papa" und der Papstbesuch von 799.* Berlin, 2002; Schieffer, R.: *Die Karolinger.* Stuttgart, 2006; Sypeck, J.: *Becoming Charlemagne: Europe, Baghdad, and The Empires of A.D. 800.* New York, 2006; Barbero, A.: *Charlemagne: Father of a Continent.* Berkeley, 2004; McKitterick, R.: *Charlemagne: The Formation of a European Identity.* Cambridge, 2008; Becher, M.: *Karl der Große.* München, 2007. On the imperialistic politics of

In his letter to Pope Leo III, in which he warns the pope to engage a pious conduct of life, Charlemagne clearly reveals the king's and the pope's tasks and the division of the tasks: the ruler is obliged to protect the Church of Christ from the attacks and destruction of pagans by arms, and to strengthen the Catholic faith; the pope's duty is to support the king's acts by hands raised to god, just as Moses, in order to ensure him victory over the enemies of the name of Christ.[34] Thereby, the foundations of the "two swords theory"[35] made complete by Pope Bonifatius VIII in 1300 have been laid, and, simultaneously, the emperor's imperialistic demands have been acknowledged.[36]

Otto I (936–973), after he came to power, was called the greatest among European kings by a Saxon chronicler of the period. Otto laid claim to obtaining Italy and Rome and thereby the emperor's crown; all the more because he believed that through his victory over the Hungarians and the successes of the Slavic mission he as "the defeater of heathen barbarians, disseminator of Christianity and defender of the church" was entitled to emperor's dignity. The ceremony of crowning him emperor took place on 2nd February 962 in Rome. From that time, German kings could obtain emperor's title if they went to Rome for being crowned (that is, only German kings could become emperor but not all German kings became emperor). Otto I was aware of the actual scope and limits of his emperor's power: he called himself "the emperor of the Romans and Franks". His grandson, Otto III,

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Charlemagne see Nótári, T.: *Bavarian Historiography in Early Medieval Bavaria.* Passau, 2010, 57. sqq.; Idem: An Early-Medieval Show Trial–Tasilo III's Dethronement. In: Beck Varela, L.–Gutiérrez Vega, P.–Spinosa, A. (eds): *Crossing Legal Cultures.* München, 2009, 141–158; Wolfram, H.: *Die Geburt Mitteleuropas. Geschichte Österreichs vor seiner Entstehung. 378–907.* Wien, 1987, 208. sqq.; Classen, P.: *Karl der Große, das Papsttum und Byzanz. Die Begründung des karolingischen Kaisertums.* Sigmaringen, 1985; Hageneder, O.: Das 'crimen maiestatis', der Prozeß gegen die Attentäter Papst Leos III. und die Kaiserkrönung Karls des Großen. In: Mordek, H. (Hrsg.): *Aus Kirche und Reich. Festschrift für F. Kempf zu seinem 75. Geburtstag.* Sigmaringen, 1983, 54–79; Schieffer, R.: Arn von Salzburg und die Kaiserkrönung Karls des Großen. In: Dopsch, H.–Freund, S.–Schmid, A. (Hrsg.): *Bayern und Italien. Politik, Kultur, Kommunikation (8.–15. Jahrhundert). Festschrift für K. Reindel zum 75. Geburtstag.* München, 2001, 104–121.

[34] Alcuinus, *epistula* 93. *Nostrum est: secundum auxilium divinae pietatis sanctam undique Christi ecclesiam ab incursu paganorum et ab infidelium devastatione armis defendere foris, et intus catholicae fidei agnitione munire. Vestrum est, sanctissime pater: elevatis ad Deum cum Moyse manibus nostram adiuvare militiam, quatenus vobis intercedentibus Deo ductore et datore populus christianus super inimicos sui sancti nominis ubique semper habeat victoriam, et nomen domini nostri Iesu Christi toto clarificetur in orbe.*

[35] Cf. Lucas, *Evangelium* 22, 36. sqq.

[36] Cf. Levison, W.: Die mittelalterliche Lehre von den beiden Schwertern. *Deutsches Archiv für Erforschung des Mittelalters*, 9 (1952), 14–42; Hoffmann, H.: Die beiden Schwerter im hohen Mittelalter. *Deutsches Archiv für Erforschung des Mittelalters*, 20 (1964), 78–114. On Pope Boniface VIII see Wood, Ch. T.: *Phillip the Fair and Boniface VIII: State vs Papacy.* New York, 1967; Schmidt, T.: *Der Bonifaz-Prozeß. Verfahren der Papstanklage zur Zeit Bonifaz' VIII. und Clemens' V.* Köln–Wien, 1989; Coste, J. (ed.): *Boniface VIII en procès. Articles d'accusation et dépositions des témoins (1303–1311).* Rome, 1995; Paravicini Bagliani, A.: *Boniface VIII. Un pape hérétique?* Paris, 2003; Matheus, M.–Klinkhammer, L. (Hrsg.): *Eigenbild im Konflikt. Krisensituationen des Papsttums zwischen Gregor VII. und Benedikt XV.* Darmstadt, 2009.

upon the impact and suggestion of his educator and friend, the greatest scientist of the age, the French Gerbert d'Aurillac[37] (later Pope Sylvester II) announced the program of "renewing the Roman empire" *(renovatio imperii Romanorum)*. As a matter of fact, he thought of the empire of Christian emperors, first of all, of Constantine the Great and Charlemagne, and Christian mission played a central part in his concept.[38] He expressed this by adding the title "the slave of Jesus Christ" *(servus Iesu Christi)* and later "the slave of the apostles" *(servus apostolorum)* to the emperor's title. The finishing stroke was given to the merely formally existing *Sacrum Romanum Imperium* by the battle at Austerlitz. On 6 August 1806 Franz I resigned from the emperor's title.[39] (We need to add that the name used in literature for *Sacrum Romanum Imperium*, the *"German-Roman Empire"* is unhistorical because it is the translation of *"Heiliges Römisches Reich deutscher Nation"*, which had never become an official name.)

Otto Frisingensis, in his work entitled *Chronica sive Historia de duabus civitatibus*, written in the mid-12th century, wanted to continue Augustinus's work entitled *De civitate Dei*. The work focuses on the line of empires following each other *(translatio imperii)*, which moves consistently from east to west as time passes (Assyrians, Persians, Greeks, Romans, Germans), and prevails within Europe too (Rome, Byzantium, Charlemagne's Empire, the Langobard Empire, the Sacrum Romanum Imperium). The crowning of these empires is Otto's Holy Roman Empire, which must survive until the end of the world.[40]

[37] On Gerbert d'Aurillac see Eichengrün, F.: *Gerbert (Silvester II.) als Persönlichkeit*. Leipzig–Berlin, 1928; Joubert, M.: *Gerbert-Sylvestre. Il premier pape francais*. Aurillac, 1938; Darlington, O. G.: Gerbert, the Teacher. *The American Historical Review*, 52 (1947) 3, 456–476; Werner, K. F.: Zur Überlieferung der Briefe Gerberts von Aurillac. *Deutsches Archiv für Erforschung des Mittelalters*, 17 (1961), 91–144; Kosztolnyik, Z. J.: The Relations of Four Eleventh-Century Hungarian Kings with Rome in the Light of Papal Letters. *Church History* 46 (1977) 1, 33–47; Riché, P.: *Gerbert d'Aurillac. Le Pape de l'An Mil*. Paris, 1987.

[38] From the recent literature on the idea of *renovatio imerii* see Granucci, S. R.: *Renovatio Imperii Romanorum*. San Francisco, 1970; Alfhoff, G.: *Otto III*. Darmstadt, 1997; Görich, K.: *Otto III. Romanus Saxonicus et Italicus. Kaiserliche Rompolitik und sächsische Historiographie*. Sigmaringen, 1993; Schramm, P. E.: *Kaiser Rom und Renovatio. Studien zur Geschichte des römischen Erneurungsgedankens vom Ende des karolingischen Reiches bis zum Investiturstreit, I–II*. Darmstadt, 1984; Warner, D. A.: Ideals and Action in the reign of Otto III. *Journal of Medieval History*, 25 (1998) 1, 1–18.

[39] See also Freiherr von Aretin, K. O.: *Das Alte Reich 1648–1806, I–III*. Stuttgart, 1993–1997; Diestelkamp, B.: *Recht und Gericht im Heiligen Römischen Reich*. Frankfurt am Main, 1999; Schnettger, M. (Hrsg.): *Imperium Romanum–irregulare corpus–Teutscher Reichs-Staat. Das Alte Reich im Verständnis der Zeitgenossen und der Historiographie*. Mainz, 2002; Schmidt, G.: *Geschichte des Alten Reiches. Staat und Nation in der Frühen Neuzeit 1495–1806*. München, 1999; Hartmann, P. C.: *Das Heilige Römische Reich deutscher Nation in der Neuzeit 1486–1806*. Stuttgart, 2005. Gotthard, A: *Das Alte Reich 1495–1806*. Darmstadt, 2003; Stollberg-Rilinger, B.: *Das Heilige Römische Reich Deutscher Nation. Vom Ende des Mittelalters bis 1806*. München, 2009.

[40] From the further literatur on Otto Frisnigensis see Mierow, Ch. Chr.: Bishop Otto of Freising: Historian and Man. *Transactions and Proceedings of the American Philological Association*, 80 (1949), 393–402; Fischer, J. A. (Hrsg.): *Otto von Freising. Gedenkgabe zu seinem 800. Todesjahr.* Freising, 1958; Goetz, H-W.: *Das Geschichtsbild Ottos von Freising. Ein Beitrag zur historischen Vorstellungswelt und zur Geschichte des 12. Jahrhunderts*. Köln–Wien, 1984; Glaser, H.: Bischof Otto von Freising (1138–1158). In: Schwaiger, G. (Hrsg.): *Christenleben im Wandel der Zeit I.* München, 1987, 56–79; Kirchner-Feyerabend, C.: *Otto von Freising als Diözesan- und Reichsbischof.*

VI. An example of denial of continuity–official rejection of the name *Third Reich*

It is a general delusion that the "Third Reich" *(Drittes Reich)* was the official name of Germany, after Nazis seized power, strongly urged by the party and state propaganda machinery, too. It is less known that Hitler always had strong reservations against this term, although before the NSDAP took over (*Machtergreifung* or *Machtübernahme*), what is more, in the period following it, it undoubtedly proved to be a useful, highly powerful propagandistic phrase.[41] However, the decree issued by the propaganda ministry of the German press on 10th June 1939 expressly prohibited the official use of the phrase "Third Reich". In accordance with this decree, the official name of Germany–which is a so-called *völkischer Staat*,[42] that is, a state based on the race idea *(Rassenidee)*–is "Great German Empire" *(Großdeutsches Reich)*. A circular issued by the propaganda ministry *(Reichsministerium für Volksaufklärung und Propaganda)* of the German press years later, on 21st March 1942 orders–most probably following the pattern of "Empire" used by the British–that the official name of the "new Germany" in the future shall be simply: "Empire" *(Reich)*. The aim of the name *"Reich"* is to document to the public of the world the closed state unity of the territories that belong to the "new Germany". The same regulation restricts the application of the word "Reich" to Germany, stressing that there is only one "Empire" and it is Germany.

The "Third Reich" as an empire compared to historical precedents, ancestors, marked with a "serial number" was not compatible with the imperialistic self-awareness of national socialism, which considered itself the crowning of German history. In historical terms, the "First Empire" means the Holy Roman Empire *(Sacrum Romanum Imperium)* founded in 962, which existed until 1806. The "Second Empire" was founded, more exactly proclaimed on 18th January 1871 in the hall of mirrors in the Palace of Versailles and existed until November 1918. In German philosophical and political thinking, the idea of the "Third

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Frankfurt am Main, 1990; Deutinger, R.: Engel oder Wolf? Otto von Freising in den geistigen Auseinandersetzungen seiner Zeit. In: Dietl, C.–Helschinger, D. (Hrsg.): *Ars und Scientia im Mittelalter und in der Frühen Neuzeit. Ergebnisse interdisziplinärer Forschung. Georg Wieland zum 65. Geburtstag.* Tübingen–Basel, 2002, 31–46; Arnold, A.: Otto von Freising. In: Wurst, J.–Langheiter, A. (Hrsg.): *Monachia.* München, 2005. 75. sqq.; Deutinger, R.: Das Privilegium minus, Otto von Freising und der Verfassungswandel des 12. Jahrhunderts. In: Schmid, P.–Wanderwitz, H. (Hrsg.): *Die Geburt Österreichs. 850 Jahre Privilegium minus.* Regensburg, 2007, 179–199.

[41] See Hamza, G.: Die Idee des "Dritten Reichs" im deutschen philosophischen und politischen Denken im 20. Jahrhundert. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae, Sectio Iuridica*, 38 (1997), 11–22; Idem: Die Idee des "Dritten Reichs" im deutschen philosophischen und politischen Denken des 20. Jahrhunderts. *Zeitschrift der Savigny-Stiftung, Germanistische Abteilung*, 118 (2001) 321–336; Idem: The Idea of the "Third Reich" in the German Legal, Philosophical and Political Thinking in the 20th Century. *Acta Juridica Hungarica*, 42 (2001) 1–2, 91–101; Neurohr, J. F.: *Der Mythos vom Dritten Reich. Zur Geistgeschichte des Nationalsozialismus.* München, 1957; Glum, Fr.: *Der Nationalsozialismus. Werden und Vergehen.* München, 1962; Kershaw, I.: *Hitlers Macht. Das Profil der NS-Herrschaft.* München, 1992; Fritsche, K.: *Politische Romantik und Gegenrevolution. Fluchtwege in der Krise der bürgerlichen Gesellschaft: Das Beispiel des "Tat"-Kreises.* Frankfurt am Main, 1976.

[42] On this topic in the contemporary literature see Nicolai, H.: *Der Staat im nationalsozialistischen Weltbild.* Leipzig, 1933; Huber, E. R.: *Verfassungsrecht des Großdeutschen Reiches.* Hamburg, 1939.

Reich" can be traced back to deep roots.[43] It can be identified as early as in Fichte. The idea of the "Third Reich" was given a highly great part, often central significance in conservative cultural philosophy, primarily in Arthur Moeller van den Bruck's works.[44] The national socialist regime clearly distanced itself from the idea of the "Third Reich" for historical and philosophical reasons already in the late thirties. In Germany, eventually, the view hallmarked by the name of Hans F. K. Günther, Richard Walter Darré and Alfred Rosenberg, who laid or intended to lay *Führerprinzip* on theoretical bases, became the official ideology of the national socialist Germany, in which the idea of the "Third Empire" was given no role.[45]

More in-depth analysis would be needed for accurately processing the ideology, which would demonstrate how the imperial ambitions of the modern age (for example, Spain, the British Empire and the United States of America) fit into the ideology of *translatio imperii*–upon the termination of the religious background of this thought, by replacing it with a kind of cultural mission legitimacy. In my paper, I could, of course, highlight only a few points from the history of the ideology of *translatio imperii*; an overall analysis of the subject would call for an independent monograph.

[43] Dempf, A.: *Sacrum Imperium. Geschichts- und Staatphilosophie des Mittelalters und der politischen Renaissance*. Wien, 1929; von Mutius, G.: *Die drei Reiche. Ein Versuch philosophischer Besinnung*. Berlin, 1920; Schmitt, C.: Der Begriff des Politischen. *Archiv für Sozialwissenschaft und Sozialpolitik*, 58 (1927) 1, 1–33.

[44] Moeller van den Bruck, A.: *Das dritte Reich*. Berlin, 1923.

[45] Mayer, D.: *Grundlagen des nationalsozialistischen Rechtssystems. Führerprinzip, Sonderrecht, Einheitspartei*. Stuttgart–Berlin–Köln–Mainz, 1987; Scheiner, U.: Die neuere Entwicklung des Rechtsstaates. In: *Staatstheorie und Staatsrecht*. Berlin, 1978, 205. sq.; Neumann, F.: *Behemoth. Struktur und Praxis des Nationalsozialismus 1933–1944*. Frankfurt am Main, 1988, 171. sqq.; Funke, M.: *Starker oder schwacher Diktator. Hitlers Herrschaft und die Deutschen. Ein Essay*. Düsseldorf, 1989, 85.

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Michal Šejvl*

The Changing Role of the State: The State as a Mirror of the Individual?

If the topic of the workshop is the continuity and discontinuity of the state and law, it is possible to tackle the subject of the changing role and nature of the state itself. This change can be perceived from many perspectives and some of them are already almost traditional from a lawyer's or political scientist's point of view like the state and globalization, the transformation of the state (typically, post-communist transformation), the state and (European) integration, the shift from state governance to (non-?)state governance, the changing role of the public sector (vis-à-vis privatization, public-private partnership) and so on.[1] Some perspectives are "hot topics" waiting to be elaborated deeply in the near future, e.g. the role of the state in the current financial crisis, the possibility of establishing a "world government" (given that currently states are too weak to solve the problems of "too big to fail" companies); others can be seen as topical in the future–or maybe not.[2] But here I do not want to write about these complicated issues, instead, I'll focus on two abstract speculations I have on my mind. The first speculation has been influenced by the famous statement of Carl Schmitt, namely, that all concepts of modern state theory are secularized theological concepts.[3] From Schmitt's perspective, thinking about the state was influenced by thinking about God (e.g. Hobbes' "Leviathan" was an attempt to create an earthly or

* Ph.D., Institute of State and Law, Academy of Sciences of the Czech Republic, 116 00 Praha 1, Národní 18.
E-mail: sejvl@ilaw.cas.cz

[1] For a relevant survey of these topics see, e.g. Hay, C.–Lister, M.–Marsh, D. (eds): *The State. Theories and Issues*. New York, 2006.

[2] For example, during the time of writing this article I have been aware of the phenomenon of living in virtual worlds, such as Second Life. More and more people are using the possibilities offered to them by our technically developed civilization and are spending more and more time in virtual reality, where they cannot only amuse themselves (like in a computer game), but also work and earn money or establish sometimes permanent relationships with others (like marriage). If this trend gains more ground in future, we will face an interesting social phenomenon, namely, that a growing segment of the population will prefer this virtual world to our "real" world and care only about physical subsistence and fast Internet connection–other needs will be satisfied in the virtual world. Will this affect the life of states? Of course: socially passive people in the "real" world will be only marginally interested in the elections and parliamentary democracy (while in the virtual world they will form governments and organize demonstrations) or paying taxes (in the virtual world the duty to pay them has not been established yet). Does it sound like a science fiction such as "Matrix"? Maybe, but when we consider the fact that virtual dollars can be exchanged to "real" money and that some states have already opened their virtual embassies in Second Life (like the Maldives, Sweden, Estonia, Serbia, Colombia and the Philippines), it is possible that in the near future states will be increasingly interested not only in how to regulate these virtual worlds, but also in how to convince people, who have been "going virtual" to "return" and participate in the "real" life of the state.

[3] Schmitt, C.: *Political Theology. Four Chapters on the Concept of Sovereignty*. (Orig. publication: Berlin, 1922), Cambridge–London, 1985, 36 et seq.

"mortal" God with almighty authority over its citizens). To put it shortly and maybe too simply, the state is perceived as a mirror of God in spite of the fact that modern states were born in the process of secularization.[4] Thinking about this statement has entailed my first speculation: The concept of the state and its sovereignty is modelled according to the concept of the moral sovereignty (moral autonomy) of the individual. In the first part of this article I will try to support this hypothesis with arguments originating mainly in the history of ethics and the theory of the state.

The second hypothesis I'll present here is a mere development of the first one: Do we face in our present-day world any changes in the moral characteristics of the individual? If yes, what are these changes and how can they possibly affect the features of the state? The description of some present-day changes in the individual's position and the changing role of the state stemming from them are the topics of the second part of this article. I will finish with a not very optimistic metaphor of the contemporary state conceived as an authoritarian insurance company. At the same time, these speculations are only a broader (and maybe deeper) version of my former ideas presented in previous workshops and published subsequently.[5]

1. The first speculation

If the majority of scholars agree that the roots of the modern concept of the state must be identified in the 16th and 17th centuries (e.g. Machiavelli was the first theorist to use the word "status" for the description of the state as "lo stato", Bodin was the first thinker to elaborate the concept of sovereignty lying "at the heart" of the concept of state, whereas, Hobbes offered us the first theoretical concept of the secularized state (to mention only the most famous and significant development in the fields of political science and law), and it was also at that time when the new concepts of individuality were born. The developments concerning individuality can of course be observed a long time before these centuries–some recognize them, e.g. in the use of the word "ius" as a subjective right in the philosophy of William of Ockham,[6] others in the cultural and political advances of Italian city states[7] or in the somehow personal, inner relationship with God, which evolved during the Reformation and so on. The classical work on the development of modern identity (and its three components, i.e. a sense of ourselves as beings of inner depth, the affirmation of ordinary life, which in contrast to the Middle Ages focuses on other aspects of life, finally, the expressionist notion of nature as an inner moral source) is the result of the lifelong research

[4] How this process of secularization ensued was famously described by Ernst-Wolfgang Böckenförde. See Böckenförde, E.-W.: Vznik státu jako proces sekularizace (The Creation of the State as a Process of Secularization). In: Hanuš, J. (ed.): *Vznik státu jako proces sekularizace: diskuse nad studií Ernsta-Wolfganga Böckenfördeho*. (Orig. publication: Berlin, 1991), Brno, 2006, 7–24.

[5] The changing nature of citizenship (i.e. the relationship of the individual to the state) was presented and published in Šejvl, M.: European Identity and European Citizenship: The Case of the Missing Polis? *International Journal of Public Administration in Central and Eastern Europe*, 2 (2008) 2, 49–56. The implications of these changes in moral attitudes to the state for the symbolic order (manifested in state symbols) were presented and published in Šejvl, M.: (Not Only) State Symbols in Danger? *International Journal of Public Administration in Central and Eastern Europe*, 4 (2010) 1, 105–110.

[6] See, e.g. Villey, M.: *La Formation de la Pensée Juridique Modern*. 4th ed., Paris, 1975.

[7] See, e.g. classics like Burckhardt, J.: *Kultura renaissanční doby v Italii* (The Culture of the Renaissance in Italy). (Orig. publication: 1860), Prague, 1912.

of Charles Taylor.[8] Taylor in particular argued against the notion of a disembodied, decontextualized and disengaged subject (rather simply, "against the notion of the modern atomistic individual"), instead, he focused on the fact that modern individuality is constructed (in contrast to the ideas of thinkers I will introduce later, such as Hobbes or Grotius) within the framework of "strong evaluations" that transcend the atomic individual's perspective–may it be a Platonic idea of the virtues of reason and self-mastery, the sense of honour (e.g. of medieval nobility) or the modern understanding of the expressive power of inner selves or the virtues of counting everyone's interests equally.

Be that as it may, the notion of individuality so precious to liberalism and modernity was conceived some time at the beginning of the modern age and almost immediately had implications for the new (modern) conception of the state. In my opinion, it was Thomas Hobbes in his "Leviathan" who on a theoretical level issued the "birth certificate" of the modern state. Hobbes developed the new legitimacy of the state for the first time in the context of atomic individuals with their innate natural rights and broke off with the Aristotelian concept of the *zoon politikon* elaborated in "Politics". The Aristotelian ethics of virtue presupposed the naturalness of the *polis* (city-state) and explicitly rejected the concept of atomic individuality: "... and a man who is by nature and not merely by fortune 'citiless' ranks either low in the scale of humanity or above it", i.e. is a wild beast (*therion*) or a god (*theos*).[9] Man's good life was the *telos* of the *polis* and vice versa Aristotle could not imagine a man living a good life without the *polis*. Thus, the theory of the state since the time of Aristotle and throughout the Middle Ages was always concomitant of the ethics of virtue and virtue itself was either rationally discovered in the world of ideas (for Plato and similarly yet differently for Aristotle) or rationally reconstructed by our understanding of *ius naturale* given by God (for Aquinas) or a result of God's command (for Ockham). I will now cite one example from private law as an illustration of such an ethics of virtue, which is easily understood by lawyers: Why should we keep the contract? According to Aristotle, there is a difference between the contract and performance on the bases of friendship and virtue. Only the contracts that are immediately performed (*traditio* in Roman law) are purely commercial transactions. If a promise is involved (a transaction with delayed performance), it shall not be a contract, but (in the end) a matter of a friendship and virtue. Thus, there is a duty to keep promises among friends because of virtue and the question of keeping contracts is not raised, because the offer and the acceptance ensues in the same moment (as in the case of *traditio*), therefore, the contract is a matter of the pure profit of the contractors. The matter is differently (and yet similarly) solved under Roman law–a "pure" promise is not legally protected and as such it shall not be enforceable in court (*pactum nudum*), therefore, its performance is only a matter of virtue, whereas only a promise concomitant to a formal contract (*contractus*) must be kept according to law. The duty to keep the contract is either a matter of virtue (among Aristotle's friends), or a matter of "economic" profit (in case of Aristotle's *traditio*) or a matter of form (in Roman law).[10] It was not a matter of an individual's will transferred to another person, simply because no

[8] Taylor, Ch.: *Sources of the Self.* Cambridge, 1989.

[9] Aristotle: *Politics.* 1253a. Cited according to the English translation by Rackham, H.: Cambridge–London, 1959, 9.

[10] For these examples of adherence to contracts I am indebted to my colleague, Tomáš Sobek. See Sobek, T.: *Závaznost smlouvy* (The Binding Character of Contracts). In: Havel, B.–Pihera, V. (eds): *Soukromé právo na cestě. Eseje a jiné texty k jubileu Karla Eliáše.* Plzeň, 2010, 274–299.

clear concept of a morally autonomous individual obtained. It was rather an "external" virtue that guided the behaviour of man.

Whereas, Hobbes posited autonomous individuals with natural rights as a necessary condition of the establishment of the state by a contract–thus, he invented the concept of social contract. This Hobbesian social contract must be adhered to neither because of virtue (how could we draw on the virtue of individuals who in a natural state behave like wolves?), nor because of "economic" profit (which plays a role in *traditio*, not for the future),[11] but because of the public force of the sovereign: "And covenants without sword are but words and of no strength to secure a man at all."[12] We can see that in spite of the fact that Hobbes posited autonomous individuals, he deprives them of their autonomy in the moment they enter a state. At the same time, the sovereign is not necessarily endowed with virtue, since his/her "sword" is sufficient. We have to look elsewhere for the development of more fully elaborated concepts of the moral autonomy of the individual in the teachings of Hobbes' contemporary, Grotius (in the area of the obligatory character of private contract) and Hobbes' follower (and critic), Locke (in the area of the social contract, i.e. the obligatory character of "public" contract). As far as the ideas of Grotius are concerned, the form of a contract (or of a promise) is not an essential condition for adherence to a contract (or a promise); what matters is the will (or the intention) of the contractor (the promisor). We have the same power over our actions as we have over our property. The reason for adherence to the contract is the intention of the contractor to transfer a part of his/her will to another contractor. The promise consists in the alienation of a part of our freedom towards another contractor. Thus, even a *pactum nudum* has binding force, not necessarily according to positive law, but according to natural law. Thus, according to a different conception of the binding character of the contract, it lies in the individual's will. This constitutes an important step towards the moral autonomy of the individual, in spite of the fact that natural law is not conceived of as the product of the individual's moral choice yet, but it is still perceived as the rational duty of man.[13] As far as Locke is concerned, according to the "Second Treatise on Government", morally autonomous individuals retain their autonomy even after they have entered the state via a social contract (and thus retain their natural rights), therefore, the sovereign is bound by the contract (unlike Hobbes' sovereign) and cannot, e.g. impose the "right" religion on them (according to the "Letter on Tolerance"). This way the state that must respect the moral autonomy of individuals was created.

We have seen how the notion of the moral individual slowly developed in the 16th and 17th centuries and at the same time, often in the works of the same thinkers, new theories of the state (established via the social contract) emerged. Briefly, morally autonomous individuals create a legally autonomous state–of course, in those centuries it was primarily an absolutist state (of Hobbes or Pufendorf), with the exception of Locke's state. Nevertheless, the first complex philosophy of moral autonomy was introduced by Kant. For Kant, it is only possible to have moral laws, if these laws were autonomously chosen by an

[11] It is true that for Hobbes the establishment of the state by a social contract was a matter of rationality and thus even a matter of "economic" profit–this is the reason why a sovereign could not deprive her citizens of their lives or personal property, because in that situation their position would not be any better than in the natural state. See Hobbes, T.: *Leviathan*. (Orig. publication: 1651), Prague, 2009, Chapter XXI, par. 11 et seq., 151 et seq.

[12] See Hobbes, T.: *ibid.* Chapter XVII, par. 2, 117.

[13] See Grotius, H.: *On the Law of War and Peace.* Translated by Campbell, A. C. (Orig. publication: 1625), London, 1814, Book II., Chapter XI.

individual using a "test" of the categorical imperative–"act as if the maxim of your action could be universal law". I do not want to explicate his ideas deeply, since Kantian ethics as one of the most influential ethical conceptions is widely known. Nevertheless, I would like to point out that owing to Kant, the foundations of quite a different concept of the state have been conceived. He did not posit an absolutistic state, but a state bound by its own laws, i.e. a *Rechtsstaat* in German. In spite of the fact that the word "Rechtsstaat" cannot be found in Kant's works, many scholars claim that it was his intellectual influence that prepared the ground for various *Rechtsstaat* conceptions elaborated throughout the 19th century.[14] If we translate the Kantian idea of the morally autonomous individual, who binds himself/herself by moral maxims, into the realms of state and law, we reach the idea of the autonomous state that binds itself by its own laws embodied in *Selbstverpflichtkeit* ("self-binding character") of the *Rechtsstaat* elucidated in Jellinek's *Allgemeine Staatslehre*.[15]

Of course, we could mention theories of the state, which at first sight do not seem to be influenced by the concept of the morally autonomous individual. Now I'll present some of them and show that those state theories also reflect moral individuality–except that in these theories the individual is not perceived as a morally autonomous unit. The 19th century brought forth many theories, which challenged the moral autonomy of the individual. For historicism, man was essentially the product of history, for nationalism, the product of the nation, for racism, the product of race, for conservative thinkers like Burke, the product of tradition, for Marxism, the product of impersonal economic forces. We can conclude that the morally autonomous individual was "dispersed" in history, tradition, nation, race or class. At the same time, the 19th century produced new conceptions of the state, e.g. for a German nationalist, law and the state are essentially the product of "Volksgeist" (therefore, every nation has to have its suitable form of law, like for Savigny, or state, like, e.g. for Bluntschli). For Marxists (if there really obtains something like a Marxist conception of the state), the state is the instrument of the bourgeoisie employed to impose obedience on powerless social classes; for organicists such as von Gierke, the state is merely one institution within the society besides, e.g. guilds and other associations. The important thing is that conceptions of the non-autonomous state (because it depends on nation, class, history etc.) feature along with the conceptions of the non-autonomous individual (that is, the individual "dispersed" in nation, class, history etc.). It is obvious that the conception of the state is modelled according to the conception of the individual.[16]

[14] See Bluntschli, J. K.: *Theory of the State.* (English translation of the 6th German edition), London, 1885, 65 et. seq.; Jouanjan, O.: Présentation. In: Jouanjan, O. (ed.): *Figures de l'Etat de droit. Le Rechtsstaat dans l'histoire intellectuelle et constitutionnelle de l'Allemagne.* Strasbourg, 2001, 13 et seq.; Heuschling, L.: *Etat de droit, Rechtsstaat, Rule of Law.* Paris, 2002, Chap. I., 35 et seq.

[15] Jellinek, G.: *Všeobecná státověda.* (Orig. publication: Allgemeine Staatslehre, 1900), Prague, 1906, 508 et seq.

[16] From this perspective, Hegel can be seen as an elaborator of the dialectical connection between moral individualism and the organic or historic conception of the state. On one side he posits civil society for expressing and ensuring individual interests; on the other side the state is posited at some higher moral level, which overcomes the differences in individual interests to form a public interest. This dialectical triumph is conceivable only within a particular conception of history, namely, the conception that history leads to the realm of freedom–in the sphere of the state, human freedom is more liberated than in the previous stages (the stage of civil society).

2. The second speculation

Are we facing any changes in the conception of the morally autonomous individual at present? Maybe yes and I'll refer to one change that particularly worries me: the "free rider's" opportunistic moral. I mean something that was expressed by a French historian, Marcel Gauchet: "In front of our eyes a new ideological pathology is developing–the pathology of non-belonging. It is the opposite of the non-normality of totalitarian times, when the individual was negated in the name of a collective that determined him/her (be it a race, a nation or a class). We are now making the opposite mistake. The new entity of the pure individual is emerging, who does not owe anything to society, but demands everything from it. Duties towards a collective and bonds of a common history are becoming impossible... The collective is rejected if belonging to it causes any problems, but on the other hand there is a growing demand on a collective. An individual who wants to self-govern himself/herself is taking shape, who exists by and for himself/herself, who does not want to belong to any entity, but in reality s/he demands guarantees for his/her very existence via this evasive entity."[17]

What do I mean by the "free rider's" morality? The conception that our moral behaviour is the product of our individual choices is more or less accepted by various liberal conceptions (but of course not by the Aristotelian morality of virtue). The subject with a "free riding" morality is neither a Kantian subject, which has acquired his/her moral attitude due to the "test" of the categorical imperative. Why would it be rational to act in a way that the maxim of my action is universal law, if acting as I wish can be more effective for myself–why bother about paying for the ticket, if I can be a "free rider"? Of course, this "morality" cannot be universal (if everybody was a "free rider," the system of public transport would collapse), but why should the "free rider" bother? Of course, this "morality" cannot be sustained for the whole society in the long run (and many scholars of ethics argue that ethics has developed because it was rational not to be a "free rider" in the long run). "But in the long run, I will be dead anyway," a "free rider" could reply. In fact, "free riders" do not want freedom, because freedom implies responsibility; therefore, what they want is arbitrariness. They are not moral pluralists, because moral pluralism in the end requires tolerance for the moral attitudes of others. Instead, they crave for "amorality" and arbitrariness, which are condemned by almost every book on ethics on the first pages. "Free riders" do not invoke tolerance or understanding for others, on the contrary, they are disinterested in the lives of others and respect sheer solutions that invoke power or force. "Free riders" neither treat others as ends in themselves (like in Kantian ethics), nor do they care about "greater happiness of great amount of people" (like in Bentham's utilitarism), on the contrary, they treat others as means to their own ends (their employees as the means of the production of profits, their lovers as the means of production of sexual satisfaction etc.) and they favour "public happiness" exclusively if they can benefit from it–not a minute longer. They live in variable social contexts according to their wishes (which in itself is nothing immoral) and switch them any time the specific social context expects them to contribute something.

How the emergence of such "morality" is possible? I would like to offer a possible answer. In social reality not many people think about themselves explicitly as morally

[17] Gauchet, M.: *Dějinný úděl. Hovory s Francoisem Azouvim a Sylvainem Pironi.* (Orig. publication: *La condition historique*, Paris, 2003), Brno, 2006, 180 and 191 (translated by the author).

autonomous subjects or do not formulate their moral attitudes explicitly. It is also possible for them to "switch" in various real life situations between different conceptions of morality and sometimes behave immorally. Modernity can be perceived as a process of emancipation that granted humankind (including slaves, women, various racial, sexual and ethnic minorities) the broadest possible freedom. However, during the process of modernization the evolution of the moral autonomy of the individual, which used to be the topic of ethics, was accompanied by various techniques of discipline, which has topicality for many historians, historical anthropologists and sociologists. Norbert Elias described how the rules of "proper" behaviour and politeness slowly emerged,[18] whereas, Michel Foucault reformulated the history of modernity as a history of constant "normalization" called "biopolitics".[19] Whether we agree with these theories or not, we reject these techniques or we endorse them as positive ones, still we can see that many perceptions of these thinkers are true. One of the conclusions of Foucault's theories could be that while we regarded ourselves in the course of history as more and more liberated (and every new bill of human rights seems to confirm this perception), our freedom as morally autonomous individuals was in fact facilitated merely by those techniques of normalization. But what happened when the "free rider's morality" emerged? The same processes of civilization and normalization gave rise to many mysterious organizations not necessarily originating in the state, which decide on our lives without care about our freedom. As one Czech sociologist claimed: "What is in fact rational about the fact that an atomic bomb can be dropped any time on people, who use their handkerchiefs and feel ashamed of taking the meal on the table as first? Civilization is at the crossroads, when polite behaviour does not lead to any rewards, but straightforward brutality is gaining ground as a result of the arrogant decisions of state bureaucracies... Modern society has reached the moment, when "normal" brutality is sometimes still punished, but politeness is no longer rewarded."[20] This tenet can be valid not only from the perspective that modernity brought forth an all-powerful state, but also from the perspective that our safety and confidence (one of the "dearest" values we as a people have) are in danger not only because of the behaviour of the state, but also because of the powers our states are unable (or unwilling?) to control – and we could expound here extensively on the impacts of economic globalization with its financial crises and so on. If the "moral" behaviour of Kant's subject does not yield the "polite" social environment anymore, why not become "free riders"?

The implications of the "free rider's morality" can be clear: The whole public sphere, which manifests itself in communication, rituals and gestures, as a sphere of the symbolic

[18] Elias, N.: *O procesu civilizace.* (Orig. publication: *Über den Prozess den Zivilisation*, Basel, 1939), Prague, 2006.

[19] For the process of disciplining and normalization in the factories, schools and primarily the prisons of early modernity, see Foucault, M.: *Dohlížet a trestat. Kniha o zrodu vězení.* (Orig. publication: *Surveiller et punir*, Paris, 1975), Prague, 2000. For disciplining as a universal technique applied to the whole population of the absolutist state, see Foucault, M.: *Security, Territory, Population, Lectures at the College de France 1977–78*, and Foucault, M.: *Je třeba bránit společnost. Kurs na College de France 1975–1976.* (Orig. publication: *Il faut defendre la societé*, Paris, 1997), Prague, 2005. For the problem of "homo oeconomicus", which is treated in a similar manner to our problem of "free riders", see Foucault, M.: *Zrození biopolitiky. Kurs na College de France 1978–1979.* (Orig. Publication: *La naissance de la biopolitique*, Paris, 2004), Brno, 2009.

[20] Keller, J.: *Nedomyšlená společnost* (Unconsidered Society). Brno, 1992, 42 (translated by the author).

order is in danger. For lawyers, the judicial ritual is jeopardised with regard to the future, because it does not connect people anymore in a common idea of justice.[21] Claiming that "it is a gesture" means "it is a lie." As to the future, there are only words that try to manipulate with others and gestures that are empty. And if the public sphere is at stake, the distinction between the public and private will blur, as well: Are the people living in front of TV cameras in "reality shows" for twenty-four hours a day living their private or public lives? Are the people in virtual worlds such as Second Life living their private or public lives?

3. Possible implications of the conception of the state: the state as an authoritarian "insurance company"

Modern states declared they protected the interests of their citizens. The insurance of safety was the main motivation of the people who established the Hobbesian state. The absolutist state declared that it prevailed so as to grant people the "public good" (whether they wanted it or not). Later, states based on the rule of law declared that they were associations for the protection of human rights and modern democratic states claim to have power over what people have authorised them to do in the election process. Sovereignty is the "soul" of the state and the proclamation of people's sovereignty implies the necessary democratic legitimacy.

Nonetheless, we are witnessing various changes in the concept of sovereignty, such as post-sovereignty or multi-level governance. Blurring the division of the public and private spheres has brought about the PPPs or the shift from government to governance. Is the state (as an actor that can effect changes in reality in favour of the interest of its people) disappearing? From the "free rider's" perspective the state has a mere simple function: it should act as an "insurance company", which helps "free riders," if some of their acts have failed to be successful. It is in fact indifferent, whether "free riders" are persons who lost their jobs or families or financial companies that face bankruptcy. The state can privatise, effect outsourcing or other activities that limit its role as an economic actor. But abandonment of functioning as an "insurance company" is impossible, otherwise "free riders" would have to behave in a responsible manner. The complete disappearance of the state (the aim of many anarchists or libertarians) is not a program for "free riders". Potentially all citizens are "free riders," among whom bonds of solidarity do not obtain. It is indifferent whether "free riders" are successful in their personal lives (and consider their not-so-successful co-citizens to be "losers" or "parasites") or unsuccessful (and think about successful citizens with envy and hatred). Since there is no solidarity in a society of "free riders", the state must force "free riders" to contribute something to the state. In view of that, the "insurance company" must be an authoritarian institution. The practices of the "policing state" are stronger and stronger (DNA and other databases collecting data about us, surveillance cameras and legislation sometimes clashing with our human rights etc.) and again they are open to privatization or outsourcing, but only in so far as private firms (as "good" "free riders") can benefit from these and the state does not fall prey to anarchy. If the inhabitants of the state are all potential "free riders", why shouldn't those who govern the state, i.e. politicians and bureaucrats be "free riders", as well? If discussions (that can effect change in somebody's opinion, because he or she is convinced by the arguments of the other party) are obsolete (because "free riders" change their opinions as they wish), can we still say that

[21] See Garapon, A.: Le devenir de rituel judiciaire? In: Biet, Ch.–Schifano, L. (ed.): *Représentations du procès. Droit, Théâtre, Littérature, Cinéma.* Paris, 2003, 23 et seq.

we live in a deliberative democracy? Is our policy determined by democratic deliberation or rather by economic factors the state is unable (or unwilling?) to control? Or is it rather the fear of terrorism (that justifies almost anything including practices like "waterboarding") that dictates our laws? If "free riders" behave dangerously, we call them "rogue" and use force against them, if states behave dangerously, we call them "rogue states" and use force against them. If "free riders" fail in their personal lives, we call them "failed" and send them to an "insurance company", if states fail in their role as "insurance companies", we call them "failed states". Therefore, my conclusion is that the state is the mirror of the individual.

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VÍT ŠT'ASTNÝ*

The Continuity and Discontinuity of the Titles of Supreme State Organs in the European Countries of the Communist Bloc with special attention to the Situation in Czechoslovakia

The following contribution deals with the development of the titles of supreme state organs (i.e. heads of state) in European countries during the communist era with respect to the differences between these countries. The head of state is considered to be a symbol representing the state in relation to other countries and often functions as a living symbol of the unity of the state.

Central European, South-Eastern and Eastern European countries with communist regimes would change the organ that served as head of state. These changes were motivated in some cases by the fact that monarchy had been deposed and replaced by the republic, but the countries that had been republics before the communist coups d'état changed their supreme organs, as well. The value of discontinuity was this way reinforced by titular or symbolic discontinuity.

All the so-called Eastern Bloc countries (the Soviet Union and its satellites) used to be republics (monarchy is by definition precluded in such countries). Nevertheless, most of these countries refused the traditional concept that the head of the republic should be the President of the Republic. Although, some of them (mostly only for a limited period) were represented by the President of the Republic, most of these countries in accordance with the principle of collective leadership replaced the individual President by collective organs such as the titular head of state (the chairman of this collective organ was regarded as the head of the republic). However, despite the proclaimed principle of collective leadership, political life was organized on the basis of the leader principle. The Secretary General or First Secretary of the Communist Party (the Head of the Communist Party) was positioned on top of the pyramid. The Head of the Communist Party functioned sometimes as a head of state, sometimes as a head of government, but there was no common rule: the practice varied in different countries. Despite the specific practices in different Eastern Bloc countries, there were some common features. The basic common feature was the collectivity of the organ that served as head of state (if presidency had been abolished). The abolition of presidency often ensued after the death of the incumbent president or after the adoption of a new constitution.

Before the description of the historical situation in Eastern Bloc countries, let me engage in a brief summary about the respective situation in our current world. Most of contemporary republics favour a constitutional system, in which the President of the

* Researcher, Institute of State and Law, Academy of Sciences of the Czech Republic, 116 00 Praha 1, Národní 18.
E-mail: stastny@ilaw.cas.cz

Republic functions as the head. Out of 194 independent states, 45 states are monarchies, 149 are republics. The head of the monarchy is the Emperor (Japan), the King or Queen (Belgium, Denmark, the Netherlands, Norway, Spain, Sweden, the United Kingdom and other 15 countries of the Commonwealth,[1] Bahrain, Bhutan, Jordan, Cambodia, Malaysia, Saudi Arabia, Thailand, Lesotho, Morocco, Swaziland, Samoa, Tonga), the Grand Duke (Luxembourg), the Prince (Monaco, Liechtenstein) or two Co-Princes, respectively (Andorra), the Sultan (Brunei, Oman), the Emir (Qatar, Kuwait), the Pope (The Vatican). The United Arab Emirates constitute a monarchy, a federation of seven federal emirates (these emirates are monarchies), however, the head of all federations is the President. The remaining 149 countries are republics. The President is the head in 142 countries (if we include the United Arab Emirates, the President is the head of state in 143 countries). Seven other republics, where the President is not the head of state, include Bosnia and Herzegovina (collective presidency with 3 members and a rotating chairman), San Marino (two Captains-Regent), Burma (Chairman of the National Council for Peace and Development), Niger (Chairman of the Supreme Council for the Restoration of Democracy), Cuba (President of the Council of State), North Korea and Libya, where it is questionable who the head of state is.[2]

At present, therefore, the titles of the President of the Republic and the head of state don't overlap in merely seven republics. The number of republics where the President of the Republic doesn't coincide with the head of state decreased after the collapse of communist regimes in Central, South-Eastern and Eastern Europe. In these countries, the characteristic collective state leadership without an individual President used to be common.

In *Poland* after World War II, presidency was restored in 1947. However, this post was abolished in accordance with the July Constitution of 1952, which copied the soviet model. Between 1952 and 1989, the Council of State functioned as the collective head of state of Poland. Following the Polish Round Table Agreement in 1989, the Council of State was abolished and its Chairman (Jaruzelski) became President of the Republic for a transitional period. Simultaneously, the Government of the Republic of Poland in Exile also prevailed and it was headed by the President of the Republic (1939–1990). That secured the continuity with the Polish Republic before World War II. The last president in exile was Ryszard Kaczorowski, who resigned upon the election of Lech Wałęsa as President of the Republic of Poland in 1990. The ninety-year-old Kaczorowski died in April 2010 during the air crash near Smolensk.

The situation in the *German Democratic Republic* was similar to that in Poland. Although the GDR was a newly established republic under soviet control, its head was President of the Republic. Nevertheless, after the death of Wilhelm Pieck, the first president

[1] Antigua and Barbuda, the Bahamas, Barbados, Belize, Grenada, Jamaica, Canada, Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Australia, New Zealand, Papua New Guinea, Solomon Islands, Tuvalu.

[2] The chairmanship of the National Defence Commission of North Korea (Kim Jong-il as chairman) was elevated by the amended constitution to the rank of "the highest post in the state." Nonetheless, traditional duties of the head of state are largely performed by the Chairman of the Standing Committee of the People's Supreme Assembly. In addition, the deceased long-life president, Kim Il-sung was declared eternal president. In Libya, the *de facto* leader is the Leader of the Revolution Gaddafi, but the titular Head of State is the General Secretary of the People's General Congress.

(1960), the presidency was abolished and the Council of State as a new collective organ serving as head of state was set up in the GDR. This constitutional situation prevailed until the end of the GDR in 1990.

In *Hungary*, presidency had existed until 1949 when in accordance with the new constitution it was replaced by the collective Presidential Council of the Hungarian People's Republic. The incumbent President became its first chairman. However, individual presidency was restored after the collapse of the communist regime in Hungary.

In *Romania*, after the coerced abdication of King Michael I and the abolition of monarchy, the Chairman of the Presidium of the National Grand Assembly functioned as head of state. This status changed in 1961, afterwards the Chairman of the Council of State served as head of state. The next change ensued in 1974, when the ambitious Romanian communist leader, Ceauşescu proclaimed himself President. In communist Romania, the tendency was opposed to that in other communist countries, since a collective head of state was replaced by an individual President.

In *Bulgaria*, subsequently to the abolition of monarchy, the departure of Tsar Simeon II to exile and the provisional presidency of Vasil Petrov Kolarov (1946–1947), in accordance with new constitution a titular head of state, i.e. the Chairman of the Presidium of the National Assembly was in office. After 1971, when next new constitution was adopted, the Council of State (with the chairman at the top) functioned as a collective head of state. This constitutional situation prevailed until the collapse of the communist regime in Bulgaria.

In *Yugoslavia*, President Tito (before 1953 he had served as the Prime Minister) functioned as head of state. After Tito's death individual presidency was abolished and the Collective Presidency (with its rotating heads as representatives of the Yugoslav nations) functioned as head of state. The individual presidency was restored in 1992, but by that time the original Yugoslavia had already dissolved.

During the entire communist period, the titular head of Albania was the Chairman of the Presidium of the People's Assembly. Presidency was restored in 1991.

Finally, it was the situation in the Soviet Union, its constitutional and state system with its Stalinist constitution dating back to 1936 that were models for its satellites. From 1938, the titular head was the State Chairman of the Presidium of the Supreme Soviet (between 1989 and 1990 only Chairman of the Supreme Soviet). The first and the last President of the Soviet Union, that is, Gorbachev was elected in 1990.

In the second part of this article, I will describe the respective situation in communist *Czechoslovakia*. This situation was specific. The head of the Czech state from its formation had been the Prince, then the King. Since the end of the monarchy and the establishment of the Czechoslovak Republic, the head has been the President of the Republic. This presidential tradition was not disrupted either in the era of communism. In contrast to other Eastern Bloc countries, the individual president in Czechoslovakia has never been replaced by a collective organ.

The position of the President of Czechoslovakia (and of the Czech Republic at the moment) is peculiar not only from a constitutional, but also from political and sociological points of view. The President of the Republic enjoys full public confidence and the majesty of the position is accented by some (not only legal) circumstances, such as his seat is in the majestic Prague Castle, which is the largest coherent castle complex in the world, furthermore, his portraits are on display in schools, offices and other public spaces despite the lack of a relevant legal obligation. He is the only living person with portraits on post

stamps, finally, the President is welcomed by ceremonious fanfares signalling his arrival during official actions.

The Czech presidential tradition was created by Masaryk, the first Czechoslovak president and his successors have always followed in his footsteps. We can cite a definitive historical publication that outlines the dominant view on President Masaryk: "The first president, T. G. Masaryk with his extensive education in philosophy, history and sociology, knowledge of foreign countries and languages, with important scientific and educational activities, significant political experience and exquisite personal morality has created a standard of statesmanship in Czech political culture and thereby has become an unattainable ideal for his successors".[3]

In some respects, Masaryk followed the monarchical traditions of the Czech lands. He was called "tatíček"–daddy (good father of the nation). This concept was partially transferred to his successors. This is important as to understanding the developments after the communist coup.

The presidential tradition in the Czech lands was not disrupted even during World War II, since besides Beneš, the president in exile, the so-called state president Hácha was in office in the Nazi-controlled Protectorates of Bohemia and Moravia.

After the communist coup d'état in February 1948 (formally perpetrated in accordance with constitution), the incumbent democratic president, Beneš remained in office (in accordance with communist interests, since the legitimacy of the new regime was thereby strengthened). After President Beneš' abdication (four months later), a new president, Gottwald, the leader of the Communist Party and Prime Minister was elected. The constitution of 1948 had been prepared before the communist coup and many legal institutions (including individual presidency) originated in the constitution of the first republic. Therefore, communist leadership benefited from the prestigious and popular post of the presidency.

After Gottwald's death in 1953, the abolishment of the post of the President of the Republic became possible. The issue was discussed in leading organs of the Communist Party of Czechoslovakia, but the according proposals were rejected, since obviously, the Communist Regime intended to draw on the popularity of the presidential post. Relevant discussions resuscitated during the preparation of the new constitution in 1960, nevertheless, the establishment of a new collective head of state was rejected again. Although, the new so-called Socialist Constitution copied soviet models, the name of the country (Czechoslovak Socialist Republic) changed and consequently, the national emblem was also replaced, whereas, the post of the President of the Republic was retained. This constitutional situation did not change until the end of the Czechoslovak communist era in 1989.

The post of the President of the Republic used to be largely ceremonial, but its importance increased, since the head of the Communist Party was often elected to be President. Communist leaders considered this post to be a symbolic confirmation of their leading role in the country.

Let me mention one example from 1975. Seriously ill President Svoboda refused to abdicate, therefore the Parliament adopted a special constitutional amendment. This act stated that the Parliament (the Federal Assembly) was authorised to elect a new president provided that the incumbent one was unable to carry out his official duties for a year or even longer. In Svoboda's case, his bad health made the act relevant. Immediately after the

[3] Čapka, F.: *Dějiny zemí Koruny české v datech.* Prague, 1998, 622 (translation by the author).

adoption of this amendment, the Secretary General of the Communist Party of Czechoslovakia, Husák was elected new president, although except for symbolic power, he acquired no real power.

Subsequently, the presidential tradition with its symbolic importance has continued undisrupted in the Czech Republic.

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KALEIDOSCOPE

TEKLA PAPP*

New trends of atypical contracts in Hungary

1. Description of atypical contracts

The regulatory bounds of Hungarian Civil Code were broadened by the development and phenomena of the market economy, which also led to the development of different legal "formations" relying on the contractual freedom declared by the great codices of natural law of the ninetieth century:

– the professional, businesslike management (the regular producing, service providing, commercial activity in order to get profit), the establishment and application of newer and newer contracts became possible because of the so many financial connections and connection among goods, the enormous investments, the cross-border relations of legal transactions, and

– new contractual techniques appeared which exceeded the traditionally institutionalized basic types of contracts: these are too detailed, self-regulating agreements tending to unification, standardization.

The need of the establishment of the group of atypical–different from those contracts expressly mentioned by name in the Hungarian Civil Code–contracts arose because of the economic changes and changes in the legal practice in Hungary at the end of the 20th century.

The characteristics of these contractual relationships are the following:[1]

a) Atypical agreements has no Hungarian names generally, *their names have foreign origin* (e.g. leasing agreement, franchise agreement, concession agreement, syndication agreement, licence agreement) or they are designated in a complicated way that does not express the essence of the legal relationship precisely (e.g. consort agreement as an agreement with the purpose of taking part in the group of consumers; timesharing agreement as an agreement with the aim to acquire the right of utilization of a real estate for a definite and repeated period of time).

b) The "Express contracts" (Part Four, Title III) of *Hungarian Civil Code does not dispose of atypical contracts*, they cannot be ranked among the contracts mentioned by their name. It must be noticed that this feature is relative: a new situation can evolve by the amendment and the recodification of the Hungarian Civil Code.

c) The foreign patterns of practice and legislation and the domestic customs had a very important role in the establishment and development of the rules referring to atypical

* Dr habil., Ph.D., Associate professor, University of Szeged Faculty of Law, Department of Civil Law and Civil Procedural Law, H-6720 Szeged, Tisza L. krt. 54.
E-mail: papptekla@juris.u-szeged.hu

[1] Papp, T.: *Atipikus szerződések* (Atypical contracts). Szeged, 2009, 9–10.

contracts. The legal constructions formed this way became clear and they were regulated by law within a decade or even few years were enough for it.

d) Except for the syndicate agreement and the franchise agreement, atypical contracts became codified by an *act* (e.g. concession agreement, independent commercial agency agreement) *or governmental regulation* (e.g. itinerant sale, "distance contract") *or by an implemented international convention* (e.g. factoring, leasing).

e) In the European development of law several efforts to unification can be observed in connection with these agreements (e.g. Directive 85/577/EC about the itinerant sale, Directive 94/47/EC about the timesharing, Directive 97/7/EC about the "distance contracts") and by the harmonization of laws in the European Union its impact on the Hungarian regulation can be clearly seen.

f) According to the item 200(1) of the Civil Code ("The parties are free to define the contents of contracts, and they shall be entitled, upon mutual consent, to deviate from the provisions pertaining to contracts if such deviation is not prohibited by legal regulation."), with regard to *the freedom of the contractual type*–abiding by the prohibition of violation of legal regulations–these agreements can be concluded with an optional content and the general rules of contracts (Civil Code, Part Four, Title I) also refer to them.

g) Though there is no obligatory formality in case of some atypical contracts (syndication contract, franchise agreement, operative leasing agreement), the others (independent commercial agency agreement, consort agreement, timesharing agreement, concession agreement, factoring agreement, financial leasing agreement) must be concluded in a written form–according to the rules of law–, but in practice the *written form* is preferred: it is not necessary for the contract to become operative, but it is a kind of a guarantee and it has an important role as an evidence.

h) The effort to create a detailed and precise formulation resulted in the application of *general conditions of a contract and blank contracts.*

i) Generally there is an *economic organization* (point 685(c) of Hungarian Civil Code) or an undertaking in conformity with the Consumer Protection Act (point 2(b) of the Act CLV of 1997) as one of the subjects of atypical contracts but since the trade has been extended and has become more complex, both subjects of the contractual relation can be economic organization or undertaking (e.g. "distance contracts", factoring agreement, franchise agreement).

j) Atypical agreements *regulate long-term relations of the market* therefore they tend to refer to a permanent legal relationship (except for the "distance contracts" and itinerant sale).

The expression "atypical" itself is not new in the field of the regulation of contracts: in the 20s and 40s of the 20th century this or the category "non-typified" could be found in the literature.[2] Those obligations relying on legal bases that are different from those institutionalized forms that can be complied with the classification created by Roman law were considered to call contracts without name/classification or innominated/atypical contracts. Licence agreements, syndication agreements, huckstery agreements, tariff agreements and the various compensatory trade agreements belong to this group. The

[2] See also Villányi, L.: *A magyar magánjog rövid tankönyve* (Short Textbook of the Hungarian Private Law). Budapest, 1941.

content of these contracts were formed by the consent of the parties beyond the rules contained in the general provisions of contract law of the Hungarian Draft of Private Law.[3]

2. Classification of atypical contracts

In order to classify a part of the modern contracts, the category of mixed contracts (contractus mixtus) was established. Agreements including the services provided by express contracts in many ways belong to this group:

a) it can be a contract that *unites the different types* (e.g. purchase agreement combined with donation), in this case the elements of different contracts are combined and they cannot be separated, it cannot be identified from which contract the provisions were originated from;

b) or it can be a contract with a *combination of types* in it (e.g. theatre contract), in this case the features of different contracts are not combined with each other but they are mixed in a new contract in a way that they can be separated and remain identifiable; see the decision of Supreme Court Gfv. IX. 30. 018/2005., this decision is about the breach of a mixed contract–with elements of professional service, agency and leasing–and the Supreme Court separated the legal consequences by types of contracts; the agreement on the utilization of software also belongs to this group as it contains elements of professional service, leases, leasehold and leasing and it depends on the object of the dispute which contractual provisions shall be used (e.g. in case of software-utilization the elements of leases shall be used) (Metropolitan Court of Appeal 5. pf. 21. 373/2006/3.);

c) or the object of the contract *can be an entirely special service* (e.g. agreement in order to manage the tasks of the caretaker; subtenancy agreement concluded for a definite period and combined with agency agreement referring to placing placard–Supreme Court Pfv. XI. 20. 314/2006.; mixed agreement covering a complex legal relation similar to the franchise agreement with elements of leasehold and utilization which refers to of the entry, utilization, operation of a parking system–SZIT-H-GJ-2008-89.), but as for its other features it is not special and not different from the contracts in Civil Code.

Atypical contracts *cannot be ranged*–without anxiety–*among any classes of mixed contracts*; atypical contracts are a group of *independent, sui generis agreements* for they include all types of mixed contracts or none of them; therefore the mixed contracts and atypical contracts are not the same category: atypical group is *more* (the combination of mixed types) and different (at the same time they cannot be classified among these types).

The innominated contracts *are not considered to be classified as atypical contracts.* These contracts generally appear as "Agreements", there is no permanent legal relation regulated by them but they cover special legal transaction that does not arise regularly. Contrary to atypical contracts they have no names or nomination, they are not widespread but they are unique and exceptional contracts without normative regulation. The rights and obligations deriving from these innominated contracts can be settled by the application of common rules of contracts of the Civil Code; see e.g. decision of Supreme Court: Pfv. I/A.

[3] Papp, T.: Az atipikus szerződések és a magyar Magánjogi Törvényjavaslat (The atypical contracts and the Hungarian Draft of Private Law). In: *Atipikus jelenségek szerződési jogunkban* (Atypical phenomena in our Contract Law). Szeged, 2009, 9–24.

20. 446/2001. (in connection with the agreement close to servitude but it cannot be considered as loan for use).

Those nominated contracts that are regulated in "Express contracts" of the Civil Code are not atypical, but they are typical ones as the agreements concluded in everyday-life are compared to these contracts.

According to the facts mentioned in the first two items, *the following* contracts are considered to be *atypical:* syndication agreement, "distance agreement", itinerant sale, independent commercial agency agreement, timesharing agreement, consort agreement, concession agreement, licence agreement, franchise agreement, leasing agreement and the factoring agreement.

3. The attitude of the legislator and the judicial practice to atypical contracts

The appearance of atypical contracts resulted in the abandonment of dogmatic traditions and–at the beginning–a very doubtful enforcement of law.

As for the regulation of atypical contracts many views showed up:[4]

a) absorption-theory: provisions referring to that express and namely designated contract of the Civil Code which is the most similar to that certain atypical contract (especially in regard to congruency of essential services) must be enabled to receive and "absorb" that atypical contract in question;

b) combination-theory: making a "list" (coordination of the contractual facts and legal consequences) referring to the different aspects of the certain atypical contract under which provisions of the express contracts of the Civil Code can be judged;

c) analogical theory: application of general rules of contracts of the Civil Code referring to atypical contracts;

d) creation-theory: because of the complication to insert atypical contracts in the system of the Civil Code this area of jurisdiction must be codified in accordance with the purpose of the contract and the interest of the parties by the creation of special rules. (This theory is followed by actual legislation in connection with atypical contracts.)

At the recodification–that is still going on–of the Hungarian Civil Code the problem of regulating atypical contracts in a code became highlighted: in the promulgated concept of the new Civil Code (Magyar Közlöny Vol. II., No. 15., 31st January 2002.) the explanatory statements of some parts are contradictory. We consider–by making the actual provisions more flexible–the "distance contract" can be inserted in the special conducts of contracts, the itinerant sale can be included in the special modes of sale, the independent agency agreement can be classified as a special agency, the factoring agreement can be inserted in the rules of assignment and contracts referring to financial services. The timesharing can be codified after its insertion (it depends whether it belongs to possession or contract law). The codification of concession agreement and franchise agreement among utilization contracts and the leasing agreement (relying on the two basic types: the financial leasing and the operative leasing) among the financial and utilization obligations *must be considered.* In our opinion the consort agreement and the syndication contract *cannot be regulated* in the Civil Code. Comparing to the earlier concept the new draft of Civil Code (31st December 2006.) is one step backward in connection with the adaptation of atypical contracts into the Civil Code: from the contracts of this book only two can be found in the Draft. The category of factoring is implied in the definition of assignment [section 5:167. An obligee (assignor)

[4] Papp: *Ibid.* 14–16.

shall be entitled to transfer his future, conditional claim that is against the obligor, to another person (assignee) by contract], but the provisions of the concept regulating the factoring agreement cannot be found in the Draft. Conversely the independent commercial agency agreement is regulated in the Draft; see: section 5:289. the agency agreement, section 5:96. the contract on solicitation, section 5:310. the characteristics of the solicitation of insurance and B&L association. The agency (intermediary) agreements–as an independent type of contract–are not regulated by the Civil Code; these contracts are considered to be agency of representation, more exactly they belong to commercial (market) agency (Metropolitan Court Gf. 75.600/2004.) According to recent developments there are two drafts of the Civil Code: the Expert Draft of the Codification Commission and the bill no. T/5949. of the Ministry of Hungarian Justice and Law Enforcement. The Expert Draft takes a stand on a code based on monistic view and the reason for it is that the contracts applied in the commercial life and constructed especially for the commercial life do not dispose of attributes that would require a special legal provision. In lack of suitable core to create a type, atypical contracts from the aspect of factoring, leasing and franchise agreements are not regulated by the Draft, but–according to it–it makes the existing contractual law able to solve the emerging legal problems. Similarly to the Draft of 2006 the Expert Draft of 2008 makes the application of assignment (sections 5:176–5:177.) possible for factoring agreement and settles the rules of agency (sections 5:308.–5:315.) and the provisions of the contract on solicitation (sections 5:316.–5:331.). The draft of January, 2009 of the ministry is also suitable for the implication of assignment (sections 5:168–5:165.) and the factoring but instead of agency agreement the intermediary contract (sections 5:271–5:275.) is regulated and the solicitation contracts are reframed (sections 5:276–5:287.) and the leasing (sections 5:340–5:347.) and the factoring (sections 5:348–5:354) agreement are also wished to be codified.

Atypical contracts are generally approached from the aspect of the result by the *judiciary practice*: they concentrate on the judgment of the legal transaction and not on the qualification. Therefore, based on the conditions of the transaction it examines:

- the purpose of the potential intention of the parties;
- the commercial, economic aim wished to be reached;
- the special attributes of the specified service;
- and–apart from the above-mentioned–what the parties considered to be essential from the aspect of the conclusion of the contract when regulating their legal relationship.

The type of the contract is not defined by the nomination given or wording used by the parties, but by its content based on the elements of the definition of the agreement. The openness and flexibility of the judiciary view are confirmed by one of the decisions of the Supreme Court: the title of the acquisition of a property can also be concluded from an atypical contract as according to the contractual freedom the agreement of the parties is legally binding even if the type of the contract cannot be found among the nominated, express contracts of the Civil Code (EBH 2009. 1843., LB Kfv. IV. 37.074/2007.).

4. Groups of atypical contracts[5]

Atypical contracts cannot be classified by only one attribute and the usual classification related to contract law (based on the aspect of subject, object, service) has no result either. Therefore a different classifying is used, which is out of the ordinary: atypical contracts can be divided into independent and not independent (dependent) contracts.

[5] Papp: *Ibid.* 16–18.

The *independent* group is made up by agreements that are *independent from other legal relationships and other activities;* therefore the concession agreement, the licence agreement, the factoring agreement, the franchise agreement and the leasing agreement belong to this group.

The category of *"non-independent" (dependent)* contracts can be divided into two classes depending on the fact whether the atypical contract in question is *based on another legal relationship or activity.* The syndication agreement is an atypical contract connecting to another legal relationship, because it is based on the memorandum of association. The other group of atypical contracts relies on a certain activity–that is conducted professionally, in a businesslike manner by one of the parties–and in this case these contracts transmit the benefit of that certain activity towards the consumer. The distance contract belongs here, because it is related to the purchasing and service-providing activity of the undertaking, similarly to the itinerant sale, the independent commercial agency, the consort agreement and the timesharing agreement. (The regulation of this subdivision of the non-independent atypical contracts is highly influenced by the protection of consumers.)

Atypical contracts can be divided into groups depending on whether their *accessorial or essential characteristics are different from the contracts typically mentioned in the Hungarian Civil Code.* The following contracts belong to the accessorial atypical contracts:

– the distance contract, in this case the way of drawing up the contract means the difference;

– the itinerant sale, because the place of drawing up the contract is special;

– the independent commercial agency, because it is a unique commission;

– the timesharing contract, as it regulates a special utilization right, which cannot be found in Hungarian Civil Code. Considering the substance, the indirect object (the service) of the contract, atypical contracts are fundamentally different from the agreements namely mentioned in the Hungarian Civil Code.

Atypical contracts can be categorized by their *codification* too: whether they are regulated in a legal norm and if yes what kind of regulations or acts they are.

5. New tendencies in the field of atypical contracts

The category of atypical contracts is open and incomplete from many aspects: on the one hand they can belong to the namely codified contracts by a possible insertion in the system of Civil Code, on the other hand the regulation of legal relations by contracts is required because of the changing economic and social circumstances. If the essential elements of these agreements, reflecting the new phenomena, comply with the criterions of atypical contracts,–after a certain period for "crystallizing out"–they can be considered to fall under this contractual category. Hereinafter two contracts are presented that will belong to atypical contracts after some years of consolidation and stabilization:

5.1. Treatment contract

This *name* comes from the German "Behandlungsvertag" and it has Anglo-Saxon roots as well. This contract is inserted among service contracts in the Draft (Principles of Law; PEL) drawn up by the Study Group of European Civil Code.[6]

[6] von Bar, C.–Clive, E.–Schulte-Nölke, H. (eds): *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference.* Munich, 2008.

The treatment contract is a kind of agreement according to which the provider of the medical service provides the mentioned medical service for natural persons receiving medical care by abiding by the customs of that profession, the practice (protocol), the ethical rules and principles and in a manner that can be generally expected. The *purpose* of this contract is to provide a medical service that is suitable for the will and interest of the patient or the person who resorts this medical care (High Court of Appeal of Szeged Pf. III.20 308/2007.). The *subjects* of the treatment contract are the provider of the medical service (natural person, legal entity or an organization without legal entity with a license of the public health authority to provide medical services; item 3(f) of Act CLIV of 1997 on Health) and the person who receives this medical service (the generally used designation "patient" is not correct, for a natural person who goes to a screening test and other obligatory examinations/who is vaccinated or gives birth to a child cannot be considered to be ill so as to be a patient). The *direct object* of the treatment contract is to provide or receive medical service; the *indirect object* is the medical service itself.

As for the subject matter of the treatment contract in connection with the rights and obligations of the health care workers (especially doctors) and patients the following statements can be made:[7]

– they are in correlation with each other (the obligation on the side on the doctor appears as a right on the side of the patient; for example the duty to provide information-right to information);

– certain rights can only be effective by complementing each other (for example the right to receive medical service-right to consent);

– in some cases the requirement of exercising a right is an obligation (for example the duty of documentation, data protection-inherent rights);

– on the ground of treatment contract the patient has the right to receive medical service–which is a fundamental right provided by the constitution–so as to every patient has the right to receive medical care that is justified by his health, continuous, appropriate and without discrimination and the right to relieve the pain and suffer [Act on Health section 6, item 7(1)]. The *rights to choose the attending physician* and *to initiate to be examined by another physician* appear as sub-rights of the right to receive medical service. The right of the patient to health care is realized as a *duty to provide health care* on the side of the physician and he has *the right to refuse the examination or treatment* only in cases held by the Act on Health; if the obligation to provide medical service is not exercised according to the rules by the provider, it must bear the r*esponsibility* for the consequences emerging in connection with the violation of rules (Equal Treaty Authority 1419, 2006.). According to his right of self-determination, the patient can decide whether he exercises his right to get medical care by resorting it (completely/partly) or to refuse it. For the appropriate exercise of self-determination it is essential for the physician to exercise *his own right to choose freely among the scientifically accepted methods of examination and therapy:* relying on his special knowledge and expertise recommendations are made by him on issues related to examination/treatment and the patient voices his opinion about it. The right to self-determination is closely related to the *right to information:* the physician must inform the patient about his state of health, the recommended examinations and operations, the advantages, the consequences of their postponement, the risks, the process and expected

[7] Papp: *Ibid.* 18–21; Dósa, Á.: *Az orvos kártérítési felelőssége* (Doctor's Liability for Damages). Budapest, 2004; Jobbágyi, G.: *Orvosi jog* (Medical Law). Budapest, 2007.

outcome of the treatment and about other alternative possibilities. The physician does not have *the duty to inform* if the patient waives his right to information or regarding to his state of health the physician decides to retain certain information Act on Health item 135(1). The right of the patient to *learn and examine the contents of his healthcare documentation* and the *request for information* related to it is a sub-right of the right to information that can only be asserted by complying the *duty of documentation* of the provider of the medical service. The duty of documentation is related to *the obligation of the physician to maintain confidentiality* (the patient can give release from this or an obligation to provide data can be specified by the rules of law) and the *data protection* [according to the Act on Data-Protection data in connection with the state of health is considered to be special and must have an enhanced protection, Act LXIII of 1992, point 2 (2)b)]. The patient has the obligation to pay consideration in return for the provided medical care (in case of private practice/clinic directly, as for public institutions indirectly from the payments of employers and employees).

The treatment contract is a *consensual onerous, bilateral (in case of transplantations multilateral)* agreement *of "facere" nature that can be concluded in oral or written form or by conduct that implies acceptance.* As for the position of the treatment contract among the other contracts, the commission and the contract for work can be noticed from the expressly and namely mentioned contracts of the Civil Code,

– because of the limited possibility to choose institution on the one hand and because of the medical care became a service on the other hand, the personal procedural obligation of the agent and the confidential relation between the principal and the agent which characterize the contract of agency is not necessarily manifested in case of treatment contracts: the right to self-determination (and not right to give instruction) can only be exercised efficiently by the patient if the obligation to inform is discharged by the agent (the physician) with special knowledge;

– according to the contract of professional service, contractors shall be obliged to create some result by work but this is not necessarily a part of each treatment contract [in case of making prosthesis it is (Pest Central District Court 31. P. 89. 625/1994.; Metropolitan Court 41. p. 21. 853/1997); even in case of esthétique operations, I.V.G. and sterilization procedures, but in case of heart transplantation and cranial operation the diligence is determinant)].

The treatment contract cannot be classed among mixed contracts:

– it cannot be considered as a combination because it is very difficult to define which types of contracts are mixed in it (in case of a treatment in hospital, the elements of leases, deposit and contract of public utility can be mentioned besides the elements of contract and contract of professional agency);

– it is not uniting the different types, as the combination of the contractual elements cannot be recognized: the contractual characteristics that can be determinant in the treatment contract are changing by the types of medical care;

– the purpose of the treatment contract is always a special service that is changing in case of every type of medical care (difference between operation and pulmonary screening) and therefore they cannot be reduced to one special service.

In our opinion the treatment contract is an *independent, sui generis, atypical contract which isn't namely mentioned in the Civil Code.*

5.2. Merchandising contract[8]

The word "merchandising" (in Germany it is "Vermarktung") means trade/sales/promotion of purchasing goods. Merchandising is a legal institution and an economic phenomenon at the same time: the medium of promotion and marketing. *In economic meaning* the merchandising is the coordination of establishing a shop, furnishing the place, the presentation of goods, the decoration, the variety, the human relations, the packaging, the promotion and motivating the customers in a way that is suitable for fulfilling the needs and requirements of that certain group of costumers.

From the aspect of law merchandising is considered to be an image-transfer. The purpose of the merchandising is the secondary utilization: the utilization of a well-known and accepted image in another field.

As for the designation of merchandising, there are three different definitions: the restrictive category of the Council of Copyright Experts, the definition of image-transfer contract regulated in the Act on Sport and the one created by the International Association for the Protection of Intellectual Property (AIPPI). *According to the Council of Copyright Experts* (expert opinion no. 13/2003.) the purpose of the contractual relationship is the utilization of the typical figures and elements of a work of an author in order to increase the marketability of other works, goods and services. According to the *image-transfer in the Act on Sport* in return for consideration, under a marketing activity the name, image of an athlete, the name, arms of a sports association-body and other intellectual goods in relation with sports activity are used on boards, gifts and souvenirs, clothes, other objects and in an electronic way in order to influence the consumers (Act I. 2004, section 35). According to the *International Association for the Protection of Intellectual Property* the contract has the feature of utilization under which symbols, trademarks, parts of a work of an author, the physical appearance real or fictive persons are utilized in order to motivate the purchase of goods and providing services (supposing that these signals in question are not used in accordance with their original functions but for purchasing goods and services by the general reputation or attraction of the figures).

As for the three definitions we can agree with the one with the most extensive meaning, as the two more restrictive definitions are implied in it: the parts of a work of an author, the fictive persons are mentioned in the definition created by the International Association for the Protection of Intellectual Property and athlete belongs to the category of the real person and the arms/name of a sports organization/association/body are classified as a symbol/ trademark according to the extensive definition.

The *purpose* of the conclusion of a merchandising contract is to influence costumers on the market by applying the name/image of a famous person/imaginary figures/characters of a cartoon/figures of novels and tales/trademark etc. in order to motivate them to buy. The motivation of sales, the increase of the marketability of goods are based on the positive consideration of the applied person/labeling and in reason of this merchandising is an effective way of product/service/advertising (the costs of introduction to the market can be

[8] Vida, S.: *A merchandising védjegyjogi oltalma* (Patent Law Protection of Merchandising). *Védjegyvilág,* (1995) 3, 10–17; Tattay, L: *A merchandising és a szellemi alkotások* (The Merchandising and the Intellectual Works). http://www.jak.ppke.hu/tanszek/polgjog/letolt/merc.doc; Strihó, K.: *A merchandising szerződés* (The Merchandising Contract). http://jesz.ajk.elte.hu/striho33.mht; World Intellectual Property Organization: Character Merchandising-Report prepared by the International Bureau, WO/INF/108. Geneva, Dec. 1994; Csécsy, Gy.: *A szellemi alkotások joga* (The Law of Intellectual Works). Miskolc, 2008.

reduced by the image-transfer). The turnover of the undertakings applying merchandise is increasing, they have extra profit and they are promoters of the competition in the market by using this legal construction extensively.

The fields mostly affected by merchandising–as the medium of marketing–are: articles of clothing and fashion (e.g. Gucci bag, Benetton T-shirt), printed matters and stationery (e.g. postcard with Tweety on it), entertainment (e.g. the promotion of a concert by a popular tv personality), gifts and knick-knackery (e.g. a cup with Winny-the Pooh on it), food products (e.g. spice mix by Horváth Rozi), furnishing and household goods (e.g. Tiffany lamp), sports goods and sports equipment (e.g. the sportswear of Nike is promoted by Roger Federer), toys (e.g. Harry Potter board game), goods of health- and beauty care (e.g. Penélope Cruz as the face of L'Oréal) and electronic commodities (e.g. the TAG Heuer watch is made popular by Tiger Woods).

The *subjects* of merchandising are the merchandiser that uses image-transfer in order to increase the negotiability of his goods/service and the entitled (natural person, legal entity, organization without legal entity) that contributes to the commercial utilization of his name/image/parts of his work/corporate name/trademark/indication/logo etc.

The *direct object* of the merchandising contract is the usage and utilization of the goodwill/image connecting to the indirect object, the *indirect object* can be personality (the name/image of a person alive/historical, corporate name of a not natural person), attributes of an imaginary person (name, voice, illustration, multi-dimension reproduction, see Spiderman, Rambo), trademark, illustration, emblem (e.g. sport association), corporate name, parts of a work of an author (characters of animals of a cartoon, melody, book/title of a film etc.) and prestige (e.g. a T-shirt with the name and arms of a famous university).

One of the most important elements of the content of the merchandising-contract is the utilization of the image which does not requires assent (e.g. the promotion of Kaiser beer as "the beer") or it does require it (e.g. for the utilization of the image of a person alive, for the name of a historic person, the authorization of the Hungarian Academy of Sciences). The utilization for personal purpose can also be possible, in this case the created image (goodwill) is extended to other areas by an undertaking (e.g. a restaurant markets wines with its name on the label). The other important attribute is the legal protection of the entitled person on the one hand against the illegal image-transfer of the merchandiser, on the other hand against the utilization of image/goodwill by the rivals of the merchandiser without title and legal basis (thus without a merchandising agreement). To settle these problems varied ways of protection are provided by law:

– the provisions of Civil Code referring to personality (Act IV of 1959. sections 77–80, 84–85);

– the provisions of the Act *on the Protection of Trademarks and Geographical Product Markings [Act XI. of 1997, point 5(1)a), section 7., item 12(2), section 27]*;

– the rules of Copyright Act (Act LXXVI of 1999, section 16.);

– the section of the Act on Sport (Act I of 2004, section 35);

– the norm of the Act on the Press [Act II. of 1986, item 3(1)];

– the rules of the Act on Essential Conditions of and Certain Limitations to Business Advertising (Act XLVIII. of 2008. item 9(2), sections 10, 12, 13, 14, 18, 19, 20);

– *the fact of the annex of the Act on the Prohibition of Unfair Business-to-Consumer Commercial Practices (the Unfair Commercial Practices Act) (Act XLVII. of 2008, annex point 3)*;

– *the section of the Act on the Prohibition of Unfair Trading Practices and Unfair Competition (Act LVII. of 1996., section 8., secondary protection as it regulates the possibility to act against the rival of the merchandiser).*

Merchandising is a heterogeneous and complex legal institution of which qualification is influenced by its character of indirect object: it can include elements of the contract of publishing, adaptation to screen, utilization of products related to graphic images, utilization of applied graphic works, advertising, sponsorship, image-transfer, licence, franchise, utilization of commercial/corporate name collectively and severally. In consequence, relying on the varying and special object and content of the merchandising agreement (similarly to the treatment contract) it is an onerous atypical contract with the characteristics mentioned in this study in item 1.

6. "False" atypical contracts[9]

Those contracts can be considered "false" atypical contracts which–*by their name and content–pretend to have some of the characteristics of atypical contracts* (e.g. foreign name; apparently they do not seem to belong to the express contracts of the Civil Code; the role of foreign practice in their Hungarian establishment; applicability of general rules referring to contracts; they are mostly concluded in order to create a permanent legal relation between economic organizations); but as a matter of fact they can be classified as mixed contracts or a nominated, express contract.

As for the definition of the type of a certain contract the name given and the terminology used by parties is not determinant, *the content and elements of the definition of the agreement are decisive.*

Under the *distribution contract*[10] the distributor–restricting his market of acquisition and purchase to a certain geographic area–purchases goods from manufacturer and in return for a discount he purchases these goods in his name and on his behalf, on the basis of a general contract that establishes a permanent legal relationship (Vb/01103; DCFR: Principles, Definitions and Model Rules of European Private Law). As a synonym of distributor the expressions like importer, reseller, purchaser, dealer can also be applied. [Regulation of Ministry of Health no. 4/2009. (III.17.); 104/2007. VJ; 81/2006. VJ; 26/2006. VJ; 21/2006. VJ; 154/2004. VJ; 60/2004. VJ; VEF 2007.2; BDT 2007. 1533.] The distribution contract refers to the purchase and sale of a certain product therefore it can be identified with the purchase agreement (with the chain of purchase) regulated by the Civil Code. The distributor is a merchant who purchases and sells certain products–with regard to his profile of activity–professionally. Our point of view is confirmed by the decision of the Court of Appeal of Szeged Gf. I. 30 332/2007.; BDT 2008. 69.): there is no consignment between the foreign manufacturer and the domestic distributor if the product is purchased by a contract of sale by the distributor and afterwards he purchases the goods recorded as his own stock towards other resellers and users; the profit of his commercial transaction is covered by the margin applied by him.

The content of the dealer contract can be the same as the essential characteristics of the distribution contract on the one hand: it can be aimed at a dealer activity [the judgment of the Court of First Instance in Fiatagri UK Ltd. and New Holland Ford Ltd. v. Commission of the European Communities (T-34/92.); the judgment of the Court of First Instance in John Deere Ltd. v. Commission of the European Communities (T-35/92.) 51/2005. VJ;

[9] Papp: *Ibid.* 23–25.

[10] Ujlaki, L.: A disztribútor szerződés fogalmának értelmezése (The Interpretation of the Concept of the Distribution Contract). *Gazdaság és Jog*, (2002) 6, 25–26; Vörös, I.: *Nemzetközi gazdasági kapcsolatok joga II.* (The Law of International Economic Relations II.). Budapest, 2004.

292/1996. VJ; 24/1995. VJ] and resale (26/2006. VJ; 2/2003. VJ). On the other hand the dealer agreement can be concluded with the content of consignee/agency and purchase at the same time (5/2004. VJ). Thirdly it may happen that the dealer purchases the product from the manufacturer and he concludes a carriage contract for it with the consumer (Taxation issues No. 1998/150). According to the above-mentioned sales contracts or a consignment or sale combined with an independent commercial agency agreement (and also combined with some elements of deposit) or a postponed sale combined with sale are covered by the dealer contract.

The *conclusion of an outsourcing contract*[11] occurs if a service (field of activity) or at least the main part of a service is entrusted to an outsider contractor–who is independent from the aspect of ownership and management–by an economic organization besides the demolition of his possible internal capacities. The reason of externalization is the reduction of the costs, its purpose can be the increase of its operational effectiveness, the concentration on the main activity and to reach a higher level of service. The outsourcing contract can be conducted for placing the processing, service of application, management of application, placing the system-infrastructure, placing the infrastructure, placing the system, placing the course of business, placing the business strategy etc. (87/2006. VJ; 176/2005 VJ; 40/2005 VJ; 15/2003. VJ; 98/2002. VJ; 167/2001. VJ). In our opinion the outsourcing contract can be considered as a professional service contract combined with agency: on the one hand the right to command and the right of control, on the other hand the effort to diligent procedure in that certain case entrusted to him can refer to agency, and providing a service has the character of professional services (as it tends to another result reached by work).

In the background of investment contracts[12] there is always a definite economic purpose: the effort of saving, extra profit or making profit; though the economic intention of the parties of the contract can be reached by different contracts (BH 2007.17.), and the most decisive from the aspect of law is how they reach it, in which legal form, under which nominated contract they are concluded (BDT 2001.398.). We agree with Gyöngyi Harsányi that we must make a difference between contracts regarding the fact whether the operation of investment is arranged by the investor personally or he has it arranged by a specialized undertaking. In case of "personal investment" the contract "with the purpose of investment" cannot be mentioned as a nominated, independent (sui generis) contract from the aspect of law: the economic intention is realized in existing types of contracts like loan/deposit/ security transactions/transactions of stock exchange/sales agreement/insurance contract/ taking a shareholding in an association etc. (Court of Appeal of Szeged Pf. I. 20/057/2005.) If the direct object of the agreement is an investment service provided by a specialized undertaking, in our opinion this agreement will be a mixed contract, a combination of types: with the character of agency (command, control, diligent procedure, portfolio-management, account-management), consignment/independent commercial agency–more exactly commodity exchange, investment of securities, real estate agency, B&L association and insurance agent–(agency/conclusion of transaction) and deposit (the custody of money/ security of handed over).

[11] Sziebig, P.: *Kiszervezve; Elmélet és gyakorlat az IT-outsourcingban* (Outsourced; Theory and Practice in IT-outsourcing). Budapest, 2006.

[12] Harsányi, Gy.: Befektetési jellegű szerződések kötelmi jog elemzése (Obligation Law Analysis of Contracts with Investment Character). *Gazdaság és Jog,* (1997) 3, 3–6.

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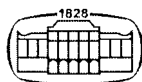

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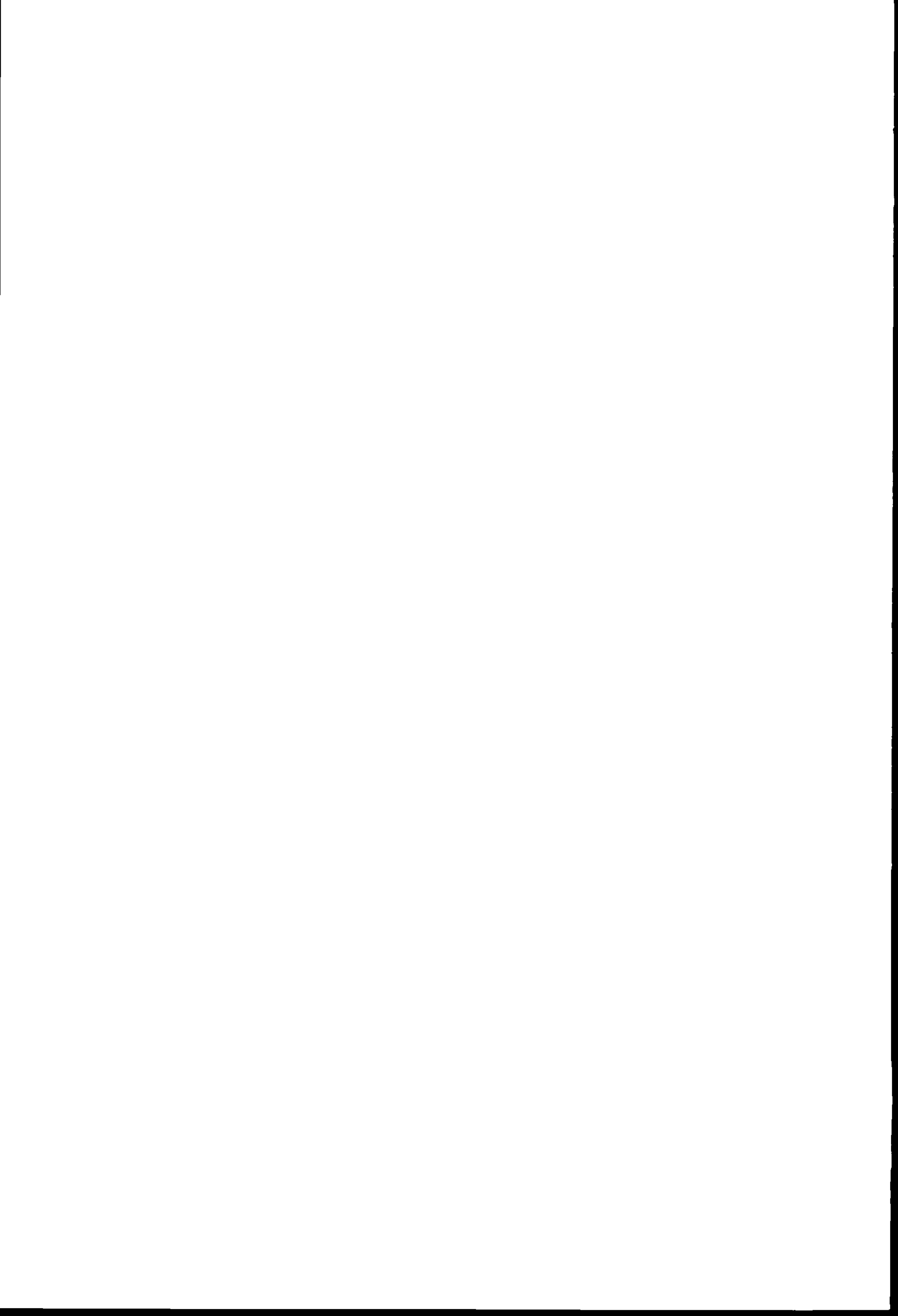
CONTENTS

STUDIES

Dániel Deák	Removing Tax Barriers from the Clearing and Settlement of Cross-border Capital Market Transactions	183
Csaba Varga	Literature? In Substitution for Legal Philosophy? (Variations to and Uses of "Law and Literature")	207
Gábor Attila Tóth	From Uneasy Compromises to Democratic Partnership: The Prospects of Central European Constitutionalism	220
Miklós Hollán	Trading in Influence: Requirements of the Council of Europe Convention and the Hungarian Criminal Law	235
Jenő Szmodis	Taking Legal Philosophy Seriously	247
Zoltán Szathmáry	Information Society and Its Deviances	256

OBITUARY

Vanda Lamm	Lajos Lőrincz (1935–2010)	271



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DÁNIEL DEÁK*

Removing Tax Barriers From The Clearing and Settlement of Cross-border Capital Market Transactions**

Abstract. Where the institutions of the retention at source of taxes and the prevention of foreign financial intermediaries from assuming in the source country the liability to file tax information and arrange for the payment of tax in fair conditions comparable to their domestic counterparts are to be assessed in the light of the relevant Community law as communicated by the ECJ, it is crucial while concluding whether national legal practices of withholding taxation are consistent with Community law to apply the proportionality principle in specific cases. Where the application of the proportionality principle dictates us in a specific case respect of the effectiveness principle in enforcing rights both on the side of the tax authorities and taxpayers, an avenue may open up for progressively removing barriers from the clearing and settlement of securities transactions across the border. This paper is to discuss how the EC principles of effectiveness and proportionality are to be enforced by the European Court of Justice with regard to removing barriers from the free movement of services and capital upon withholding taxation.

Keywords: effectiveness principle, proportionality principle, withholding tax, retention versus relief at source of or from taxes, paying and information agent

I. Procedural rule of reason and industry-specific problems

As the procedural aspect is the compliment of, and corollary to, the exercise of substantive law rights,[1] it is worth distinguishing between procedural and substantive tax law. Procedural possibilities that are available for taxpayers must be interpreted some times in the context of the positive standard of effectiveness as developed in *Arcaro* (and later in the tax case of *Persche*): national procedures are to be assessed in the light of the purpose that they should be aimed at ensuring fulfilment of the substantive law contents of Community freedoms. At the same time, the national public authorities must be consistent in interpreting national law in the light of Community law. Connection between procedural and substantive tax law can also be reversed: procedural law may fill the gaps left for lack of Community law harmonisation, substituting for substantive law. This is to proceduralise a substantive law problem. An example for this is *Inizan* or 446/03 *Marks and Spencer*: the national authorities are not required to change their legislation, but are expected to grant the taxpayer an extra opportunity for the easy enforcement of rights consistently with the proportionality principle where the taxpayer has otherwise exhausted all other possibilities.

Upon the clearing and settlement (finalisation) of cross-border capital market transactions, it is a common problem that foreign resident taxpayers and foreign financial intermediaries are discriminated, or even they are deprived from fundamental procedural rights. Domestic resident market players may also suffer from the lack of effectiveness in

* Professor of Law, Corvinus University of Budapest, H-1093 Budapest, Fővám tér 8.
E-mail: daniel.deak@uni-corvinus.hu

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[1] 309/85 *Barra*, ECR 1988, 355, para. 17.

enforcing their rights. For example, the business of local paying agents with foreign investors may be burdensome or domestic resident taxpayers may face problems in their own legal system if they enter the border while investing between two Member States in the internal market.

Even if the procedural rules are part of the constitutional order of Member States, harmonisation promoted by reference to the so-called procedural rule of reason.[2] Accordingly, the national legislation on procedural rights curtailing the taxpayer's claim may be compatible with Community law, it is subject to the following conditions, however:

(i) it must not be intended specifically to limit the consequences of an ECJ judgment; and

(ii) the restriction on taxpayer rights (e.g. the introduction of a time-bar) must be sufficient to ensure that the right to (re)payment is effective (e.g. by introducing transitory provisions).

The major industry-specific problems that will be discussed below in the light of the above considerations can be highlighted as follows:

(i) Lack of effectiveness to be granted to foreign resident taxpayers can be mentioned in brief as follows:

– access to fiscal relief may be difficult; relief at source is not always possible, e.g. in Germany or the Netherlands;

– availability of quick refund procedures may be limited, delay in refund may occur (good examples are, on the contrary, e.g. in Germany: "Datentraegerverfahren" or "Data Medium Procedure");

– lack of European-wide harmonised relief models; and

– foreign resident taxpayers may be deprived of procedural rights.

(ii) Non-discrimination of foreign financial intermediaries can be highlighted at the major points as follows:

– local tax ID is usually required for foreign financial intermediaries; representation through a national subsidiary or a local PE may be obliged to serve as a paying agent (e.g. in Italy);

– payment to foreign intermediaries is not possible in gross; no responsibility is given to a foreign intermediary either to transfer information;

– foreign intermediaries have to bear strict and unlimited liability for any failure (high level of the standard of care) instead of applying a good faith standard; and

– limited possibility of self-certification through contracting out (good examples are, e.g. the "Know Your Customer" rules in the U.S. or the institution of "Qualified Intermediaries" in Ireland).

(iii) Lack of effectiveness to be granted to domestic resident taxpayers active across the border can be exemplified as follows:

– paying agents may be obliged to bear strict, and joint and several, liability for withholding taxation (e.g. in Hungary);

– the centralised model developed in major European capital-exporting countries (e.g. through Euroclear, called "Central Securities Depository") has not yet been proliferated in many Member States (like in CEE countries); and

– the opportunities of simplified reporting of taxpayer information (like the Dutch pattern of GGC or "Large Authorised Representative"), have not yet proliferated.

[2] C-62/00 *Marks and Spencer*, ECR 2002, I-6325, para. 36.

Lessons can be drawn in particular from the ECJ cases as indicated in a matrix below:

Community harmonisation of tax procedural rights	**Cases not decided in favour of the MS**	**Cases decided in favour of the MS**
(i) Procedural rights: effectiveness to be granted to foreign resident taxpayers (exercising, as a last resort, the freedom of capital)	*Fokus Bank* (free movement of capital), *ELISA* (free movement of capital)	*FKP Scorpio* (freedom to provide services), *Skatteverket v. A.* (free movement of capital), *Rimbaud* (free movement of capital)
(ii) Access to relief: equivalence or non-discrimination to be granted to foreign resident financial intermediaries (usually exercising the freedom to provide services)	*Svensson and Gustavsson* (freedom to provide services), *Safir* (freedom to provide services), *Danner* (freedom to provide services), *Skandia and Ramstedt* (freedom to provide services)	
(iii) Procedural rights: effectiveness as a positive standard to be granted to foreign resident citizens and enterprises (exercising the freedom of persons) to ensure fulfilment of Community freedoms and to be consistent in interpreting national law in the light of Community law	*Heylens* (free movement of workers), *Marleasing* (freedom of establishment), *Vlassopoulou* (freedom of establishment), *Arcaro* (harmonisation of the protection of environment)	
(iv) Procedural rights: effectiveness to be granted to domestic resident taxpayers active across the border (exercising, as a last resort, the freedom of capital)	*San Giorgio* (free movement of goods), *Barra* (free movement of workers, non-discrimination), *Peterbroeck* (freedom of establishment), *Société Baxter* (freedom of establishment), *Vestergaard* (freedom to provide services), *Metallgesellschaft and Hoechst* (freedom of establishment), *Laboratoires Fournier* (freedom of establishment), *Persche* (free movement of capital)	*Algera* (not in favour of more harmonisation), *Rewe* (free movement of goods), *Comet* (free movement of goods), *Deutsche Milchkontor* (free movement of goods), *Berlin Butter* (free movement of goods), *Inizan* (freedom to provide services), *Twoh Int.* (free movement of goods), *X and Passenheim* (free movement of capital)
(v) Procedural rights: effectiveness to be granted to domestic and foreign resident taxpayers through the possible harmonisation in fiscal matters	C-349/03 *Commission v. UK* (free movement of goods)	C-338/01 *Commission v. Council* (not in favour of more harmonisation), C-533/03 *Commission v. Council* (not in favour of more harmonisation)

II. Analysis of ECJ cases

1. Effectiveness in the protection of the rights of foreign resident taxpayers

The taxpayers who are active across the border want to benefit usually from the free movement of capital principle. In a few Member States, relief at source (based on a respective bilateral double tax convention) is not available. Instead, those who claim treaty

relief must enter into burdensome procedures to get tax refund. The difficulties arising from national practices in claiming treaty relief results in restriction on the fundamental Community freedoms, mainly on the freedom of capital. The national legislator or the national public authorities do not have the explicit intention to do discrimination. It can still be problematic that foreign taxpayers cannot get easy access to the national law facilities of the host Member State. They are thus not able to protect their rights effectively.

It can be criticised that foreign resident shareholders do not always have rights as parties to administrative proceedings. It is apparently more comfortable for the national tax authorities to get in contact with the relevant domestic resident subsidiary. It is discriminatory, however, if foreign resident shareholders are not recognised as parties to the procedures of tax administration. Apparently, their interests are not necessarily the same as those of the subsidiary. They are thus deprived of the possibility effectively to protect their rights.

The practice has spread over in the European Economic Area that foreigners are not given taxpayer rights upon the withholding of taxes.[3] It comes from that foreign resident taxpayers are subject to tax in the source country without having been granted the right to protect their rights to be associated with the liability to pay tax. Quite frequently, foreign taxpayers are not allowed to initiate disputes with the local tax authorities concerning the title to, and the qualification of, the income they derive from the country. They will only be recognised as parties to administrative procedures if they apply for refund.

National orders must not impair the individual rights flowing from the fundamental freedoms, the EFTA Court holds (in Para. 41 of *Fokus Bank*). Such an obligation of the host country follows from the effectiveness principle enshrined in both the EC Treaty and the EEA Treaty. Even if foreign resident taxpayers have the right to file complaints in the host country, they are not notified of the reassessment of withholding tax. They are thus deprived of the right to be heard (Para. 42).

If the relief at source method is available for foreign taxpayers, they are not in a need of initiating procedures according to the host country's law, provided, however, that no dispute is (and will be) developed between the taxpayer and the tax authorities. During a tax audit, reassessment is not precluded. Then, the taxpayers subject to withholding tax should be recognised as parties to the procedure of tax audit. Refund is obviously less favourable for taxpayers than the use of the relief at source method. However, applying for tax refund, foreign taxpayers are most likely recognised as parties to the procedure of refund. This is a paradoxical development that comes from the sporadic nature of Community law harmonisation.

In *FKP Scorpio*,[4] the procedure of retention at source of tax was not found inconsistent with the freedom to provide services either at the level of the payment creditor (the foreign resident taxpayer) or the payment debtor (the domestic resident paying agent). Restriction can be justified in this case by the host Member State's need to ensure that the taxable income should not escape taxation. Fiscal supervision is thus a legitimate need (Para. 35). The ruling of ECJ does not concern, however, a situation where the EC Mutual Assistance Directive can be invoked, which was not available in this case (Para. 36). The national law procedure of retention at source was also scrutinised in the light of the proportionality principle. The ECJ concluded that the national law restriction could also be justified in this respect. The question has eventually remained open how the retention at source procedure

[3] E-1/04 *Fokus Bank*, judgment of the EFTA Court on 23 November 2004, para. 45.

[4] C-290/04, ECR (2006), I-9461, para. 39.

can be justified by the need of fiscal supervision in a situation where the affected Member States can rely on the armoury to be provided by the Mutual Assistance Directive. The ECJ also holds that it constitutes an obstacle to the freedom to provide services if tax relief can be taken into account at the various stages of the taxation procedure only upon production of a certificate issued by the home Member State, stating that the conditions for treaty relief are satisfied. This obstacle can be justified, however, by the need that the proper functioning of the procedure for taxation at source must be ensured (Paras 58–59).

The judgment does not make an assessment of the affected national taxation procedure in respect of the requirement of certification. It only mentions about that certificates may be required. It does not give guidance of how certification must take place. It is thus not precluded that the requirement of certificates is burdensome, not being proportionate with the objective of the effectiveness in tax collection.

The problem of FKP Scorpio is also raised in respect of a service-provider who is resident in a state outside the EEA. Although the freedom to provide services is not available for those who reside outside the EU, the Community freedom to provide services is applicable not only to the service-provider, but also to the recipient of services who is resident in an EU Member State (Para. 63 in *FKP Scorpio*). Indeed, the paying agent who is liable to respect the law on the retention at source of tax and to obtain certificates that prove eligibility for treaty relief must be provided with the possibility of benefiting from the Community principle that taxpayer rights must be effectively protected. In the specific case, the recipient of services (FKP Scorpio) is not entitled to benefit from the Community freedom to provide services because the provider of services is not established in an EU Member State (Para. 67). Any way, the difficulties arising from the retention at source procedure and from burdensome formalities of certification must in principle be assessed not only in respect of the provider, but also of the recipient of services if otherwise the services are provided within the Community by those who are established in a Member State.

In *ELISA*, it is clarified that the EC Mutual Assistance Directive does not preclude the application of a double tax convention. This is still spelled out not in general terms, but in the instance that the particular provisions of a double tax convention may prevent the requested Member State from collecting, using and transferring information by its laws in accordance with Art. 8 (1) of the Mutual Assistance Directive.[5] This does not mean that restrictive national law practices, such as the procedure of taxation at source, could not be found in certain cases as inconsistent with the free movement of capital principle or with other Community freedoms. Procedural rules must eventually be assessed in the light of Community freedoms. National administrative practices need not be harmonised, and cannot be condemned, unless they prevent citizens and companies from exercising their Community freedoms.

As it also comes from this ECJ case, national law may despite the harmonisation of the mutual assistance in tax matters constitute an obstacle to the exchange of cross-border tax information where a double tax convention excludes from its scope tax haven companies. This is why the French tax legislator felt to be legitimised while categorically excluding non-French companies from tax relief if the respective double tax convention does not make it possible to the French tax authorities to obtain information of them. It is yet another issue

[5] Council Directive 77/799/EEC OJ L 336, 27.12.1977, 15, as amended significantly by Council Directive 92/12/EC, OJ L 76, 23.3.1992, 1; C-451/05 *ELISA*, ECR 2007, I-8251, para. 55.

that it is not consistent with the proportionality principle if taxpayers will not be granted the opportunity to prove on the contrary to the legislative presumption that they meet the legal requirements for the grant of tax relief.

As arises from Para. 102, the free movement of capital principle precludes national legislation when national law does not allow a company established in another Member State to supply evidence to establish the identity of its shareholders and, this way, prevents such a company from obtaining tax relief. The ECJ held that the taxpayer should not be excluded "a priori" from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain that the taxpayer would not attempt the avoid or evade the payment of taxes.[6] Relief at source cannot thus be precluded if the taxpayer is successful in providing evidence for fulfilling the requirements for the treaty relief claimed. Obviously, the national tax authorities can also rely on the facilities of the EC Mutual Assistance Directive. Even if these facilities are not available for any reason, national law restrictions must not be in breach of the proportionality principle either.

It can happen that there is no possibility to have resort to the framework of Community law harmonisation as provided for by the EC Mutual Assistance Directive. This is clear in cases *Skatteverket v. A.*[7] and *Rimbaud*.[8] The proportionality principle cannot be invoked either. Indeed, the application of the proportionality principle does not seem to be appropriate where the source country entities reside in tax havens (in these cases, in a Swiss canton and in Liechtenstein, respectively), and the source jurisdiction is not willing to provide sufficient information to the residence country's tax authorities.

In *Scorpio*, the legal framework provided for by the EC Mutual Assistance Directive is missing as well. The ECJ did not feel to be compelled to rely on the proportionality principle on its merits, however. The principle is just mentioned (in Paras 37–38), but it is not explained why the retention at source procedure is found to be consistent with the proportionality principle. While in the tax haven-related cases of *Skatteverket v. A.* and *Rimbaud* the tax authorities seem to be authorised not to relax their practices, this standpoint does not seem to be justified in *Scorpio*. It tells us the future only how much the Scorpio-attitude can be maintained, and how the ECJ position taken in *ELISA* that is based on the application of the proportionality principle can be reconciled with its less ambitious approach taken in *Scorpio*.

In *Skatteverket v. A.*, the ECJ clarifies that the concept of restrictions on the free movement of capital is different, depending on whether the movement of capital takes place to or from third countries or within the Community (Para. 36). This is because the liberalisation of the movement of capital with third countries may pursue objectives other than that of establishing the internal market (Para. 31). Upon interpreting the procedural law infrastructure, it must not be out of consideration that it is not the same concept of restrictions on the free movement of capital that must be secured. The procedural law facilities could thus be restricted in respect of third countries where the free movement of capital principle is also restricted in its scope, to be compared to its application in the context of the single European market. As explained by the ECJ, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements,

[6] Para. 96. See also: Case C-254/97 *Baxter* ECR 1999, I-4809, paras 19 and 20; Case C-39/04 *Laboratoires Fournier*, ECR 2005, I-2057, para. 25.

[7] C-101/05 *A*, ECR 2007, I-11531.

[8] C-72/09, ECR 2010, 00000.

compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage. This is the case, in particular, because that third country is not under any contractual obligation to provide information. Thus, it proves impossible to obtain such information from that country.[9]

It has been the standard in the ECJ practice that the justification based on the fight against tax evasion is permissible only if it targets purely artificial contrivances. Accordingly, a general assumption of tax avoidance or evasion fails to justify a restrictive national tax measure.[10] The retention at source of tax procedure is a restriction on the free movement of capital at least because it discourages the taxpayer to be active in investment in another Member State if encountered with difficulties in enforcing treaty benefits. It cannot surely be justified by the general assumption of tax avoidance because–as held by the ECJ–such justification would be in breach of the proportionality principle. Even if the national tax authorities of a Member State are not able for any reason to have recourse to the exchange of tax information to be provided by the tax authorities of another Member State or EEA country, the tax authorities should conduct a case-by-case assessment of the information provided by the taxpayer whether this information can be verified, the Commission argues in *Rimbaud* (Para. 45). A case-by-case assessment could perfectly be possible in a procedure of claiming the relief of double tax conventions as well. The national tax authorities are usually able to verify the information the taxpayer may have provided of fulfilling the conditions for treaty relief.

The argument that the case of *Rimbaud* did not differ from that of *ELISA* due to the fact that the Luxembourg tax authorities were prevented from providing information like the Liechtenstein tax authorities was dismissed by the ECJ. The ECJ held that, even though, in the situation which was under consideration in *ELISA*, the Luxembourg authorities were not, by virtue of Art. 8(1) of Directive 77/799, under any obligation in principle to provide information, the fact remained that the regulatory framework was quite different (Para. 46). Such a regulatory framework for cooperation between the tax authorities of different Member States is usually not missing in a procedure of taxation at source. There is thus no reason to refrain from switching from the retention at source of tax method to that of the relief at source. The national tax authorities of a Member State should be able to verify the information provided by the financial intermediaries, who accompany their clients active in investing in another Member State.

In the above cases, it was the main problem that foreign resident taxpayers were not granted effectiveness in protecting their rights. As a result, taxpayers were usually prevented from exercising their right to the free movement of capital. They are not only confronted with difficulties in claiming national law or treaty relief, but it can also happen in these cases that they are deprived of their procedural rights. Such mistreatment cannot be upheld in the light of Community freedoms, however.

[9] Para. 63, reiterated in *Rimbaud*, para. 44.

[10] C-196/04 *Cadbury Schweppes*, ECR 2006, I-7995, para. 50, reiterated in *Rimbaud*, para. 34.

2. Equivalence accorded to foreign resident financial intermediaries

The practice of Member States to apply withholding taxes at source may constitute barriers to the exercise of fundamental freedoms. This is to hurt foreign resident taxpayers, who derive income across the border. Being discouraged from cross-border investment, they will be prevented from exercising their right to the freedom of capital. Financial intermediaries may also be prevented from offering withholding agent services across the border if they do not enjoy a level playing field with their domestic resident counterparts. The restrictive practice of the retention of taxes at source may thus result in the infringement of both the free movement of capital and the freedom to provide services.

The free movement of capital principle can be applied in parallel to the freedom to provide services (e.g. *Svensson and Gustavsson*).[11] In another legal case (*Safir*), the freedom to provide services is carved out by the EC Court from the national court's question relating to several freedoms, including the free movement of capital.[12] It comes from Barrier 11 (and 12)[13] that the freedom to provide services and the free movement of capital principles are highlighted as the two different sides of the same coin. It depends on the intonation only whether the stress is laid on the services provided by financial intermediaries rather than on the investor's choice. As it comes from the case of *Svensson and Gustavsson*, a rule that makes the grant of interest rate subsidies subject to the requirement that the loans have been obtained from an establishment approved in a certain Member State constitutes discrimination not only against the applicant, but also against credit institutions established in other Member States, and is inconsistent with the freedom to provide services principle accordingly (Para. 12). This is the problem of the missing level playing field. Foreign financial enterprises may suffer from discrimination not only if they cannot gain access to clients who may apply for subsidised loans, but also in cases where they are prevented from performing withholding services by transferring information and untaxed income in a custody chain if necessary.

The taxpayer in *Safir* complains about that when a person holding a policy issued by a company not established in Sweden applies for an exemption from, or reduction of, tax on the life insurance premiums, "Skattemyndigheten" requires precise information concerning the income tax to which the company is subject, unless the authorities already have such information. As Jessica Safir points out, such a requirement is particularly burdensome for the policyholder. It may also dissuade insurance companies, which do not operate on the Swedish market, from offering their services there, since it means that those companies must provide their potential customers with precise information relating to the tax system applicable to those companies in another Member State (Para. 28). Where a Member State introduces a burdensome procedure that is only applicable to cross-border cases, such a policy restricts among other things the Community freedom to provide services, discriminating against foreign financial enterprises. This is also the case with foreign financial enterprises if they are confronted with extra legal requirements associated with

[11] C-484/93 *Svensson and Gustavsson*, ECR 1995, I-3955.

[12] C-118/96 *Jessica Safir*, ECR 1998, I-1897.

[13] Giovannini Group, Second report on EU clearing and settlement arrangements, Brussels, April 2003, 11. The results of the Giovannini reports are reflected within the Commission communication on "Clearing and settlement in the EU–The way forward", COM (2004) 312 final, under heading "3.2. Taxation issues".

withholding taxation, while offering services to their clients, who enter the market of another Member State.

Finally, the ECJ did not find as legitimate the need to fill the fiscal vacuum arising from the non-taxation of savings in the form of capital life assurance policies taken out with companies not established in Sweden (Para. 34). In other words, the Swedish law that provides for the fiscal vacuum to be filled is in breach of the proportionality principle. Similarly, the assumption of a fiscal vacuum that is filled by the retention of tax at source may also be found as inconsistent with the proportionality principle.

In *Danner*, national governments contend that the non-deductibility of contributions paid to schemes operated by foreign insurance enterprises is justified by the need to ensure the effectiveness of fiscal controls, and to prevent tax evasion.[14] That argument cannot be upheld, the ECJ holds because first, Member States may rely on the EC Mutual Assistance Directive (Para. 49), secondly, they may request the taxpayer to provide sufficient proof of fulfilling the legal requirements (Para. 50). The reliance on the Mutual Assistance Directive and on the principle of proportionality are issues that are also relevant to the problem of discrimination both against foreign investors and foreign financial intermediaries that are confronted with the retention at source of income tax.[15]

3. *Effectiveness as a positive standard in the protection of the rights of foreign resident citizens and enterprises*

Foreign resident citizens or enterprises may be mistreated in a host Member State, where they are not granted effectiveness in law enforcement in the sense that national law practices omit to apply a positive standard. This means that national treatment should ensure fulfilment of Community freedoms. Then, procedural rules must be assessed from the viewpoint whether they constitute obstacles to the exercise of substantive freedoms. Procedural rules are thus not to be assessed taken by itself, but to the extent that they may constitute barriers to the exercise of substantive law rights. Besides, the national public authorities, while exercising their power, are expected to be consistent with Community law in interpreting national law. If this is not the case, Community freedoms may be violated. This problem usually concerns the freedom of persons. In the tax law area, no legal cases emerged for a long time to illustrate the above-mentioned positive standard (see, however, the tax case of *Persche* as discussed below in the next session). Still, it will be interesting to take a look at non-tax cases to try to learn from them with particular regard to the failure of national legal measures to grant foreign resident taxpayers the opportunity of the easy enforcement of rights.

A procedure for the recognition of the equivalence of diplomas must enable the national authorities to assure themselves on an objective basis that the foreign diploma certifies that its holder has knowledge and qualifications, which are equivalent to those certified by the national diploma.[16] The person, who is subject to a procedure before the national authorities must also be able to defend his or her rights under the best possible conditions and have the possibility of deciding with a full knowledge of the relevant facts whether there is any point in their applying to the courts (Para. 15). It is an effectiveness standard that is determined

[14] C-136/00 *Danner*, ECR 2002, I-8147, para. 44.

[15] Reiterated in paras 43 and 45, respectively, in C-422/01 *Skandia and Ramstedt*, ECR 2003, I-6817.

[16] 222/86 *Heylens*, ECR 1987, 4097, para. 13.

by the ECJ in this case. The public authorities should have the right of full assessment of the private party's case, but the latter is also allowed to defend himself or herself effectively. An alternative to the taxation at source procedure by allowing relief at source could in principle be designed in a way that both the tax authorities and taxpayers could be granted the possibility of effectiveness in enforcing their respective rights.

The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter.[17]

There are two standards the ECJ identifies in this case. First, the purpose of a national law procedure must be to ensure by all appropriate methods the fulfilment of legal obligations consistently with Community law. The national authorities are therefore not only obliged to refrain from what would be a barrier to the exercise of Community freedoms, but they have to do everything necessary to be consistent in their actions with Community law. This is a very high standard, in the light of which it is doubtful whether the "a priori" exclusion of a relief at source procedure is consistent with Community law. Secondly, the national authorities are obliged to give interpretation of national law in full compliance with Community law. The question is in this instance no longer about the enforcement of individual rights and obligations. Instead, the dispute is placed on a higher level. The consistent interpretation of national law principle is a meta-principle, on the level of which subjective rights cannot be discussed. It is still closely connected with the positive expression of the effectiveness principle in cases like *Marleasing*. Other examples for that are *Vlassopoulou* and C-168/95 *Arcaro*.

Subjective rights cannot be enforced in the context of Community law unless they are built into the structure of Community law that has been developed. In addition to the enforcement of individual rights, the meta-principles of Community law–and even the principles of the operation of Community institutions–must be taken into account. Examples of the principles of the operation of Community institutions include the democracy principle and the subsidiarity principle. The principles of the superiority of Community law over national law or that of direct applicability are meta-principles of Community law. The principles of proportionality or legal certainty can also be considered as meta-principles of Community law. Meta-principles do not concern substantive rights or fundamental freedoms. They are authoritative as to the mechanisms, according to which the rules of Community law can be applied, serving as the legal foundation for decisions of the public authorities, where written sources of law fail to provide an answer. All these meta-principles are material to the enforcement of individual rights. They do not imply procedural rights as such, however.

In *Arcaro*, the national court seeks to ascertain whether, upon a correct interpretation of Community law, there is a method of procedure allowing the national court to eliminate from national legislation provisions that are contrary to a provision of a directive which has

[17] C-106/89 *Marleasing*, ECR 1990, I-4135, para. 8, reiterated in C-340/89 *Vlassopoulou*, ECR 1991, I-2357, see paras 17 and 22, and in C-168/95 *Arcaro*, ECR 1996, I-4705, para. 41.

not been transposed, where the latter provision may not be relied on before the national court in criminal proceedings. The answer the ECJ has given is that there is no such method of procedure in Community law. However, the national authorities are obliged to follow a procedure in which it is possible to achieve the result envisaged by Community law (Paras 39–40). In this instance, the ECJ reiterates what was already said in *Marleasing*. The relief at source procedure, and the deprivation of foreign financial intermediaries and their clients of procedural rights in the source Member State does not seem to be consistent with this standard of effectiveness to be granted to taxpayers.

4. Effectiveness in the protection of the rights of domestic resident taxpayers

The Community law principle of effectiveness is applicable not only to foreign, but also to domestic resident taxpayers, who are active across the border (exercising, as a last resort, the freedom of capital). Lack of effectiveness in the enforcement of rights may be a problem that concerns not only foreign resident investors or foreign financial intermediaries, but also domestic resident participants of European capital markets, that is, those domestic taxpayers, who are active as investors entering the state border, or who are the recipients of the services of foreigners. For example, there may be problems in claiming exemption of foreign earned income or foreign tax credit. Or, for instance, Fokus Bank as a domestic subsidiary or FKP Scorpio as a domestic resident recipient of the services of foreign artists may also encounter difficulties in handling the international tax issues of withholding taxation.

The issues of public administration have emerged in the ECJ practice since the early times. Some examples for the matters that have been subject to the ECJ scrutiny are as follows:

- revocation of administrative decisions and protection of vested rights;
- partial validity of administrative decisions;
- passing of time limits;
- taking due care by the public authorities in obtaining information of the relevant facts and data;
- burden of proof;
- activity of monitoring; and
- consideration of national tribunals seized of a matter of their own motion whether national law is compatible with Community law.

It has been spelled out that although the solutions in Member States may vary, the ECJ is invited to rely on the learned writing and case law of Member States, reconciling differences if necessary.[18]

(i) Equivalence and effectiveness

As it comes from *San Giorgio*, it is incompatible with Community law to apply in a Member State legal presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid has not been passed on to other persons, or the national rules of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary one. The court seized of the specific matter must be free to decide whether or not the burden of charges has been passed on to other persons.[19] Where the procedure of producing evidence as provided for by

[18] Joined cases of 7/56, 3/57 to 7/57 *Algera*, ECR, 62–63.

[19] 199/82 *San Giorgio*, ECR 1983, 3595, para. 14.

national legislation must not be burdensome to the extent that it would not be proportionate with legislative goals, the retention at source of taxation procedure must not be without alternatives either, and relief or simplified refund procedures should be available as well for both foreign resident taxpayers and the domestic paying agents assisting the former. A burdensome national law procedure of providing evidence may constitute a barrier to the exercise of Community freedoms (freedom of capital in respect of the investor and freedom to provide services in respect of the local paying agent or of foreign financial intermediaries that have accompanied their clients to another Member State).

In *Barra*, the ECJ had the opportunity plainly to express the idea that it can be an impediment to the exercise of Community freedoms if not supported by appropriate procedural law institutions:

> "The right to repayment of amounts charged by a Member State in breach of the rules of Community law is the consequence and complement of the rights conferred on individuals by the Community provisions as interpreted by the court. Whilst it is true that repayment may be sought only in the framework of the conditions as to both substance and form laid down by the various national laws applicable thereto, the fact nevertheless remains ... that those conditions ... may not be so framed as to render virtually impossible the exercise of rights conferred by Community law."[20]

To the extent that national law restricts repayment of the duty introduced in breach of the rules of Community law solely to plaintiffs, who brought an action for repayment before the delivery of the judgment in case 293/83 *Gravier*, where the ECJ found the imposition to foreign students of a national vocational training fee incompatible with Community law, actually deprives individuals who do not satisfy that condition of the right to obtain repayment of amounts unduly paid. Such a provision renders the exercise of the rights conferred by the effectiveness principle of EC Treaty impossible (Para. 19 in *Barra*). As it is clear from this judgment, the ECJ did not endorse the national law restriction of the possibility of repayment to those, who acted in good faith in accordance with the national law assumption. In the light of this judgment, national law restriction of tax relief to those who are supposed to act in good faith cannot be accepted in cases either where the facility of relief at source is not available, based on the legislative assumption that tax avoidance or evasion cannot be precluded otherwise.

The obligations imposed by national legislation on undertakings wrongly granted pecuniary advantages based on Community law must be no more stringent than those imposed on undertakings which have wrongly received similar advantages based on national law, provided that the two groups of recipients are in comparable situations and therefore different treatment is objectively unjustifiable.[21] It also comes from *Deutsche Milchkontor* (Para. 33) that that Community law does not prevent national law from having regard, in excluding the recovery of unduly-paid aids, to such considerations as

- the protection of legitimate expectation,
- the loss of unjustified enrichment,
- the passing of a time-limit, or
- the fact that the administration knew, or was unaware owing to gross negligence on its part, that it was wrong in granting the aids in question.

[20] 309/85 *Barra*, paras 17–18.

[21] Joined cases of 205/82 to 215/82 *Deutsche Milchkontor and others*, ECR 1983, 2633, para. 23.

Furthermore, national legal rules may also apply to

- the burden of proof, and
- the monitoring activity of the public authorities within the limits of non-discrimination (Para. 39) and loyalty to Community interests (Para. 45).

In the light of the judgment in *Deutsche Milchkontor*, one cannot really argue that recourse to the relief at source or the equal treatment of domestic and foreign financial intermediaries would be precluded, or the smooth operation of paying agents, who provide information and apply withholding tax in respect of foreign investors would be impossible. Simplification and more generosity in legislation does not mean that the tax authorities would not enjoy freedom in raising objections to the taxpayer's conduct if necessary, withdrawing the possibility of having direct access to tax relief. The public authorities–whether at a level of the Member State or the Community–may enjoy in certain areas (such as the Common Agricultural Policy) wide discretion as spelled out in the *Berlin Butter* case.[22] The purpose of giving more emphasis to the effectiveness principle in the procedure of withholding taxation is not to restrict the scope of action of the tax authorities. It is only important to eliminate national legislation, the result of which would be to preclude simplified procedures and easy access to tax relief.

The ECJ does not encroach upon the Member State's right to introduce national procedural rules. This inaction is done, however, with the proviso that national rules must reflect the principles of equivalence (non-discrimination) and effectiveness. This means in procedural matters that it is the national law according to which cases must be decided, with the proviso, however, that the applicable national law–compared to that applicable to purely national cases–must not be for the citizens invoking Community law

- less favourable, and
- less efficient.

Where disparities are experienced, the idea is not to do comparison between national jurisdictions, but to do that between the national rules applicable either to cross-border or purely domestic cases. Harmonisation can thus take place in an indirect way. It is not the national procedural rules that are to be approximated, but the national procedural rules are to be assessed in the context of cross-border and purely domestic cases. To the extent that cross-border cases will not be mistreated, national procedural law systems will not be approximated to each other.

The above idea is plainly expressed in *Peterbroeck*. In this case, the period during which new pleas could be raised by the appellant under Belgian law had expired by the time the national court held its hearing so that the latter was deprived of the possibility of considering the question of compatibility of the national law issue with Community law whether the higher company tax rate applicable to foreigners resulted in restriction on the freedom of establishment. As explained by the ECJ, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights, which individuals derive from the direct effect of Community law.

[22] Joined cases 133 to 136/1985 *Walter Rau Lebensmittelwerke*, ECR 1987, 2289, para. 29.

However, such rules must not be less favourable than those governing similar domestic actions, nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.[23]

The requirements that the public authorities should have recourse to the Community law framework of coordination and that national law restrictions must not go beyond what is necessary to achieve the legislative goal are set in the ECJ practice not only in respect of foreign, but also of domestic resident taxpayers. As held in *Baxter*, the national tax authorities are not prevented from benefiting from the harmonised company law directives on annual accounts.[24] Similarly, it is explained in *Vestergaard* that the EC Assistance Directive can be invoked by tax administrations.[25] Furthermore, it is precluded to prevent the taxpayer from submitting evidence for the expenditure relating to research carried out in another Member State.[26] It is also prohibited to prevent the taxpayer from submitting evidence for the deduction of the costs of training courses, taking place in another Member State.[27] National legislation, which absolutely prevents the taxpayer from submitting evidence that expenditure relating to research carried out in other Member States has actually been incurred and satisfies the prescribed requirements cannot be justified in the name of effectiveness of fiscal supervision. As confirmed in *Laboratoires Fournier*, the possibility cannot be excluded "a priori" that the taxpayer is able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the nature and genuineness of the research expenditure incurred in other Member States.[28]

(ii) Equally effective treatment, equivalence of the treatment accorded in various Member States

As it comes from *Metallgesellschaft and Hoechst*, it is precluded to apply national law restrictions by the national public authorities on a claim on the grounds that the taxpayer did not get involved in burdensome administrative proceedings to seek remedy first.[29] In other words, there should be enough room available for parties to conduct legal disputes on fair terms. Similarly, the taxpayer should be granted enough room to have direct access to tax relief. Raise the tax authorities doubts on how much the taxpayer's claim is established, they have the opportunity to challenge claims that seem to lack sufficient legal basis in a procedure of tax audit and the subsequent legal dispute.

The ECJ holds in *Inizan* that Arts. 49 EC and 50 EC must be interpreted as not precluding legislation of a Member State which, first, makes reimbursement of the cost of

[23] C-312/93 *Peterbroeck*, ECR, 1995, I-4599, para. 12. See reference to the double requirement of equivalence and effectiveness already in *San Giorgio*, para. 12. They fist appear in 33/76 *Rewe*, ECR 1976, 1989, para. 5, and 45/76 *Comet*, ECR 1976, 2043, para. 13. These standards have been plainly explained in *Brasserie du Pêcheur and Factortame*. Accordingly, national law criteria must not be less favourable than those applying to similar claims or actions based on domestic law, and must not be such as in practice to make it impossible or excessively difficult to obtain rights. See: Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*, ECR 1996, I-1029, para. 90.

[24] See reference to *Baxter* above.

[25] C-55/98 *Vestergaard*, ECR 1999, I-7641, para. 26.

[26] C-254/97 *Baxter*, para. 19.

[27] C-55/98 *Vestergaard*, para. 25.

[28] C-39/04 *Laboratoires Fournier*, ECR 2005, I-2057, para. 25.

[29] Joined cases C-397/98, C-410/98, ECR 2001, I-1727, para 107.

hospital care provided in a Member State other than that in which the insured person's sickness fund is established conditional upon prior authorisation by that fund and, secondly, makes the grant of that authorisation subject to the condition that it be established that the insured person could not receive within the territory of the Member State, where the fund is established the treatment appropriate to his condition. However, authorisation may be refused on that ground only if treatment which is the same or equally effective for the patient can be obtained without undue delay in the territory of the Member State in which he or she resides.[30] It is not precluded to introduce in a Member State a prior administrative authorisation scheme. It must be based, however, on a procedural system, which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time, and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings (Para. 57).

The Community law requirement of achieving a treatment that is equally effective in comparable cases is a particular expression of the effectiveness principle, in this case spelled out in the context of the freedom to provide services. Interestingly, the problem of *Ms Inizan*, a patient, is dealt with as a matter of the freedom to provide medical services. Similarly, the problem of a taxpayer crossing the border may raise the issue of financial intermediaries that are to exercise the freedom to provide services. In contrast to the case of *Inizan*, the question is either about the domestic financial service-providers, who accompany their clients abroad or about foreign financial intermediaries, who accompany their clients in the source country. In the light of the judgment in *Inizan*, it is any way doubtful whether "a priori" exclusion of gaining access to relief at source or prevention of foreign financial intermediaries from serving their clients in the host Member State is consistent with Community law.

A Member State is not obliged to co-operate with its fellow Member State unless the denial of coordination with the other Member State would prevent citizens from exercising their fundamental rights across the Community. The EC Court made use of this standard in C-446/03 *Marks and Spencer* as well: for lack of a fiscal nexus established in the UK, the United Kingdom is not obliged to grant the opportunity of carrying over the losses of a Luxembourg subsidiary to a UK parent company unless the UK taxpayer proves that in Luxembourg there is no way of recognising any loss carryover for tax purposes. It is a novelty in the Advocate General's opinion delivered on that case that he would extend the equivalence principle, germane to the concept of the internal market as introduced as of 1993, to the matters of direct taxation, that is, to a territory where Member States traditionally enjoy freedom: a key to the solution of the problem is "the comparison and equivalence of the treatment accorded in various Member States".[31]

It is interesting to see in *Marks and Spencer* the way in which the proportionality principle has been utilised. This principle was used before in the simple sense that restrictive national measures could be challenged or approved, depending on whether they meet the proportionality test. The ECJ decision is new, however, at the point of Marks and Spencer that the UK national legislation is subject to the proportionality test in the instance where there is no explicit restriction by national law on any Community freedom that would be

[30] C-56/01 *Inizan*, ECR 2003, I-12403, para. 59.

[31] C-446/03 *Marks and Spencer*, ECR 2005, I-10837, para. 59, opinion of AG L. Poiares Maduro, para. 77.

plainly inconsistent with Community law. The proportionality principle would then be left in a vacuum. This is not yet the case in point because the gap arising from the lack of explicit restrictive national law measures is filled by the special meaning of Community law, suggested by the profession and represented by the ECJ. The expression of this meaning is a result of the recursively closed organisation of interpreting and applying Community law. The law that has been developed in *Marks and Spencer* is a product of self-generation, that is, it has been developed, not having a peculiar legislator, who would have been authorised to adopt the applicable law.

A key to understanding the decision in C-446/03 *Marks and Spencer* lies in the EC Court's assessment whether the opportunity of loss carryover for the company group has been fully exhausted in the particular case. It is not the UK law, strictly speaking, which is being evaluated. Not a single legal measure of the UK tax law has been condemned in the abstract. It is the UK legal practice that has been condemned, not proven friendly enough in a particular case. No statutory provision of the UK tax law has been challenged. The UK law has been criticised, however, because its impact has been detrimental, constituting a restriction on the taxpayer's right for cross-border loss carryover.[32]

(iii) Obligation of the tax authorities to have recourse to the facilities of harmonised Community law on tax procedures

In *Persche*,[33] the ECJ is uncertain, whether the EC Mutual Assistance Directive requires the tax authorities of the residence Member State to have recourse to the assistance of the competent authorities of the recipient body's Member State of establishment to obtain the necessary information or whether, on the other hand, the said tax authorities may require the taxpayer himself or herself to provide all the necessary evidence. The question is here in other words of how to divide the burden of proof between the parties. Upon the finalisation of securities transactions, it is also a question how much foreign financial intermediaries and domestic resident paying agents are obliged to provide relevant information, and how much the local tax authorities may be requested by national law to have recourse to the facilities of the EC Mutual Assistance Directive, and approach their foreign counterparts. Where domestic or foreign intermediaries suffer from the unusually high-level requirement of strict liability, no balance of interests can be achieved. The national procedural law would be consistent with the proportionality principle if foreign intermediaries and domestic ones with foreign clients were obliged to a due care standard like their normal domestic counterparts.

The Commission contends that, even if the EC Mutual Assistance Directive itself does not require a Member State to have recourse to the assistance of another Member State in order to inform itself of a fact, the evidence of which is in that other Member State, the former State would however be required, within the scope of application of Art. 56 EC, to have recourse to the possibilities offered by that directive in order to exclude any less favourable treatment of cross-border situations as compared to purely internal situations

[32] As a consequence of the judgment, the UK legislation was eager to fill the assumed gaps left after the judgment in *Marks and Spencer*, trying to put the issue of last resort into a context of revised statutory law. It is the paradoxical aspect of the case, however, that such a problem cannot simply be solved by statutory means. For more explanation see Deák, D.: Legal autopoiesis theory in operation–a study of the ECJ case of C-446/03 Marks and Spencer v. David Halsey. *Acta Juridica Hungarica*, 49 (2008) 2, 163.

[33] C-318/07, ECR 2009, I-359.

(Para. 36). Hence, the directive itself does not require the national authorities to have recourse to the facilities the directive provides. Such an obligation directly comes, however, from the principle of effectiveness as a positive standard (see its discussion above in connection with *Arcaro*). The requirements are thus relevant that the national authorities are obliged to follow a procedure in which it is possible to achieve the result envisaged by Community law, and that national law must be interpreted consistently with Community law. The positive standard of effectiveness makes a requirement for national procedural law by means of invoking substantive Community law to be extracted from Community freedoms.

Since the EC Mutual Assistance Directive provides for the possibility of national tax authorities requesting information which they cannot obtain for themselves, the EC Court has ruled that the use, in Art. 2 (1) of the EC Mutual Assistance Directive, of the word "may" indicates that, whilst those authorities have the possibility of requesting information from the competent authorities of another Member State, such a request does not in any way constitute an obligation. It is for each Member State to assess the specific cases in which information concerning transactions by taxable persons in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State.[34] The ECJ argues that it is left for the Member State to legislate whether, and in what conditions, the national authorities are obliged to have recourse to the mutual assistance with the tax authorities of another Member State. The Member State of legislation remains nevertheless to be subject to the proportionality principle. This is a position slightly different from that taken by the Commission. Namely, the latter refers to the positive standard of effectiveness and, therefore, concludes that the affected Member State is obliged to ensure the enforcement of Community freedoms. The ECJ is confined to a meta-principle (proportionality), while the Commission substantiates its position by referring to substantive law.

Furthermore, the ECJ holds that a Member State cannot exclude the grant of tax advantages for gifts made to a body established and recognised as charitable in another Member State on the sole ground that, in relation to such bodies, the tax authorities of the former Member State are unable to check, on-the-spot, compliance with the requirements which their tax legislation imposes. An on-the-spot inspection is not usually required since the monitoring of compliance with the conditions imposed by the national legislation is carried out, generally, by checking the information provided by those bodies (Paras 66–67). The national authorities that preclude the possibility of relief at source cannot thus justify this restriction by referring to the difficulties in organising on-the-spot audits if necessary because the organisation of such audits is always an extra burden for the authorities, no matter whether they have to conduct examination within the country or in another Member State.

The taxpayer in *Twoh*, a Dutch company, supplied computer parts to another company residing in Italy. Twoh was required only to place the goods at the buyer's disposal at a warehouse situated in the Netherlands. Twoh issued invoices on intra-Community deliveries and, consequently, did not pay VAT. The Dutch tax authorities were of the opinion that Twoh did not demonstrate that the goods were transported to another Member State. The taxpayer requested the tax authorities to rely on the EC Mutual Assistance Directive and the

[34] Para 65. See also, in C-184/05 *Twoh International*, ECR 2007, I-7897, para. 32.

EC Administrative Cooperation Regulation[35] and gather information from the competent Italian tax authorities, but the Dutch tax authorities refuted to meet this requirement.

The ECJ considers that, as the Commission has correctly argued, the principle that the burden of proving entitlement to a tax derogation or exemption rests upon the person seeking to benefit from such a right is to be viewed as being within the limits imposed by Community law. Thus, it is for the supplier of the goods to furnish the proof that the conditions for exemption (Para. 26). What is important in this case is the fact that Twoh, being unable to provide the necessary evidence to establish that the goods have in fact been dispatched to the destination Member State, has requested the Netherlands tax authorities to gather information that should be capable of demonstrating the intra-Community nature of its supplies, obtaining information from the competent authority of that latter Member State, in application of the EC Mutual Assistance Directive and the EC Administrative Cooperation Regulation (Para. 28).

As it comes from respect of the proportionality principle, where the taxpayer is unable to obtain the necessary evidence, being not able to approach the competent authorities of another Member State, the local tax authorities are obliged to act and provide the taxpayer with the relevant information. The local tax authorities may thus explicitly be obliged to rely on the EC Mutual Assistance Directive even upon the finalisation of securities transactions where the taxpayer is for objective reasons prevented from gaining access to evidence. For instance, local paying agents with foreign clients may have serious difficulties in approaching the foreign tax authorities if necessary. Similarly, the local authorities may not require from foreign financial intermediaries to obtain a local tax ID where it is easy for the tax authorities to approach the competent tax authorities of the home Member State and check if the tax ID showed is authentic.

In the joined cases of C-155/08 *X* and C-157/08 *Passenheim-van Schoot*,[36] the Dutch tax authorities obtained information from the Belgian tax authorities among other things of the savings account of a Dutch resident taxpayer held with a Luxembourg subsidiary of the Belgian-based Kredietbank. The Dutch tax authorities were not in a position of providing any evidence for tax evasion. They were, however, eager to initiate a procedure of fiscal supervision. This was the case because the assets of the Dutch taxpayer, which were deposited in Luxembourg and concealed from the Dutch tax authorities, were subject to net wealth tax in the Netherlands. The Dutch tax authorities wanted to benefit from the Dutch tax law, which said that the normal five-year period of the statute of limitations for tax assessment could be extended to 12 years (from the date when the tax debt arose) in respect of the assets held outside the Netherlands.

The taxpayer raised the issue as to whether these Dutch rules on the extended recovery period and the related calculation of tax penalty do not constitute an obstacle to the freedom to provide services and the free movement of capital that cannot be justified. The extent to which the Luxembourg bank secrecy should be lifted in order to facilitate the exchange of tax information between the Dutch and Belgian tax authorities in accordance with the EC Assistance Directive is a secondary issue, ancillary to the main subject.

For the purposes of answering the question whether the Netherlands can be forgiven for introducing an extended recovery period in cross-border cases, the ECJ distinguished

[35] Council Regulation 218/92/EEC on administrative cooperation in the field of indirect taxation (as amended), OJ L 24, 1.2.92, 1.

[36] ECR 2009, I-5093.

MAGYAR TUDOMÁNYOS AKADÉMIA KÖNYVTÁRA

between fiscal evasion and fiscal supervision (Para. 63). Where there is no evidence available for the tax authorities to combat tax evasion, it can be accepted that an extended period of the statute of limitations is applicable. Where, however, the tax authorities hold any means of evidence in order to discover tax liability in a cross-border case, the tax authorities have already the right to request information from the other Member State.

The provision of information cannot be denied in particular where the requesting authorities have been in a position to gain knowledge of the case, but they need more information to complete their investigation. Where, however, for lack of sufficient information, the tax authorities are not able to provide any evidence of a particular case, a Member State is allowed to console itself by enhancing the chances of discovering unpaid tax even by extending the period of the statute of limitations for the recovery of the assessment of tax.[37] Where the national legislation is proportionate with the aim of discovering fiscal evasion, the restrictions on any Community freedom that are developed because of the application of national law can be justified.[38]

Where cross-border securities transactions are finalised, the tax authorities may obviously hold information that is enough for them to rely on the EC Mutual Assistance Directive in respect of both domestic and foreign resident taxpayers. "A priori" exclusion of relief at source or the mistreatment of domestic resident withholding agents or foreign financial intermediaries cannot thus be justified. With regard to the facilities available due to the operation of the Mutual Assistance Directive, the scope of the national legislator to act by introducing special measures, including restrictions on the legal management of cross-border cases, does not seem to be very wide. The ECJ explained that the mere fact that the taxable items concerned are located in another Member State does not justify the application of an extended recovery period. One can conclude from this statement that the exclusion of the facility of relief at source cannot be justified either by the mere fact that income is derived abroad or by foreigners.

5. *Effectiveness to be granted to domestic and foreign resident taxpayers through harmonisation in fiscal matters*

In the area of tax law, the question can be raised as to whether the exclusion of tax matters from the scope of internal market legislation can be extended not only to substantive tax law, but also to the procedural matters of taxation. One could argue that procedural tax law and cooperation in tax matters between the tax authorities of the Member States constitute issues that go beyond the scope of tax harmonisation. Reference to the EC Taxation Savings Directive,[39] a reporting rather than a tax directive, can also be made in order to enhance the significance of cross-border cooperation in tax matters in terms of the exercise of Community freedoms. The matter of cooperation between the public authorities in tax matters should then extend beyond simply dealing with taxes. Arguably, free competition–the basic institution of the EU–can be distorted for lack of sincere cooperation between the public authorities, whether competent in tax or non-tax matters.

This is the logic the Commission followed in the case of C-533/03 *Commission v. Council*, when it was required before the ECJ–in vain–to base a range of amendments made to the existing EC directives and regulations on the cross-border cooperation in tax matters

[37] Paras 44 and 57.

[38] Paras 52–53, 72–73 and 75.

[39] Council Directive 2003/48/EC (as amended), OJ L 157, 26.06.2003, 38.

on the legal basis of the internal market legislation rather than on the provisions of the old way of fiscal harmonisation to be achieved progressively in the common market (Art. 93 EC, Art. 113 TFEU).[40] In C-533/03 *Commission v. Council*, the Commission contends that Council Regulation 1798/2003/EC[41] and the directive, modifying the EC Mutual Assistance Directive,[42] are not adopted on a correct legal basis. In essence, both the parties and the ECJ follow the arguments known already from case C-338/01.

In the case of C-533/03, the ECJ held (in Para. 45) that "lex specialis" prevails over "lex generalis", and this is why Art. 93 EC Treaty on tax harmonisation should take priority over Art. 95 EC Treaty (Art. 114 TFEU) on overall internal market legislation in this case. As a consequence, the provisions on the cooperation of tax authorities must be treated as tax provisions. The issue of cooperation of the public authorities in tax matters cannot thus be separated from the contents of taxation. In other words, as Community law stands at present, the term of tax sovereignty should comprise not only substantive tax law provisions, but also the rules that are applicable to tax procedures. Unfortunately, attempts to seek to establish distinction between fiscal (substantive tax law) harmonisation and cooperation (procedural tax law harmonisation) have ended in failure, although one can argue that the law on Community cooperation should go beyond the mere subject of the harmonisation of substantive tax law provisions. It remains a task for the future to establish this claim better.

In C-349/03 *Commission v. UK*, the UK tax authorities were condemned to the extent that they denied cross-border cooperation in tax matters in respect of Gibraltar on the grounds that the latter is not part of the EU customs territory, and thus the harmonised rules on VAT and excise duties were not applicable. The ECJ held that the exclusion of Gibraltar from the EU customs territory does not mean that Gibraltar fell outside the requirement of mutual assistance by the competent authorities of the Member States. The substantive tax law issue has thus clearly been separated from the matter of mutual assistance in tax matters.[43]

The ECJ does not seem to be consistent in deciding in these two cases. The difference in the positions the ECJ took can be reconciled, however, in so far as the two questions were raised in different ways. In the first case (C-533/03 *Commission v. Council*), the ECJ supported the standpoint of the EC Council that resisted the extension of the scope of harmonisation in the particular respect of administrative tax law due to lack of political consensus. In the second case (C-349/03 *Commission v. UK*), the ECJ reasoning was driven by the possibly strictest interpretation of the derogation granted to the UK upon the EC accession of the UK. This difference in context seems to give sufficient explanation for the difference in the conclusions that the ECJ arrived at in the two cases.

The Commission contends in C-349/03 *Commission v. UK* that the EC Mutual Assistance Directive does not affect "the tax law as such of the Member States" (Para. 22). The Member States' competence to legislate tax should in this respect be confined to substantive tax law matters. Even if the harmonised rules of VAT do not apply to Gibraltar, the information of the taxpayers registered for VAT purposes in Spain and engaged in contacts with Gibraltar-based parties may be relevant for Spanish VAT purposes. The Commission plainly argues that the effectiveness principle of Community law requires the

[40] ECR 2006, I-1025, para. 25. For the Council's arguments, see para. 33.

[41] OJ L 264, 15.10.03, 1.

[42] That is, Council Directive 2003/93/EC, 15.10.03, OJ L 264, 23.

[43] ECR 2005, I-7321, para. 53.

extension to Gibraltar of the mutual information system (Para. 24). This example shows that the scope of procedural tax rules may exceed that of substantive tax law matters. Where harmonisation in substantive tax law can be a taboo, this is not necessarily true for the procedural aspect of tax law.

The Spanish Government argues that distinction must be made depending on whether a cooperation measure relates to a tax harmonisation objective or relates simply to a measure, which confined itself to laying down rules for cooperation between the Member States (Para. 28). Tax cooperation measures may thus have two layers: they may consist of tax harmonisation provisions, properly speaking, and provisions on unqualified cooperation. The UK argument is, on the contrary, that the administration of a tax system and the revenue-raising power of a Member State are inextricably linked to each other (Para. 34). According to the UK, fiscal provisions concern not only the conditions of substantive tax liability, but also arrangements for the collection of taxes (Para. 36).

The ECJ approved that there should be provisions of simple cooperation that cannot be regarded as acts on tax harmonisation (Para. 44). The EC Mutual Assistance Directive is still interpreted in the context of the UK accession treaty (Para. 46), and it may not affect common cases. Under Para. 47 of the judgment, procedural tax law rules are discussed in this case as acts on harmonisation, and not as fiscal provisions within the meaning of Art. 95 (2) EC [on exceptions to the scope of internal market legislation, currently Art. 114 (2) TFEU]. Where tax procedural rules are discussed under in the disguise of harmonisation acts, they may go beyond the scope of tax law. Harmonisation acts cannot be adopted, however, without the explicit approval of the Member States. Where tax procedural rules are related to fiscal rules, they should mean not only substantive, but also procedural tax law provisions.

In C-338/01 *Commission v. Council*,[44] the Commission contends that the purpose of the directives that modify the EC Recovery Directive[45] is to bring about the internal market. They must accordingly be based on the Treaty basis on internal market legislation (Para. 18). In view of the fact that Art. 95(2) EC [Art. 114 (2) TFEU] constitutes an exception to the principle set out in Art. 95(1) EC, it should be narrowly construed and its application is restricted to what is necessary for the attainment of its objectives, such as the protection of the Member States' sovereignty in matters relating to taxation (Para. 19). The Commission holds that the substantive tax law of the different Member States is not affected by the modification of the Recovery Directive (Para. 20). One could thus argue that sovereignty of the Member States to be exercised in fiscal matters is not extended to procedural tax law issues, and fiscal provisions would not relate to the rules of tax procedures in the context of Art. 114 (2) TFEU.

Furthermore, the modifying directives do not simply concern the smooth operation of the internal market. They are aimed among other things at bringing about the fiscal neutrality of the internal market, the European Parliament contends (Para. 24). The term of fiscal neutrality should go beyond the scope of tax law. It should thus relate to the smooth operation of the internal market. The Parliament also argues that Council Directive 2001/44/EC[46] does not create a "sui generis" European procedure of the recovery of taxes. Instead, it

[44] ECR 2004, I-4829.

[45] Council Directive 76/308/EEC, OJ L 73, 19.3.76, 18, significantly amended by the contested Council Directive 2001/44/EC, L 175, 28.6.01, 17.

[46] OJ L 175, 28.6.01, 17.

merely prescribes national treatment for foreign claims (Para. 25). The Directive provides a framework only that allows Member States to continue to be sovereign in tax matters.

In contrast to the above arguments, the Council gives a broader meaning to the term of "fiscal provisions". They mean not only any measure regulating public revenue, or covering not only the definition and description of taxes, but also the manner in which taxes are assessed and collected (Para. 36). The term of fiscal should therefore be extended not only to substantive, but also to procedural tax law (and it should thus be confined to tax law) in the context of Art. 95 (2) TEC, the Council argues. Further on, a restrictive approach would be dependent on political assessments in respect of tax procedures, something, which would be at variance with the system of the attribution of powers within the Community and with the principle of legal certainty (Para. 37).

The United Kingdom Government criticises the Commission for its unduly strict interpretation of the term "fiscal provisions" and for failing to take account of the opening sentence of Art. 95(1) EC, to the effect that this provision applies only "where nothing in the Treaty provides otherwise". Article 93 EC and Art. 94 EC are both special provisions for the adoption of measures relating to direct and indirect taxes (Para. 50). The UK Government adds that the term "fiscal" used in the English-language version of Art. 95 EC embraces not only taxation "stricto sensu", but also public spending and borrowing. Contrary to the Commission's contention, there is no justification for drawing a distinction between the rules on taxable persons, taxable events, bases of taxation, rates and exemptions, and the rules for the administration and enforcement of taxes (Para. 52).

The ECJ held that, by reason of their general character, the words relating to fiscal matters cover not only all areas of taxation, without drawing any distinction between the types of duties or taxes concerned, but also all aspects of taxation, whether material rules or procedural ones (Para. 63). It should further be added that the decisive criterion for purposes of comparison with a view to the application of Art. 90 EC (Art. 110 TFEU) is the actual effect of each tax on domestic production, on the one hand, and on imported products, on the other. Even where the rate is the same, the effect of the tax may vary according to the detailed rules for the assessment and collection thereof applied to domestic production and imported products (Para. 65).

III. Conclusions

Where the institutions of the retention at source of taxes and the prevention of foreign financial intermediaries from assuming in the source country the liability to file tax information and arrange for the payment of tax in fair conditions comparable to their domestic counterparts are to be assessed in the light of the relevant Community law as communicated by the ECJ, it is crucial while concluding whether national legal practices of withholding taxation are consistent with Community law to apply the proportionality principle in specific cases. Where the application of the proportionality principle dictates us in a specific case respect of the effectiveness principle in enforcing rights both on the side of the tax authorities and taxpayers, an avenue may open up for progressively removing barriers from the clearing and settlement of securities transactions across the border.

The cornerstones for such avenues can be reconstructed from the positions the ECJ has developed in particular as follows:

> "... the use of retention at source represented a proportionate means of ensuring the recovery of the tax debts of the State of taxation. The same is true of the potential liability of the recipient of services who is required to make such a retention, as that

> enables the absence of retention at source to be penalised if necessary. Since that liability constitutes the corollary of that method of collecting income tax, it too contributes in a proportionate manner to ensuring the effectiveness of collecting the tax." (paras 37–38 in *FKP Scorpio*);
>
> "... the taxpayer should not be excluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain, clearly and precisely, that he is not attempting to avoid or evade the payment of taxes (see, to that effect, Case C-254/97 Baxter and Others [1999] ECR I-4809, paragraphs 19 and 20, and Case C-39/04 Laboratoires Fournier [2005] ECR I-2057, paragraph 25)." (Para. 96 in ELISA);
>
> "Since Directive 77/799 provides for the possibility of national tax authorities requesting information which they cannot obtain for themselves, the Court has ruled that the use, in Article 2(1) of Directive 77/799, of the word 'may' indicates that, whilst those authorities have the possibility of requesting information from the competent authority of another Member State, such a request does not in any way constitute an obligation. It is for each Member State to assess the specific cases in which information concerning transactions by taxable persons in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State (Twoh International, para. 32)." (para. 65 in Persche).

Unfortunately, contradictions hidden in the first two items above of ECJ assertions can hardly be reconciled.[47] It cannot then be understood why the domestic resident recipient of a foreign service-provider–being, e.g. a local fiscal agent–is "a priori" excluded from providing evidence, enabling the tax authorities of the source Member State to ascertain that he or she is not attempting to avoid or evade the payment of taxes while seeking to gain access to relief at source of taxation. As an alternative, the position granted to the local paying agent could arguably be extended to a foreign resident investor or a foreign financial intermediary accompanying its clients across the border.

It is bad news for the taxpayers engaged in cross-border securities transactions that the applicability of the proportionality principle is subject to a case-by-case assessment; it is thus for each Member State to assess the specific cases in which information concerning transactions by taxable persons in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State. The domestic tax authorities may well conclude in a specific case that it is not necessary to initiate mutual assistance with the tax authorities of another Member State. It is good news, however, that the domestic tax authorities must certainly not arrive at a final decision unless they make an assessment of the case under examination before.

It is a key to the application of the proportionality principle that rights and obligations must be allocated according to the facts and circumstances of the specific case. This means, for example, that it is not enough to require alleviation of foreign financial intermediaries from strict liability. Instead, their liability should be adjusted to the real case. There are a

[47] Notably, the ECJ answers the question, whether the procedure of retention at source of tax is consistent with Community law without regard to whether the services provided to FKP Scorpio are deemed to take place within the Community.

few issues[48] that can be highlighted to illustrate how the proportionality principle can be operated as follows:

– "a priori" exclusion of relief at source seems to violate the proportionality principle in general; the introduction of a quick refund procedure (not appearing in the OECD Implementation Package) may be helpful, however, to find a balance between the legislative goals and means in respect of withholding taxation;

– the source country's request for applying for a new tax identification number does not comply with the idea of holding a single European passport, otherwise available for financial enterprises both under the EC Consolidated Banking Directive;[49]

– under the harmonised Community law on VAT refund, appointment of fiscal representatives must not be requested by the source Member State;[50] such a rule could be extended to the tax treatment upon the finalisation of cross-border securities transactions as well with a view to respecting the proportionality principle;

– from the perspective of the application of the proportionality principle, an ideal solution could be the provision of information by the financial intermediary to the source country's authorities and, in turn, the transfer of information by the source country to the residence country; this option is preferred both by the OECD and the EC Taxation Savings Directive;

– while designing the allocation of rights and liabilities of all members that may be engaged in a custody chain, it is necessary to coordinate the status of authorised intermediaries with that of domestic withholding agents; and

– respect of the proportionality principle requires to bear in mind that the intermediary that has the closest relationship with the investor has access to information about the investor what may entail strict liability while the domestic withholding agent does not have strict liability for under-withholding; in fact, proposed procedures are intended the reduce the risk of under-withholding, but not necessarily the authorised intermediary's liability.

[48] OECD Centre for Tax Policy and Administration, Report by the pilot group on improving procedures for tax relief for cross-border investors; Possible improvements to procedures for tax relief for cross-border investors: Implementation Package; Public discussion draft; 8 February 2010 to 31 August 2010, 9–10.

[49] Indent 7 of the recitals of Directive 2006/48/EC of the EP and the Council, OJ L 177, 30.6.06, as amended.

[50] Art. 204 of Council Directive 2006/112/EC, as amended, OJ L 347, 11.12.06.

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CSABA VARGA*

Literature? In Substitution for Legal Philosophy? (Variations to and Uses of "Law and Literature")

Abstract. Anglo–American and French, as well as German, Spanish and Hungarian variations to "Law and Literature" are surveyed for that as to the nature of the discipline some conclusions can be formulated. Accordingly, "Law and Literature" recalls that which is infinite in fallibility and which is not transparent in its simplicity, that is, the situation confronted that we may not avoid deciding about despite the fact that we may not get to a final understanding. What is said thereby is that "Law and Literature" is just a life-substitute. Like an artificial ersatz, it helps one to see out from what he/she cannot surpass. What it is all about is perhaps not simply bridging the gap between the law's proposition and the case of law, with unavoidable tensions confronting the general and the individual, as well as the abstract and the concrete. Instead, it is more about live meditation, professional methodicalness stepped back in order to gain further perspectives and renewed reflection from a distance, so that the underlying reason for the legal (and especially judicial) profession can be recurrently rethought. In a fictional form, literature is the symbol and synonym of reflected life, a field where genuine human fates can be represented. Thereby, at the same time it is a substitute for theology, rooted in earthly existence as a supply to foster feeling kinds of, or substitutes to, transcendence.

Keywords: enigma of law, Shakespeare, Madách's *The Tragedy of Man*, Kleist's *Michael Kohlhaas*, Sophocles' *Antigoné*, Dostoyevsky

1. The Enigma of Law and its Study

"Law and Literature"? It helps human quality to enrich us. It helps channel back again into the law's domain that which is endless and incomprehensible throughout, and which escapes from all final explanation. It reconstructs the milieu in which we can float at most but which we will never have acquired. It helps us recognise in our existence the image of God we can hardly perceive with eyes dedicated to earthy matters. It helps us cogitate about the mystery of our existence in the Universe, the existential unthinkability of our presence thrown into being. It helps the human quality restored in us, whereto we still always escape back when our artificial being in this very world makes us dry, shrivelled, empty or weightless.

As is commonly known, our science is great albeit hyperbolic. We provided ourselves with scientific methodology to proceed step by step with the help of the logic of a world we made from ideas and conceptualised, and we erect intellectual buildings by executing relentless demands drawn from it. By the same token, in the meantime, however, we inevitably also deconstruct our world. And, thereby, we transformed that which has been so deep as to be impossible to break through and untransparently phenomenal, into simplicity reduced until it could be seen from one single aspect that we have sliced out of it. Moreover, we also prescribed what to see in it, and we also slowly began to see it–and nothing except it–indeed.

* Scientific Adviser, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30; Professor, Director of the Institute for Legal Philosophy of the Catholic University of Hungary, H-1088, Budapest, Szentkirályi u. 28–30.
E-mail: varga@jog.mta.hu; homepage: http://drcsabavarga.wordpress.com

Hoping for a securer state, we built a fortress we believed to be firm as a rock around ourselves from mere consequences. We bedded ourselves methodically into mortar as far as we could; and on the fundament of our estate under our soles we scan the firmament to foresee whether or not we may once put even stars under the settling yoke of our intellect. When walking proudly and bravely, we think to navigate our existence on the field we have created without recognising that we have augmented it by a ballast in the meantime. For if sky and earth quake, we have to realise that we find ourselves in the old uncertainty. As lotus or corals live in water and others do live on them, we cuddle up together. And although flood floats and waves play with us with tide raising and sinking, in our misappointed sense–feeling ourselves at home in such a floating–we constitute, hand in hand, a standing mainland for ourselves.

Thus, our scholarship is great even if hyperbolic. It forecalculates how and in what way we should go on, and we may know whether we have gone on actually, because we may come on steadily indeed. For in that it has a message at all, it tells the truth. For we may actually delve into it deeper with the help of methodicality–with regard to all matters we may be at all immersed in. Our civilisation is pushed by our scholarship increasingly further; thus, we dig even deeper and deeper until, slowly, our sight will be lost. Sometimes we already forget where we have begun to dig at all. By now we mostly see–exclusively, even if ever from nearer–that which we may sense on the edge of our spade. And the more our eye becomes accustomed to it, the less sight remains to see anything else. Whilst we approach, we also drift apart inevitably.

Indeed, science is to be found wherein there is sacrifice, too. This is where it is important–unavoidably–to develop partialities in ourselves. This is where we make order by fabricating concepts for ourselves, and also by establishing necessary links as laws amongst them. And independent of how much uncertain it is–both from where it starts and where it concludes–we call such links established as knowledge by right, because we get more by it than otherwise. In this manner, we have already built an artificial world around ourselves.

Under such conditions, it is worthwhile to know what we are actually doing, so that after having made a sacrifice for it, we may also rebuild the fullness of our human beings. For we may get used to our new world to a great extent. And we should realise after all that our science has never been and will never be anything complete or completed. Certainly, the outcome is not reality itself but *alter ego* humanly constructed and construed, which we have made primitive by virtualising as slices of what God created or what happened to us, i.e. as proofs and stems remaining in our sense. All this is as if we magically identified ourselves with something else, and for this, we build for our own use, from twigs and leaves, entities–animals or humans–living as a cosmos in themselves. Well, the actuality produced by our scholarship as a world of concepts is by no means more viable in itself than the noble action of our magical act. And still: if it is feasible to do *that* and *that* can be learnt and practiced, then we may precipitate effects through such substitutes, too.

In sum, there is science. It also has to be as it proved to be useful for humanity, in the humans' earthly struggle.

2. "Law and Literature"

Law is scholarship on human ordering. It addresses the issue as to whom anything may be attributed and ascribed, and in what, and how, proper balance should be manifested, a balance that we would like to measure, with scales set up in our earthly existence. In the final account, our law is the constant refinement of the autocracy of human will through various deflectors.

Whilst we spade even deeper in our scholarship on human ordering, we become in fact already increasingly involved in ourselves by our deflectors, driven by and getting entangled with other deflectors. After a while, sometimes we cannot any longer know for sure what is actually driven by what. And if, instead of an appeal to, or interest in, our choice, namely, of our human fallibility, we try to read the scale from the miracle of Creation, then the innocence of admiration, of the mysticism of reunion with the divine essence, of the maiden and still devoted astonishment will also sooner or later be replaced by a scale reading as transformed into its own and distinct profession, which, through its artificial ways, will achieve its methodicality born from that professionalisation so that, eventually, it cannot see in its self-mirror anything else than its own self, virtualised by its own means.

Law, then literature? Literature, then law? Even the expression makes them transcendent as there is neither law, nor literature inside. The profession of jurisprudence, always sinking into its own devices while becoming emotionless as to the grandiose donation capable of being astonished at the real world, looks in and through them–as the primitively taintless expression of anything human (compared to legal artificiality)–for the heady clarity of fullness and for the regenerating force of its conception, which withstands explanations to the very being.

Returning back to the original indication: "Law and literature"? Well, "law" here is what it is not any longer and, in turn, "literature"–that is all. Like *The Jolly Joker* (as an extra trump card), "literature" in such a connection is all that is still capable in our world of giving an account of the fullness of being lost repeatedly, so as to realise newly its inexhaustibility, and to persuade us as to the original fallibility of whatever explanation and final setting, with the limited devices at our disposal. Therefore, it can stand for anything else and it will depend on custom, fashion or just any occasional mainstream idea, whether we hold onto whatever word, human expression or catharsis that is recurrently sensed by humans in its naming. Since it could as well be fable or myth, a primitive popular event shooting out from atavistically ancient directness, just as well as the playing of a string quartet, thunderstorm or volcano breakout, or again, the playing of moths or animal rut. We call it 'literature' as we do also mostly rely on text, with an understanding of texts and contexts in it. We refer to it as if understanding a text differed from understanding a world. That is, we act as if law were simple text-reproducing concretisation, instead of the (unmatched but always accessible) wisdom of the realisation that we weigh much and many times whilst we equalise balance only rarely–at a time when we can hardly do anything else. For, we hardly abide by anything else in law than tradition, within the frameworks of which we wish exactly–and just through the law and its responsively responsible practice–to relax.

Hamlet? *Michael Kohlhaas*? *Raskolnikov*? Heroes of Franz Kafka, Robert Musil, William Shakespeare, Heinrich von Kleist and Fyodor Dostoyevsky coming out from and then returning to fog? Instead of the self-reassuring conformism of the peacockery of hypocrisy, Friedrich Nietzsche shouted to the world the majestic royal nudity of Humanism still based on the Enlightenment. In lack of any resignation resulting from unprocessed conscience, Sören Kierkegaard concluded, in turn, a self-loss of being thrown into existence. Now, where are we ourselves? And what may we do mainly? For want of anything better, meditate while in front of our wise books, reading *The Trial of the Genius* by Barna Horváth[1] in order to care, protect and defend ourselves, and even more so at a time when we have

[1] Horváth, B.: Der Rechtsstreit des Genius: I. Sokrates and II. Johanna, a) Der Tatbestand and b) Das Verfahren. *Zeitschrift für öffentliches Recht*, 22 (1942), 126–162, 295–342 and 395–460.

already begun to choke from our own playing of false self-reassurance, still rounded off to mere geometry or rhetoric in our retained honesty. It seems to be purposeless to have constructed, like the Chess Turk by Wolfgang von Kempelen,[2] a lawyer moved by piston-valves of the rationale of some selected schemes.[3] This is so because all that notwithstanding, a human is hidden in the machinery, behind the bewigged-cloaked external appearances. That is, what is hidden is not rationality disciplined in The Turk's torso but benevolence, mixed with fallibility, because there is a spell of drama in the air when the lawyer starts calculating or concluding a deal with an apparently cool head. The tempting remembrance of the Greek theatre[4] is not by chance, therefore. For all those fighting are humans, although mere fate will decide after all. We rectify, and intervene to struggle with self-created rules, which could perhaps be cruder without us; we even try to hold down the hand of the fate, although no human effort is ever to succeed in full. We may have fought ourselves to get into the arena without, however, pushing out fate's hand. In turn, we are already so many and flail with so wide a range of weapons that sometimes we already trample each other; moreover, here and now we ourselves stumble upon our deflecting devices more and more.

What remains still? Nothing else but struggle and confidence. Can fight and trust be added to them? They are a strange combination at first glance, since the former was already practiced before the law, and the latter serves as a balm despite the law, too. And then, what might be the lesson to be drawn from all this? Maybe the first is the fact that no device can dispense of a manufacturer. Later on, it does not work instead of or without a user. Therefore, we have to resist the command of the self-laudating idol in front of us that, instead of the Good Lord, would make us adore this humanly created civilisation up to the point when, grovelling in front of it, we would also give up our civility and responsibility.

"Law and Literature" recalls that which is infinite in fallibility and which is not transparent in its simplicity, that is, the situation confronted that we may not avoid deciding about despite the fact that we may not get to a final understanding. This is so because we may tear much from the wires, albeit we cannot solve their totality. What is said here and now–for want of anything better–as "Law and Literature" is, therefore, only a life-substitute. Like an artificial ersatz, it helps us to see out from our everyday complexities, exemplifying why our personal existence is difficult to grasp, a condition that we cannot surpass, even if we may improve it to make it more noble with love offered to everyone. All this is like a monastic psalm: they do and we do what we all have to do, as this is the only thing that may convey meaning on our daily efforts, on human labour, without being able to replace it. This is one of the chances which we may securely draw on.

[2] Cf. <http://www.kempelen.hu/index_en.html>, <http://en.wikipedia.org/wiki/The_Turk> and <http://www.museumofhoaxes.com/hoax/Hoaxipedia/Great_Chess_Automaton/>.

[3] Cf. Varga, Cs.: Leibniz und die Frage der rechtlichen Systembildung. In: Mollnau, K. A. (hrsg.): *Materialismus und Idealismus im Rechtsdenken: Geschichte und Gegenwart.* Stuttgart, 1987. 114–127.

[4] What will survive in medieval mysterium and morality plays or school dramas unchangingly unifying theatric performance and justice publicly administered, with experiencing the transmission of community messages as a community function. Cf., e.g. Gillespie, J. C.: Theatrical Justice. *Northern Ireland Legal Quarterly*, 31 (1980), 67–72. as well as–equipped with sharpened problem-centredness–Garfinkel, H.: Conditions of Successful Degradation Ceremonies. *American Journal of Sociology*, 61 (1956), 420–424. For a summary, see Tindemans, K.: *Recht en tragedie: De scène van de wet in de antieke polis.* [Diss.] Leuven, 1995/1996.

3. Varieties of "Law and Literature"

"Law and Literature"? We may brood over the helplessly expansive imperialism of the caducity of great nations, the undemanding servility of the self-emptying confidence of past conquerors, when their *gloire* has already dissipated.

Law and Literature differs from its antecedents. In the thoroughly based Anglo–American classical studies of more than a century ago, the literary *analogon* (either in personal paths of life or in problematic) still served as the medium of professional leisurely adventure;[5] and Shakespeare's oeuvre was used (in general[6] or as concentrated on his individual pieces, figures, *topoi*,[7] or as connected with his once lawyerly professional

[5] Its early treatments–with the exception to, e.g. Andrews, W. (ed.): *The Lawyer: In History, Literature, and Humour.* London, 1896–were hardly more than collections of interesting features of mere biographical data–, e.g. Hawes, G. R.: Literature and the Law. *The Green Bag* [An Entertaining Magazine for Lawyers], 11 (1899), 234–237 and Westley, G. H.: From Law to Literature. *The Green Bag*, 12 (1900), 446–449–or dythirambs of the literary value of old lawyerly documents–Holdsworth, W. S.: Literature in Law Books. *Washington University Law Quarterly*, 24 (1939), 153–172–or a series of free associations on the ungraspability of anything law–, e.g. Cardozo, B. N.: Law and Literature. [*Yale Review* (1925) reprint] *Columbia Law Review*, 39 (1939), 119–137–, and it is only at a later time that analyses with a philological care will crop up–, e.g. from two periods of time, Cahn, E. N.: Goethe's View of Law, with a Gloss out of Plato. *Columbia Law Review*, 49 (1949), 904–920 and Boland, D.: Images of Law in Classical Russian Literature. *Irish Student Law Review*, 8 (2000), 53–65–and mostly for a propedeutic purpose.

[6] Cf., e.g. Heard, F. F.: *Shakespeare as a Lawyer.* Boston, 1883; Davis, C. K.: *The Law in Shakespeare.* 2nd ed., St. Paul, 1884; White, E. J.: *Commentaries on the Law in Shakespeare, with Explanations of the Legal Terms Used in the Plays, Poems and Sonnets, and a Consideration of the Criminal Types Presented, also a Full Discussion of the Bacon–Shakespeare Controversy.* 2nd ed., St. Louis, 1913; Greenwood, G.: *Shakespeare's Law.* London, 1920; Barton, D. P.: *Links between Shakespeare and the Law.* London, 1929; Keeton, G. W.: *Shakespeare and his Legal Problems.* London, 1930; Keeton, G. W.: *Shakespeare's Legal and Political Background.* New York, 1968; Phillips, O. W.: *Shakespeare and the Lawyers.* London, 1972; MacKinnon, F. V.: *The Timeless Shakespeare: The Natural Law in Shakespeare.* Gloucester, 1985; Wells, R. H.: *Shakespeare, Politics and the State.* London and Basingstoke, 1986; Cook, N. L.: Shakespeare Comes to the Law School Classroom. *Denver University Law Review*, 68 (1988), 387–411; Kornstein, D. J.: *Kill all the Lawyers? Shakespeare's Legal Appeal.* Princeton, 1994; Ward, I.: *A Kingdom for a Stage, Princes to Act: Shakespeare and the Art of Government.* Nottingham, 1997 and Ward, I.: *Shakespeare and the Legal Imagination.* London, 1999; Sokol, B. J.-Sokol, M.: *Shakespeare's Legal Language.* London and New Brunswick, 2000.

[7] Cf., e.g. Guernsey, R. S.: *Ecclesiastical Law in Hamlet: The Burial of Ophelia.* New York, 1885; Clarkson, P. S.–Warren, C. T.: *The Law of Property in Shakespeare and the Elizabethan Drama.* Baltimore, 1942; Gless, D. J.: *Measure for Measure: The Law, and the Convent.* Princeton, 1979; Clark, A. M.: *Murder under Trust, or the Topical Macbeth and Other Jacobean Matters.* Edinburgh, 1981; Gohn, J. B.: Richard II: Shakespeare's Legal Brief on the Royal Prerogative and the Succession to the Throne. *Georgetown Law Journal*, 70 (1982), 943–973; Hamilton, D. B.: The State of Law in Richard II. *Shakespeare Quarterly*, 34 (1983), 5–17; Klein, H.–Dávidházi, P. (eds): *Shakespeare and Hungary: The Law and Shakespeare.* Lewiston, 1996; Hawley, W. M.: *Shakespearean Tragedy and the Common Law: The Art of Punishment.* New York, 1998; Kahn, P. W.: *Law and Love: The Trials of King Lear.* New Haven, 2000; Sokol, B. J.–Sokol, M.: *Shakespeare, Law, and Marriage.* Cambridge and New York, 2003; McDonald, M. A.: *Shakespeare's King Lear with The Tempest: The Discovery of Nature and the Recovery of Classical Natural Right.* Lanham and Oxford, 2004.

practice[8]) as a theological, ethical or political warehouse of patterns to forge an understanding of the nature and infinity of law as one of the deepest human challenges; jurist authors in that period turned with interest to other literary manifestations, too,[9] just as they constructed examples in the fine arts[10] or architecture.[11] By contrast, as Law and Literature expressedly becomes a movement in the United States of America,[12] it is not a product of philosophical

[8] Cf., e.g. Hicks, F. C.: Was Shakespeare a Lawyer? A Review of the Literature in Question. *Case and Comment* [Rochester, N.Y.], 22 (1916), 1002–1011; Law, E.: *Shakespeare's »Tempest« as Originally Produced at Court.* London, 1920; Knight, W. N.: *Shakespeare's Hidden Life: Shakespeare at the Law (1585–1595).* New York, 1973; Kornstein, D. J.: *Kill all the Lawyers? Shakespeare's Legal Appeal.* Lincoln and London, 2005.

[9] E.g. Hester, D. A.: Law and Piety in the »Antigone«: A Reply to J. Dalfen, »Gesetz ist nicht Gesetz...«. *Wiener Studien*, 14 (1980), 5–11; Hornsby, J. A.: *Chaucer and the Law.* London and Norman, 1988; Cambridge, R.: Aequitas and Iustitia in Mediaeval German Psalters. In: *Mediaeval German Studies Presented to Frederick Norman.* London, 1965. 31–38; Kirchberger, L.: *Franz Kafka's Use of Law in Fiction: A New Interpretation of In der Strafkolonie, Der Prozess, and Das Schloss.* New York, 1986; Islawm, S.: *Kipling's »Law«: A Study of his Philosophy of Life.* London, 1975; Hildebrand, E. G.: Jane Austen and the Law. *Persuasions* [Journal of the Jane Austen Society of North America], 4 (1982), 34–41 and Treitel, G. H.: Jane Austen and the Law. *Law Quarterly Review*, 100 (1984), 549–586; Simon, E.: Palais de Justice and Poetic Justice in Albert Camus. The Stranger' *Cardozo Studies in Law and Literature*, 3 (1990), 111–125.

[10] E.g. Wind, E.: Platonic Justice, Designed by Raphael. *Journal of the Warburg and Courtauld Institutes*, 1 (1937–1938), 69–70; Cummings, F.: Poussin, Haydon, and The Judgement of Solomon. *The Burlington Magazine*, 104 (1962), 146–152; Puttfarken, T.: Golden Age and Justice in Sixteenth-Century Florentine Political Thought and Imagery: Observations on Three Pictures by Jacopo Zucchi. *Journal of the Warburg and Courtauld Institutes*, 43 (1980), 130–149; Riess, J. B.: *Political Ideals in Medieval Italian Art: The Frescoes in the Palazzo dei Priori [Perugia (1297)].* Ann Arbor, 1981; Tiefenbrun, S. (ed.): *Law and the Arts.* Westport and London, 1998.

[11] Interestingly enough, English–American pragmatism produced a lot on this field like, e.g. Taylor, K. F.: *In the Theater of Criminal Justice: The Palais de Justice in Second Empire Paris.* Princeton, 1993; Graham, C.: *Ordering Law: The Architectural and Social History of the English Law Court to 1914.* Burlington, 2003; McNamara, M. J.: *From Tavern to Courthouse: Architecture and Ritual in American Law (1658–1860).* Baltimore and London, 2004.

[12] Just to mention few inspiring representatives, cf., e.g. Fish, S.: Working on the Chain Gang: Interpretation in the Law and in Literary Criticism. [*Critical Inquiry* 9 (1982), 201 et seq. reprint] in his: *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies.* Oxford, 1989, 87–103; Levinson, S.: Law as Literature. *Texas Law Review*, 60 (1982), 373–403; White, J. B.: Reading Law and Reading Literature. *Texas Law Review*, 60 (1982), 415–445; Weisberg, R. H.: *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction.* New Haven and London, 1984; White, J. B.: *When Words Lose their Meaning: Constitutions and Reconstitutions of Language, Character, and Community.* Chicago and London, 1984 and *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law.* Madison, 1985; West, R.: Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Thought. *New York University Law Review*, 60 (1985), 145–211; Posner, R.: *Law and Literature: A Misunderstood Relation.* Cambridge and London, 1988; Levinson, S. and Mailloux, S. (ed.): *Interpreting Law and Literature: A Hermeneutic Reader.* Evanston, 1988; Weisberg, R.: The Law–Literature Enterprise. *Yale Journal of Law and the Humanities*, 1 (1988), 1–67; West, R.: Communities, Texts, and Law: Reflections on the Law and Literature Movement. *Yale Journal of Law and the Humanities*, 1 (1988), 129–156; White, J. B.: What Can a Lawyer Learn from Literature? *Harvard Law Review*, 102 (1989), 2014–2047; Weisberg, R.: *Poethics and Other Strategies of Law and Literature.* New York, 1992; White, J. B.: *Acts of Hope: Creating Authority in Literature, Law, and Politics.* Chicago and London, 1994; Ward, I.: *Law and Literature: Possibilities and Perspectives.* Cambridge, 1995.

self-reflection pressed any longer without interests but is a device for avoiding scientific methodicalness in tribal discordance resulting from brutalised inside fights, when demands are launched and historical entitlements are declared. I am the one who once took part in the parade of the American world when saloon-Trotskyists, hidden in the mantle of the mainstream Critical Legal Studies, with unbarbered heads and in unwashed engine uniforms, flung in the face of wondering European legal sociologists: "Then damn the theory!"–although those latter asked only for the basis of this new-world toy, which played many times with us as a subversion, at an international scientific conference summoned at Oñati in the Basque Country–and saw his friends, theorists of Harvard with international reputations who could whisper about the line that cannot be easily found between respectability and political correctness. So too I was the one who took part in the Anglo–American Critical Legal Studies meeting in the crumbling New College building in Oxford, convened for a fashionable meditation limited to criticism, when on the cocktail-grass of the break the distinguished guest, me, invited from Hungary, having noticed the always closed gate of the ancient chapel opening for a few minutes for ritual reasons, called out ardently, and the domestic participants, recruited from suburbs, as new staff without the antique titles of their Bodleian Library having ever been used, reproved immediately the intruder: "Up? To church? Why? We never go there!". Well, accordingly my ruminations formed from such experiences and my Australian and American impressions of three decades ago, the revolutionism of the generation of 1968 culminated first in so-called Critical Legal Studies. Then, following the split into different isms, it disintegrated into so-called re-segregation deconstructionisms called either feminist or otherwise (sometimes ethnic), demanding historical revision and justice to be done by a re-division of the chance-giving cards. For instance, in the sanctum of Yale feminist jurisprudence presented itself in interjections, the sentimentalism of injuries, which the champions of intellectual methodicalness, self-styled masters of reason, listened to with cold faces. When they asked for its theory of knowledge and methodology, the answer was a more impetuous cry of pain, since–I realised–all this was just showing the scandal of domination until now (with cathatonic anger flung always in face of the "male chauvinism of white domination"), namely, that today's female revolutionists did not even have vocabulary with which they could express themselves. "From what might we gather"–they said, mostly with contemptuous rejection–"even if the Bible also speaks by you and for you?". Well, after such representatives had experimented, with a foundation based on narrative jurisprudence, how to ontologise law through the style analysis of the language of legal processes, that is, how to reveal from behind its striking neutrality the relations of domination as a basic structure (which they felt intolerable), such legal theories began slowly wandering to the domain of literature (of course, not to the European or American versions, which they hated, but to their *black*, *latino* or *hispanic* variations)–in the United States of America, at the end of the millennium, following the barbarian coming into power of the generation of students who rioted in 1968–since there was neither law nor theoretical demand in their production but sheer emotional self-conditioning and claims (that could otherwise be received with full respect).[13] Under such

[13] As formulated by T. Nagy: *Narratív tematika a kortárs amerikai jogelméletben* [Narrative topics in contemporary American legal theorising]. Szeged, 2003, 22: "Writings by representatives of feminist jurisprudence and race-consciousness [...] begin look like literary texts proper.". Or, it may be claimed that "Kafka's *The Trial* is as good a jurisprudence as any other legal theory". Gräzin, I.: On Myth, Considered as a Method for Legal Thought. *Law and Critique*, 15 (2004), 159–181, abstract.

conditions, not even the literary moment was too empathetic with them in the sense of European refinement, as the whole white male kit–from Homeros to Eugen Ionescu–could have been thrown away with pleasure in exchange for a good Puerto Rican woman slave story or for any pretext of female humiliation.

Law and Peace. Law and Modernisation. And Development, and Language, and Economy, and Literature–and all along the prayer-mill, in order to speak, having somewhat transcended Marxism, *à propos* of law in terms of political action and of the claim of a new class heralding new conquests, instead of law in a genuine sense or the morality and human values underlying it. Or, literature is just a pretence here[14]–with anonymous stories, instead of the civilisational meditations and debates of thousand years, as portrayed by Sophocles, Jean Racine, William Shakespeare, Johann Wolfgang Goethe, or just Albert Camus and Friedrich Dürrenmatt–because those rebels' demands, as sensed momentarily, can now be declared.

The *French* version of Law and Literature[15] is, as referred to earlier, dynamically forming but its footing is lost and the road missed, as for the time being it is hardly more than some panting feeding generated by the feeling of being overdue.[16] Of course, I believe that it may finish by borrowing the American naming patterns without following the latter's fashionable zigzags, and will strengthen as an auxiliary branch of studying law, and standing for interdisciplinarity itself,[17] as mixed with specific literary and artistic analysis.

[14] When it serves mere rhetorical purposes by signalling the legal absurdity of police actions exemplified by, e.g. Ghetti, M. R.: Seizure through the Looking Glass: Constitutional Analysis in Alice's Wonderland. *Southern University Law Review*, 22 (1994–1995), 231–254.

[15] E.g. Henriot, E.: *Moeurs juridiques et judiciaires de l'ancienne Rome d'après les poètes latins*. I–III. Paris, 1865 [reprint: Aalen, 1973 and Pamploma, 2007].

[16] Cf., e.g. Tzitzis, S.: Scolies sur les *nomina* d'Antigone représentés comme droit naturel. *Archives de Philosophie du Droit*, 33 (1988), 243–258; Biet, C.: La justice dans les *Fables*: La Fontaine et »le droit des gens«. *Le Fablier* [Revue des Amis de Jean de la Fontaine], (1992) 4, 17–24; Buschinger, D. (ed.): *Le droit et sa perception dans la littérature et les mentalités médiévales*. (Actes du Colloque du Centre d'Études Médiévales de l'Université de Picardie, Amiens, 17–19 mars 1989.) Göppingen, 1993; Malaurie, P.: *Droit et littérature: Une anthologie*. Paris, 1997; *Littératures classiques* [Toulouse] (2000), 40; Bouquet, P.–Voilley, P. (ed.): *Droit et littérature dans le contexte suédois*. Paris, 2000; Pech, T.: *Conter le crime: Droit et littérature sous la Contre-Réforme: les histoires tragiques (1559–1644)*. Paris, 2000; Rubinlicht-Proux, A.: *Le droit saisi par la littérature*. [Thèse, 1997.] Villeneuve d'Ascq, 2001; Biet, C. (ed.): Droit et littérature, *Europe* 80 (2002) 876; Ost, F.–Van Eynde, L.–Gérard, P.–van de Kerchove, M. (eds): *Lettres et lois: Le droit au miroir de la littérature*. Bruxelles, 2001. As revealed by Ost, F.: Raconter la loi: Aux sources de l'imaginaire juridique. Paris, 2004. and Brogniez, L. (ed.): *Droit et littérature: Dossier*. Bruxelles, 2007, it is the late translation of Posner's provocative book [in note 12], unnoticed for a decade–*Droit et littérature*. Paris, 1996.–that would give a new impetus to an enervate culture reactivated now in France.

[17] For instance, the course by M.-A. Frison and A.-G. Slama–<http://66.249.93.104/search?q =cache:odh5vYr7lQQJ:www.sciences-po.fr/formation/cycle1/annee2/ouverture_2006/mafr_slama.pdf +%22droit+et+litt%C3%A9rature%22+frison-rocheandhl=huandgl=huandct=clnkandcd=1>–stops at the wisdom–concluded from the legende of Horus, *Le Roman de Renart* [around 1175, attributed to Pierre de Saint-Cloud], Shakespeare's *The Merchant of Venice*, Racine's *Antigoné* and *Bérénice*, Balzac's *César Birotteau*, Dostoyevskiy's *The Brothers Karamazov*, Anatole France's *The Crime of Sylvester Bonnard*, and finally, Kafka's *The Trial*–in accordance to which in contrast to English–American literature, interested in procedural subtleties solely, the French literature focuses on cases when governmental measures can overweight law.

4. The German Study of Artistic Representations

It is perhaps typical that the *Germans*—who, due to their past romanticism, founded on classical monographies (and in scholarly grounded manners), exemplify analyses that might result from the fullness of human beings' fallible swirl over the law–do not relegate to any wonder-expectation anything like *Recht und Literatur* or *Recht und Kunst*. Instead, they do their job. With scholarly thoroughness founded a century ago, they use the literary legacy to a spectacular depth. And through a series of historical overviews and panoramic processing[18] of oeuvres rising like symbols—first of all by Shakespeare, Kleist and Kafka[19]–as well as monuments of world literature,[20] they look for the literary precipitation of the law's drama

[18] Cf., e.g. Keysser, A.: *Recht und Juristen im Spiegel der Satire.* I–II. Bad Rothenfelde, 1919; Rathe, K.: Der Richter auf dem Fabeltier. In: Weixlgärtner, A.–Planiscig, L. (ed.): Festschrift für Julius Schlosser zum 60. Geburtstage. Zürich, Leipzig and Wien, 1927, 187–205; Fehr, H.: *Das Recht in der Dichtung* [Kunst und Recht, II]. Bern, 1931. and *Die Dichtung im Recht* [Kunst und Recht, III]. Bern, 1936. and *Die Tragik im Recht.* Zürich, 1945; [Reichsminister] Frank, H.: *Recht und Kunst.* Leipzig, 1939; Nossack, H. E.: *Das Verhältnis der Literatur zu Recht und Gerechtigkeit.* Wiesbaden, 1968; Nentwig, M. A.: *Richter in Karikatur und Anekdote.* Köln, 1981; Würtenberger, T.: Satire und Karikatur in der Rechtsprechung. *Neue Juristische Wochenschrift*, (1983), 1144–1151; von Schirnding, A.: *Recht und Richter im Spiegel der Literatur.* Stuttgart, 1990; Kaufmann, A.: Recht und Gnade in der Literatur. *Neue Juristische Wochenschrift*, (1984), 1062–1069 and *Recht und Gnade in der Literatur.* Stuttgart, 1991; Molk, U. (ed.): *Literatur und Recht: Literarische Rechtsfälle von der Antike bis in die Gegenwart.* (Kolloquium der Akademie der Wissenschaften in Göttingen im Februar 1995.) Göttingen, 1996; Weber, H.: *Annäherungen an das Thema »Recht und Literatur«.* Baden-Baden, 2002; Weber, H. (ed.): *Prozesse und Rechtsstreitigkeiten um Recht, Literatur und Kunst.* Baden-Baden, 2002; Weber, H. (ed.): *Dichter als Juristen.* Berlin, 2004; Weber, H.: *Recht und Juristen im Bild der Literatur.* Berlin, 2005; Kaul, S.: *Fiktionen der Gerechtigkeit: Literatur, Film, Philosophie, Recht.* Baden-Baden, 2005.

[19] Cf., e.g. with respect to William Shakespeare, Kohler, J.: *Shakespeare vor dem Forum der Jurisprudenz.* Würzburg, 1883–1884 and Berlin, 1919, Illies, G.: *Das Verhältnis von Davenants »The Law against Lovers« zu Shakespears »Measure for Measure« und »Much Ado about Nothing«.* Halle, 1900 and Schwarze, H.-W.: *Justice, Law and Revenge: The Individual and Natural Order« in Shakespeares Dramen.* Bonn, 1971; in respect to Heinrich von Kleist see Caro, H. C.: *Heinrich von Kleist und das Recht: Zum 100 jährige Todestage Kleist's.* Berlin, 1911; Körner, J.: *Recht und Pflicht: Eine Studie über Kleists »Michael Kohlhaas« und »Prinz Friedrich von Homburg«.* Leipzig and Berlin, 1926; Fink, A.: Michael Kohlhaas–ein noch anhänginger Prozeß: Geschichte und Kritik der bisher ergangenen Urteile. In: Becker, H.-J. and al. (eds): *Rechtsgeschichte als Kulturgeschichte. Festschrift für Adalber Erler zum 70. Geburtstag.* Aalen, 1971, 37–108, Sendler, H.: *Über Michael Kohlhaas–damals und heute.* Berlin, 1985, Apel, F. (ed.): *Kleists Kohlhaas: Ein deutscher Traum vom Recht auf Mordbrennerei.* Berlin, 1987; Ensberg, P. (ed.): *Recht und Gerechtigkeit bei Heinrich von Kleist.* Stuttgart, 2002; and eventually, with respect to Franz Kafka see Hebell, C.: *Rechtstheoretische und geistesgeschichtliche Voraussetzungen für das Werk Franz Kafkas, Analysiert an seinem Roman »Der Prozess«.* Frankfurt am Main, 1993; Ferk, J.: *Recht ist ein »Prozess«: Über Kafkas Rechtsphilosophie.* Wien, 1999.

[20] Cf., e.g. in chronological order of subjects, Funke, H.: *Die sogennante tragische Schuld: Studie zur Rechtsidee in der griechischen Tragödie.* Köln, 1963; Kaufmann-Bühler, D.: *Begriff und Funktion der Dike in den Tragödien des Aischylos.* [Diss.] Heidelberg, 1954; Gagarin, M.: Dike in the »Works and Days«. *Classical Philosophy*, 68 (1973), 81–94 and Dike in Archaic Greek Thought. *Classical Philosophy*, 69 (1974), 186–197; Kolb, H.: Himmlisches und irdisches Gericht in karolingischer Theologie und althochdeutscher Dichtung. *Frühmittelalterliche Studien*, 5 (1971), 284–303; Klibansky, E.: *Gerichtsszene und Prozeßform in erzählenden deutschen Dichtungen des*

with the involved (and sometimes insoluble) dilemma that our fallible human history is to face. They reconstruct the law's world picture using other arts like fine arts[21] and architecture,[22] giving an opportunity to dissertations' monographic treatment.[23] And all this

12.–14. Jahrhunderts. Berlin, 1925; Conrad, H.: Recht und Gerechtigkeit im Weltbild Dante Alighieris. In: Bauer, C. et al. (eds): *Speculum Historiale: Geschichte im Spiegel von Geschichtsschreibung und Geschichtsdeutung.* (Johannes Spötl aus Anlass seines 60. Geburtstages.) Freiburg, 1965. 59–66; Fehr, H.: *Das Recht in der Sagen der Schweiz.* Frauenfeld, 1955; Stuby, G.: *Recht und Solidarität im Denken von Albert Camus.* Frankfurt am Main, 1965.

[21] For a general overview see, e.g. Jessen, P. A.: *Die Darstellung des Weltgerichts bis auf Michelangelo.* Berlin, 1883; Voss, G.: *Das Jüngste Gericht in der bildenden Kunst des frühen Mittelalters: Eine kunstgeschichtliche Untersuchung.* Leipzig, 1884; von Moeller, E.: Die Augenbinden der Justitia. *Zeitschrift für christliche Kunst,* 18 (1905), 107–122 and 141–152, Die Waage der Gerechtigkeit. *Zeitschrift für christliche Kunst,* 20 (1907), 269 et seq. and 291 et seq. as well as 346 et seq., Die Zahlensymbolik in ihren Beziehungen zur Gerechtigkeit. *Zeitschrift für christliche Kunst,* 21 (1908), 137–148 and Das Auge der Gerechtigkeit. *Das Recht,* 21 (1908), 305–310; Fehr, H.: *Das Recht im Bilde* [Kunst und Recht, I]. Erlenbach-Zürich, München and Leipzig, 1923; Frommhold, G.: *Die Idee der Gerechtigkeit in der bildenden Kunst: Eine ikonologische Studie.* Greifswald, 1925; Holtze, F.: Die blinde Themis. *Deutsche Juristen-Zeitung* [Sonderausgabe (1925)]; Lederle, U.: *Gerechtigkeitsdarstellungen in deutschen und niederländischen Rathäusern.* [Diss.] Philippsburg, 1937; König, E.: Die sog. »Gerechtigkeitsbilder« der altniederländischen Malerei. In: *Das Recht in der Kunst.* Berlin, 1938, 198–208; Simon, K.: *Abendlänische Gerechtigkeitsbilder.* Frankfurt, 1948; Schoenen, P.: Die Kunst in Dienste des Rechts. In: Wolffram, J.–Kelin, A. (ed.): *Recht und Rechtspflege in den Rheinlanden (1819–1969): Festschrift für 150 jährigen Bestehen der Oberlandsgerichts.* Köln, 1969, 439–488 and 488–512; Kahsnitz, R.: Gerechtigkeitsbilder. In: *Lexikon der christlichen Ikonographie.* 2. (1970), 134–140; Dölger. F. J.: *Die Sonne der Gerechtigkeit und der Schwarze: Eine religionsgeschichtliche Studie zum Taufgelöbnis.* 2. Aufl. [repr. 1914.] Münster, 1971; Kissel, O.R.: *Die Justitia: Reflexionen über ein Symbol und seine Darstellung in der bildenden Kunst.* München, 1984; Bering, K.: *Kunst und Staatsmetaphysik des Hochmittelalters in Italien: Zentren der Bau- und Bildpropaganda in der Zeit Friedrichs II.* Essen, 1986; Latz, H.–Pleister, W.: *Recht und Gerechtigkeit im Spiegel der europäischen Kunst.* Köln, 1988; Sellert, W.: *Recht und Gerechtigkeit in der Kunst.* Göttingen, 1993; Bähli, M.: *Das Recht am eigenen Bild.* Basel, Genf and München, 2002.

[22] E.g., all by Frölich, K.: *Alte Dorfplätze und andere Stätten bäuerlicher Rechtspflege.* Tübingen, 1938; *Mittelalterliche Bauwerke als Rechtsdenkmäler.* Tübingen, 1939; *Stätten mittelalterlicher Rechtspflege im niederdeutschen Bereich.* Gießen, 1946; *Rechtsdenkmäler des deutschen Dorfs.* Gießen, 1947 and *Denkmäler mittelalterlicher Strafrechtspflege in Ost- und Mitteldeutschland.* Giessen, 1946.

[23] As partial monographising see, e.g.–treating the oeuvre of Albrecht Dürer–Würtenberger, T.: Recht und Gerechtigkeit in der Kunst Albrecht Dürers. In: *Kunst und Recht: Festgabe für Hans Fehr.* I. Karlsruhe, 1948, 221–235; Schultheiss, W.: Albrecht Dürers Beziehungen zum Recht. In: *Albrecht Dürers Umwelt: Festschrift zum 500. Geburtstag Albrecht Dürers am 21. Mai 1971.* Nürnberg, 1971, 220 et seq; Eichler, H.: *Recht und Reich bei Dürer.* Innsbruck, 1976; in respect of further giants, Hegel, E.: Rembrandt und das Recht. In: *Das Recht in der Kunst.* Berlin, 1938, 170–181 and Jerz, M.–Daumier, H. (eds): *Der Mensch und die Justiz.* Boppard, 1966; as to other manifestations, Troescher, G.: Weltgerichtsbilder in Rathäusern und an Gerichtsstätten. In: *Wallraf-Richartz-Jahrbuch,* 11 (1939), 139 et seq; Kisch, G.: Gerechtigkeitsbilder auf Basler Renaissance-Medaillen. *Zeitschrift für schweizerisches Recht,* 72 (1953), 341–371 and *Recht und Gerechtigkeit in der Medaillenkunst.* Heidelberg, 1955; Gathen, A. D.: *Rolande als Rechtssymbole: Der archäologische Bestand und seine rechtshistorische Stellung.* Berlin, 1960; Engelhard, E.: Die Gerechtigkeit auf Ofenplatten. *Landeskunde Vierteljahresblätter* [Trier], 13 (1967), 7–10; von Hielmcrone, U.-D.: *Die Darstellungen der Justitia im Landesteil Schleswig.* [Diss.] Kiel, 1974; E. van Holk, L.: Justitia: Bild und Sinnbild

is done so that both the genuine uncharted mystery of our human world, which composes the very substrate (background and medium, conditions and deep reasons) of legal problematisation in an almost limitless variegation, and our constant search for value-mediation, also weighing and balancing in cases of the apparently flat denial of values, can be shown by live examples.

Reaffirming the unerasable human moment that is hidden in the law, we may encounter *further*–and especially Spanish[24]–contributions as well, occasioned by literary[25] and fine arts[26] pieces.

Interest is also rising in Hungary.[27] It must be founded on monographisation, while its proper message can only be deciphered through essayism. For it may sound on "the »voice« of humaneness, which is recurrently muted by the impersonal procedures of law and the abstractions of decision-makers."[28]

What it is all about is perhaps not simply bridging the gap between the law's proposition and the case of law–with unavoidable tensions confronting the general and the individual,

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im 17. Jahrhundert in den Niederlanden. In: Carlen, L. (ed.): *Forschungen zur Rechtsarchäologie und rechtlichen Volkskunde.* Zürich, 1981, 155–199 and Eine mittelalterliche Rechtslegende und ihre Darstellung in der Kunst des 17. Jahrhunderts. In: *Forschungen zur Rechtsarchäologie und rechtlichen Volkskunde*, 5 (1983), 135–157; Becker-Moelands, M.-A.: Die Titelbilder juristischer Bücher. In: *Forschungen zur Rechtsarchäologie und rechtlichen Volkskunde*, 8 (1986), 41–77; Windisch, E.: Justitia: Porträt eines Mädchens, Porträt eines Vogels. In: *Festschrift für Hildebert Kirchner zum 65. Geburtstag.* München, 1985. 393–411.

[24] E.g. Obregón, J. R.: *Examen crítico de algunas ideas de derecho público que se leen en Don Quijote.* [Tesis.] Madrid, 1905; Martínez Val, J. M.: *En torno al »Quijote«: Dos ensayos jurídicos.* Cuidad Real, 1960; Batiza, R.: *Don Quijote y el Derecho.* México, 1964; Pérez Fernández, J.: *Ensayo humano y jurídico de »El Quijote«.* Madrid, 1965; Castañeda, J. E.: El Derecho et el Quijote. *Revista de Derecho y Ciencias Politicas* [Lima], 37 (1973), 5–67 and 199–250; Ciuro Caldani, M. Á.: *Filosofía, Literatura y Derecho: Estudios y notas.* Rosario, 1986; Fina Sanglas, A.: *Justicia y literatura.* Barcelona, 1993; Echevarría, R. G.: *Love and the Law in Cervantes.* New Haven and London, 2005; Talavera, P.: *Derecho y literatura: El Reflejo de lo jurídico.* Granada, 2006; Barchet, R. A. (ed.): *El Derecho en la épocy del Quijote.* (Seminario Internacional, organizado por el Instituto de Estudios Jurídicos Internacionales Conde de Aranda: Universidad Rey Juan Carlos, Campus de Vicálvaro, del 15 al 17 de marzo de 2005.) Pamplona, 2006; Prat Westerlindh, C.: *La justicia en »El Quijote«.* Madrid, 2006; González, J. C. (ed.): *Implicación derecho literatura: Contribuciones a una teoría del Derecho.* Granada, 2008.

[25] E.g. Carpi, D. (ed.): *Shakespeare and the Law.* Ravenna, 2003 and Meyer, M. J. (ed.): *Literature and Law.* Amsterdam, 2004.

[26] E.g. Zdekauer, L.: *L'idea della Giustizia e la sua immagine nelle arti figurative.* Macerata, 1909 and *Iustitia: Immagine e idea.* Siena, 1913; Stechow, W.: Römische Gerichtsdarstellungen von Rembrandt und Bol. *Oud-Holland*, 46 (1929), 134–139; Deonna, W.: La Justice à l'Hotel de Ville de Genève et la fresque des juges aux mains coupés. *Zeitschrift für schweizerische Archäologie und Kunstgeschichte*, 11 (1950), 144–149; Jónsdóttir, S.: *An 11th Century Byzantine Last Judgement in Iceland.* Reykjavík, 1950; Overdiep, Door Mr. G.: Justitia, waar is uw blinddoek? In: *Pro excolendo iure patrio, 1761–1961.* Groningen, 1961, 87–122; van Lohuizen-Mulder, M.: *Raphael's Images of Justice, Humanity and Friendship: A Mirror of Princes for Scipione Borghese.* Wassenaar, 1977.

[27] As an auxiliary to legal history, it can also found an interdisciplinary field of research as exemplified by, e.g. Kajtár, I.: *Bevezetés a jogi kultúrtörténetbe* (Introduction to the cultural history of law). Budapest and Pécs, 2002.

[28] Nagy: *Narratív tematika... op. cit.* 6.

the abstract and the concrete (as interwar legal philosophies claimed steadily[29])–and perhaps it is not even about some refining correction or supplementation (which motivated the French movement[30]). Instead, it is more about live meditation, professional methodicalness stepped back in order to gain further perspectives[31] and renewed reflection from a distance, so that the underlying reason for our profession can be recurrently rethought.

5. Some Literary Reconsiderations

Due to the artistic expression and internal inexhaustibility of literary presentation, in the parallel examination of law and literature even apparent truisms can feature as genuine enigmas, fertilising theoretical research.

As to the necessary connection between the transcendence of final issues and the worldly undertaking of law, one may draw from *The Tragedy of Man* by Imre Madách[32] (dramatist, surpassing his teacher[33] even as a professional thinker) the wisdom that may unite faith, hope and love. For "in the act of man steadily committing mistakes, who often fights in vain and without success, the verification of the existence of God is not included. To the contrary, it is man having languished in unsuccessful struggle and discouraged by the uncertain end, who needs strong trust in God in order to be able to restore the negative balance of his struggles having a penchant for denying life itself, towards life and further struggle." Such optimism is only feasible if it is oriented toward personal felicity through one of his or her community, which is precisely embodied by the Hungarian traditional public law focus on community, as testified to by the doctrine of the Holy Crown, in contrast to the Germanic model of private law dedication, rooted in their feudal experience.[34]

For me, the Kleistean story of *Michael Kohlhaas* used to provide a basic cultural anthropological exemplification of the ancient wisdom, which, enshrined by the Jewish, Islamic and autochthonous cultures, subordinates conflict-resolution to community peace (the classic '*shalom*'), to prevent, from the beginning, the unravelling of any one-sidedness without scale and proportion, especially of the relentless fights for justice.[35] Albeit for others

[29] As collected from the representative authors, see Somló, F.: *Schriften zur Rechtsphilosophie.* (ed. Varga, Cs.) Budapest, 1999; Moór, J.: *Schriften zur Rechtsphilosophie.* (ed. Varga, Cs.) Budapest, 2006; Varga, Cs. (ed.): *Die Schule von Szeged: Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas.* Budapest, 2006 and Losonczy, I.: *Abriß eines realistischen rechtsphilosophischen Systems.* (ed. Varga, Cs.) Budapest, 2002.

[30] Ost, F.–Van Eynde, L. in <http://66.249.93.104/search?q=cache:AJD4ire0GaMJ:www.dhdi.free.fr/recherches/theoriedroit/articles/osteyndelit.doc+%22droit+et+litt%C3%A9rature%22+Ost&hl=hu&gl=hu&ct=clnk&cd=12> speaks about, e.g. scholarly diversion ("as a humanist decoration apt to clarify the dryness of legal evidence"), critical subversion ("revealing the king naked and the song's false disharmony"), and foundational conversion ("when the narrative turns to be the basis for making it »thought over«, »evaluated«, moreover, »prescribed« as well").

[31] "perspective on" in Posner, R. A.: Remarks on Law and Literature. *Loyola University Chicago Law Journal*, 23 (1991–1992), 181–195, quote at 182.

[32] Moór, Gy.: *Az Ember Tragédiája jogbölcseleti megvilágításban* [The »Tragedy of Man« in the light of legal philosophy]. Budapest, 1923. Cf. also <http://en.wikipedia.org/wiki/Imre_Madách> and *The Tragedy of Man* trans. Szirtes, G. in <http://mek.niif.hu/00900/00918/html/index.htm>.

[33] In so far as running counter to his master, Anton Virozsil, he will be an early follower of the doctrine of "natural law with variable content", theorised by Rudolf Stammler. *Ibid.* 13–14.

[34] Quote at *ibid.* 5, and comment at 15.

[35] Cf. Varga, Cs.: *Lectures on the Paradigms of Legal Thinking.* Budapest, 1999, para. 2.3.3.

(and also in a self-justifying manner) this is just the allegory of paradoxes, since "the verdict will repeat then the offence convicted by itself", as "*Kohlhaas* would have never achieved his justice [...], if he had not taken it himself", as a result of which, however, "the total compensation [...] will deprive him of his life".[36]

Or, through the dramatic presentation of one of the earliest known allegories of rival interests and roles, as played by Sophocles' *Antigone*, we may tentatively consider laying aside all our resultant sympathy for a moment, since we may be convinced that it is the espousal of *Antigone*'s rejection of any compromise that will force *Kreon* to act. For the community's very survival would be endangered by an equal acknowledgment of the mixed qualities of an emotionally fighting party, led by tradition, on the one hand, and of the conspirator, on the other, in the brother departed. That is to say exactly that the simple-minded inflexibility of *Antigone* may exclude for *Kreon* the possibility of any wise, humanely refined offer, with a compromise achieving a counter position without a final sharpening, while looking for any choice for cooperation.[37]

Or, pushing up to the final sense Dostoyevsky's permanently rooted humane thoughts, we may dawn on the idea that offences are neither to be matched with one another, nor are they to be matched with their penalties, since–as we may learn from common wisdom as opposed to the forcedly impersonal typification of the law–"[e]very story is individual, while the final sentence is however the same".[38]

6. Conclusion

In the end, we may realise that for such an interest, it is not literature that is from the outset endowed with some predestined role. As the embodiment of a type of thinking, literature is the symbol and synonym of reflected life, a field where "the mystery manifesting itself through different fates"[39] can be represented. Otherwise expressed, literature is hardly anything other here than a substitute for theology, rooted in earthly existence as a supply to foster feeling transcendence. Law, too, came into being to serve this, although we cannot explain what it is originally and what law could serve it the best, and how. Nevertheless, the closest to the issue may be the *Confessiones* by Augustinus (preceding the time when theology as a distinct scholarship was born), since it targeted our faith in God as humanity's basic need, expressed by love streaming from humanity.

[36] Miller, J. H.: Laying down the Law in Literature: The Example of Kleist. *Cardozo Law Review*, 11 (1989–1990), 1491–1514, quote at 1500, note 29 and at 1501.

[37] Posner: *Remarks on Law and Literature. op. cit.* 183 and 193–194.

[38] Murav, H.: Dostoïevski et le droit. *Europe* 80 (2002), 115. Cf. Varga: *Lectures on the Paradigms... op. cit.* para. 2.3.1.5.

[39] Ost et al.: *Lettres et lois... op. cit.*

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GÁBOR ATTILA TÓTH*

From Uneasy Compromises to Democratic Partnership: The Prospects of Central European Constitutionalism**

Abstract. The Central European countries have been constitutional democracies for two decades. They were created by the political and constitutional transition of 1989, which was based upon the acknowledgment of fundamental rights and the rule of law. Timothy Garton Ash has argued that the peaceful, negotiated regime changes in Central Europe established a new model of non-violent revolution. The year 1989 became the major historical reference point for this kind of change. However, more than twenty years later, in the light of antidemocratic, authoritarian and intolerant tendencies, it is far from clear whether the negotiated revolution is a story of success or failure. This paper first outlines the constitutional and political background of revolutionary transition. It shows that uneasy compromises with members of the ancien régime were an unavoidable part of the peaceful transition. Nevertheless, the achieved constitutional structures and rules do not prevent political communities from realising the full promise of democracy. Second, this analysis attempts to explore, through the use of examples, how the century-old historical circumstances, the social environment, and the commonly failed practice of constitutional institutions interact. The goal of this section is to highlight some of the differences between universal principles and local peculiarities, focusing particularly on the constitutional features of presidential aspirations, the privileges of churches and certain ethnic tensions. The way the authorities apply the constitution is not detached from place and time, since those authorities possess culturally and historically predetermined knowledge and premises. Thus, we can say that antidemocratic, authoritarian and intolerant political and legal tendencies are embedded in the past and present of political communities. Finally, the paper argues that the chances of success of liberal democracies depend significantly on extraconstitutional factors. It seems that Hungary is in a more depressing and dangerous period of its history than for example Poland. The future of Central European constitutional democracies relies on the actions of people in the countries concerned and the commitment of Western societies.

Keywords: Central Europe, political transition, constitution, parliamentarism, presidential system, freedom of religion, discrimination, Roma people

I. The promise of democracy

A quarter-century ago the Central European countries, the former Czechoslovakia, Hungary and Poland, were Communist regimes that could be characterised by a single-party system (Hungary) or a dominant-party system (Czechoslovakia and Poland) without the possibility of competitive elections. The common feature of these states, like any other Communist countries, was chronic shortage:[1] an economy of shortage instead of a market economy, a budget deficit instead of a balanced budget, and the lack of democratic institutions rather than a constitutional democracy. Although constitutions formally declared fundamental rights, these were not legally enforceable. The constitutional structures of these states were not based upon the principles of separation of powers and the rule of law. Moreover, the

* Assistant Professor, University of Debrecen, Faculty of Law, H-4010 Debrecen, P.O. Box 81. E-mail: tga818@law.unideb.hu

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[1] Kornai, J.: *Economics of Shortage*. Amsterdam–New York, 1980.

states did not ensure the independence of the judiciary or the press. And, of course, non-governmental organisations were forced by the repressive regimes to work underground.

Today, the Central European countries, the so-called Visegrád Group,[2] belong to the class of constitutional democracies. This term refers to a set of political institutions and practices:[3] notably, members of the legislature are selected through periodically held free elections. The vast majority of the nation's adult population has the right to vote regardless of race, gender or property ownership. The states' constitutions contain enforceable legal provisions rather than a collection of mere good wishes. The purpose of constitutions is seen as limiting the authority of state power. Each of these constitutions recognises and protects judicial independence, freedom of the press and the right to establish civil associations. There are constitutional courts–or in Poland, a Tribunal–hat safeguard the observance of constitutional regulations and strike down unconstitutional laws.[4] Judicial protection of the constitution in all countries is closer to the centralized German model than to the diffuse U.S. judicial review.

The historical turning point for the transformation from authoritarian regime to democracy was the autumn of 1989. Timothy Garton Ash described the events with the expression "refolution", combining the term of reform and revolution.[5] Other authors label the developments as "coordinated transition",[6] or "negotiated revolution".[7] Moreover, the dissolution of the federal state of Czechoslovakia and the establishment of the Czech Republic and the Slovak Republic, which took place in 1993, is often mentioned as "Velvet Divorce", a reference to the term "Velvet Revolution" that was used internationally to describe the 1989 revolution[8] (the Slovaks used the term "Gentle Revolution"). These classifications all express that the Central European single-party systems did not collapse

[2] The Visegrad Group consists of the Czech Republic, the Republic of Hungary, the Republic of Poland and the Slovak Republic. The name comes from the Northern Hungarian town of Visegrad, which hosted the royal summit of the Central European emperors in the 14th century. The group was established during a meeting of the President of Czechoslovakia, Václav Havel, the Prime Minister of Hungary, József Antall, and the President of Poland, Lech Wałęsa, which was held in Visegrád in 1991. The main reasons for the cooperation stem not only from the geographical closeness of these countries but also from their common interests in the future development of Central Europe within the EU and the transatlantic relations.

[3] Kis, J.: *Constitutional Democracy.* Budapest–New York, 2003, ix, xiv.

[4] From theoretical and critical point of view see Sadurski, W.: *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe.* Dordrecht, 2005. See also Schwartz, H.: *The Struggle for Constitutional Justice in Post-Communist Europe.* Chicago–London, 2000; Procházka, R.: *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe.* Budapest–New York, 2002.

[5] Ash, T. G.: Refolution, the Springtime of Two Nations. *The New York Review of Books*, 36 (1989) 10; Ash, T. G.: Revolution in Hungary and Poland. *The New York Review of Books*, 36 (1989) 13.

[6] Kis, J.: Between Reform and Revolution. *East European Politics and Society*, 12 (1998) 2, 300–383.

[7] Tőkés, R. L.: *Hungary's Negotiated Revolution: Economic reform, social change and political succession, 1957–1990.* Cambridge, 1996.

[8] But see the birth of the Czech Constitution from a critical point of view. Gümplova, P.: *Democracy and the Politics in Extraordinary: The Constitutional Making in Czechoslovakia.* 1992. www.newschool.edu/uploadedFiles/NSSR/Departments_and_Faculty/Political_Science/Recent_Placements/Gümplova-Democracy_Extraordinary.pdf

due to a classical revolution, but through negotiations and compromises between the old regime and the democratic opposition. However, the political transition did result in revolutionary changes in the political and constitutional system and did so without a revolution as such.[9]

In his new evaluation, Ash presupposes that the peaceful, negotiated regime changes in Central Europe together with unification of Germany and disintegration of the Soviet Union established a new model of non-violent revolution. The ideal type of classical revolution is "violent, utopian, professedly class-based, and characterized by a progressive radicalization, culminating in terror". "The 1989 ideal type, by contrast, is non-violent, anti-utopian, based not on a single class but on broad social coalitions, and characterized by the application of mass social pressure–"people power"–to bring the current power holders to negotiate. It culminates not in terror but in compromise. If the totem of 1789-type revolution is the guillotine that of 1989 is the round table."[10]

Without doubt, the negotiation was a process led not by the common interests of the parties, but by a clash of values and interests, in which both parties, the Communists and the Democratic movements, were compelled to make compromises. We can say that the demand to reach compromises is one of the underlying characteristics of peaceful transitions. A well-known example is that in the first Polish elections 65 percent of the parliamentary seats were secured by the Communists, and the position of President of the Republic was also shaped to suit their expectations. Due to the rapidly changing political environment, the Hungarian opposition was forced to make much smaller compromises. In order to incorporate those modern constitutional principles and rules into the Constitution that were strongly favoured by the opposition, it was impossible to exclude the representatives of the old regime from political power and economic advantages. Moreover, not only pragmatic motives but also principled reasons underlay the absence of mass revenges. That is to say the legal guarantees of the new constitutional democracies were extended to everyone, irrespective of which side they had taken. The Hungarian Constitutional Court called this "a revolution under the rule of law".[11]

Consequently, the new democracies faced a double, seemingly paradoxical task: they had to explore the legal and moral difference between the old and the new regime, and make clear beyond doubt that they did not place the representatives of the old regime at a legal disadvantage unacceptable in a state under the rule of law. It is striking that after the transition the Central European countries faced the same legal and political questions, applied similar constitutional principles and rules, and operated identical procedures. Although the solutions were sometimes different, the procedures dealing with the Communist heritage were basically determined by Parliaments and Constitutional Courts reacting to each other's activity, occasionally fighting with each other. The most significant issues include the rehabilitation and compensation of the victims of the Communist regimes'

[9] János Kis characterises the coordinated transition as an interruption of legitimacy, but continuity of legality. Kis, J.: *Between Reform and Revolution. op. cit.* 317. See also from the critical point of view of democratic theory, Arato, A.: Dilemmas arising from the Power to Create Constitutions in Eastern Europe. In: Rosenfeld, M. (ed.): *Constitutionalism, Difference, Identity, and Legitimacy.* Durham, 1994, 165–194.

[10] Ash, T. G.: Velvet Revolution: The Prospects. *The New York Review of Books*, 56 (2009) 19.

[11] Decision 11/1992. See Sólyom, L.–Brunner, G. (eds): *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court.* Ann Arbor, 2000, 214.

punitive measures, the restitution of the unjustly nationalised properties, the use of retroactive sanctions of criminal justice, and the disclosure of the secret services' files.

In this respect the transition in Central Europe seems to be finished. The uneasy compromises with members of the *ancien régime* were an intrinsic, unavoidable part of the negotiated revolution. The non-violent but drastic change created political and legal institutions akin to those already existing in the established liberal democracies. In comparison with the speedy political transformation, the texts of the constitutions were changed progressively. In the aftermath of the Polish Round Table Agreement, the old constitution was amended in April 1989, and the first democratic parliament then reshaped the relations between the legislative and executive branches of the State ("Small Constitution"). The reformed constitution was finally replaced in 1997 by a completely new constitution for Poland. The constitution of Czechoslovakia was also amended several times between 1989 and 1992. The most important of these is the incorporation of the Charter of Fundamental Rights and Basic Freedoms in 1991. After the dissolution of the federal state, the Czech Republic and the Slovak Republic adopted a new constitution in 1992. However, the Fundamental Rights Charter remained a part of both constitutional systems. In the Czech Republic the separate document has the same legal rank as the constitution. In Slovakia the basic provisions of the Charter were integrated directly into the constitution. By contrast, Hungary is the only nation that did not adopt an entirely new constitution after the fall of Communism. Similarly to the other countries in the region, the 1989–1990 amendments of the old text created the legal frameworks of the new constitutional democracy. Since the transition, the Constitution has been amended several times, including the modification that empowered Hungary to join the European Union.

Since the models of the reshaped Central European constitutions were international human rights instruments, as well as the more recent Western constitutions, they were written in the language of modern constitutionalism. As regards the constitutional principles, the institutional architecture and the language of the constitutional reasoning, each Central European country belongs to the community of modern liberal democracies. (This is why Ash calls the Central European revolutions non-utopian.)

Nevertheless, I share the view that law in a constitutional democracy is an interpretive concept influencing the everyday life of the members of the political community, rather than a catalogue of rules.[12] Law and, especially constitutional law, is a practice of the political community. The Constitutional Court, other legal authorities (the Parliament, the President of the Republic, ordinary courts, ombudspersons etc.), petitioners and others are participants in that common practice. The way a constitutional court examines the text of a constitution depends on place and time. The justices possess culturally and historically predetermined pieces of knowledge and premises ("pre-judices").[13] In the course of deciding cases these preconceptions enter into dialogue with the norms. Thus, interpretation is embedded in the everyday life of the political community. On the one hand, it is so because the social environment provides the preconditions of interpretation; on the other, interpretation shapes communal practice.

[12] Here I follow Dworkin's conception of law as integrity. Dworkin, R.: *Law's Empire.* Oxford, 1998, 226, 410–413.

[13] Here I refer to Gadamer's hermeneutic conception. Gadamer, H.-G.: *Truth and Method.* New York, 1975.

In the following analysis I show, via Central European examples, how the century-old historical circumstances, the social environment, and the commonly failed practice of the constitutional institutions interact. The words of the Constitution are inseparable from the social context to which those words refer.

II. Universal principles and local peculiarities

Universal values and principles are the foundations of constitutional democracies. Individual rights and political equality are worthy of being pursued worldwide. In the modern era, the constitutional institutions of democracy enjoy widespread acceptance. Since their peaceful transition, Central European countries have been ensuring liberty, equality and collective self-government much more than before. This means a transition from an authoritarian to a democratic regime, from dominance of communist ideology to a pluralistic society. However, universal values and principles conflict with particular interests, nationalist aspirations and theoretical conceptions of political realism. I focus here particularly on the constitutional issues of presidential ambitions, the privileges of churches and ethnic discrimination because these issues may represent well the common constitutional difficulties and prosperities of the Visegrád countries.

1. Presidential ambitions

It is generally believed that a constitutional democracy may take various, equally reputable institutional forms. It may be a monarchy, such as Japan and Spain, or a republic like France. It may have a presidential (United States) or a parliamentary system (United Kingdom). It may be a federal (Germany) or a unitary state (South Africa). Nonetheless, some theorists argue that presidential systems have difficulties sustaining democratic practices. We might say that under a range of cultural and social conditions, a parliamentary regime is better than a presidential one. Depending on political traditions and culture, the electoral system and the prerogatives of the other branches of the state, presidentialism might slip into authoritarianism.[14]

The new Central European democracies followed Western European solutions in establishing adapted parliamentary systems instead of importing a U.S. presidential architecture.[15] In this respect, the Hungarian Constitution copies the German Chancellor-led system with a weak president elected by the parliamentary representatives. The Czech and the Slovak Constitutions determine similarly that the Prime Minister heads the executive and the Cabinet is the supreme body of that branch.[16] The Polish Constitution embodies, to some extent, a different system, whereby the popularly elected President and the Government jointly head the executive branch.

In spite of this, several scope-of-authority controversies reveal a characteristic uncertainty that occurs in Central European parliamentary systems. The President is frequently in political conflict with the Prime Minister. Formal power and actual power may differ: the President may expand his authority as "the guardian of the Constitution".

[14] Lipset, S. M.–Lakin, J. M.: *The Democratic Century.* Norman, 2004, 38–48.

[15] Lech Garlicki, L.: Democracy and International Influences. In. Nolte, G. (ed.): *European and U.S. Constitutionalism.* Cambridge, 2005, 264.

[16] Following a constitutional change in 1999, the Slovak president was no longer elected by the parliament, instead by popular vote. However, the Slovak Republic did not change to presidentialism.

Vindicating real power 'as the head of state and the depository of national sovereignty sometimes leads to theatrical struggles.[17]

In the early years of new democracies, serious conflicts emerged between presidents and prime ministers over appointment-related issues. The first President of Hungary disputed with the Prime Minister over the competences of the President as commander in chief of the armed forces. The Constitutional Court interpreted the president's power restrictively, defining that the constitution clearly provided a pure parliamentary system and the Government was the sole executive branch.[18] When the Hungarian President refused to sign the dismissal of the chairman of National Television initiated by the Prime Minister, the Constitutional Court tailored the President's right of refusal to appoint extremely narrowly. According to its reasoning, the President of the Republic "stands outside the executive power" and "no construction may be derived from the Constitution according to which the Government and the President of the Republic jointly head the executive branch, making consensus-based decisions in a mutually limiting and counterbalancing manner".[19] During a similar so-called media war, Polish President Walesa dismissed the chairman of the Committee for the Supervision over Radio and Television. The ombudsman challenged his decision. The Constitutional Tribunal ruled that the President could not dismiss the chairman, except for a judicially established violation of law.[20] The Slovak Prime Minister Mečiar asked President Kováč to discharge the foreign minister. Kováč refused and asked the Constitutional Court whether he was required by the Constitution to obey the Prime Minister's request. The Court ruled in its highly criticised decision that the President was not obliged to comply with the Prime Minister's request only to consider it.[21]

In recent years "chair wars" between prime ministers and presidents have been commonplace. The most decisive issues have been the following: who represents the country abroad and who represents the country's position in the European Union. In the past three years–following the short co-government of the Kaczyński twins[22]–Polish President Lech Kaczyński and Prime Minister Donald Tusk engaged in endless contention over the competences. It seems that the Czech President, Vaclav Klaus also wants to represent the State's authority in several subject matters. It is noteworthy that the Czech and Polish Presidents were the last two obstacles standing in the way of the EU Lisbon Treaty. Kaczyński signed the reform treaty into law only after Poland had won a United Kingdom-style opt-out from the Charter of Fundamental Rights by a protocol to the treaty.[23] Klaus

[17] Dorsen, N.–Rosenfeld, M.–Sajó, A.–Baer, S.: *Comparative Constitutionalism.* Cases and Materials. St. Paul (MN), 2003, 269.

[18] Decision 48/1991. See Sólyom–Brunner (eds): *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court. op. cit.* 159.

[19] Decision 36/1992. See Dorsen–Rosenfeld–Sajó–Baer (eds): *Comparative Constitutionalism. op. cit.* 268.

[20] Decision 7/1994. See *ibid.* 271.

[21] Resolution 39/93. (Jun 2, 1992.) See Schwartz, H.: *The Struggle for Constitutional Justice in Post-Communist Europe.* Chicago, 2000, 202.

[22] From July 2006 to November 2007 President Lech Kaczyński's identical twin brother, Jarosław Kaczyński served as Prime Minister.

[23] The Art. 1(1) of the protocol precludes both the domestic courts in Poland and the United Kingdom, and the EU courts from finding that "laws, regulations or administrative provisions, practices or action" in the countries to which it applies are inconsistent with the Charter. Art. 1(2) says that the Title IV of the Charter, which contains economic and social right does not create judicially enforceable rights.

also insisted such a preference and demanded an exemption to prevent German families expelled after the Second World War from lodging property claims with the European Court of Justice. Eventually, EU leaders promised to amend the protocol so that it would apply to the Czech Republic, and subsequently the Czech Constitutional Court raised no objections, so Klaus also signed the treaty.[24]

At the same time, it can be seen that these kinds of debate often result in correct conclusions. The Czech and the Polish Prime Ministers frequently refrain from any attempt to bypass the President, so as to avoid a constitutional crisis. In addition, these conflicts make it clear that in a parliamentary system it is the prime minister and the cabinet that define the state's position in EU and foreign-related matters. This means that the president could present the state's position at the international level only when authorized to do so by the prime minister and according to the cabinet and parliament's instructions. This solution comes from the text of the Czech and the Slovak Constitution, and, interestingly, Polish political and constitutional practice is moving toward this direction, too. (The Constitution of Poland does not contain this modification, because in 2009 the parties were not able to reach a consensus on this matter.)

However, it seems to me that Hungary is the only one country among the members of the Visegrád Group, which is moving in the opposite direction. László Sólyom, the President of the Republic did not intend to award the former Prime Minister on the recommendation of the current head of the Government in 2007. Therefore the President filed a petition with the Constitutional Court seeking the abstract interpretation of the Constitution. In his opinion "the moral integrity of the Head of State may be jeopardized if he is not given true discretionary powers in making a decision under his powers following from the Constitution". The President was convinced that his decision on recommendation for an award was a purely moral issue and represents solely a value judgment. Thus, the President might assert the constitutional values in accordance with his own moral integrity. In its decision the Constitutional Court ruled: "the President of the Republic has actual discretionary powers in conferring orders and awards... In case of a recommendation for an award that violates the constitutional values of the Republic of Hungary, it is the right of the President not to sign the recommendation, refusing to confer the award. Therefore, the refusal to confer an award... protects in this case the constitutional values of the Republic of Hungary."[25]

As a result of the decision the President refused to confer the award on the former Prime Minister because the latter had not changed his views on the 1956 revolution, in which he had fought against the rebels. Simultaneously, the President was about to widen his competencies. The head of the state began to represent an alternative government program: he launched his own foreign policy, engaged in conflicts with neighbouring countries, and strongly criticised the Government's economic policy. Last year the President *de facto* jeopardised the legislature by persistently returning Acts to Parliament for reconsideration and proposing preliminary norm control at the Constitutional Court. Currently, such authoritarian aspirations enjoy remarkable popularity in Hungary. It is widely believed that a wise statesman can be a better lawmaker than the disgraceful

[24] The protocol Klaus requested has no direct connection with the claims of the expelled Germans.

[25] Decision 47/2007.

Parliament, and this national leader should be the guardian of the Constitution instead of the unfamiliar Constitutional Court.[26]

Of course, this brief survey of the features of parliamentary systems and presidential aspirations in Central Europe is by no means exhaustive. Moreover, executive–legislative relations are more complex than a simple choice between a presidential and a parliamentary system.[27] Two conclusions, however, seems clear. First, when president and prime minister jointly head the executive branch, their decision-making in a mutually limiting and counterbalancing manner might jeopardise the functioning government.[28] Second, when a popular head of the state gains concentrated power, this might endanger the values and principles of constitutional democracy and tend to authoritarianism. In spite of the achievements of the first democratically elected, charismatic presidents, such as Havel and Wałęsa, dignified heads of the state with effective power may imperil democracy. Just like the lessons learnt from the region's earlier history, these recent examples also illustrate that under Central European societal circumstances a parliamentary regime could be better than a presidential one.

2. Church privileges

The future of the European political communities depends to a great extent on their ability to cope with religious challenges. Simply put, one of the two difficulties is to find the proper place for Christian values within secularised constitutional democracies. Some strongly warn about the growing influence of religious fundamentalism and suggest an exclusion of the non-secular considerations from the public discourse.[29] The other challenge Europe is facing now is how to effectively ensure equal rights and social cohesion for Muslim communities and individuals. As a result of terror attacks in some metropolises and the long-standing economic crisis, a worrying anti-Muslim trend has been developing in Western European countries.

Since the number of Muslims is much lower in Central Europe than in the West, the issue of the Christian values and a secular state plays a greater role in the constitutional jurisprudence of the Visegrád Countries. Examining closely only the text of the constitutions, we may assume that with the exception of Poland, the various religious organisations have equal status and people with different beliefs or conscience are treated as equals. Below, I demonstrate that the way judges apply the constitution does not depend on the text but rather on culturally and historically predetermined premises. In spite of the textual

[26] President Sólyom also had conflicts with the subsequent government. This is why he was not re-elected by the new parliamentary majority. The current prime minister has the ambition to be "the leader of the nation". It seems likely that the Constitution will be reshaped soon in accordance with these presidential aspirations.

[27] Shugart, M. S.: Of Presidents and Parliaments. *East European Constitutional Review*, 2 (1993) 1, 30.

[28] This is also the case in Romania and Ukraine.

[29] See for example the dispute between András Sajó and Lorenzo Zucca on the growing claims of religions and the position of the secular state. Sajó, A.: Preliminaries to a concept of constitutional secularism. *International Journal of Constitutional Law*, 6 (2008) 3–4, 605–629. Zucca, L.: The crisis of the secular state–A reply to Professor Sajó. *International Journal of Constitutional Law*, 7 (2009) 3, 494–514. Sajó, A.: The Crisis that was not there: Notes on a Reply. *International Journal of Constitutional Law*, 7 (2009) 3, 515–528.

differences, the Hungarian and the Polish constitutional case-law is similarly pro-Church and in some ways intolerant.

According to Wojciech Sadurski, the Polish Constitutional Tribunal is "the author of surely the most outrageously partisan and illiberal decisions of any constitutional court in the region".[30] The most infamous example is the 1997 decision concerning abortion. The Tribunal–by striking down a pro-choice statute–reintroduced a quasi-absolute ban on abortion issue. With this craven decision the Tribunal surrendered to the Church.[31] It is noteworthy that the "Small Constitution" did not specifically include a right to life. The abortion ban and the rights of foetuses therefore were deduced from the abstract constitutional declaration that Poland is a democratic state under the rule of law.

The 1997 constitution seemingly advanced the interests of the Catholic Church. The preamble refers to a "culture rooted in the Christian heritage of the Nation". In Art. 18, marriage, as the union of a man and a woman, is granted the protection of the state. According to the Art. 25, the relations between Poland and the Catholic Church shall be determined by international treaty concluded with the Holy See. Under Art. 53, religious education and religious upbringing are protected. However, according to the preamble, "we the people" are "[b]oth those who believe in God as the source of truth, justice, good and beauty, [a]s well as those not sharing such faith but respecting those universal values as arising from other sources". The Preamble also declares that believers and non-believers are "equal in rights". Art. 53 guarantees freedom of conscience to everyone. Art. 25 provides further protection, that public officials "shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life". What is more, the relationship between the State and the churches shall be based not only "on the principle of cooperation", but also "on the principle of respect for their autonomy and the mutual independence of each in its own sphere." Thus, despite the reference to God and conventional morality, the constitution has not created a Catholic Poland as an alternative to a secular state.

Considering only the text of the constitution, Hungary can be classified as an ideal example of the secular constitutional democracy. The Free Exercise Clause reads: "In the Republic of Hungary everybody has the right to freedom of thought, conscience and religion." According to the Separation Principle "the church shall operate in separation from the state". In contrast to the Polish constitution, this text does not refer to the Christian heritage or a treaty with the Holy See. Instead of state–church cooperation, it asserts only a strong separation principle.[32]

Despite these different constitutional guaranties, however, the Hungarian Constitutional Court often follows the ideas of historical churches by its conventionalist interpretation.[33]

[30] See Wojciech Sadurski's Book Review on Herman Schwarz's The struggle for constitutional justice in post-communist Europe. *International Journal of Constitutional Law*, 1(2003) 1, 162.

[31] Schwartz, H.: *The Struggle for Constitutional Justice in Post-Communist Europe.* Chicago, 2000, 69.

[32] Moreover, the historical circumstances are also different. While a great many people in the Polish Church made enormous contributions to the victory of democracy in Poland, the Hungarian churches remained inactive during the transition. See, for example, Michnik, A.: Church and State in Eastern Europe.The Clean Conscience Trap. *East European Constitutional Review*, Volume 7 (1998) 2, 67–74.

[33] For a detailed analysis of the following case-list see Tóth, G. A.: Unequal Protection: Historical Churches and Roma People in the Hungarian Constitutional Jurisprudence. *Acta Juridica Hungarica*, 51 (2010) 2, 122–135.

Although the abortion case struck down the quite liberal decree only on formal grounds (basic rights shall be regulated by an Act of Parliament), the reasoning emphasized that the legislature might extend the right to life and dignity to the foetus. In such a case, the abortion would be possible only if it was required to save the mother's life. "The nature of such an extension (...) is comparable only to the abolition of slavery, but it surpasses even that event in significance."[34]

In the Hungarian case law not only is homosexual marriage declared to be contrary to the Constitution, but the Court also hindered the introduction of the registered partnership of homosexual as well as heterosexual couples. Mainly historical churches objected the 2008 Act on Registered Partnership. The judgment that accepted the churches' conventional approach was passed before the given statute had come into force.[35]

According to the Court, "treating the churches equally does not exclude taking the actual social roles of the individual churches into account". The judgment on church status explicitly provided preferential treatment for historical churches vis-à-vis other religious communities.[36] Based upon this consideration, the Court found a decree on army chaplain service providing for the free exercise of religion and spiritual care only for members of the four historical churches (Catholic, Calvinist, Lutheran, Jewish) to be constitutional.[37]

Numerous cases ended with an exceptionally favourable financial outcome for historical churches. The Court declared it constitutional that churches are exempted from the general statutory ban on acquiring soil. Since 1997, "positive discrimination" has to be secured for church-run schools as compared with public education institutions run by foundations or associations. According to this decision, only church-run schools have the right to the auxiliary subsidy above the normative state allowance. In 2007 this preferential

[34] It was not the Constitutional Court but the Parliament that reintroduced a quite pro-choice regulation. For the Decision 64/1991 see Sólyom–Brunner (eds): *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court. op. cit.* 178.

[35] Decision 154/2008. In terms of heterosexuals the judges found it unacceptable that the statute did not separate adequately the status of registered partnership from the institution of marriage. As for homosexual couples, the judgment implicitly established the category of *separate and unequal*. Even though the decision theoretically acknowledged that the registered partnership of homosexuals is not unconstitutional, it did not uphold the reviewed regulation. Apart from the fact that homosexual couples may not get married, when it comes to regulating their registered partnership "the differences flowing from the nature" of such relationships and marriage must be maintained. This means that in Hungarian constitutional practice the reasons for equal treatment must be shown, not that there is a compelling interest in unequal treatment. After the ruling the Parliament passed a restricted version of the Act on Registered Partnership. As a result registered same sex partnership has become a legal option in Hungary. The Court upheld it in its Decision 32/2010.

[36] In the Czech Republic a 2002 Act created a two-tiered system of registration for religious organisations. To register at the first tier, a church must have at least 300 adult members residing in the country. In order to register at the second tier, the church must have existed for at least 10 years and must have a membership equal at least 0.1 per cent of the population. Second-tier registration entitles the church to a share of state funding as well as allowing the clergies to perform an officially recognized marriage ceremony and serve as an army-chaplain. Muslims have not been granted these privileges. See Pajas, P.: The Impact of the New Czech Law on Churches. *The International Journal of Non-for-Profit Law*, 6 (2003) 1. http://www.icnl.org/knowledge/ijnl/vol6iss1/special_6.htm

[37] According to Kis, this judgment would hardly survive the test either of the separation principle or that of the religious neutrality of the state and of the abolition of religious discrimination. Kis, J.: *Constitutional Democracy. op. cit.* 282.

financial treatment was extended to the social and welfare activities of the churches, in contrast to those humanist institutions that are not affiliated with churches. In 2008 the judges, by referring to the Treaty concluded between the Republic of Hungary and the Holy See, demanded that Catholic schools and public education institutions run by the state or municipalities be financed to exactly the same degree.

The above-mentioned cases illustrate that the interpretative practice of state–church cooperation strengthened the old privileges of historical churches. Moreover, by using the concept in the wrong way, the exceptional treatment falls within the ambit of constitutionally justifiable preferential treatment. From the perspective of constitutional interpretation, the judges accepted the premise that historical churches have notable social weight, and that they have an outstanding role in the field of spiritual care, and also socially and culturally. At the same time, through their decisions they influenced communal practice in such a way that historical churches were granted exceptionally favourable conditions for their spiritual and other activities. This type of traditionalism supports maintaining tradition even if it violates the principle of equality.

3. Ethnic discrimination

One of the most difficult issues of constitutional theory and practice concerns the equal protection of ethnic minorities. Political and constitutional debates regarding the rights of old and new minorities are a familiar feature of Western democracies. Old minorities are long settled within a particular territory and not those people but the state borders have moved. Conversely, new minorities, who face a more unfavourable social and legal environment, are immigrants, asylum seekers and guest workers.

The countries of Visegrád Group are not the preferred destinations of immigrants. However, a number of conflicts involving old minorities have emerged in the last two decades. Although ethnic violence did not undermine the transition to a constitutional democracy, nationalist tendencies and ethnic exclusions cause serious tensions among the population. In place of a comprehensive examination I describe just the tip of the iceberg.

More than ten million Roma people live in the European Union. No ethnic group in Europe suffers more social exclusion, worse discrimination and greater poverty. Roma are divided into a number of distinct populations; the largest and still growing part of them live in Central and Eastern Europe. By 2030, sixteen percent of Slovakia's under-eighteens will be Roma, according to a study by the Open Society Foundation Bratislava. The European Commission estimates that by 2040, forty percent of the new entrants onto Hungary's labour market will be Roma. The political and social conditions for Roma are worsening in Central Europe: the past years have seen an expansion in racist attacks of families, with homes set on fire as well as forced evictions and the building of walls around settlements.

However, for the most part, national authorities have felt little compulsion to help this most marginalised group. What is more, the new Hungarian Government–copying the Italian administration–proclaimed Roma to have become a national law and order problem. As a consequence, they are the target not only of increasing public hostility but also of special police measures and discriminatory criminal sanctions. In some countries, policies even add to discrimination and segregation: despite decades of calls for change, Roma children are still being segregated in schools and often placed in "special schools" with sub-standard education.

Direct or indirect discrimination against ethnic minorities is evidently a constitutional issue. The Constitutions of the Central European countries ensure the fundamental rights

for all persons on their territory without discrimination on the basis of race, colour, national or social origins. In accordance with this, national statutory laws prohibit discrimination in such areas as employment, housing, voting rights, education, and access to public facilities. Furthermore, all Constitutions explicitly protect ethnic minorities. (Besides the antidiscrimination principle, the Hungarian Constitution also provides for the principle of preferential treatment.) It is a common feature of the basic texts that the equality principle derives from the constitutional value of human dignity. The Hungarian Constitutional Court echoed the Dworkinian conception: "The prohibition of discrimination means all people must be treated as equal (as persons with equal dignity) by law–i.e. the fundamental right to human dignity may not be impaired, and the criteria for the distribution of the entitlements and benefits shall be determined with the same respect and prudence, and with the same degree of consideration of individual interests."[38]

Constitutions contain principles and general rules of institutions and human rights. Of course, Roma as an ethnic group cannot be seen in the text. But the question arises whether the courts or other authorities can apply the constitutions independently from the historical background and the community practice. Could the courts fulfil their task by examining nothing but the text and an individual complaint? According to some Constitutional Courts, the answer is yes. In the light of the leading case of the European Court of Human Rights, the answer is no.

In the case of *D.H. and Others v. the Czech Republic*[39] eighteen Czech nationals of Roma origin alleged that, as a result of their ethnic origin, they were assigned to special primary schools for children with learning difficulties. They argued that the placement in special schools amounted to a general practice that had resulted in segregation and racial discrimination through the coexistence of two educational systems, namely special schools for the Roma and ordinary schools for the majority of the population. Previously the Czech Constitutional Court dismissed the applicants' appeal partly on the ground that "there was nothing in the material before it to show that the relevant statutory provisions had been interpreted or applied unconstitutionally" and partly on the ground that it was not the Constitutional Court's role "to assess the overall social context".[40]

In contrast, the Grand Chamber of the European Court of Human Rights examined the empirical basis for and the historical background of the segregated school-system. It observed, for example, that the European Commission against Racism and Intolerance had noted that the channelling of Roma children into special schools for the mentally retarded was reportedly often "quasi-automatic". According to data collected from several independent bodies more than half of all Roma children in the Czech Republic–and specifically in the hometown of the applicants–attended special schools.[41] This evidence proved to be sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination. In these circumstances the Court was not satisfied that the difference in treatment between Roma and non-Roma children was objectively and reasonably justified.

[38] Decision 9/1990. See Sólyom–Brunner (eds): *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court. op. cit.* 111.

[39] D. H. and Others v. The Czech Republic, Judgment of 13 November 2007.

[40] Decision I. US 297/99.

[41] In 1999, 56 per cent of all pupils placed in special schools in Ostrava were Roma. Conversely, Roma represented only 2.26 per cent of the total number of pupils attending primary school in Ostrava. See D.H. and Others v. The Czech Republic, para 190.

As a consequence the Court held that the applicants as members of that community had necessarily suffered the same discriminatory treatment.[42]

In the case of *D.H. and Others v. the Czech Republic* the Court graciously noted that the Czech Republic is not alone in having encountered difficulties in providing schooling for Roma children and, unlike some countries, it has sought to tackle the problem.[43] The jurisdiction of the Czech Constitutional Court is certainly not exceptional.[44] It is well known that in Hungary many hundred thousands of Roma face social difficulties, prejudice and segregation.[45] However, if one wants to be informed by the constitutional case law, it is easy to overlook the fact that a part of the citizens is Roma.[46] This is so since the Hungarian Constitutional Court has not openly addressed the problems affecting Roma. From the first decade of constitutional review, it can be reconstructed from one of the decisions regarding compensation that, during the Second World War, similarly to Jews, Roma were also deported. Apart from this, the court never referred to the Roma in an explicit manner. Here are some examples of the case-law: the judges upheld a local government decree declaring those Roma people who do not fit into the life of the community *persona non grata*; they concluded that it was not unconstitutional that Hungarian law did not demand equal treatment from private organizations acting in the public sphere; they did not deal with the unfair treatment of Roma squatters, in spite of the joint motion of the Parliamentary Ombudspersons for Civil Rights and for the Rights of National and Ethnic Minorities; they refrained from reflecting social reality when examining the anti-Roma local governmental resolutions revoking social allowances; they referred to U.S. governmental abuses rather than Hungarian (or Czech or Slovak) malpractice in connection with coercive sterilization.[47]

[42] Previously a Chamber of the Court composed of seven judges held that there had been no violation of the Convention. Goodwin, M.: D.H. and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe. *German Law Journal*, 7 (2006) 4, 421–431.

[43] But see Siklova, J.–Miklusakova, M.: Denying Citizenship to the Czech Roma. *East European Constitutional Review*, 7 (1998) 2, 58–64.

[44] See also the case of Oršuš and Others v. Croatia, Judgment of 16 March, 2010, which upheld the precedent of the D.H. and Others v. The Czech Republic. The Constitutional Court of Croatia had dismissed the applicants' constitutional complaint on similar grounds than the Czech court. Subsequently the Government of the Slovak (!) Republic intervened as a third party in the European Court of Human Rights' proceedings. It referred to the margin of appreciation afforded to the States in the sphere of education and stressed that the States should not be prohibited from setting up separate classes at different types of school for children with difficulties, or from implementing special educational programmes to respond to special needs.

[45] See, for example, the European Commission against Racism and Intolerance's latest report on Hungary. http://www.coe.int/t/dghl/monitoring/ecri/Country-by-Country/Hungary/HUN-CbC-IV-2009-003-ENG.pdf

[46] For detailed analysis of the following case-list see Tóth, G. A.: *Unequal Protection: Historical Churches and Roma People in the Hungarian Constitutional Jurisprudence. op. cit.*

[47] Decision 43/2005. In reality, like in the Slovak and Czech cases, Hungarian Roma women are among the victims. For example, the Committee on the Elimination of Discrimination against Woman held that the State had violated a Roma woman's fundamental rights by performing the sterilization surgery without obtaining her informed consent. (CEDAW/C/36/D/4/2004.) A 2005 report by the Czech ombudsman identified dozens of cases of coercive sterilization between 1979 and 2001. See also, Body and Soul, Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia (Center for Reproductive Rights, 2003).

In sum, the taboo in Roma cases has not been broken yet. For two decades the problems relating to the exclusion and discrimination of Roma have remained hidden.[48]

Due to lack of space, I cannot deal with other constitutional aspects of Central European ethnic tensions. In general, the stronger a nation-building policy is, the more the Roma people suffer from discrimination. For example, the current legislative and governmental measures driven by nationalism in Hungary and Slovakia sometimes go hand in hand with anti-Roma actions. Recently the Hungarian parliamentary majority has reshaped the citizenship law, which represents an old-fashioned nation-state policy based upon language, culture and ethnicity rather than equality of all citizens, regardless of ethnicity.[49]

While, on the one hand, Central European Constitutions affirm the principle of non-discrimination and contain specific clauses for minority protection, on the other hand, the constitutional culture tends to provide room only for those who belong to the ethnic majority.

III. Conclusions

For two decades the Central European countries have been part of the group of constitutional democracies. In spite of uneasy political compromises, the coordinated transition resulted in revolutionary outcomes. Since international human rights instruments and Western constitutions influenced the texts of the constitutions, the reshaped constitutional systems do not hinder political communities from realising the full promise of democracy. In this respect the transition is unquestionably a success.

From Poland to Hungary, every Visegrád Country established its own parliamentary system. They created judicial institutions, in the form of constitutional courts, in order to enforce the principles and rights recognised by the constitutions. Numerous examples demonstrate that neither the parliaments nor the courts have been able to retain the last word as to constitutional adjudication. The meaning of the constitution is constructed through an institutional dialogue between elected officials and judges.

The achievement of these relatively new constitutional democracies depends significantly on extra textual factors, notably political and interpretive practices. The record of constitutional courts and other actors in defence of constitutional values is far from unambiguously positive. This paper has focused particularly on the constitutional issues of presidential aspirations, church privileges and ethnic discrimination. Of course, any selection of examples intended to illustrate a broader phenomenon is inevitably somewhat arbitrary. The differences among these countries certainly should not be ignored. Yet some concluding remarks seem in order.

[48] Kriszta Kovács shows that the Hungarian Constitutional Court has never declared unconstitutionality based upon suspect classification. It found, for example, that the victims of gender-based discrimination are mostly men. Kovács, K.: Think Positive, Preferential Treatment in Hungary. *Fundamentum, Human Rights Quarterly,* 5 (2008), 46, 48.

[49] Hungary passed a law this year granting dual citizenship to Hungarians living abroad. Citizenship will be awarded to those who can prove their knowledge of the Hungarian language and claim Hungarian ancestry. The new bill has inflamed tensions with Slovakia, home of 500,000 ethnic Hungarians who comprise more than ten per cent of the country's population. The Slovak Parliament immediately passed a law in order to pose an obstacle the dual citizenship. Previously, the Hungarian Constitutional Court ruled that it would not violate the non-discrimination clause of the Constitution or any international legal obligations if Parliament passed a law offering preferential naturalization that granted Hungarian citizenship–on request–to persons who claim Hungarian ethnicity but do not reside in Hungary. Decision 5/2004.

The words of a constitution are connected to an existing political community. The scope-of-authority conflicts between Central European presidents and prime ministers represent an uncertainty in constitutional interpretation not necessarily inherent in the written regulations. The constitutional status of a president can be changed without amending the constitution. As the recent controversies show, the main political actors, first and foremost the presidents, often misinterpret their competences.

Constitutional design and case-law are part of a larger social and political process. The choices of the interpreters determine to what extent social reality appears in judgments and to what conclusions it contributes. The privileges of historical churches are not based on the text of the constitutions so much as the churches' hypothetical social role. When changing societal experiences conflict with the conventions, then the conventions are sometimes held to be stronger than reality. An empirical survey could be an effective method of mapping indirect discrimination and racism. However, while historical churches have become constitutional categories, Roma barely appear in the decisions. Besides adequate reflection on the social reality, the constitutional interpretation also requires moral evaluation. In the case of historical churches, the judges apply the concept of preferential treatment, but it is not clear what type of inequality can be found at the starting point. In contrast, in the case of Roma numerous studies forewarn of the extraordinary social consequences arising from inequality.

According to the partnership view of democracy, people are full partners in a collective political enterprise, so that a majority's decisions are democratic only when certain further conditions are met that protect the status and interest of each citizen.[50] As a consequence, authoritarianism, prevailing ideology, historical privileges, and nationalism endanger democracy. In this respect, Hungary is currently in a depressing and dangerous period of its history. An empowered national leader seems to be an attractive constitutional alternative to the endless parliamentary debates. Paraphrasing the words of the Polish preamble, we can say that reference to God as the source of truth and justice in Hungary is more common than reference to those universal values as arising from other sources. These tendencies go hand in hand with a nation-state policy based upon national language, culture and ethnicity.

It is noteworthy that all Central European countries except for Hungary adopted a new constitution after the regime change. All of them preserved the values and institutions that had been established between 1989 and 1992.[51] The most recent Hungarian Government–having the required two-thirds parliamentary majority–has already announced that it will provide a new constitution for the country. In contrast to the other countries, the clear and present aim of the prospective Hungarian Founding Fathers is to repeal the 1989 established constitutional principles and institutions.

The future of Central European constitutional democracies relies not only on the actions of people in the countries concerned but also on the commitment of Western societies. In the long run, the Visegrád Countries are not able to ignore the achievements of the modern constitutionalism. This is why so important even from Eastern point of view that Western democracies are able to cope with the unpopularity of representative bodies, to find the proper place of religious values within secularised democracies, and to ensure equal protection of law to ethnic minorities.

[50] Dworkin, R.: *Justice in Robes.* Cambridge (MA), 2006. 134, 139.

[51] The current Polish preamble expresses that in 1989 the Homeland recovered and regained the possibility of a sovereign and democratic determination of its fate.

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MIKLÓS HOLLÁN*

Trading in Influence: Requirements of the Council of Europe Convention and the Hungarian Criminal Law**

Abstract. Active trading in influence, namely promising, giving an undue advantage to someone, who asserts or confirms that he or she is able to exert an improper influence over third persons, is not explicitly regulated by the HCC. Exceptionally this conduct may be qualified as active bribery of domestic or foreign (international) public officials, but only if the active influence trader intends that the passive influence trader (on the basis of their arrangement) will transmit the undue advantage to the public official. Other cases of active trading in influence are not punishable under Hungarian Law, e.g. when the entire advantage is given to an influence trader, who asserts only his or her influence (without pretending the commission of active bribery). In this regard the Hungarian legislation is not in conformity with the requirements of the COE Convention, which oblige member states to active trading in influence irrespective of the allegation of bribery. Hungarian criminal law shall be harmonized with the requirements of the COE Convention by penalizing active trading in influence.

Keywords: criminalization of active trading in influence, implementation of international conventions, Hungarian criminal law, GRECO

1. Introduction

Criminal liability for trading in influence is a relatively new phenomenon in national criminal laws.[1] Criminalization of corruption offences was traditionally limited to passive or active form of bribery. At the third millennium only a limited number of countries (e.g. Belgium, France, Hungary, Poland, Slovenia) provided for an explicit incrimination of trading in influence.[2] The scope of the offence descriptions are not identical, since e.g. certain legislations criminalise only asking or accepting the undue advantage,[3] but others penalize also those perpetrators who gives or promise it.[4] It should be noted, however, that certain conducts qualified as trading in influence in a country are penalized in other jurisdictions as bribery.[5]

* Research fellow, Ph.D., Institute for Legal Studies of the Hungarian Academy of Sciences, 1014 Budapest, Országház u. 30.
E-mail: hollanmiklos@gmail.com

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[1] Explanatory Report of COE Convention. para. 64.

[2] Vander Beken, T.–Siron, N.: Comparative Report. In: Vander Beken, T.–de Ruyver, B.–Siron, N. (eds): *The organisation of the fight against corruption in the member states and candidate countries of the EU.* Antwerpen–Apeldoorn, 2001. 16, 17.

[3] Sections 256, 258/E of Hungarian Criminal Code (HCC).

[4] Sect. 433-2 paras 1–2 of French Criminal Code; Bueb, J.-P.: France (National Report). In: Vander Beken—de Ruyver–Siron (eds): *The organisation of the fight against corruption... op. cit.* 179–180.

[5] Vander Beken–Siron: Comparative Report. In: Vander Beken–de Ruyver–Siron (eds): *The organisation of the fight against corruption... op. cit.* 17; Mac Mahon, L.: Ireland (National Report). In: Vander Beken–de Ruyver–Siron (eds): *The organisation of the fight against op. cit.* 235;

The disparity of national regulations is mirrored at the international level. Certain international conventions (instruments), when oblige member states to criminalise corruption, explicitly or actually cover only the offence of bribery. The following international instruments are founded on this restrictive approach of criminalisation:

– the protocol to the convention on the protection of the European Communities' financial interests (27 September 1996);[6]

– the convention on combating bribery of foreign public officials in international business transactions (adopted on 21 November 1997 in the framework of OECD);[7]

– the convention drawn up on the basis of Art. K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of member states of the European Union (26 May 1997);[8]

– the joint action of 22 December 1998 adopted by the Council on the basis of Art. K.3 of the Treaty on European Union, on corruption in the private sector.[9]

Only the Criminal Law Convention on Corruption adopted on 27 November 1999 in the framework of Council of Europe (hereinafter COE Convention)[10] contains explicit provisions on trading in influence on public officials.[11] Trading in influence on executives of business organisations is not covered by this instrument, while both bribery of public officials and bribery committed in the private sector shall be penalized (at least as a principle).[12]

Slingerland, W.: *Trading in influence: corruption revisited. How a better understanding of the systemic character of trading in influence can help the Council of Europe and its Member States choosing the right instruments to tackle this form of corruption* (EGPA Study Group on Ethics and Integrity of Governance, Toulouse, 8–10 September 2010). 9. http://www.uwdierenarts.nl/cust/corruptie2.0/art.s/EGPA_paper_W.Slingerland_20100926.pdf.

[6] *Official Journal C 313*, 23/10/1996. 1; See in details Vermeulen, G.: The Fight Against International Corruption in the European Union. In: Rider, B. A. K. (ed.): *Corruption: The Enemy Within*. The Hague–London–Boston, 1997. 333–342.

[7] In: www.oecd. org. In details see Adolfi, G.–Pieth, M.: How to Make the Convention Work: the Organisation for Economic Co-operation and Development Recommendation and Convention on Bribery as an Example of a New Horizon in International Law. In: Fijnaut, C.–Huberts, L. (eds): *Corruption, Integrity and Law Enforcement*. The Hague–London–Boston, 2002. 349–360.

[8] *Official Journal C 195*, 25/06/1997. 1. See in details Grotz, M.: Legal Instrument of the European Union to Combat Corruption. In: Fijnaut–Huberts (eds): *Corruption, Integrity and Law Enforcement. op. cit.* 383–384.

[9] *Official Journal L 358*, 31/12/1998. 2–4. In details see Grotz: *op. cit.* 385–386.

[10] See in details de Vel, G.–Csonka, P.: The Council of Europe Activities against Corruption. In: Fijnaut–Huberts (eds): *Corruption, Integrity and Law Enforcement. op. cit.* 364, 368–380; Salazar, L.: The Council of Europe Criminal Law Convention on Corruption. In: Alvazzi del Frate, A.–Pasqua, G. (eds): *Responding to the Challenges of Corruption*. Roma–Milan, 2000. 221–234. On the anti-corruption initiatives in the Council of Europe see Csonka, P.: Corruption: The Council of Europe's Approach. In: Rider, B. A. K. (ed.): *Corruption the Enemy Within*. The Hague–London–Boston, 1997. passim.

[11] Art. 12 of COE Convention.

[12] Arts 7–8 and 37 of COE Convention.

2. The COE Convention

2.1. Obligation to Criminalise–Reservations

According Art. 12 of the COE Convention "Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of [domestic public officials, members of domestic public assemblies, foreign public officials, members of foreign public assemblies, officials of international organisations, international parliamentary assemblies, judges and officials of international courts] in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result".

Taking into account the different approaches of national legal systems, the COE Convention provides that State Parties can reserve their right not to establish as a criminal offence under their domestic law trading in influence on public officials.[13] The possibility of reservations is unlimited with regard to Art. 12, namely states may reserve the right not to establish as a criminal offence trading in influence as such. While certain forms of bribery of public officials, namely bribery of domestic public officials,[14] active bribery of foreign public officials,[15] bribery of officials of international organisations,[16] bribery of judges and officials of international courts[17] shall be criminalized unconditionally, namely reservations in these regards are not permissible.

Certain states (Denmark,[18] Netherlands,[19] Republic of Slovenia[20]) simply reserve the right not to establish as a criminal offence the conduct referred to in Art. 12. Others (as Switzerland[21] and Finland[22]) restricted the criminalization to conducts which had been already considered punishable under their domestic law. Others (United Kingdom,[23] French Republic,[24] Belgium[25]) explicitly referred to certain elements by which they wanted to restrict the scope of criminalization (in line with their existing criminal law).

[13] Art. 37 of COE Convention.

[14] Arts 2–3 of COE Convention.

[15] Art. 5 of COE Convention.

[16] Art. 9 of COE Convention.

[17] Art. 11 of COE Convention.

[18] Reservation contained in a Note Verbale from the Permanent Representation of Denmark appended to the instrument of ratification deposited on 2 August 2000.

[19] Reservations contained in the instrument of acceptance deposited on 11 April 2002.

[20] Reservation contained in a Note Verbale from the Ministry of Foreign Affairs of Slovenia, dated 4 May 2000, deposited at the time of ratification of the instrument on 12 May 2000.

[21] Reservation contained in the instrument of ratification deposited on 31 March 2006.

[22] Reservations contained in the instrument of acceptance deposited on 3 October 2002.

[23] Reservation contained in a Note Verbale handed over by the Permanent Representative of the United Kingdom to the Secretary General at the time of deposit of the instrument of ratification on 9 December 2003.

[24] Reservation contained in the instrument of ratification deposited on 25 April 2008.

[25] Reservation contained in a Note Verbale handed over by the Permanent Representative of Belgium to the Deputy Secretary General at the time of deposit of the instrument of ratification on 23 March 2004.

2.2. *Protected interest*

The Explanatory Report explicitly states: "[c]riminalising trading in influence seeks to reach [...] the corrupt behaviour of those persons who are [...] contributing to the atmosphere of corruption."[26] At it was correctly pointed out by Stessens, trading in influence does not presuppose the breach of the principal-agent relationship which forms the bedrock of the classical concept of public corruption.[27] It should be emphasized that in certain cases even the commission of bribery of public officials do not jeopardise official duties, but only infringe the confidence in the impartiality of public administration.[28] Taking into account this background, the subsequent criminalisation of trading in influence seems to be self-evident, since asserting an improper influence could be as much detrimental to the trust in public administration as the (sometimes false) appearance of venality.

2.3. *Conducts on the active and passive side*

The conduct of the bribee (requesting, accepting the undue advantage or the promise thereof) is usually called "passive bribery", while the offence of the briber (promising, offering, giving the advantage) is denominated by the attribute "*active*". The distinction between active and passive side is relevant also with respect to the regulation of trading in influence. The "passive" form presupposes that a person, asserting a real or pretended influence on third persons, requests, receives or accepts an undue advantage with a view of assisting the person who supplied the undue advantage by exerting the improper influence. "Active" trading in influence means that a person promises, gives or offers an undue advantage to someone who asserts or confirms that he is able to exert an improper influence over third persons.[29] The terms "active" and "passive" trading in influence are not used by the conventions, but mentioned in the explanatory reports[30] and in the related legal literature.[31] The COE Convention obliges states parties to penalise both passive and active trading in influence. However, states parties can use the possibility of partial reservation to restrict the scope of incrimination to the passive side. This could have been done by Hungary, when it deposited its instrument of ratification, acceptance, approval or accession.

2.4. *Influence*

2.4.1. Real, intended, exerted or successful influence

The COE Convention does not require real influence, only the assertion thereof. Factual connection between the influence trader and the public official is, therefore, not required by the definition. COE Convention covers also cases when the influence-trader only asserts, but does not intend to exert his or her real influence on the public official. It is explicitly

[26] Explanatory Report of the COE Convention. para. 64.

[27] Stessens, G.: The International Fight against Corruption. General Report. *International Review of Penal Law*, 72 (2001) 3–4, 892, 907.

[28] Wiener, I. A.: *Hivatali bűntettek* (Offences Against Public Officials Duties). Budapest, 1972. 79–80.

[29] Explanatory Report of COE Convention. para. 65.

[30] Explanatory Report of COE Convention. paras 65–66.

[31] Stessens, G.: *op. cit.* 907.

provided in the COE Convention that trading in influence should be criminalised "whether or not the influence is exerted or whether or not the supposed influence leads to the intended result".[32]

The possibility of the partial reservation, however, enables member states to restrict the scope of the offence description by requiring the existence of real, intended or (successfully) exerted influence. Criminal law of the United Kingdom (on the basis of the corresponding reservation) remains to be confined to those cases of trading in influence in which an agency relationship exists between the person who trades his influence and the person he influences.[33] Even partial reservations, in which (successfully) exerted influence is required as an element of trading in influence, are compatible with the COE Convention. The reservation under Art. 37 may even neutralize the explicit prohibition in Art. 12, according to which the offence shall be criminalized "whether or not the influence is exerted or whether or not the supposed influence leads to the intended result".

According to Stessens "[i]t is a matter of some regret that the drafters of the convention have not ... required that the person concerned has influenced the decision making process [...], or, at least, he was actually able to influence it".[34] In my opinion, requiring real, intended or (successfully) exerted influence would fundamentally alter the nature of the offence. By penalising the assertion of real (intended) influence or requiring (successful) exertion thereof, the offence of trading in influence protects only the decision-making process of public officials. If the confidence in the impartiality of public administration is to be secured, the alleged exertion of influence (in exchange of undue advantage) shall be criminalised as well.

2.4.2. The improper influence

According to the COE Convention the influence must be improper, therefore, as it is stated by the Explanatory Report, acknowledged forms of lobbying do not fall under the offence description.[35]

2.4.3. Influence on domestic, foreign or international public officials

According to Art. 12 of the COE Convention the asserted influence is connected to the decision-making of following types of public officials, namely

- domestic public officials (including judges),
- members of domestic public assemblies,
- foreign public officials (including judges),
- members of foreign public assemblies,
- officials of international organisations (including judges and officials of international courts),
- members of international parliamentary assemblies,

For the purposes of the COE Convention "public official" shall be understood by reference to the definition of "official", "public officer", "mayor", "minister" or "judge" in

[32] Art. 12 of the COE Convention.

[33] Reservation contained in a Note Verbale handed over by the Permanent Representative of the United Kingdom to the Secretary General at the time of deposit of the instrument of ratification on 9 December 2003.

[34] Stessens: *op. cit.* 907–908.

[35] Explanatory Report of the COE Convention. para. 65.

the national law of the State in which the person in question performs that function and as applied in its criminal law. The term "judge" shall include prosecutors and holders of judicial offices.[36]

COE Convention covers trading in influence on public officials (including members of public assemblies and judges) irrespective of whether they are exercising public power at domestic, foreign or international bodies (or organisations). The possibility of partial reservation, however, enables national legislators to exclude cases, when the asserted influence relates to foreign or international public officials. The French Republic reserved the right not to establish as a criminal offence the conduct of trading in influence defined in Art. 12 of the Convention, in order to exert an influence, as defined by the said article, over the decision-making of a foreign public official or a member of a foreign public assembly.[37]

2.4.4. The passive influence trader

According to the COE Convention the scope of perpetrators is not confined to public officials. In the legal literature some regret was expressed that the scope of criminal liability is too wide in this respect.[38] It should be noted, however, that the obligation of the COE Convention can be restricted by applying partial reservation to offenders who are public officials or holders of public functions.[39] Belgium reserved the right not to establish as a criminal offence under its domestic law the conduct referred to in Art. 12 of the Convention which does not concern the use by a person holding a public function of the influence–be it real influence or supposed influence–that he or she disposes of owing to his or her function.[40]

It should be noted, however, that this restriction of the offence description does not sufficiently protect either the impartial decision making process or the public confidence therein. Decisions of public officials may be influenced not only by their colleagues, but by relatives or friends. By asserting such an influence not only public officials, but anyone may suggest that the decision making in the public sphere is not impartial. To comprehensively protect these interests it requires that criminal law shall cover all influence traders regardless of their status as public officials.

3. Hungarian law

The first Hungarian Criminal code in 1878 provided for bribery of public officials as a single offence of corruption. Separate regulation on trading in influence on domestic public officials was introduced into Hungarian criminal law only in 1942. Trading in influence on state organs and economic enterprises was criminalised in 1971 during the socialist era. The contemporary Hungarian Criminal Code (HCC) adopted in 1978 contracted these offences in Section 256. The regulation covers trading in influence on domestic public officials and trading in influence on economic enterprises and non-profit organisations. Trading in influence on foreign or

[36] Art. 1 points a–b) of COE Convention.

[37] Reservation contained in the instrument of ratification deposited on 25 April 2008.

[38] Stessens: *op. cit.* 907.

[39] Art. 37 of COE Convention.

[40] Reservation contained in a Note verbale handed over by the Permanent Representative of Belgium to the Deputy Secretary General at the time of deposit of the instrument of ratification on 23 March 2004.

international public officials was subsequently (in 1998) introduced into Section 258/E. of the HCC as a separate offence ("trading in influence international relations").[41]

Taking into account this evolution (extension of the criminalisation)

– trading in influence on domestic public officials,

– trading in influence on foreign (or international) public officials,

– trading in influence on business and non-profit organisations may be distinguished in the HCC.

Trading in influence on domestic public officials is committed by somebody, who "by asserting that he is able to influence a public official, requests or accepts an undue advantage for himself/herself or on behalf of another person". Trading is influence on domestic officials is a felony which is punishable by imprisonment of one to five years. HCC defines the concept of domestic public official with reference to certain positions and/or functions. Particular positions, namely Members of Parliament, the President of the Republic, the Prime Minister; judges, prosecutors shall always be considered as public officials. In addition, domestic public officials are those persons whose "activity forms part of the proper functioning of" certain public authorities (state administration organs, local government organs, courts, prosecutor offices, the Constitutional Court etc.). The concept of public officials comprises persons, who entrusted with public power (public administrational duties) at organs (or bodies), which exceptionally (on the basis of a legal regulation) fulfil tasks of public power (public administration), e.g. teachers at state exams.[42]

Trading in influence on foreign (international) officials is regulated as a separate offence in Hungarian Criminal Law. According to Section 258/E the crime is committed by any person, who–asserting to influence a foreign public official–requests or accepts an unlawful advantage for himself or on behalf of another person. *Trading is influence* on foreign (international) officials is a felony which is punishable by imprisonment up to five years. It is correctly pointed out in the legal literature that an independent offence description in Section 258/E is superfluous, since the regulation is almost identical with Section 256 (1) of HCC. Trading in influence on foreign (international) officials should have been regulated rather as an extension of Section 256.[43] HCC provides for a legal definition of "foreign public official", which shall relate not only to foreign, but also to international officials. The concept of foreign public officials comprises

– a person serving in the legislative, judicial or administrative body of a foreign state,

– a person serving in an international organization created under international convention, whose activities form part of the organization's activities,

– a person elected to serve in the general assembly or body of an international organization created under international convention,

[41] Concerning the history of the regulation see Wiener, I. A.: A korrupciós bűncselekmények szabályozása a Csemegi Kódextől napjainkig (The regulation of corruption offences from the first Hungarian Criminal Code until recently). In: *Györgyi Kálmán ünnepi kötet* (Kálmán Györgyi Anniversary Volume). Budapest, 2004. 631–639.

[42] Section 137 point 1 of HCC.

[43] Tóth, M.: A magyar büntetőjogi kodifikáció történetének néhány tanulsága – az új törvény megalkotásának előestéjén (Some lesson from the history of criminal law codification in Hungary–on the eve of adopting the new code). In: *Békés Imre ünnepi kötet* (Imre Békés Anniversary Volume). Budapest, 2000. 267.

– a member of an international court that is vested with jurisdiction over the territory or the citizens of the Republic of Hungary, and any person serving in such international court, whose activities form part of the court's activities,

Trading in influence on economic enterprises and non-profit organisations is regulated by Section 256 (3) a) of HCC. The offence is committed by "any person who requests or accepts an undue advantage for himself/herself or on behalf of another person by asserting that he is able to influence employees (of members) of economic enterprises or non-profit organisations". The concept of economic enterprise comprises budgetary organs, namely public schools, public hospitals performing public functions and financed from the state budget. If the employee (or a member) of the budgetary organ is entrusted with public power (public administrational duties), asserting influence thereon shall be qualified as trading in influence on public officials.

3.1. Protected interest

Criminalisation of trading in influence on public officials protects the public confidence in impartial decision making of domestic public officials.[44] It was concluded from the fact that the definition of trading in influence is fulfilled even if it is impossible that the public official breaches his or her official duties. This interpretation may be extended, *mutatis mutandis,* to trading in influence on foreign or international public officials. With regard to trading in influence on economic enterprises and non-profit organisations, the protected interest may be conceptualized as public confidence in impartial decision making of these organisations. It was correctly pointed out in the legal literature that this rationale of criminalisation should be reconsidered with regard to economic enterprises after the fall of the socialist era and at the dawn of market economy.[45] Unlike planned economy of the socialism, in a market economy the requirement of impartiality may not give reasons for the identical scope of offence descriptions for trading in influence in the public sphere and in the business (non-profit private) sector.

3.2. The undue advantage

With regard to bribery it is widely acknowledged that the advantage may not be considered as undue, if its acceptance is permitted by explicit legal norms or staff regulations. In absence of such a regulation the legality of the advantage is vividly disputed in the legal literature.[46]

[44] Vida, M.–Juhász, Zs.: Befolyással üzérkedés (Trading in Influence). In: Nagy, F. (ed.): *A magyar büntetőjog különös része.* Budapest, 2009. 375.

[45] Kis, N.: Büntethető-e a lobbyzás? (On the punishability of lobbying). *Magyar Jog* (2003) 5, 280–281.

[46] Gál, I. L.: Molnár Csaba ügye a Fővárosi Ítélőtáblán. Döntés az Országos Rendőr-főkapitányság Pénzmosás Elleni Osztálya vezetőjének vesztegetési ügyében (Case of Molnár Csaba at the Higher Appellate Court of Budapest: Bribery Case of the Chief Money Laundering Investigator of the National Police Department). *Jogesetek magyarázata (JeMa)* (2010) 1, 33–38; Hollán, M.: Molnár Csaba vesztegetési ügye: még egyszer az előny jogtalanságáról. Kritikai megjegyzések Gál István László elemzése kapcsán (Bribery case of Csaba Molnár: Once Again on the Undue Nature of Advantage–Critical Remarks of the Evaluation of László István Gál). *Jogesetek Magyarázata* (2010) 3, 45–53; Gál, I. L.: Újabb gondolatok Molnár Csaba vesztegetési ügye kapcsán. Válasz Hollán Miklósnak (New thoughts with regard to the Bribery Case of Csaba Molnár: A Reply to Miklós Hollán). *Jogesetek Magyarázata* (2010) 3, 54–56.

With regard to trading in influence criminal courts shall decide the undue nature of the advantage without any statutory basis. Act No. XLIX. of 2006 permitted to act as a registered lobbyists and excluded the undue nature of those advantages accepted in compliance with its provisions.[47] The entire act was abrogated by Section 19 b) of Act. No. CXXXI of 2010 (new regulation of civil participation in law-making), the question of lobbying became thus unregulated. It should be noted, however, that in my opinion, the legality or illegality of the advantage is closely connected to the improper nature of the influence.

3.3. The conduct

In contrast to bribery, the regulation of the HCC covers only passive side of trading in influence, namely requesting or accepting the undue advantage. Accepting the promise of the undue advantage, which is criminalized as bribery, is not punishable at the offence of trading in influence.

Active side of trading in influence is not explicitly punishable, namely the offence description of the HCC does not cover giving or promising of the undue advantage. In the judicial practice active trading in influence is not punished, even if it may be qualified as soliciting or aiding (abetting) of passive trading in influence. It is usually maintained that the legislation purposely leave this conduct out of the ambit of criminal law. This interpretation is mainly supported with the observation that in the context of corruption offences the active side shall be explicitly criminalized as a separate offence (as it is regulated by bribery).[48]

According to the judicial practice,[49] giving or promising the undue advantage (active trading in influence) is qualified as active bribery,[50] if the passive influence trader asserts or pretends that he/she is bribing a public official. Active bribery means giving (or promising) of an unlawful advantage in connection with the official capacity of a public official to him (or her) or in consideration of him (or her) to anybody else. According to the judicial practice not only relatives of public officials, but also passive influence traders may be targets of the undue advantage. This interpretation does not depend on whether the passive influence trader intends, attempts or actually commits the asserted (pretended) active bribery.

In my opinion this interpretation of the Supreme Court is applicable *mutatis mutandis* to trading in influence on foreign (international) public officials, which definition is similar to bribery of domestic public officials. With regard to budgetary organs and private sector entities, however, the criminal liability of the active influence trader for bribery presupposes that he or she the gives or promises the undue advantage to induce the executive of the economic enterprise to breach his or her duties. The above described interpretation is derived from the definition of active bribery, and it, therefore, does not depend on the fact that the assertion of active bribery is not regulated as an aggravating circumstance of passive trading in influence.

[47] Vida–Juhász: *Befolyással üzérkedés. op. cit.* 375.

[48] Vida–Juhász: *Befolyással üzérkedés. op. cit.* 378.

[49] Opinion No. 13 of the Supreme Court (Criminal Division).

[50] Section 253 of HCC.

3.4. Perpetrator

The scope of influence traders is not restricted, the offence may be committed by anyone. Even public officials may be perpetrators of trading in influence by requiring or accepting an undue advantage by asserting influence on another public officials.[51] If, however, a public official requires or accepts an undue advantage for instructing inferior public officials, his or her conduct is qualified as bribery. *If the passive influence trader actually bribes a* public official etc., he or she shall be liable for active bribery and trading in influence.[52]

3.5. The asserted improper influence

The perpetrator shall request or accepts the undue advantage by asserting that he/she is able to influence a public official. The connection between the public official and the influence trader can be real (friendship, love) or only purported. The actual or attempted exertion of the influence is not, consequently, contained as an element of the offence description.[53]

The improper nature of the influence is not an element of the current offence description. It is widely acknowledged, however, that the offence description requires that the asserted influence induce the public official to take into account factors irrelevant in the case (his/her connection with the influence trader etc.).[54]

3.6. Aggravating circumstances

The punishment for trading in influence on domestic public officials shall be imprisonment of two to eight years, if the perpetrator:

- asserts or pretends that he/she is bribing a public official;
- pretends to be a public official;
- commits the criminal act for regular financial gain.

At the offence trading in influence on foreign and international officials the HCC provides for no aggravating circumstances.

The punishment for trading in influence in the private sector is up to three years of imprisonment if the employee (or the member) is authorised to act independently. If trading in influence in the private sector is committed for regular financial gain, the punishment is imprisonment up to three years or in case the employee (or the member) is authorised to act independently the offence is punishable with imprisonment of one to five years. The assertion of bribery or pretending to be a public official is not an aggravating circumstance of this offence.

4. Evaluation of the implementation by the GRECO

When the compliance of the Hungarian legislation with the COE convention was evaluated by the GRECO, it was ascertained that "there [was] no specific provision which [...] cover active trading in influence in the Hungarian Criminal Code".

[51] Decision of Bf. I. 761/1963. of the Supreme Court. In: *Büntető elvi határozatok* (Leading Decisions of Criminal Courts). Budapest, 1973.

[52] Court Decisions No. 1989/176.

[53] Court Decisions No. 1989/176.

[54] Bócz, E.: Az államigazgatás, az igazságszolgáltatás és a közélet tisztasága elleni bűncselekmények. (Offences against public administration, judiciary and purity of public life). In: Györgyi, K.–Wiener, A. I. (eds): *A Büntető Törvénykönyv magyarázata*. Budapest, 1996. 537–538.

Hungarian authorities claimed "that active trading in influence is fully covered by the provisions of active bribery of domestic public officials [...] and active bribery of foreign public officials and international officials [...] since these provisions cover all cases when "the advantage is offered/promised/given »to another person on account of« the official". This term "refers to a person, who–regarding his/her real or pretended relation to the public official–may be able to influence the actions of the public official".[55]

The report explicitly mentions that "the representative of the Academia was clearly of the opinion that Hungarian law was not in full compliance with Art. 12 of the Convention in this respect".[56]

The GET accepted "that [...] the provisions on active bribery may apply also to situations of active trading in influence", when the "bribe transmitted by the influence peddler to the influenced official". It was also pointed out that according to the COE Convention, "[i]t is not a condition that the public official should be bribed by the influence peddler; the (asserted or confirmed) exertion of an improper influence over the decision-making of the official can be different from the (promised) undue advantage. In the view of the GRECO Evaluation Team "it has not been substantiated that the Hungarian criminal law covers all possible situations of active trading in influence as foreseen in Art. 12 of the Convention". Therefore it was recommended that active trading in influence shall be regulated to be "in full conformity with Art. 12 of the Criminal Law Convention on Corruption".[57]

5. Evaluation of the author

In contrast to several states, Hungary made no reservations[58] to Art. 12 of the Convention. Therefore, it is obliged to criminalize trading in influence on public officials as it is defined by the COE Convention.

Passive trading in influence on domestic, foreign and international public officials is a separate criminal offence under Hungarian criminal law regulated by Sections 256 and 258/E of the HCC. Requesting and accepting of undue advantages is punishable irrespective of whether the undue advantage is requested or received by a public official or by anyone else. The offence description covers real, pretended, intended or exerted influence. In this regard the Hungarian criminal law is in conformity with the requirements of the COE Convention.

Active trading in influence, namely promising, giving an undue advantage to someone, who asserts or confirms that he/she is able to exert an improper influence over third persons, is not explicitly regulated by the HCC. Exceptionally, this conduct may be qualified as

[55] Group of States Against Corruption, Directorate General of Human Rights and Legal Affairs Directorate of Monitoring. Strasbourg, 11 June 2010 Public Greco Eval III Rep (2009) 8E Theme I Third Evaluation Round Evaluation Report on Hungary on Incriminations (ETS 173 and 191, GPC 2) (Theme I) Adopted by GRECO at its 47th Plenary Meeting (Strasbourg, 7–11 June 2010) 91.

[56] *Op. cit.* para 91. The author of this study was the representative of the Academy, his opinion will be presented subsequently (in title 5 of the study).

[57] *Op. cit.* para 92.

[58] Cf. http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=173&CV=1&NA=37&PO=HUN&CN=999&VL=1&CM=9&CL=ENG

active bribery of domestic[59] or foreign (international) public officials,[60] but only if the active influence trader intends that the passive influence trader (on the basis of their arrangement) will transmit the undue advantage to the public official. Other cases of active trading in influence are not punishable under Hungarian Law, e.g. when the entire advantage is given to an influence trader who asserts only his or her influence (without pretending the commission of active bribery). In this regard the Hungarian legislation is not in conformity with the requirements of the COE Convention, which oblige member states to active trading in influence irrespective of the allegation of bribery. Hungarian criminal law shall be harmonized with the requirements of the COE Convention by penalizing active trading in influence.[61]

The COE Convention does not oblige state parties to criminalize trading in influence on budgetary organs, economic enterprises and non-profit organisations. Decision on upholding, decriminalising or restricting the offence of trading in influence in these spheres shall be made by national legislator. In this regard the transition to market economy may justify the restriction of the criminal offence to budgetary organs (hospitals, nurseries etc.). Trading in influence in the private owned business sector shall be decriminalised.

[59] Section 253 of HCC.

[60] Section 258/B of HCC.

[61] According to Art. 37 of COE Convention reservations may be made only at the time of signature or when the state deposits its instrument of ratification, acceptance, approval or accession.

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JENŐ SZMODIS*

Taking Legal Philosophy Seriously

Abstract. The article emphasizes the various characters of legal phenomena, which are discoverable just from different aspects. The article approaches the problem of multidisciplinarity on the basis of some considerations of a concrete research. After that, it introduces the necessity of multidisciplinary tendencies as indirect consequences of Western analytical thinking. It outlines that evolution of legal philosophy results in a special plurality within jurisprudence. The article attempts to sketch the structure of multidisciplinary legal inquiry.

Keywords: biological aspects, human ethology, legal philosophy, legal positivism, natural law, methodology, multidisciplinarity

I. On some personal considerations

As Dworkin warned, if we wish to take rights seriously, we have to take into consideration not only norms, rules as texts, but we should consider legal principles and numerous morally relevant momenta. Moreover I would suggest that we should deal with the totality of human phenomenon, while we attempt to discover the world of law. As I see, there is no sharp demarcation between legal principles and moral-social principles. It is also a big question how moral-social principles can become legal principles, if we suppose the existence of such a sharp border. Of course, if we think this process happens by juridical authority, we hint to a formal moment again.

We should take into account that despite that, moral principles can often be grasped conceptually, they do not take their origin from the territory of conceptuality, but they are rooted deeply in the nature of man, which has been formed fundamentally by an evolutionary process. Some moral principles have just cultural origin, so their nature is discoverable from wholly cultural aspects. Dworkin asserted "A general theory of law must be normative as well as conceptual".[1] It may be true. However, I suppose that although all research takes place by concepts, however, not only by them. On the other hand, usage of concepts does not mean that objects of inquires are exclusively concepts. Numerous legally relevant circumstances have non-conceptual, often unconscious, nature. Thus, we should be highly careful with conceptual approaches, and we must strive for a varied viewpoint, if we take legal philosophy seriously.

Some years ago I attempted to outline the spiritual origin of the Roman law, which undoubtedly constitutes the basis of Western law, especially of the continental legal systems.[2] At the beginning it was clear for me that in the Roman law the strictly controlled forms not only restrict prevalence of equity and justice, but those result in the autonomy of law, result in law, as a separate phenomenon. The anxious-ritualistic attitude of the ancient

* PhD legal adviser, Budapest.
E-mail: szmodisj@t-online.hu

[1] Dworkin, R.: *Taking Rights Seriously*. Cambridge, 1977. VII.

[2] Szmodis, J.: *A jog realitása. Az etruszk vallástól a posztmodern jogelméletekig* (The Reality of the Law. From the Etruscan Religion to the Postmodern Theories of Law). Budapest, 2005.

Roman law was conspicuous as opposed to the collective ideas about the "Proper" of Indo-European tribes.

While I examined the ontological nature of the Western law, I had to accept there are numerous previous non-legal questions, which can influence indirectly or directly the result of the legal research. Numerous particular problems emerge during the examination of the law, of which the answers fall under areas of other disciplines. Namely, law is often connected with religion, but wherein significant psychological phenomena appear. Thus, while we examine law, we have to answer in an appropriate way among others such problems, which are fundamentally in spheres of the history of religion or psychology.

And at this point we can meet a huge dilemma. We either ignore and neglect the non-legal problems because of our incompetence or we attempt to use properly the knowledge of other disciplines during our inquiry. However, if we do not take relevant non-legal aspects into account, we renounce in advance a duly sophisticated legal concept, but if we carefully and circumspectly utilize the knowledge of non-legal disciplines, we can theoretically reach a really scientific concept of law, and we can describe its mechanism. In my opinion the latter option is more fruitful.

It was clear, previous researches ignored connection between the Etruscan religion and the Roman law despite religious determination of Roman law had been well known from Demelius[3] to Max Weber,[4] Wolff[5] and MacCormack.[6] On the other hand, that has been clear for a long time, that Etruscan religion had exerted influence on Roman religion. In order to see the chain of "Etruscan religion–Roman religion–Roman law" and to compare structural similarities of Roman law and Etruscan religion, we should surpass the exclusively legal aspects and we should examine the question in historical, psychological and religious contexts.

Thus, we have to use a multidisciplinary approach, which does not take notice of the limitations of previous considerations, but always focuses on the emerging particular problems. During this process the topical question determines, selects and chooses the viewpoint of a certain discipline. That question, which is best connected with the concrete discipline. Consequently, multidisciplinary legal research, at least for me, is not only a theoretically acceptable possibility, but it is a practically tested and imperative method.

II. On the problem of multidisciplinarity

The well-known categorical attitude and analytical character of Western thinking have developed necessarily certain specialized disciplines. However, the scientific ideas, as models, have never been identical with the reality, which, although suffers from the simplification, but can take revenge. Namely, in the most cases the one-sided logic can take us along just to a special point of the cognition. However, the phenomenon starts being silent from there. Thus, in my interpretation the "Multidisciplinary Legal Research" is an approach without a too restrictive methodology to support sophisticated analysis, often by syntheses.

[3] Demelius, G.: *Untersuchungen aus dem römischem Civilrechte.* Weimar, 1856.

[4] Weber: Economy and Society: an outline of interpretive sociology. *University of California Press.* Berkeley, 1978, 781–799.

[5] Wolff, H. J.: *Roman Law. An Historical Introduction.* Norman, 1951, 49.

[6] MacCormack, G.: Formalism, Symbolism and Magic in Early Roman Law. *Tijdschrift voor Rechtsgeschiedenis*, 37 (1969), 339–468, especially 439, 444, 445.

Ortega wrote properly, only the scientist specializes, but science itself does not.[7] Inter- and multidisciplinary approach have got foreground recognizing this circumstance. And I distinguish interdisciplinarity from multidisciplinarity at this point. Namely, in my interpretation the phenomena are interdisciplinary, and the cognition of them is multidisciplinary from different aspects. The things as momenta of reality are accessible from a lot of possible different aspects. It is true even if we do not take this circumstance into account in every case. Thus, although we tend to accept the legal institutions as being separated from other phenomena and other no-legal approaches according to our positivistic tradition, law and legal phenomena are interdisciplinary.

The conceptual analysis of law provides a lot of chances to discover the internal logic of a certain law. However, as we know, the life of the law has not been logic, it has been experience.[8] It is also clear that the essence of law is in its function and this function can be realized just by the operation of law. The conceptual approaches are not able to catch this operation by analysis of the concepts. However, the functional approaches of law can take us along to a concept of law theoretically. Of course, the analytical-conceptual way can be highly helpful in cognition, but it is true first of all at such developed legal systems, which build themselves by concepts. We should not forget that our modern legal systems have not been built by only concepts and theoretical categories. Namely, these systems are continuation of a special ideological structure, which consisted of Christian morality, an irrational (but often expedient and efficient) system of the feudal domination and the Roman law. These are the deeper bases of our legal systems. Consequently, we can not renounce the analysis and inquiry of the past phenomena during cognition of the nature of our law. The historical aspect has a special importance from this point of view.

That is also clear, that legal philosophy is an interdisciplinary area, because this domain is situated between territory of the law and field of the philosophy. In spite of this fact, the acceptance of inter- and multidisciplinarity proved to be significantly harder in jurisprudence (as in humanities in general) than in natural sciences. Although this phenomenon can have various causes, however, I tend to think that the most probable reason for this is in nature of humanities. Namely, natural science is organized on the basis of expediency, whereas ideological momenta have a bigger role in the human disciplines and cultural evolution.[9] These contain such belief-like elements (imagination and ideas) which resist more strongly new thoughts and approaches than pragmatic-rational reflections.

From these aspects the traditional, analytical-conceptual attempts are especially interesting in approaches to the phenomena of normativity and validity. Also, that is thought-provoking, how the categories of phenomenon and the concepts can get confused in this inquiry in certain measure. Moreover, certain paradox gets into these researches. We can expound only such elements from a concept, which have been taken into that previously. Namely, a concept cannot exist without its creator, although the phenomenon, which is covered by philosopher, can. We instinctively interrogate the modern concepts of normativity and validity on the basis of our democratic and rational ideology, however simultaneously we tend to smuggle certain contents into the examined concept, contents which are not in the concept necessarily. Thus, we should distinguish phenomena of normativity and validity from concepts of normativity and validity. I suppose, that the phenomenon of normativity

[7] Ortega y Gasset, J.: *The Revolt of the Masses*. Notre Dame (IN), 1985. Ind. 101–109.

[8] Holmes, O. W.: *The Common Law*. Boston, 1881, 1.

[9] Eibl-Eibesfeldt, I.: *Human Ethology*. New York, 1989, 12.

(or validity) is rooted deeply in the complex of the human behavior (this is a special conglomerate of characteristics of human behavior),[10] especially in obedience.[11] Fundamentally, irrational momenta get importance in this phenomenon, but rational considerations significantly do not. Numerous efforts try to explain normativity in the context of conscious decisions, and these explanations do not take into account the irrational nature of real social processes.[12] Thus, the concept of the normativity (or validity) is not discoverable by only a conceptual analysis, but its approach is possible by observation and in a descriptive way. Perhaps, the duality of phenomenon and concept is the biggest trap for the legal philosophers. Western thinking makes us believe, the conceptual way provides the best solution for cognition.

However, carefully contemplating over these things, we have to accept the circumstance that we should not use previous ideological suppositions (for example natural legal thoughts about will of majority or legal positivistic ideas about faultless creation of the norms and validity), if we wish to discover normativity (or validity) as a value-neutral ontological category. We should previously observe the operation of such things, about which we subsequently create concept. Frankly speaking, if we examine the men-created law and its validity and normativity, it is expedient to know the real nature of humankind, and not only which we wish to see about mankind and its law. However, in this case we open wide the door of the legal philosophy and we have to look into the disciplines of the human nature. And we cannot be sure, that we see, it will be identical to our previous ideological expectations about humanity.

III. Evolution of legal philosophy

In the late periods of the cultures an account necessarily comes to the front and a historical attitude, too. This happened also in the Western culture in the 18th century. We can see this not only on the basis of Spengler's philosophy of history. Anyone can tell examples from his or her own life and on the basis of personal experiences, how the progress of the age is connected with the shaping of a historical attitude and a nostalgic view-point. At the same time, namely in the 18th century, history became a discipline, and gradually the historical attitude determined other forms of the thinking whether in the questions of the arts or in the problems of the law. Also, legal history became an independent branch of humanities, showing the changeability of the legal institutions and law itself. Legal philosophy, which significantly dealt with the connection of law and morality and researched the proper law previously, got dubious from that time.

Although Grotius and Pufendorf reminded us of the culturally determined character of law, the plurality of legal forms and spirits of the legal systems became more and more clear by the opening of the historical (and of course geographical) perspective. The historical view and the interpretation of social processes on the basis of their reasons and causes brought a sociological view to the foreground, while sociology also shaped an independent discipline. Legal sociology developed a separated direction of the research on the trails of

[10] Csányi, V.: Reconstruction of the Major Factors in the Evolution of Human Behaviour. *Praehistoria*, 4–5 (2003–2004), 221–232; see also Csányi, V.: *Az emberi viselkedés* (Human behavior). Budapest, 2006.

[11] Milgram, S.: *Obedience to Authority: An Experimental View*. New York, 1974.

[12] Eibl-Eibesfeldt: *op. cit.* 12.

works of Ludwig Gumplowicz[13] and Max Weber,[14] further enlarging the perspective of legal philosophy. Also, the revolution of the psychology, researches of Pierre Janet, Sigmund Freud, Alfred Adler and Carl Gustav Jung did not leave legal philosophy intact and untouched. The existence of the law appears as a special interference of conscious and unconscious, instinctive mechanisms in the works of Scandinavian and American legal realism. Theories relating to culture and anthropology have helped comparative legal research, and legal anthropology come into existence too, while the scientific analysis of the literature formed the stream of "law and literature", and economy laid the foundation of the economical analysis of law. However, the traditional questions and problems of the legal philosophy revolved around legal positivism and natural law in spite of gradual multidisciplinary transformation of philosophy of law.

Austin, Somló, Kelsen and Merkl and of course Langdell could summarize the problems of the law (as an autonomous phenomenon) in a so attractive way, and Stammler, Radbruch, Verdross, Rawls, Messner argued for the theory of the natural law so originally that the tension of this two characteristic standpoints influenced with a special force the discussion of the legal philosophy. Some decades later in the Critical Legal Studies (a highly exciting continuation of the American Legal Realism) the psychological stream became stronger again, but its (CLS) ideological disposition and its activist character has limited to the chances of this tendency in paradigmatic renascence and regeneration of legal philosophy.

In the middle of the 20th century a new discipline came into being again, namely ethology. On the basis of researches of Konrad Lorenz and other scientists not only animal's behavior has been examined, but the scientific interest has been spreading on areas of human nature and behavior of mankind, and on the cognition and evolutionary description of humankind as a race. In this process among others Eibl-Eibesfeldt and such social-psychologists created lasting works, who especially lively exposed human behavior, which is in the most cases independent of the cultural circumstances.

The ideological, quite idealistic and fundamentally speculative natural law got a chance to renewal from the biological, evolutionary view-point. Margaret Gruter, attempted to approach the phenomena of law[15] on the basis of biological determination of the human behavior, and such excellent legal scholars joined her efforts as Wolfgang Fikentscher.[16] Thus, a new inspiration of legal thought arose again in the German cultural area after Pufendorf, Kant, Hegel etc., but this tendency could reach break-through only in America. Gruter completed a pioneering work by her fundamental books, by the foundation of Gruter Institute, and by initiating international conferences. Owen D. Jones continues Gruter's way

[13] Gumplowicz, L.: *Der Rassenkampf. Sociologische Untersuchungen*. Innsbruck, 1909.

[14] Weber: *op. cit.*

[15] Gruter, M.–Bohannan, P.: *Law, Biology-Culture: The Evolution of Law*. Santa Barbara, 1983; Gruter, M.: *Law and the Mind: Biological Origins of Human Behavior*. Newbury Park, 1991; Gruter, M.–Masters, R.: Common Sense, and Deception: Social Skills and the Evolution of Law. In: Großfeld, B.–Sack, R.–Möllers, T. M. J. (Hrsg.): *Festschrift for Wolfgang Fikentscher*. Tübingen, 1998.

[16] Fikentscher, W.–McGuire, M.: A Four-Function Theory of Biology for Law. *Rechtstheorie*, 25 (1994), 1–20; Fikentscher, W.: *Modes of Thought: A Study in the Anthropology of Law and Religion*. 2nd ed., Tübingen, 2004; Fikentscher, W.: *Law and Anthropology: Outlines, Issues, Suggestions*. München, 2009.

not only by excellent writings,[17] but he managed to systematize evolutionary jurisprudential efforts by the organization of the Society Evolutionary Analysis in Law.

However, all these ambitions and exertions exist just as alternatives of the mainstream of legal philosophy. It is also clear that the biological interpretation of law[18] is spreading in the same way, as the research of law as an interdisciplinary phenomenon. The establishment of the Southern California Interdisciplinary Law Journal was a quite early moment of the latter process in 1978. Nowadays inter- and multidisciplinary research and interpretation come to the foreground more and more at universities and institutions.

The common aspects of the law and the environment are accentuated at the Vanderbilt University Law School over and above evolution related researches of Jones. The Centre for Interdisciplinary Law and Policy Studies at the Ohio State University Moritz College wishes to illuminate the connections of law, nature, society and the culture. In the 1990s reorganized Interdisciplinary Academic Programs of the University of Chicago Law School shows properly the essence of multidisciplinary legal efforts, namely "the law does not exist in a vacuum". However, the Planning an Interdisciplinary Curriculum of the Vermont Law School aims a many-sided approach of the law in the same way. The Yale Law School Forum on Multidisciplinary Legal Research has facilitated intellectual exchange among graduate students with research in legal or legal-related issues by more meetings. Especially remarkable are researches of David Garland at the New York University School of Law, which map the connections between punishment and culture.[19] However, in Europe also there are some ambitions to break out from our traditional concepts and theories, eliminating boundaries between legal and non-legal phenomena. John Bell has warned properly "The study of all legal subjects needs to be informed by theory and perspectives non-legal disciplines".[20] Related to the change of thinking Maurio Zamboni's article is very considerable, which marks acclimatization of evolutionary theory in the domain of legal theory.[21]

With some superficiality we can establish that in the theoretical researches of law the cultural approach, biological-evolutionary interpretations,[22] and in general multidisciplinary tendencies gain more and more ground.[23] The biological tendency is fundamentally related to that fact that in the past half century such an amount of scientific knowledge concerning mankind has been accumulated, that cannot be neglected by legal philosophy. The change

[17] Jones, O. D.: Law, Evolution and the Brain. Philosophical Transactions of the Royal Society. *Biological Sciences*, 359 (2004), 1697–1707; Jones, O. D.: Law and Biology: Toward an Integrated Model of Human Behavior. *Journal Contemporary Legal Issues*, 8 (1997), 167–173.

[18] Guttentag, M.: Is There a Law Instinct? *Washington University Law Review*, 87 (2009) 269, 270–327.

[19] Garland, D.: A Culturalist Theory of Punishment. Punishment and Society. *The International Journal of Penology*, 11 (2009) 2, 259–269.

[20] Bell, J.: Legal theory in legal education–"Anything you can do, I can do meta...". In: Eng, S. (ed.): *Proceedings of the 21st IVR World Congress*. Stuttgart, 2005, 61–68, 61.

[21] Zamboni, M.: From "Evolutionary Theory and Law" to a "Legal Evolutionary Theory". *German Law Journal*, 9 (2008) 4, 515–546.

[22] Guttentag: *op. cit.* 2009.

[23] Clark, R. C.: The Interdisciplinary Study of Legal Evolution. *The Yale Law Journal*, 90 (1981) 5, 1238–1274; see a careful new opinion Parisi, F.: Multidisciplinary Perspectives in Legal Education. *University of St. Thomas Law Journal*, 6 (2009) 2, 347–357.

of our image about human nature allows us less and less to base the examination of the law on old and ideological thought.

As an explanation for the multidisciplinary approach of law it appears in most cases that lawyers have to prepare themselves for certain special knowledge related to that profession, rules of which will be used by them. Although it is true, there are two more cardinal reasons for changing view. Firstly, a general inter- and multidisciplinary tendency of the science, secondly the legal positivistic idea about the autonomy of law, as among others the theory of Langdell drafted, is less and less tenable. These circumstances touch first of all practice, legislation and application of the law. However, we should know, the multidisciplinary legal research, and multidisciplinary analysis of law are important in the legal philosophy, too.

Moreover, legal philosophy has to clarify the structural inter-relations among the approaches of different scientific disciplines. In an optimal case various approaches to law do not coexist just incidentally, haphazardly, offering only alternative aspects. Thus, in my interpretation the multidisciplinary legal research in the long run is not only a conglomerate of the coequal viewpoints, but it is a special system from generality to peculiarity, wherein the examination is fundamentally adapted to the respective ontological, law-determining levels. Namely, really existing (thus not hypothetical and imaginary) legal systems have been built on certain biological determinants, onto the basis of the complex of human behavior. Of course, this basis permits several, often conflicting, solutions, but from these cultural characteristics and traditions select and shape the actual institutions.

Within the culturally determined system of course there is room for conceptual approaches and analyses of the law, but first of all only where the legal system exhibits a definite conceptual construct. Thus, I presume that the three fundamental levels of the approaches to law can be distinguished (biological, cultural and conceptual), which could be also complemented by horizontal viewpoints. We will return to these later.

IV. Structure of multidisciplinary legal research

The multidisciplinary approach of law could have various reasons and aims. This approach could promote dialogue among disciplines, could prepare practicing lawyers for application of such rules, which concern special professions, could help legislation in shaping efficient norms. From the aspect of legal philosophy, namely from the aspects of existence and nature of law the multidisciplinary approach has a fundamental importance, too. First of all, the view about human nature can influence the legal concepts. The different legal philosophical standpoints always set out from certain ideas concerning the humanity, even if they do not explicate this circumstance. These notions are determined culturally, moreover there could be more anthropological ideas within a culture subsequently, but simultaneously, too. In the Western culture a quite holy and idealistic view existed, because of a long domination of the Christian morality. This notion was followed and pushed to the background by a secular-rational vision about the human. Reformation and its rational attitude played and eminent role in this process.

The irrational aspects as a consequence of the result of modern psychology came to the front in 19th century. Then a highly sophisticated human-view appeared by the emergence of ethology and human ethology. Humankind is characterized in this scientific interpretation simultaneously among others by belief-like ideas (common beliefs),[24] inclination to

[24] Eibl-Eibesfeldt: *op. cit.*

constructions, altruism, indoctrinability and tendency to imitation.[25] Human ethology explains human character by evolutionary factors and processes, emphasizing characteristic elements can gain varying importance in various cultures. The environment and the above-mentioned inclination to imitation and indoctrinability can get a huge significance in shaping of concrete cultural forms.[26] General human characteristics, as sociability, sensitiveness to mutuality, obedience, so-called rule-following behavior and distinction between own group and alien group are present in all human societies.

Consequently, during the examination of social rules and law we should set out from such scientific vision about people, which describes and defines mankind as a race. This means omission of ideological views and departure from fundamentally emotionally determined approaches and concepts, and this means necessarily the consideration of human ethological model and facts, especially the so-called complex of human behavior. Thus, there is a fundamental biological, human ethological and evolutionary psychological level of the examination of law, which discovers for us, what the human nature is in general. This human quality can create various institutions and processes, however, in the reality we always meet quite definite and concrete forms of phenomena. Namely, every single culture shapes its solutions according to its own spirit and postulates whether in religion, in science and art, or relating to different social control.[27]

So, in my interpretation, the second level of examination of law must be the cultural level, wherein cultural anthropological, legal sociological viewpoints can come to the front, and aspects of philosophy of religion and history of religion, or philosophy of history could get in focus. We should take into account this natural level in order to avoid numerous intellectual and ideological traps. For example the slavery is not accepted by natural law; however, Aristotle thought this institution coming from nature. Moreover, opposite to our modern human opinions, slavery has been and is present everywhere, but sometimes this phenomenon is marginal, illegal and it is named euphemistically. However, it emerges so stubbornly, that it cannot be opposite to nature. Consequently, we should examine very carefully the occurrence of slavery, and we should take very seriously this phenomenon in order to know, eliminate and remove that. As I suppose, this phenomenon is connected to the distinction between own group and alien group, because slavery can exist relatively lastingly in intercultural or intersexual relations. (See source of slavery from captivity; black slavery; in Rome selling of debtors as slaves "trans Tiberim", so to an other group; or in general sexual slavery as usual from foreign counties.)[28] However, within groups sociability, empathy and altruism are more significant. Thus, we should know humans openly and without illusions to develop humane societies and legal systems.

On the verge of this two levels of inquiry there are psychological approaches simultaneously explaining the culturally and biologically coded phenomena. In my opinion for example the "father-complex" theory of Jerome Frank[29] as a paraphrase or variation of

[25] Csányi: Reconstruction of the Major Factors... *op. cit.*

[26] Richerson, P. J.–Boyd, R.: The evolution of human ultra-sociality. In: Eibl-Eibesfeldt, I.–Salter, F. K. (eds): *Indoctrinability, Ideology, and Warfare. Evolutionary Perspectives.* New York, 1998, 71–95.

[27] Kohler, J.: *Das Recht als Kulturerscheinung.* Würzburg, 1885.

[28] Eibl-Eibesfeldt: *op. cit.* 402–421.

[29] Frank, J.: *Law and the Modern Mind.* New Brunswick, 2009.

ideas of Feud, the feminist legal theory (at Critical Legal Studies),[30] and of course some of my ideas, too, on the basis of Jung, mean among others such psychological analysis of the law. From this aspect numerous statements of Scandinavian Legal Realism are highly relevant. This psychological-legal researches discover phenomena, which have got significant just in certain cultures, although which take their origins from nature.

I regard the conceptual analysis of law as a third level of examination. This approach could have excellent importance in legal cultures, wherein the concepts and categories have more special significance, than in "average legal culture". Thus, we have to use secular-rational concepts consistently, because Western law gradually became secularized and it detached itself from its religious roots and possibility of religious-moral interpretation. The reception of Roman law played a major role in conceptual effort. It seems, the analytical-conceptual ambitions got decisive necessarily in the Western legal philosophy.

As I have mentioned, three levels (biological, cultural, conceptual) of legal examination model the levels of reality from generality to peculiarity. This is the so-called vertical system of cognition. Biological, evolutionary phenomena characterize all humankind, culturally coded phenomena are valid within a certain culture or cultural region. However, concepts could have different meanings according to the domain of use of those concepts. Thus, the various scientific approaches are not accidental and only alternative, but they are complementary shaping a special system, and they impregnate spheres of each-other.

However, certain approaches are not situated on the basis of axis of the generality and the peculiarity, but they are arranged on the basis of domain of special interests. So moral-philosophical, theological, nature legal, historical, literatural (and other) approaches to law could comprehend more levels of generality and peculiarity. I regard these as a horizontal system of the legal examination. Independently of this circumstance, certain horizontal approaches could be more firmly connected with some vertical aspects. For example natural law necessarily could be connected with the human ethological analysis of law, the historical and literatural researches with cultural level. Of course, approaches of legal philosophy are categorizable in other way, because our categories are just models of the colorful world. However, we should in any case consider that our current, temporary, concrete approach is just one of huge pile of possible approaches. Nevertheless, we should take into consideration various aspects and approaches of law, if we take legal philosophy seriously.

[30] McKinnon, C.: Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence. *Journal of Women in Culture and Society*, 8 (1983) 2, 635–658.

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ZOLTÁN SZATHMÁRY*

Information Society and Its Deviances

Abstract. One of the most apparent features of information society is the increasing number, diversity and complexity as well as the continuous and fast change of technical tools surrounding everything and everyone. In an interaction with the adoption of new technologies, the receptive medium, the society does also change, while the environmental changes require adaptation. The change, as the new tools and the additional services are becoming a part of the citizens' everyday life at an extent never seen before, develops new deviances. However, the role of law in this change is constant: it has to regulate the social relations in a way that it could ensure social collaboration and prevent, punish any offence against it. Several branches of law within this complex legal system have a different role, where criminal law means the sanction keystone and stands guard. However, to be able to understand the role of criminal law, we have to discover the environment that needs to be regulated and to understand the incentives of deviant behaviours within this change.

Keywords: information society, deviance, cyber-stalking, technology, cyber-crime, info-communication

I. Introduction

Since the Industrial Revolution starting in the second half of the 18th century, the judgement of technology[1] has not been free of extremities in the European societies. From a layman's view, the most apparent feature of information society is the increasing number, diversity and complexity as well as the continuous and fast change of technical tools surrounding everything and everyone.[2] In an interaction with the adoption of new technologies–the cognition, usage and consumer-need-based development of its tools–the receptive medium, the society does also change, while the environmental changes require adaptation. According to the concept of technological momentum by *Thomas Hughes*, some technologies at a certain point of their lifecycle can have a deterministic power over social changes. As technologies become larger and more complex, they form the society even more until the society itself can form the technology.[3] I am not trying to answer the question whether technology is determined by social processes or vice versa–technology determines society. In fact, society has changed and is changing, in which the new technology also has some role. According to *Attila Kincsei*, the features of the technological element within this

* Public prosecutions secretary, The Budapest 4th and 15th District Public Prosecutor's Department, H-1041 Budapest, Erzsébet u. 28, Hungary.
E-mail: szathmary.zoltan@gmail.com

[1] Technology (Greek: τεχνολογια < τεχνη "art, skill, craft" + λογος "study of" + suffx ια) covers knowledge and experiences about artifical tools (e.g. machines, materials and methods) that are practical, increase individual (human) skills and help humanity discover, change and preserve the surrounding environment more. The technological tools that help people solve problems in different areas of life are called tools at a lower level and technique at a higher level. http://hu.wikipedia.org/wiki/Technol%C3%B3gia

[2] Kincsei, A.: Technológia és társadalom az információ korában (Technology and Society in the Information Age). In: Balogh, G. (ed.): *Az információs társadalom* (The Information Society). Budapest, 2007. 47.

[3] Wallace, P.: *Az internet pszichológiája* (Internet Psychology). Budapest, 2006. 285.

interaction can be summarized in the following points: the time elapsed between the developments of new technological systems generated by innovations is still getting shorter; the performance of infocommunication tools is growing; the convergence between information technology, telecommunication and media.[4]

The change, as the new tools and the additional services are becoming a part of the citizens' everyday life at an extent never seen before, is often incomprehensible mostly for the elder generations and the socially underprivileged. Under such circumstances, we have to consider the changing of social morals. The scale of behaviours considered deviant is broadening because of the tension among the acceptors, adopters and abstainers, disclaimers of the new technologies. Youngsters born in an environment networked by info communication tools become active users, which mean that they determine the norms of the new social and technological system more and more, themselves.

In this change outlined in brief, the role of law is constant: it has to regulate the social relations in a way that it could ensure social collaboration and prevent, punish any offence against it. Several branches of law within this complex legal system have a different role, where criminal law means the sanction keystone and stands guard as *ultima ratio*. However, to be able to understand the role of criminal law, we have to discover the environment that needs to be regulated and to understand the incentives of deviant behaviours within this change.

II. The concept of information society and deviance

1. Information society

It is typical for the information society that the generation, distribution and utilization of information are fundamental economic, political and cultural activities. In economics the concept of knowledge economy is consistent with this approach. Knowledge economy means that through the economic utilization of knowledge as human resource such value is generated that can be expressed not only in an intellectual but also in a material meaning. Therefore the substantial elements of information society can be summarized as follows.[5] Information as financial value has a primary role for example in electronic trade that is based on virtual acts contrary to the functional mechanisms of traditional economy. Information is also a fundamental element of wielding political power because only those are able to gain and maintain power that generate and distribute information. Another essential element of information society is technology that allows gaining and processing information. The development of technology significantly increased the speed of society's reaction towards the new living conditions because the larger flows of information gradually reduced the time needed to gain up-to-date knowledge, and continuous learning has become a requirement. Another characteristic of information society is that an increasing part of employees doing productive activity work in a position that is related to gaining and processing information.[6]

[4] Kincsei: *op. cit.* 59–60.

[5] Sum, Sz.: A szellemi alkotások jogának információtechnológiai vonatkozásairól (Information-technological Aspects of Intellectual Property Rights). In: Takács. T. (ed.): *Az informatikai jog nagy kézikönyve* (The Great Handbook of Info-communication law). Budapest, 2009. 212.

[6] *Ibid.* 212.

Based on the above general description, we can see that in everyday life the expression *information society* is often used in connection with political and economic programs. The definition of its meaning and its differentiation from other societies characterized with features of earlier periods (post-industrial, post-modern, knowledge-based, etc.) are in the focus of actual discourses of several different areas of science. Experts of informatics, anthropology, sociology, politology and jurisprudence study the concept from different viewpoints. As information society is a subject of their studies for different reasons and they do not have a solid set of concepts, therefore they disagree in which area of life this change can be considered determinant enough to characterize the whole society–assuming that information society itself does have a new nature compared to the former ones. However, we should not miss to define in what manner the study uses this concept without taking a stand on any conception. Hence, I am not trying to either develop a new theory on information society or to summarize or compare former narratives, rather highlight those elements of existing theories that are necessary for criminal law and only refer to their origin.

László Z. Karvalics helped my work by introducing three narratives to handle the concept of information society properly.[7] The first, so called macro-level "major narrative" covers theories disputed in a highly abstractive civilization-theoretical, socio-philosophical, culture-theoretical context. The conceptions marked by the meso-level "minor narrative" still handle the questions of changing social subsystems at a highly abstractive level while outlining some prioritized problems. A major part of examinations related to the third, so-called "mini narrative" contain discourses that focus on a small segment of reality and prefer practical aspects, therefore give an excellent basis to plan the direct interventions into the considered subareas. According to Z. Karvalics, the real dimensions of information society are not telecommunication or information technology, but education, science, innovation, economy and culture.[8]

Searching the *sine qua non* of information society is not the purpose of this study; therefore I continue my research by examining the society's strong relations towards technology instead of examining socio-theoretical models. After outlining the above frames, the expression information society used in my study–based on the examinations and their results executed according to the third, micro-level narrative–is trying to create a basis to understand the delinquencies of information society while considering the purposes of its own area of science. What jurisprudence concerns from the several information society conceptions is that–on ground of the complexity of social relations to be regulated–a different shade of information society prevails concerning public administration, civil or criminal law. Taking the role of criminal law within the legal system as a basis, it cannot have an independent picture of information society as its function is to protect the existing social order and values when it is not enough to protect the other branches of law or the extent of harm caused by an illegal action is so big that the strictest intervention–that highly restricts even the constitutional fundamental rights–is needed. With other words, the criminal law considers the society as mostly static–let it be post-industrial, information or

[7] Karvalics, L. Z.: Információs társadalom–Mi az? Egy kifejezés jelentése, története és fogalomkörnyezete (Information Society–What is that? The Meaning, the History and the Setting of a Phenomenon). In: Pintér, R. (ed.): *Információs társadalom* (Information Society). Budapest, 2007. 41–42.

[8] *Ibid.* 31.

knowledge-based. As an instrument, it does not develop the social relations directly, only indirectly, while it does not promote rather protect the social-economic development. However, it cannot avoid social changes because the application environment of dogmatically clarified legal institutions used by it has changed, new social values, relations and subjects of law evolved, and criminal offences can be committed or detected using new instruments.

Without considering information society determined solely by new technological tools, the topic of digital technology can be considered as priority from the aspect of delinquency and criminal investigation on grounds of the following. Criminal liability is based on free will that is included among the conceptual elements of guilt. Therefore when judging the technological element, we should accept its neutrality, i.e. the opportunities provided by infocommunication tools do not necessarily result in their utilization for criminal offences but can be incentives of the development of certain deviances and necessitate the reinterpreting of dogmatics of certain criminal offences. As a starting point, we have to thoroughly examine the new environment provided by the technologies that make the commitment of criminal offences easier and help or encumber criminal investigation–also considering the possible offenders of the new world. So the questions arising are the following: What role does technology play in delinquency and criminal investigation, what opportunities it gives, what are those new revaluated situations that–in connection with technology–require a new type of protection, and who are those who endanger these social values?

A keyword of the examined environment and information society is *convergence.* However, convergence has no exact, generally accepted definition in literature, from the aspect of this study it means that the different network platforms carry basically similar services but it also refers to the concentration of consumer tools such as telephone, television and personal computer. Abstracting from the physical environment of these tools, digitalization provided the convergence of formerly segregated branches such as information technology, telecommunication and media with the development of platform-free broadcasted contents. With other words, infocommunication convergence is a technological-based multi-level process that the market and regulation only tries to follow. It's determining technological basis is digitalization, a technical solution that enables the same content to be transferred even through formerly segregated networks.[9] Thus, convergence is a change in the fields of media, information technology and telecommunication. This process needs to be monitored because it determines the environment of committing IT crimes–not only infrastructurally but culturally as well. The technological element (tools and services) provides the society more intensive information flow and access to a mass of information, while from the society's side completing, supporting and mediating traditional, real-life activities with infocommunication technology systems result in the extension of these activities to their virtual dimensions.[10] The relative wide accessibility of these tools enables every member of the society to communicate and build relations and communities spanning over national borders.

[9] Tóth, A.: *Az elektronikus hírközlés és média gazdasági szabályozásának alapjai és versenyjogi vonatkozásai.* (The Regulation of the Electronic Communication and media from a competion law's point of view). Budapest, 2008. 57.

[10] Kincsei: *op. cit.* 59–60.

2. Deviance

The expression "deviance" refers to attitudes that violate the basic rules and norms of a community. *Jack D. Douglas* and *Frances C. Waksler* describe the conceptual levels of deviance as a funnel. According to the broadest explanation, it feels as if something was wrong, weird or strange, while according to its narrower meaning, it is a judgement that something is completely wrong. Somewhere between the two extremities becomes the deviant attitude criminal behaviour.[11]

In order to understand the new, formerly unknown deviances of information society, first I take the concept "anomie" from the concepts of theories related to social structure. The word anomie literally means "lack of social norms". Its extended meaning refers to a stage when for certain (usually new, not familiar) situations there is no former directive norm or when a long standing social practice is different from the social norms.[12] With other words, anomie means the breakdown of social order–a result of loosing social norms and values.[13] *Émile Durkheim* illustrated the concept of anomie with the change in the number of suicides per period, and explained it with several phenomenons in his research. Suicide rate grew significantly during the larger and faster economic changes for the reason that people suddenly got into new, unfamiliar situations from the usual ones–into a situation to whose norms they suddenly had to adjust to.[14] By analysing the industrial revolution of the 19th century, he drew the conclusion that the disengaged social powers did not get into balance, their relative value is not specified, and therefore the regulation cannot work for a while. People do not know anymore, what is allowed and what is not, what is fair and what is unfair, what can be claimed by right and what goes beyond its measures, therefore there is nothing they would not claim.[15] Family, political and religious communities, social groups that are self-organized or based on common interest integrate the individual into the society in different ways. During the integration process the individual accepts the examples and lifestyle patterns of the society. The stage of anomie evolves as a result of weakening integrating powers.

According to *Robert Merton* the reason for anomie is not the social change rather the social structure that sets equal goals for all its members but does not provide equal tools to achieve them, which causes tension between the requirements of our culture and the structure of our society.[16] A result of this tension is deviance. The expression "American dream" reflects the approach of our society that has been accepted since the strengthening of the idea of equality of the French revolution: the purpose is to aim for success and prosperity equally, i.e. with equal opportunities. The adjustment to the goals and tools of the period can happen in five ways: *conformism*–both are accepted, *innovation*–we accept the goals but are trying to achieve them with our own tools, *ritualism*–we give up our goals but still use the legal tools, *withdrawal*–we give up both, *rebellion*–we refuse both the goals

[11] Adler, F.–Mueller, G. O. W.–Laufer, W. S.: *Kriminológia* (Criminology). Budapest, 2002. 34–35.

[12] Gönczöl, K.–Kerezsi, K.–Korinek, L.–Lévay, M. (ed.): *Kriminológia–Szakkriminológia* (Criminology–Specialistic Criminology). Budapest, 2006. 104.

[13] Adler–Mueller–Laufer: *op. cit.* 157.

[14] Durkheim, É.: *Az öngyilkosság* (Suicide). Budapest, 1982. 227–161.

[15] Durkheim, É.: *Az öngyilkosság: szociológiai tanulmány* (Suicide: a Sociological Study). Budapest, 2000. 274–275.

[16] Adler–Mueller–Laufer: *op. cit.* 159.

and the tools and replace them with our own goals and tools creating a new social structure. Therefore innovation, withdrawal (drug and alcohol consumption) and rebellion can be considered deviances.

III. The possible reasons

1. Life on the network

The infocommunication revolution also generates changes. A dislocation of power can be seen between the groups that integrate the individuals at different levels and with different intensity while a network society is developing.[17] According to *Gábor Balogh,* the network ensures the identity of the citizens of the infocommunication period, and at the same time it is the sign of people's activity marked "homo informaticus" of the period. Network is, on the one hand, such a technical-technological tool that consists of junctions, linking routes and interconnections, and on the other hand, is a topologic formation that integrates those that act in it. A basic characteristic of the network is the connection, and as a topologic formation to ensure, maintain and transact infocommunication.[18] In an environment determined by infocommunication tools–because of the possibility of losing our identifiability as a result of living on the network–the role of consciousness and identity changes, they can become independent due to the indirect, mediated nature of our interactions. Relationships established on the internet provide us the most unmitigated possibility ever for personal achievements, self-realisation and separation from our previous personality–often more than the physical world can offer. The forms of communication can be shaped and influenced so much that the individual can portray itself completely unrealistic.[19]

Besides the possibility for experimentation, such basic human characteristics influence the users' online behaviour like desire for honest self-revelation, the need to share everyday stress with someone who understands us and has similar problems. On the other hand, it is a general truth that we often share our problems with strangers more easily than with our closest relatives. This phenomenon called "stranger on the train" can highly influence people's online behaviour.[20] Self-revelation is not always an inner pressure; it can also be a requirement to legitimate the belonging to a group or to establish mutual trust–the confession of the otherwise stigmatized character is easier to accept in both cases.[21] But what does its danger lie in? The possibilities provided by technology make the sharing and gathering of this personal information easier.

Infocommunication tools are such non-monopolistic mass products that are available for every citizen, such needs of accelerated social interactions that are more and more becoming the conditions of existence for the modern people. A conflict arises when a person leaving the infocommunicational environment is unable to identify the actions and situations

[17] Balogh, G.: Az információs társadalom olvasatai (Concepts of the Information Society). In: Balogh, G. (ed.): *Az információs társadalom dimenziói* (Dimensions of the Information Society). Budapest, 2006. 11–22.

[18] *Ibid.* 15.

[19] Jewkes, Y.–Sharp, K.: Crime, deviance and the disembodied self: transcending the dangers of corporeality. In: Jewkes, Y. (ed.): *Dot.cons–Crime, deviance and identity on the Internet.* Portland (OR), 2003. 2–3.

[20] Whitty, M. T.–Joinson, A. N.: *Truth, Lies and Trust on the Internet.* New York, 2009. 9.

[21] *Ibid.* 10–11.

of the real, direct world. Although cyberspace, the new cultic space of the 21st century will keep its high importance, the scope of problems cannot be limited solely to this sector but conspicuously show such signs of anomie that we can use to describe the negative changes of our society.

Therefore it seems easy to answer the question: what does the attractiveness of cyberspace lie in and why it is important to talk about its negative effects on personality? The answer seems to be simple: the interactions of cyberspace spread over the "real, direct" living space of the society. An increasingly significant part of users is unable to separate the interaction and role games of these two spaces, the once undiscovered, then secretly gratified deviances of their personality. According to *M. Poster* and *S. P. Wilbur*, cyberspace is ideal for the individuality to become an "unstable self", such a personality who becomes a convict of the process where he/she can create several personalities for himself/herself.[22] The experience is determining that enables people to move out of their physical and temporal space, to experiment with such sides of their personality that they are hiding in the real geographical space. By offering anonymity and free realization of imagination, cyberspace also allows the virtual realization of socially required goals and success. Concerning its influence on social relations, according to *Rezső Mészáros*, it is built on the users' common field of interest and weakens the geographical communities by abolishing geographical borders. Fanatic users get stuck in the cyberspace and step out of the "real world" society. The cultural influence of cyberspace is significant, considering the current world order, it is to be feared that it promotes the strengthening of Americanization and globalisation and offers an alternative space where the "self" has no definite contour or body.[23]

In Hungary, a technical development is given that is more intensive and dynamic than any change before; while the society is splitting into two parts (those possessing experiences and those who do not process any). According to the Hungarian Information Society Report 1998–2008 published by the Information Society and Trend Research Institute (Információs Társadalom és Trendkutató Központ – ITTK), 30% of the age group over 14 used computer and nearly 18% used internet regularly in 2001. As per the 2007 data, 52% of the same age group used computer regularly or occasionally and 45% used internet.[24] As stated in the Hungarian Information Society Report 2006 of ITTK,[25] 60% of the country's population can be considered digital illiterate as more than half of the Hungarian citizens has never used a computer. Contrary to them, others use broadband internet nearly every day and participate in the *web 2.0*[26] revolution. According to the report, this way Hungarian culture is splitting into two parts, i.e. while only a smaller part of the country is participating in the

[22] Mészáros, R.: A kibertér társadalomföldrajzi megközelítése (The Socio-geographic of the Cyberspace). In: Balogh, G. (ed.): *Az információs társadalom dimenziói* (Dimensions of the Information Society). Budapest, 2006. 216.

[23] *Ibid.* 218–219.

[24] ITTK–Hungarian Information Society Report 1998–2008. 39–40.

[25] http://www.ittk.hu/web/docs/ITTK_MITJ_2006.pdf

[26] The expression web 2.0 is covers such 2nd generation internet services that primarily community-based, i.e. the users edit the content together or share information with each other. Contrary to the former 1.0 and 1.5 services where the content was provided by the service provider. Source: http://hu.wikipedia.org/wiki/Web_2

technological development, a larger part of the citizens stays out of these changes which will cause a kind of cultural "shock" for those lagging behind.[27]

The question is whether it is about the conflict between the new practices and the norms accepted by the current majority or are the "mobile-madness", the autotelic, superficial chatting, and the addiction to virtual games and the internet real deviances. A complex philosophical-sociopsychological research is needed to be able to judge whether our society is originally demoralizating or the softening moral laws are a result of infocommunicational revolution, so I am not trying to judge it myself. However, the characterisation of deviances listed in the following chapter proves the existence of these problems.

2. The incentives of deviances on the network

How could such a young technology captivate such masses of users in such a short time? An important element is the virtual anonymity; the other is the soft community sanction as deviant behaviour in the virtual space can only result in the suspension of members with displeased behaviour contrary to the real world where violation of norms can have much more serious consequences.[28]

Of course, those with similar deviant behaviour also have the opportunity to create their own community where they can define their own norms to follow. For that very reason, deviant behaviour is currently judged relative to the system of values within the dominant group. The problem would be even more difficult to resolve if the number of users currently considered deviant and the number of "average" users were equal. Users with similar thinking and field of interest and their communities generated a particular subculture that can manifest itself in the usage of communication tools and the testing of applicants wishing to join, which aims to strengthen the community and to keep out strangers.

According to the research of *M. K. Rogers*, persons at the age of 16 and under commit the most of deviant computer-related behaviours.[29] A good example can be a self-assessment survey on latent juvenile deviances that showed that downloading video and music files are considered one of the least serious deviances.[30] The 50.9% of the youngsters interviewed have downloaded such contents before and 41.8% of the downloaders started this activity at the age of 12 or under. The young age of high percentage of users considered problematic is associated with the time when the tools that are based on new technologies became wide-spread in everyday life and their usage became natural and common.

[27] Information Society and Trend Research Institute (Információs Társadalom és Trendkutató Központ–ITTK)–Hungarian Information Society Report 2006. 62. http://www.ittk.hu/web/docs/ITTK_MITJ_2006.pdf

[28] More details in Parti, K.: Devianciák a virtuális valóságban, avagy a virtuális közösségek személyiségformáló ereje (Deviances in the Virtual Reality, the Identity-formative power of the Virtual Communities). *Infokommunikáció és jog,* (2007) 2, 57–63.

[29] Rogers, M. K.: *A social learning theory and moral disengagement analysis of criminal computer behavior: An exploratory Study.* UMI Dissertation Services. 2001. 57–58.

[30] Parti, K.: Számítástechnikai devianciák (Computer technology Deviances). In: Kerezsi, Klára–Parti, K. (eds): *Látens fiatalkori devianciák–Fiatalkori devianciák egy önbevalláson alapuló felmérés tükrében–„ISRD-2"* (Latent Juvenile Deviances–a Self-assessment survey on latent juvenile deviances–"ISRD-2"). Budapest, 2008. 127–159.

Besides the indulgent attitude of society, i.e. the soft sanctions of cyberspace communities, the mild judgment of real world society also strengthen these deviances. The reason for not sentencing such deviances is partly the fact that the idea of an absolute and exclusive possessive relation system regarding other "objects" had taken shape already decades before the development of cyberworld and has been held by the majority of society does not affect the "unreal", "non-physical" objects of cyberworld. Another reason is that the majority of offences against IT systems do not get publicity. These offences do not affect the individual users, "only" those big companies against which the majority of society often sympathizes with those resistants who like to call themselves Robin Hood. As people feel themselves protected from computer attacks, computer-based criminal offences fit into today's social system of values morally much better, so the perpetrators do not need too much effort to handle their actions morally.[31] According to a formerly published survey of *Sonda Ipsos*, the public considers illegal usage of softwares a smaller fault than if someone does not give up his/her seat to elderly people in the bus, while illegal copying of CD-s and DVD-s is considered even less serious than scallywagging.[32]

As a summary, we can state that for the young users of supported and doubted advantages of technology the lack of anonymity and sanctions, the cohesive subculture and the latent behaviours as environmental impacts verify and prove the correctness of continuing their behaviour.

IV. New deviances

1. Those concerned

The profiler and behaviour research approach provides a method to typify those who are concerned by the deviances of information society. After examining the offenders of certain crimes considered computer-related deviances *Saw, Ruby* and *Post* set up a category called CITI *(critical information technology insiders)*, i.e. the category of critical IT expert users who for different reasons all mean some danger for the computer infrastructure.[33] Introversive behaviour is typical for all users with a high risk factor, which means that they have difficulties with handling problems and establishing direct relationships to overcome certain barriers. They typically prefer to communicate their queries via e-mail to face to face. Researches demonstrated 6 high-risk characteristics: personal and community failure (frustration), computer addiction (extreme internet-usage), moral flexibility, decreased steadiness-faithfulness, self-consciousness, lack of solidarity. These personal attributes are associated with characteristics such as power lust, revengefulness, selfishness, greediness. Based on the motivations of the examined subjects a) *explorers* are motivated by the thirst for knowledge and curiosity, b) *good Samaritans* by helping others and amending things, c) *hackers* by the harmless self-expression and the desire for self-provement, d) *machiavellists* by achieving personal goals ignoring the environment or other persons, e) *exceptions* by acknowledging their unique quality, f) *avengers* by their prejudice, g) *careerists* by profiteering, h) moles also by profiteering but with the difference that they cause harm.

[31] *Ibid.* 63.

[32] http://index.hu/tech/jog/szonda0726/

[33] Casey, E.: Criminal Behavior on the Internet. In: Turvey, B. E. (ed): *Criminal Profiling–an introduction to behavioral evidence analysis.* London, 2008. 675–676.

2. Certain deviances

After demonstrating the theoretical background, we should have a look at some typical deviant behaviour that is related to information society. Such behaviours are cybersex, addiction to internet or mobile telecommunication and computers, in which computers and infocommunication systems participate as commitment tools or targets of criminal offences.

1. Cybersex. Regular visiting of pornographic sites or chatting in this subject can highly influence the users' life even outside of the network, which is evident, because the participants spend less and less time with their relatives and colleagues. However, scientists do not agree how significant this influence is.[34] Another aspect that needs to be examined within this new scope of problems is that society has not clarified what unfaithfulness means in case of a partnership. For example, according to the research of Whitty, certain online interactions such as conversations in an erotic subject, flirting or satisfaction in the meantime is considered unfaithfulness as per the social judgement based on the answers of the examined persons.[35] The internet changes the attitude of society and of individual users to sexuality by satisfying their sexual curiosity without consequences, while–with the possibility of experimentation–the normal attitude of heterosexual behaviour can also get a new content which means that the meaning of sexual categories changes, too.[36] These are the several structured and categorized partner searching websites, websites ranked based on the users' votes advertising prostitutes and masseurs, and the increasingly popular role-plays, where users can play with personalized avatars in different sexual situations.[37] By forming online communities based on similar interests, users can exchange experiences, are more likely to share their worries with each other, reveal their formerly secret deviances and with the help of encryption provided by the new technology they are more likely to share their illegal pornographic records with each other.

2. Internet-addiction. In case of internet addiction, the internet, the quantity and diversity of online accessible contents, the browsing itself and the search for information can become an autoletic source of pleasure. The question is whether we can talk about simple internet addiction or rather game-, sex- and information-addicted patients, who only differ in the chosen source of pleasure and internet only mean a tool for them. Other addictive relations were known earlier as well, but chat-addicts who visit different forums can gratify their desire only on the internet. The addicted internet users can usually be described as having an unsatisfied social need for company that can become pathological if in spite of the regular communication the possibility of meeting the communication partners personally does not even come to question. The majority of users concerned also suffer from a disorder in identification; this is why they appear with false names, age or even gender on the internet. In case of patients treated in hospital, the first diagnosis usually shows depression, distress or distracted personality instead of internet-addiction. This type of addiction is usually diagnosed only later, as a secondary disease. It might cause

[34] Whitty–Joinson: *op. cit.* 86–87.

[35] Whitty, M. T.: Pushing the wrong buttons: Men's and women's attitude towards online and offline infidelity. *CyberPsychology and Behavior*, 6 (2003) 6, 569–579.

[36] DiMarco, H.: The electronic cloak: secret sexual deviance in cybersociety. In: *Dot. cons–Crime, deviance and identity on the Internet... op. cit.* 54–55.

[37] Sharp, K.–Earle, S.: Cyberpunters and cyberwhores: prostitution on the Internet. In: *Dot. cons–Crime, deviance and identity on the Internet... op. cit.* 36–52.

withdrawal symptoms, nervous reactions or stress if the person cannot sit in front of the screen.[38]

According to a 2002 research of ITTK,[39] the characteristics of a typical internet-addicted user are the following: male, under 20 years, internet is not necessarily needed for his work or study, uses internet at home as well, spends more than 6 hours on the web, those who completed primary school are highly represented which directs our attention to the adolescent age group, the starting date of internet usage is not significant considering the development of addiction. According to scientists, it is better to use the concept "addictive internet usage" as–based on the results of the research–those concerned can be classified into three often not well-separable categories: those belonging to the group of the addictology model, secunder internet users and those having impulse control disorders. The addictology model includes those who comply with the criterias of internet addiction, their proportion is 6%. Males are more dominant in this group compared to other groups (81%). This is the youngest group as 46% of its members are under 20. Secunder internet users hang on the web so much mainly because they can satisfy certain psychical needs better online than in the real life. They use the internet as a secondary source of pleasure due to their unsatisfactory relationship network. Their proportion is 11%. Impulse control disorder is typical for the age group of 21–30, their proportion is 12%. The proportion of users considered healthy is 71%. The addicted and secunder users less often need internet for their work or study, they typically use it at home. In case of all three problematic groups an internet usage over 3 hours can be seen, 46% of the addicted spend more than 6 hours in front of the screen. Those belonging to these problematic groups generally use the internet for purposes other than getting information or e-mailing; they rather pursue other activities on the web. Typical activities are: addicted users–chatting and games (with an exceeding value), those with impulse control disorder–games and multimedia chatting, secunder group–chatting and multimedia chatting (with an exceeding value). All three problematic groups regularly turn to psychologists for help.[40]

4. Cyber-stalking, cyberbullying and sexting. Cyberstalking is a harassing behaviour committed on the internet. A speciality of communication possibilities offered by the

[38] Romhányi, T.: A világháló foglyai (Prisoners of the Internet). *Népszabadság*, 18th Sept 2004. http://nol.hu/cikk/333242/ Beszélgetés dr. Vincze Gáborral, a gyulai Pándy Kálmán Kórház pszichiátriai osztályának osztályvezető főorvosával (Interview with Gábor Vincze dr., chief doctor of the psychology ward of the Pándy Kálmán Hospital in Gyula).

[39] Participants of the research: Andrea Ritter, Zsolt Fábián Dr., Mária Hoyer, Péter Pillók. The research team used a survey developed by the American psychologist Kimberly Young with some modifications according to the Hungarian circumstances. The survey included two main parts: 11 demographic and 20 other questions that measured the harmful usage of internet. During the research 1714 people completed the online survey (with 70.8% rate of response). The analyses included 1529 valid data sheets (those that contained only answered questions). http://archive.infinit.hu/2002/0307/index.html

[40] As per the results of the research show that other addiction-related problems affect primarily the addicted internet users and less those with impulse control disorder. The separation of the group of those with impulse control disorder suggests that the addicted internet users do not form a homogenic group. According to researchers, the results show that a less specific diagnostic cathegory should be used which can be called pathological internet usage. It seems that it is unlikely to form a homogenic group and instead will be organized in such subgroups, those psychopathology, theraphy and prognosis are different.

internet is that certain ways of communication (e-mail, chat) are written and other sensors of cognition do not play any role. As a result of the lack of social control, social distress–which is one of the main barriers of aggression–does not exist anymore. Therefore, on the one hand, certain feelings, emotions, desire–anger, jealousy, bitterness, thirst for possession and control–or aggression can directed straight towards the target of the harasser, on the other hand, with the possibility of the emergence of different fantasies, the victim can become the focus of the harasser's imagination.[41] However, the thoughts of *J. Reid Meloy* are in many cases only theoretic, these possibilities should also be taken into account in a few sentences. He believes that in the first case the internet is a tool that the principal can use in order to gather personal information about the victim to make the subsequent harassment easier.[42] An attribute of the trend marked as web 2.0 of the internet-usage is that the users build communities–such as iwiw, myvip, facebook and other services–where they share data–in most cases unconsidered. In the second case the internet is a medium or communication channel, through which the principal threatens his/her victim and communicates his/her desire, feelings to him/her. In the third case, Meloy attributes a big role to the psychical effect of astonishment since electronic messages can be send anytime to anyone, the message can exist timeless until the victim discovers it that depending on the timing can make the target person feel that his/her harasser is in his/her near anywhere, anytime.[43] Anonymity increases the subjection of the victim for the reason that he/she is not aware of who his/her harasser is, therefore will suspect anyone in his/her environment.

According to *Bran Nicol* one of the characteristics of our modern culture is that the motivators of persecutive behaviours became examples to follow. Under this Nicol means the following: accepted and supported is the conviction that, on the one hand, we gather information about anyone, even foreigners and build intimate relationship with them, on the other hand, the opposite of this is that we share even our most secret desire with everyone.[44] We live in a world where the border between the individual and others has dangerously obliterated therefore harassment itself has occurred as a symptom and unavoidable product of our culture.[45] Permanently attracting attention and the constant desire to belong to celebrities both indicate that our conception about privacy has changed. The surrounding digital culture pushes us into a constant, accepted harassment. Therefore the internet itself plays such a transmitting role, through which, on the one hand, harassment becomes possible as a result of the action of the victims or by using the data published by themselves; or on the other hand, through the persecutive "services" mentioned by Nicol as examples. Nicol mentions examples of websites like CelebFanMail.com or Gawker Stalker[46] that informs us about the e-mail address and actual place of residence of nearly any celebrity based on the information published by the "everyday" people who spot them. In addition, a speciality of the functioning of the internet is that the anonymity provided is only illusory. Numerous traces arose in course of the services employed by the users that can be gathered by experts; the popularity of phising nowadays is beyond doubt.

[41] Meloy, J. R.: The Psychology of Stalking. In: Meloy, J. R. (ed.): *The Psychology of Stalking: Clinical and Forensic Perspectives*. London, 1998. 11.

[42] *Ibid.* 10.

[43] *Ibid.* 12.

[44] Nicol, B.: *Stalking*. London, 2006. 8.

[45] *Ibid.* 8.

[46] *Ibid.* 9.

Besides harassment cyberbullying and sexting can be considered deviances but for the lack of Hungarian expressions can only be described with these new foreign keywords. Cyberbullying is such a rude joke or teasing when members typically of age groups of 13–17 years disfigure each other on different platforms. In possession of a camera mobile phone any accident or unpleasant incident–irrespectively where it happened–can be watched by crowds on one of the popular websites already the same evening. Sexting is a phenomenon when young users publish pornographic, erotic or similar photos of themselves on social network websites. These two trends refer to the disappearance of private sphere, while cyberbullying is the ignorance of someone else's private sphere; sexting means the complete opening of the user's own private sphere.

5. E-crimes. Criminal offences are those behaviours that oppose the social and legal norms and violate the social cohabitation the most. Computer is no longer only the tool of committing indictable offences but more and more the IT systems and the financial or personal data stored in these systems are becoming the targets of these offences. The analysis of IT crimes runs into difficulties for different reasons. Contrary to the "traditional" criminal offences, only a few statistical data is available; due to the special infrastructure there is a high latency; the place, time and tool of commitment are special; the commitment requires special expertise; there is only a few data available about the perpetrators;[47] while the legal subject and the tool of commitment are also special. We should not forget that information has a political, economical value and a specific endanger potential, while the freedom of information and the free information flow as principals are important premises of a free political and economic system. Another feature of the legal judgment of material and immaterial goods comes from the fact that information security should consider the economic interest not only of the owners or carriers of information but also of those who are concerned about the content of information. From this aspect of information come the requirements of privacy, in a narrower meaning, the requirements related to the protection of personality rights–especially in the course of electronic data procession.[48] Therefore information is not only a carrier of economic and financial interests but can also possess value by embodying public and personal interests.

Therefore the new criminal offences of information society violate or endanger several legal subjects. According to this, I consider criminal offences against IT systems and data as IT crimes, i.e. criminal offences that violate or endanger the smooth operation of IT systems and the reliability, authenticity and confidentiality of the stored data and all related economic interests, criminal offences related to copyright and data protection–because of data processing systems are supported more and more by computers.

The question is that in an environment, where the described technology influences the individuals in the described way, what the area of social self-regulation is, the area of the

[47] As IT crimes refer to different commiting behaviours, the perpetrators of this heterogenic group are also different. For example, hackers have unique characteristics: they are usually young, white boys, with a middle class background and high intelligence (IQ over 120). They are typically shy and only make contacts with those who just like them are interested in IT. Some of them believe that they belong to an "anti-culture", fight against censorship, releasing information and fighting against the oppressors. See Taylor, R. W.: "Computer Crime". In: Swanson, C. R.–Chamelin, N. C.–Tersito, L. (eds): *Criminal investigation*. New York, 1991.

[48] Sieber, U.: A számítógépes bűnözés és más bűncselekmények az információtechnika területén (Computer-related and Other Crimes in the Field Area of Information Technology). *Magyar jog*, 40 (1993) 1, 46.

branches of law operating with the milder sanctions of the legal system, the educational obligation of the state promoting prevention, and where the dominance of criminal law starts.

V. Summary

The new deviances of information society are real phenomenon and their existence is connected to the social changes in which technology plays an important role. The deviances reflect the change of the social system of values and traditions. The presence of the users concerned, i.e. the masses of younger generations within the interaction provided by infocommunication tools mean that the system of values and rules represented by them is becoming a dominant, determining element–due to the speed and intensity of change. A gradiation between generations is missing that could ensure the mastering and teaching of norms of the new environment. Legislators have to consider these when they wish to outline the borders of criminal law within a developing, shaping system of relations–especially when defining the policy of criminal regulation.

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OBITUARY

Lajos Lőrincz (1935–2010)

Lajos Lőrincz, an internationally known legal expert, member of the Hungarian Academy of Sciences and professor emeritus of law, passed away on the 26th December 2010, at age 75.

With the death of Lajos Lőrincz, the Institute for Legal Studies of the Hungarian Academy of Sciences lost one of its most illustrious scholars, a renowned teacher at the Law Faculty of the Károli Gáspár University of The Reformed Church and the Corvinus University's Faculty of Public Administration (the former College of Public Administration) and a revered mentor of generations of academics.

After graduating from the University of Szeged, Lajos Lőrincz became a researcher of the Institute for Legal Studies of the Hungarian Academy of Sciences upon the invitation of the then deputy director of the institute, Professor István Kovács, who was first his professor, then his fatherly companion, and Lajos Lőrincz remained faithful to the institute for more than five decades. Professor Lőrincz's association with the Hungarian Academy of Sciences was long and fruitful; he was elected to be a corresponding member of the Academy in 1990, and in 1998 he becomes a full member.

Following the beginning of the 1990s, Lajos Lőrincz fulfilled several assigned academic positions, to name just a few, he was the President of the Council of Doctors, Vice-President of the Section of Economics and Law of the Hungarian Academy of Sciences, whereas lately, he functioned as a member of the Presidium of the Academy. Lajos Lőrincz brought all his responsibilities to a creditable and correct conclusion.

He was attached to István Kovács not only because of Debrecen, the homeland and the University of Szeged, where István Kovács lectured, while Lajos Lőrincz was a university student, but also because of the fact that they bore a considerable resemblance to each other as for their mentality. The former Kovács-student evolved to be a master throughout the years himself as well, and currently several generations of scholars in administrative law consider themselves to be Lőrincz-students. Similarly to his master, Lajos Lőrincz was a genuine school-founding individual, therefore, in the recent years the students surrounded him at the same table in the same study, just as formerly István Kovács had been surrounded by Lajos Lőrincz, Attila Rácz, Lajos Ficzere and others.

The career and life course of Lajos Lőrincz testifies eloquently to the responsibility of those, who sit behind teacher's desks in any educational institution. Teachers, may they work at a simple village primary school or at a prestigious university, need not only impart they knowledge to students, but they also have to endear learning and the subjects to the students. As we know straight from Lajos Lőrincz, as a schoolboy, he wasn't keen on learning or going to school, it was only later that the excellent teachers of the secondary school in Debrecen familiarised him with the pleasure of learning and reading as well as recognised the interested and talented student and his attraction towards history and literature. Merely few people may know that Lajos Lőrincz not only wrote, but also published poems in his youth.

His scholarly career began in the Institute for Legal Studies. He obtained the title of candidate of sciences due to his dissertation on the state control of scientific research at the age of 33, and 11 years later, due to his essay titled "The Limitations of Public Administration," he became a doctor of sciences, and after a further period of 11 years, he was elected to be a corresponding member of the Hungarian Academy of Sciences.

The research work of Lajos Lőrincz was related to administrative law for more than half a century. His life-work was always marked by European outlook thanks to his knowledge of languages and scholarships abroad. He was a legal scientist whose theoretical research always took the real circumstances, the condition and the problems of Hungarian public administration into consideration, therefore, it is not accidental that he dealt with issues of the reform of public administration in a number of his works. After the beginning of the 1970s together with István Kovács, he directed the research program titled "A Complex Scientific Enquiry into the Development of Public Administration," the direction of which was later taken over by Professor Géza Kilényi. During the recent years, he elaborated the conception of the reform of local government organizations in Hungary.

As a scientist, Lajos Lőrincz was reputed not only in Hungary, but abroad as well, namely, such a prestigious university as the Aix-en-Provance in France conferred the title of doctor horis causa, and as an international recognition of his scientific work he was appointed to be the Vice-President of the International Institute of Public Administration in Brussels. Past the age of 70, having disposed of specific assignments related to university administration and others in scientific life, Lajos Lőrincz devoted the vast majority of his time to lecturing at university and scientific research. As a result, during the last five years volumes by Lőrincz were published on an annual basis, whereas, in certain years even two books appeared.

It is difficult to retain one's composure, when we remember that the old and amiable colleague, who had shown us and taken pride in the volume of essays published on the occasion of his 75th birthday by the Professors of Károli Gáspár University of The Reformed Church as well as had spoken about his plans and conceptions with youthful enthusiasm, has departed this world. Lőrincz Lajos leaves wonderful memories and a corpus of very valuable scholarly works.

V. L.

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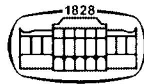

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CONTENTS

STUDIES

ANDRÁS L. PAP	Ethnic Profiling and Discrimination: The International Context and Hungarian Empirical Research Findings	273
LÍDIA BALOGH	Racist and Related Hate Crimes in Hungary – Recent Empirical Findings	296
SILVANA MOSCATELLI	The Multiple Discrimination in the European and Italian Context	316
ILJA RICHARD PAVONE	The Italian Legislation on Roma and Sinti and its Compliance with European and International Standards	325
ANDREA CRESCENZI	The Role of the Equality Bodies. The Italian National Office against Racial Discriminations	335
SÁNDOR VIDA	Trademark Infringement by Domain Name Registrars	341
GYULA KOI	The First Three Decades of Legal Reforms in the People's Republic of China (1978/1979–2008/2009)	348

BOOK REVIEW

GÁBOR HAMZA	*Nótári Tamás:* Marcus Tullius Cicero's Complete Pleadings	369

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ANDRÁS L. PAP*

Ethnic Profiling and Discrimination: The International Context and Hungarian Empirical Research Findings[1]

This paper focuses on ethnic profiling. Besides providing a description of the concept and introducing a recent, groundbreaking Hungarian empirical research project on police profiling, I will also highlight the international context within which profiling should be seen. This does not only include the assessment of the most important legal and political debates and frameworks regarding profiling by law enforcement agencies, but also the

* Senior Research Fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30; Associate Professor, ELTE University of Budapest, H-1052 Budapest, Egyetem tér 1–3.

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E-mail: pap@jog.mta.hu.

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analysis of the elusive concept of security, based on which the efficacy, and thereby the constitutionality of certain law enforcement measures may be scrutinized. Empirical findings with a thorough methodology on the actual efficiency of law enforcement measures like offender, or potential offender profiling are of corollary importance, because the well-established principle of constitutional balancing, a core feature in jurisprudence, as well as in legislation, policy making and law enforcement refers to the process of weighing how intrusive certain means are in comparison to the ends–provided of course, that the ends are legitimate. The concept of proportionality is central here: in order to assess the relationship between the means employed and the aims sought to be realized, one needs to asses three criteria: effectiveness, necessity, and the degree of harm inflicted. Under the effectiveness criterion, what is meant is the ability of the concrete measure to achieve the ends for which it was conceived and this includes consideration of the extent to which the measure in question has led to identification of criminals, along with the extent to which the measure in question affects the ability of the police to work with minority groups to identify criminals and the extent to which the measure in question may divert the police away from identifying real criminal activities. The necessity criterion refers to the existence or otherwise of other, less invasive measures available in order to achieve the same aim. Finally, the harm criterion involves scrutiny of the extent to which the concrete measure affects the rights of the individual (right to respect for private and family life, right to liberty and security, right to be free from discrimination, etc.).[2]

However, as I will argue, this sort of "security", a service which law enforcement agencies are designed and authorized to provide, is a highly elusive concept. Thus, the efficacy of policing, i.e. the process of "creating security" is especially difficult and controversial to establish. For example, in a deeply racist or prejudiced society where certain ethnic groups are widely believed to be intrinsically associated with criminality, say the Roma in Central East Europe, the police may feel, believe and even claim that they are doing what the white middle class majority taxpayers want them to do, therefore they are providing "security" if they pull over or stop and search all or many of the Roma they see. Law enforcement-related prejudices against minorities are extremely widespread. As we often hear, the majority of the prison population is Black (Roma, etc.),[3] and almost all of the terrorists are Muslim fundamentalists (mostly from Arab countries). Accordingly, appropriate restriction of the circle of suspects seems easily justifiable. For example, in Hungary, according to a survey in 2006, almost two-thirds (62%) of the Hungarian adult population agreed fully or to some degree with the claim: "the tendency to commit crime is in the nature of the Roma".[4] A 1997 survey by the Ministry of Interior showed that 54% of

[2] As spelled out in ECRI's General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing, beyond considerations relating to the individual rights affected, the harm criterion should be understood in more general terms, as including considerations on the extent to which the measure in question institutionalises prejudice and legitimises discriminatory behaviour among the general public towards members of certain groups.

[3] In Hungary, a research was published in the mid-'90s revealing estimates on the ratio of Roma inmates, which showed that based on self-definition of inmates about 40% of the prison population is Roma (see Huszár, L.: Romák, börtönök, statisztikák (Roma, prisons, statistics). *Amaro Drom*, 1997 August, 9–11), with prison directors giving much higher estimates, an average of 60%. Women Integration and Prison Project (MIP). Hungarian report "Data on Crime, Judicial and Prison data" 2004. http://mip.surt.org/ Unpublished)

[4] See http://www.tarki.hu/kozvelemeny/kitekint/20060201.html (02.10.2006)

the police perceived criminality as a central element of Roma identity[5] and in 2002–2003, the Hungarian Helsinki Committee carried out a research on discrimination against Roma in the criminal justice system, finding deep-running traces of racial profiling by the police within Roma communities.[6] Also, it is a general feature of post-9/11 developments in law that when anti-terrorist law enforcement measures are involved, a substantially empty rhetoric–the inherently false dichotomy of the "liberty vs. security"-binary–has been adopted, and with a sweeping move, it has been extended to crime-, and immigration control.

The uniqueness of this New World is, thus, twofold. First, new standards have been set up (required and accepted) for government activism in the sphere of curtailing freedom as an exchange for security. People (the political class, the electorate) appear to be willing to reformulate the traditional balance between liberty and security: a little bit more documents and ID-checks, longer lines and more flexible search–warrants seem an acceptable tax levied in return for more stringent demands for government-provided security. For example, once being convinced that we actually need to be searched and subjected to surveillance for aviation safety, and for a faster process, we are willing to giving up some if our privacy and enter a full body scanner. It seems to be the case that there is broad consensus on the fact that traditional policing principles or, for that matter, the law of the Geneva Conventions (regulating the interrogation of prisoners of war, for example) have become unsuited for handling the peculiar warfare put on by suicide bombers and terrorist organizations. Just about everywhere in the world, the war against terrorism has had the effect of widening the control functions of the national security and immigration services, as well as of other law enforcement authorities. The expanded measures and procedures thus introduced were often ones that legislators and law enforcement officials otherwise only had dreamed of attaining, but this time around, they could take advantage of changes in the public sentiment due to society's shock over the tragic events and fear spreading in their wake. For example, there are certain regulations with respect to banking (and clients' data) that the authorities have been longing for, to aid them in their fight against drugs and organized crime, but beforehand they were unable to attain them due to constitutional misgivings. Under the auspices of anti-terrorist action, all of a sudden, the same regulations become acceptable. Likewise, recent decades saw the prospects of police patrolling based on discriminatory racial profiling fail miserably within the Anglo-American world. All the same, the Arab population became a natural target of the war against terrorism. It looks as though the horrific image of weapons of mass destruction and recurring terrorist attacks have overwritten the previously held principle that it is better to have nine criminals go free than to have a single innocent person punished. What we thus see is that the rhetoric of exceptionalism (that is, the acceptance that in these special, desperate times, special, desperate measures are needed, and for now we can and should put aside the traditional decision-making rules of thumb) is also sweeping: it is not limited to the "war against terrorism", but is utilized in immigration policies, and for example in the American criminal policies on sex offenders which completely overturn the long-held classic rules of punishment, but it also seen in the general

[5] Csepeli, G.–Orkény, A.–Székelyi, M.: Szertelen módszerek (Insubstantial methods). In: Csányi, G. (ed.): *Szöveggyűjtemény a kisebbségi ügyek rendőrségi kezelésének tanulmányozásához* (A reader for the study of policing minorities). Budapest, 1997, 130–173.

[6] See Farkas, L.–Kézdi, G.–Loss, S.–Zádori, Zs.: A rendőrség etnikai profilalkotásának mai gyakorlata (The current police practice of ethnic profiling). *Belügyi Szemle*, 52 (2004) 2–3, 30–50.

trends of shifting to post-crime and risk societies. A further unique feature concerns the role of the private sector: it becomes both a victim and a willingly cooperating perpetrator in this process: it is charged with carrying out a number tasks in control and surveillance (or even in the design of privacy-protection enhancing mechanisms against the very risk itself poses on privacy), but this also creates a lucrative business opportunity. As an addition ironic twist: people seem willing to provide crucial and vast amounts of data to private companies in return for commercial services, unaware that due to outsourced state control functions these will end up in the hands of the government–only making it obvious that, despite the discrepancy of the applicable legal framework, in the field of surveillance and control, the "public-private" distinction is completely outdated.

This tendency may be alarming for many, but one can easily say that if this New Security Deal is passed within the habitual pathways of constitutional participatory democracy, there probably is not too much room for complaints against a unanimously empowered protective state. After all, the state is theoretically reconstructed as the outcome of a notional social contract in which individuals agree to trade a quotient of their liberty in exchange for the state's guardianship of security[7] in the broad sense.[8] The other apparent specialty of this new era, however, is more problematic: the concept of security, which is thus positioned centrally in the political, legal and social discourse does not seem to receive the degree of scrutiny its weight and relevance would require. In other words, not only is "security" a buzz-word for budgetary and policy demands that can easily overrule long-standing constitutional and human rights limits for government power, but while willingly giving in to these demands, we do not even seem to investigate the actual effectiveness of many of these measures, for example, whether they actually provide us security (in exchange for the liberty value offered).

In other words, at least two separate discussions are going on in the "security vs. liberty" debate: a theoretical and a practical one. The theoretical is centred around the reformulation of the traditional "security-liberty" balance-recipe. The other line of inquiry focuses on the actual practical effectiveness of certain political and legal measures the government and law enforcement agencies are allowed to have.

In this article, through the case study of ethno-racial profiling, a specific law enforcement action and a potentially structural human rights risk involved, I will provide some additional arguments to the second debate. I will highlight the importance of defining and testing the security-content of all new government powers before and during the balancing of how much liberty this security is worth. The underlying thesis is that "security" is not an objectively determined social condition, but a socio-psychological construction influenced by a number of irrational features and it is subject to both intentional and

[7] According to Ian Loader, the politics of resources or the politics of allocation is concerned with trying to ensure that all citizens are provided with a "fair" share of available policing goods; something that requires attention both to the unwarranted "over" (or overly invasive) policing of particular individuals or social groups, and to the inability of (disadvantaged) citizens and communities to acquire a proportionate level of such goods. See Loader, I.: *Policing, Securitization and Democratization in Europe*. Monday 18 April 2005, http://www.libertysecurity.org/article209.html?var_recherche=policing%2C%20securitization

[8] See, for example Loader, I.: *Necessary Virtues: The Legitimate Place of the State in the Production of Security*. 19 April 2005, http://www.libertysecurity.org/article232.html?var_recherche=necessary%20virtues

circumstantial manipulation. I will argue that "efficiency" will have both an objective dimension, on which lawmakers and judges can and should rely, but it will also have a subjective, psychological element, which also needs to be factored into our discussions, because fear and prejudice may indeed make certain policies efficient by the social psychological effect it may have on people, even if it turns preconceptions and prejudices into a self-fulfilling law enforcement prophecy.

I. The objective and subjective aspects of "security"

In the foregoing, it has been demonstrated how important the definition and measurement of security should be in law enforcement, for it is on these that both the pragmatic and political success, as well as the constitutionality of law enforcement measures depend. But easier said then done. Due to the overrepresentation of crime and violence in media and the entertainment and infotainment-business, the public usually vastly overestimates both the crime problem in general, and the actual probability of one's criminal and especially violent criminal victimization. While in their reports about crime and security in general, high-end newspapers are trying to be factual and analytical, tabloid media tend to be anything but restrained. As David Green put it: "Broadsheets tend to focus on government, quoting professional experts, elites and interest group representatives. The tabloids tend to focus on crime victims and their relatives, offering dramatic testimonials as counterpoint to the more professionalized discourse of the broadsheet press".[9] Thus, tabloid readers tend to be more fearful of crime than broadsheet readers, particularly about being mugged or physically attacked. For example, results from a British Crime Survey (BCS) indicated that tabloid readers were almost twice as likely as broadsheet readers to believe crime had "increased a lot" over the last several years–43 versus 26%–when it had actually declined.[10]

Take, for example, the widely held belief (depicted in so many movies and novels) that the job of an American police officer is dangerous. But, as Roger Roots[11] points out, police work's billing as a dangerous profession plummets in credibility when viewed from a broader perspective. According to the National Institute for Occupational Safety and Health,[12] it is true that homicide is the second leading cause of death on the job for all American workers, however, the taxicab industry suffers homicide rates almost six times higher than the police and detective industry. A police officer's death on the job is almost as likely to be from an accident as from homicide, since approximately 40% of police deaths are due to accidents. When overall rates of injury and death on the job are examined, policing barely ranks at all. The highest rates of fatal workplace injuries occur in the mining

[9] Green, D. A.: Public opinion versus public judgment about crime. Correcting the "Comedy of Errors". *British Journal of Criminology*, 46 (2006) 1, 139.

[10] Green: *op. cit.* 138.

[11] Roots, R.: Are Cops Constitutional? *Seton Hall Constitutional Law Journal*, Summer, 11 (2001), 686–757.

[12] National Institute for Occupational Safety and Health, Violence in the Work Place, June 1997. National Institute for Occupational Safety and Health, Fatal Injuries to Workers in the United States, 1980–1989: A Decade of Surveillance, National Profile, August, 1993 DHHS (NIOSH) Publication No. 93–108.

and construction industries, with transportation, manufacturing and agriculture following close behind. A full 98% of all fatal workplace injuries occur in the civilian labour force.[13]

The above example shows that it lies within the nature of the concept of "security" that due attention needs to be given to the actual verification of security risks and the effectiveness of the offered security measures in exchange for which we are willing to offer some of our rights and liberties. For instance, take the case of ID cards: not only can terrorists use a wide range of techniques to forge identities, a recent report by Privacy International showed that two-thirds of all terrorists in history have operated under their true identity,[14] thus, identity cards would have little preventative effect. Nevertheless, one hundred countries around the world currently use national identification cards,[15] and (despite concerns raised by privacy advocates) a number of governments are promoting it as a powerful tool to prevent and fight terrorism.[16]

Following Rob Allan's remark,[17] David Green[18] calls it something of a "comedy of errors" in which policy and practice are not based on a proper understanding of public opinion, which is, in turn, not based on a proper understanding of policy and practice.[19] The process of securitization,[20] a core concept in contemporary socio-political developments, is

[13] Roots: *op. cit.* 711–712. Also, note that about 2% of American soldiers serving in South Vietnam during the Vietnam War died during their service there, yet most Americans would view a one-year tour of duty in South Vietnam during that war as a grave danger. Amitai Aviram, The Placebo Effect of Law: Law's Role In Manipulating Perceptions George Washington Law Review, November, 2006, footnote 80.

[14] Privacy Int'l, Mistaken Identity; Exploring the Relationship Between National Identity Cards & the Prevention of Terrorism 2 (2004). The report also shows that "[a]t a theoretical level, a national identity card as outlined by the UK government – the proposed legislation in question – could only assist anti-terrorism efforts if it was used by a terrorist who was eligible and willing to register for one, if the person was using their true identity, and if intelligence data could be connected to that identity". See http://www.privacyinternational.org/issues/idcard/UK/ id-terrorism.pdf

[15] See Davies, S.: Identity Cards: Frequently Asked Questions, Privacy Int'l, Aug. 24, 1996, http:// www.privacy.org/pi/activities/idcard/idcard_faq.html

[16] Jennifer Morris, Big Success or "Big Brother"? Great Britain's National Identification Scheme Before The European Court Of Human Rights. *Georgia Journal Of International And Comparative Law*, Winter 2008, 471.

[17] Allen, R.: "There Must Be Some Way of Dealing with Kids": Young Offenders, Public Attitudes and Policy Change. *Youth Justice*, 2 (2002) 1, 3–13.

[18] Green: *op. cit.* 132.

[19] It needs to be noted that it may very well fall within the interest of politicians to rely on unsubstantiated public opinion. For example (see Green: *op. cit.* 137), following a high profile murder case, the then Shadow Home Secretary, Tony Blair wrote a piece in *The Sun* asserting, "[w]e can debate the crime rate statistics until the cows come home. The Home Office says crime is falling. Others say it isn't. I say crime, like economic recovery, is something that politicians cannot persuade people about one way or another. People know because they experience it. They do not need to be told. And they know crime is rising". Blair's comments imply that there is no substitute for experience, even secondhand, mass-mediated experience, and his piece lent unqualified credibility to tabloid portrayals. He as much as told the public that their fear of crime, irrational or not, is more important than any unbiased assessment of the problem.

[20] According to the constructivist "Copenhagen School" of security analysis, securitization is constituted by the intersubjective establishment of an existential threat with a saliency sufficient to have substantial political effects. The semiotic structure of securitization differentiates between "referent objects", "securitizing actors" and "functional actors". A "referent object" of securitization

intertwined with a number of institutional, political and bureaucratic interests, and the entire avalanche is based on perception rather than on objective features. The irony of the case is that no efforts are required from governments to try to assess how certain institutions or law enforcement measures will affect the actual risk of criminal or terrorist involvement, or even risk-perception. Thus, the state is under no pressure or obligation to prove the correlation between the increase in (the perception of) security–which is in most cases only assumed, presumed and forecasted. Presumably, a lack of a proper methodology to test such dynamics lies behind the fact that the public seems to accept "risk prevention" as a proper price to be paid for extended law enforcement authorizations, and social risks are not weighted against the potential benefits. "Prevention of terrorist attacks" appears to be a blank check, where we are waiving our rights to actually control the effectiveness of the preventive measures. If no terrorist attack happens, the government may argue that is exactly due to these preventive commitments that we could have escaped the threatening disasters. If such incidents do take place in our approximate or remote distance, it is even more a reason to strengthen government efforts and establish further law enforcement measures.

According to Peter Lock "Though once being upgraded to 'war', anti-terrorism becomes an open-ended activity because it is intrinsically impossible to define criteria which would unequivocally permit the declaration of victory and put an end to this war. The institutions charged with carrying out the 'war against terrorism' emerge as powerful bureaucracies with their own corporate agendas. They are often capable of evading parliamentary oversight. It plays to their advantage in their drive to achieve dominant positions in the state apparatus that many of their activities are shielded from scrutiny for asserted operational reasons. Their claims of effectiveness cannot be measured as the full dimension of their task is by definition unknown as long as the unbounded concept of terrorism rules political discourses. Their persistent exigency that they must be entitled to carry out covert operations at their own discretion is inherently difficult to monitor. Confronted with imagined terrorism as opposed to defined political challenges in a populist political climate elected bodies are not inclined sufficiently challenge the agendas of the institutional security network. The executive is capable of launching a dynamic of circular causation by imaging a hypothetical terror network, which is delineated as invisible (and hence unknowable). Politicians are not inclined to take risks and do not define how much production of alleged security is enough. As a result, measures adopted in the fight against terrorism acquire features of self-fulfilling prophecies. ... In such a context it is virtually impossible to measure progress in the fight against terrorism".[21] Commentators point out that fear also plays a noticeable role in generating identity and feeling of belonging, and

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is something that is considered to be existentially threatened. In the vast majority of cases the security referent is the state, and the "securitizing actor" is the actor who actually performs the speech act of securitization, by declaring the referent object "existentially threatened", whereas a "functional actor" is a participant in carrying out the pragmatic consequences of securitization. Security is never objectively given and there is no implicit, objective or given relation between the subject–the security actor–and the object of securitization as this relation is constructed intersubjectively through social relations and processes. See Burgess, P.: *The Ethical Subject of Security*. Tuesday 10 May 2005, http://www.libertysecurity.org/article248.html?var_recherche=ethical%20subject

[21] Lock, P.: *Anti-terrorism and Effects on Freedom of Movement-Assessing the Concept of Progress in the Fight against Terrorism*. Wednesday 20 July 2005, http://www.libertysecurity.org/article318.html?var_recherche=lock%20peter

collective insecurity can be understood as the purest form of community belonging. The "dangerization process" facilitates an increasing culture of defence. The security discourse serves as an effective means to stimulate community belonging, and is an effective vehicle of post-industrial political power.[22]

The irony of the case is that inspired by the academic discipline of law and economics, in the past years, a considerable body of literature has focused on estimating the social costs of crime and crime prevention–only these findings have not seem to have made the desirable impact on public policy and discourse. For example, Paul Dolan and Tessa Peasgood developed a methodology to provide estimates of the intangible costs arising from the anticipation of possible victimization; that is, estimates of the costs of fear of crime.[23] These costs are categorised according to whether they result in non-health-related losses or health-related losses. When people feel that they may be about to become a victim of crime, they will experience anxiety and stress. The frequency with which people are in this state and the intensity of the anxiety is one measure of the health-related loss from anticipated crime. Non-health losses are associated with changes in behaviour (where for example people use their own cars or take taxis rather than walk or use public transport because of their fear of crime)[24] and/or changes in how society is viewed.

For example, a survey of public attitudes to quality of life in the United Kingdom in 2001 found that crime was mentioned by 24% of respondents as an important factor affecting quality of life, which made crime the third largest factor after money and health.[25] They claim that the direct costs of security measures, insurance administration expenditure and costs incurred from crime-averting behaviour can be interpreted as revealing people's preferences to reduce the risks of victimization and the worry about victimization. Also, a further tangible cost attributable to anticipating crime is any loss in productivity caused by the time and energy spent on actions and emotions linked to anticipating possible victimization. This may include leaving work early to avoid walking home alone, or time spent dealing with a burglar alarm that has been accidentally set off.[26] In addition to these, other behavioural changes also involve additional time costs. Based on survey observations in the United States, on average, an adult spends two minutes locking and unlocking doors each day and just over two minutes a day looking for keys, which is valued at $437 per year.[27] It means that U.S. citizens are estimated to spend nearly $90 billion worth of time each year simply locking their doors and searching for their keys.[28]

[22] See Lianos, M.: *Hegemonic Security Discourse: Late Modernity's Grand Narrative.* Tuesday 6 September 2005, http://www.libertysecurity.org/article386.html?var_recherche=michalis

[23] See Dolan, P.–Peasgood, T.: Estimating the Economic and Social Costs of the Fear of Crime. *British Journal of Criminology,* 41 (2007) 1, 121–132.

[24] It needs to be added that more expensive forms of transport clearly bring other benefits, such as quicker and more comfortable journeys, and these benefits would need to be controlled for. *Ibid.* 123.

[25] *Ibid.* 123.

[26] *Ibid.* 124.

[27] A study found an average willingness to pay to avoid locking or unlocking assets of $804 (from a sample of 140 respondents). The extra time taken walking home to avoid potentially dangerous shortcuts could, in principle, be valued in a similar way. *Ibid.* 124.

[28] Anderson, D. A.: The Aggregate Burden of Crime, *Journal of Law and Economics,* 42 (1999) 2, 611, 623–24.

It needs to be added that according to estimates, citizens of the United States spend more on private precautions–"estimates range from $160 billion to $300 billion per year–than on the entire public law enforcement budget. That is, citizens spend more on locks, neighbourhood watches, and the like than U.S. governments (state and federal) spend on police, judges, prosecutors, prisons, and prison guards".[29]

This leads us back to the question of available information. Media theory frequently refers to the concept of cultivation. According to this, television is society's storyteller and if a viewer sees a great deal of violence on television, then she will presume that society is violent; once this presumption takes root, it can penetrate the viewer's attitudinal base and become a decision-making factor. Hence, a viewer who believes that society is violent may be more afraid to walk alone at night, inclined to purchase a home alarm system, or likely to support increasing the police force.[30] It is well documented in criminology that individual risk predictions are largely based on interpretations far removed from rational considerations of likelihood based on recorded crime rates.[31] Far more people believe that they will become future victims of a given offence than the number of those who actually become victims. For example, respondents in three waves of a longitudinal crime survey conducted in Trinidad believed that they are "likely" or "very likely" to be murdered in the following 12 months at each of three times at which the sample was questioned. In fact, in 1999, 120 murders were recorded in the population of 1.3 million, that is: 99.8% of those 585,000 expecting to die erred on the question.[32]

To sum up, not only is security an elusive and subjective concept, but most preventive measures will also defy objective verification. In light of these, let us now turn to the case study of ethno-racial[33] profiling.

[29] Mikos, R. A.: "Eggshell" Victims, Private Precautions, and the Societal benefits of shifting crime. *Michigan Law Review,* 105 (2006) 2, 308. The author also draws attention to the fact that literature supports the claim that many of the resources spent in the private war on crime are being wasted because many private precautions only shift crime onto other, less guarded citizens, and this redistribution of crime has no net social benefit, as precautions that only shift crime constitute rent-seeking behavior: individuals expend resources to transfer losses, without reducing the size of those losses. A typical example would be vehicle anti-theft devices which will urge thieves to target other cars but not deter them from stealing. A similar discussion centers on the question of gated communities, which are also found only to divert crime to other communities. (As of 2003, there were nearly seven million households located in gated communities in the US, which adds up to 7% of all households.) It is for this reason that some local governments have simply refused to allow real estate developers to control access to new or existing communities. See Mikos: *op. cit.* 309, 315, 319.

[30] Podlas, K.: The "CSI Effect" and other Forensic Fictions. *Loyola of Los Angeles Entertainment Law Review*, 27 (2006–2007) 2, 98–99. The author notes that cultivation is rooted more in media theory than psychology and that according to other research, media content merely makes the audience aware of an issue (the agenda-setting effect); at other times, it reinforces pre-existing attitudes; at still others, it seems to have no impact on values or direction of response whatsoever. Podlas: *op. cit.* 101–103.

[31] See for example Chadee, D.–Austen, L.–Ditton, J.: The Relationship Between Likelihood and Fear of Criminal Victimization. *British Journal of Criminology*, 47 (2007) 1, 133–153.

[32] *Ibid.* 133, 134.

[33] Despite obvious differences in the terms, throughout this article the two will be used interchangeably.

II. Ethnic profiling: the concept and its practice

In what follows, I will delineate the general practice of ethnic[34] profiling and ethnicity-based selection, and how these arise in the context of the fight against terrorism. In the profiling process terror-suspects, ethnic, racial, national or religious minorities, immigrants, indigenous or poor people are interchangeable. I will argue that besides the perennial problem with ethnic profiling–that it readily turns into a form of ethnic discrimination–it faces an independent problem: lack of effectiveness.

There is not one universally accepted and utilized definition for profiling. Profiling in the abstract sense refers to identifying information, making predictions and, finally, inference.[35] The word "profile" (profil in French) was originally used in the artistic field. It denoted the outlines and features of a face seen from one side or, more broadly, the portrayal of an object seen from one side only. Historically, the term "profiling" in law enforcement first came to prominence in connection with the training of crime profilers in the USA. In theory, these people are supposed to be capable of determining a criminal's personality type by analysing traces left at the scene of the crime. In any abstract profiling operation, three stages may be identified: The first stage is "observation", often referred to as data warehousing, where personal or anonymous data are collated. If the data refer to an identifiable or identified individual, they will generally be anonymised during this stage. The collected data may be of internal or external origin. For example, a bank might draw up an anonymous list of its customers who are bad payers, together with their characteristics, or a marketing firm might acquire a list of the major supermarket chains' "shopping baskets" without the shoppers being identified. This first stage is followed by a second set of operations, usually referred to as data mining, which is carried out by statistical methods and whose purpose is to establish, with a certain margin of error, correlations between certain observable variables. For instance, a bank might establish a statistical link between a long stay abroad and one or more missed loan repayments. The concrete outcome of this stage is a mechanism whereby individuals are categorised on the basis of some of their observable characteristics in order to infer, with a certain margin of error, others that are not observable. The third and last stage, known as "inference", consists in applying the mechanism described above in order to be able to infer, on the basis of data relating to an identified or identifiable person, new data which are in fact those of the category to which he or she belongs. Very often, only this last operation is referred to as "profiling", it, however, is essential, to see this final stage as part of a process.[36]

Recent developments in information technology, however, make today's profiling activities increasingly easy and sophisticated, thus the possibilities offered by profiling are numerous and cover different areas of application. For example, in the USA, ATS (Automated Targeting System) has been developed in order to evaluate the probability of a

[34] A note about terminology: besides obvious differences, I will treat racial, ethnic and nationality-based terminology as synonymous.

[35] Dinant, J.-M.–Lazaro, Ch.–Poullet, Y.–Lefever, N.–Rouvroy, A.: Application of Convention 108 to the profiling mechanism. Some ideas for the future work of the consultative committee. Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-Pd), 24th meeting, 13–14 March 2008, Strasbourg, G01 (T-PD). Secretariat document prepared by the Council of Europe Directorate General of Human Rights and Legal Affairs, Strasbourg, 11 January 2008 T-PD(2008)01, 4–11.

[36] *Ibid.* 3.

given individual being a terrorist. Also, data mining is an extremely valuable tool in the area of marketing and customer management. It is one means of moving from mass marketing to genuinely personalized marketing. Data mining can be defined as the application of statistical, data-analysis and artificial-intelligence techniques to the exploration and analysis with no preconceived ideas of (often large) computer data bases in order to extract fresh information that may be of use to the holder of these data. In other words, the value of data mining is that it is an IT tool which can "make the data talk". Generally speaking, the methods on which data mining is based can be divided into two categories: some are descriptive and others predictive, depending on whether the aim is to explain or predict a "target" variable. Descriptive methods are used to bring out information that is present but hidden within the mass of data, while predictive methods are used to exploit a set of observed and documented events in order to try and predict the development of an activity by drawing projection curves. This method can be applied to the management of customer relations in order to predict a customer's behaviour.[37] The aim is for example to determine the profile of individuals with a high purchasing probability or to predict when a customer will become disloyal. Likewise, profiling is widely used in the field of risk management, when determining the characteristics of high-risk customers. Such aims may include the adjustment of insurance premiums; prevention of arrears; aid to payment decisions where current account overdrafts exceed the authorized limit in the banking sector; use of a risk "score" in order to offer individual customers the most appropriate loan or refuse a loan depending on the probability of honouring repayment deadlines and the terms of the contract, etc. Cable digital TV provides programme distributors with precise information regarding channel selection and channel hopping by viewers who receive television channels via their telephone cable by means of DSL technology. They can thus create and keep a perfectly accurate viewing profile for each user. It therefore becomes technically possible to tailor advertisements to the user's profile. Also, a similar methodology is used by Google's on-line advertising system, where user's click stream is monitored. In the age of strategic marketing, profiling and data mining is used in creating packages and special offers; designing new products and customer loyalty policy.

The Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data defined profiling as a computerised method involving data mining from data warehouses, which makes it possible, or should make it possible, to place individuals, with a certain degree of probability, and hence with a certain induced error rate, in a particular category in order to take individual decisions relating to them. This concept of profiling differs from criminal profiling, where the aim is to get inside and understand the criminal's mind, but is similar to behavioural analysis since the aim is not to understand the motives which lead or might lead an individual to adopt a given behaviour, but to establish a strong mathematical correlation between certain characteristics that the individual shares with other "similar" individuals and a given behaviour which one wishes to predict or influence. As this approach does not depend on human intelligence, but on statistical analysis of masses of figures relating to observations converted to digital form, it can be carried out by means of a computer with minimum human intervention.

Thus, profiling (i) can be applied in a number of contexts, that can vary from the commercial sector to the field of law enforcement; (ii) it is a mechanism where the task is to narrow down the circle of potential individuals that may fall within the scope of activities

[37] *Ibid.* 8–9.

of a particular agent within the given field: it may involve identifying a group of customers or potential perpetrators; (iii) profiling will always include certain characteristics upon which the process relies; and (iv) there will always be a scheme of reasoning according to which these characteristics and the way in which they are employed are established.

In 2002, the EU's Working Party on Terrorism drew up recommendations for member states on the use of "terrorist profiling", and defined it as using "a set of physical, psychological, or behavioural variables, which have been identified as typical of persons involved in terrorist activities and which may have some predictive value in that respect".[38] According to Rebekah Delsol,[39] racial profiling refers to the use by the police of generalisations based on race, ethnicity, religion or national origin, rather than individual behaviour, specific suspect descriptions or accumulated intelligence, as the basis for suspicion in directing discretionary law enforcement actions such as stops, identity checks, questioning, or searches among other tactics. Specific definitions of racial or ethnic profiling vary along a continuum ranging from the use of race alone as the reason for the stop to those using race along with other factors as the reason for the stop.[40]

Using a narrow definition, racial profiling occurs when a police officer stops, questions, arrests and/or searches someone solely on the basis of a person's race or ethnicity. A broader definition acknowledges that race may be used as one of several factors involved in an officer's decision to stop someone. A stop is likely to be made on the confluence of several factors such as race or ethnicity along with age, dress (hooded sweatshirts, baggy trousers, perceived gang dress, etc.), time of the day, geography (looking "out of place" in a neighbourhood or being in a designated "high-crime area"). This definition reflects the fact that racial profiling may be caused by the purposefully racist behaviour of individual officers, or the cumulative effect of the unconscious use of racist stereotypes, but may also result from institutional factors, such as the use of enforcement techniques and deployment patterns, which impact on ethnic groups unequally.[41]

Profiling can take place in other stops or contacts with the public by any type of law enforcement officer or other authorities such as traffic stops in cities as well as highways, stopping and questioning of pedestrians in public places in urban areas, sweeps of trains and buses, immigration status checks by immigration officials, and airport security and customs checks or searches. Patterns of profiling can also be seen in discriminatory treatment after a stop has taken place, such as black motorists being given traffic citations while white motorists are let off with a warning, or Latin/o/a youth, but not white youth, being cited for noise violations, mass controls in public places, stop and search and identity checks, data mining and raids on places of worship, businesses and organisations.[42]

Thus, ethnic or racial profiling, that is profiling that includes race and ethnicity as one of the characteristics involved in the process, is a practice that relies on the tenet that ethnicity in itself signals a certain type of criminal involvement, terrorist plotting or illegal border crossing as more likely, and this assumption serves as a sufficient and therefore

[38] See Hayes, B.: A Failure to regulate: Data protection and Ethnic Profiling in the Police Sector in Europe. Justice Initiatives. *Justice initiatives.* June 2005, 37.

[39] See Delsol, R.: *Presentation to the LIBE Committee of the European Parliament.* Brussels, 30 June 2008, http://www.europarl.europa.eu/document/activities/cont/200806/20080625ATT32712/20080625ATT32712EN.pdf

[40] *Ibid.*

[41] *Ibid.*

[42] *Ibid.*

legitimate basis for law enforcement (police, secret service, etc.) suspicion. The peculiarity of profiling lies in the fact that it is not based on illegal behaviour, but is centred around idea to collect legal behavioural patterns or character–traits that may signal criminal behaviour–it is therefore based on an assumed correlation between criminality and the specified characteristics or behavioural patterns, a deduction based on retrospectively judged effectiveness, which is always assumed, rather than checked and confirmed.

Thus, stops are not induced by suspicious or illegal behaviour, or by a piece of information that would concern the defendant specifically. Instead, a prediction provides grounds for police action: based on the high rate of criminality within the ethnic group or its dominant (exclusive) involvement in committing acts of terror, it seems like a rational assumption to stop someone on ethnic grounds. Measures are therefore applied not so much on the basis of the (suspicious) behaviour of the individual, but based on an aggregate reasoning. The goal is to make an efficient allocation (based on rational interconnections) of the limited amount of the available police and security resources.

Law enforcement profiling, which mostly takes the form of stop and search, was first developed in the U.S. for detecting drug couriers, and was later implemented in traffic control, and more recently in anti-terror procedures. At the heart of these procedures is the idea that the race or ethnicity of the perpetrator serves as a useful tool for the detection of criminality. Originally, the procedure of profiling was aimed at creating a description profile for suspects, in order to help the authorities in filtering out potential perpetrators based on certain sets of (legal) behavior and circumstances. In the case of drug couriers, such a characterization might include short stop-overs between significant drug sources and the distribution location, cash paid for the airline ticket, and, based on criminal statistics, also ethnicity, sex and age. The inclusion of ethnicity in the profile was reasoned by the fact that gangs that play key roles in organized crime tend to be almost exclusively ethnically homogeneous.

The idea to take race into consideration as a helpful tool to screen offenders was widely accepted among law enforcement officers.[43] American studies on highway patrols for example have shown that blacks, comprising 12.3% of the American population, are significantly overrepresented among those stopped and checked by the police.[44] In New Jersey, between 1994 and 1999, 53% of those stopped by the police were black, 24.1% were Hispanic and only 21% were white.[45] A study conducted on the Moscow Metro found that non-Slavs are on average 21.8 times more likely to be stopped by the police than Slavs although they make up only 4.6% of the riders in the Metro system. A 2006 study in Bulgaria, Hungary and Spain found that Roma and immigrants in Spain are more likely to be stopped on the street for the purpose of identity and immigration checks and once stopped are more likely to be treated disrespectfully by police officers. The report published by the

[43] For example, in 1994, an estimated 2,714,000 juveniles were arrested in the United States. Of those juveniles, 25% were black and 62% were white. Black juveniles, however, comprised only 15% of the total juvenile population, whereas white juveniles comprised 80% of the total juvenile population. Garrison, A. H.: Disproportionate Minority Arrest: A Note on What Has Been Said and How It Fits Together, *New England Journal on Criminal and Civil Confinement.* Winter 1997, 32.

[44] http://quickfacts.census.gov/qfd/states/00000.html

[45] See Buerger, M.–Farrell, A.: The evidence of racial profiling: interpreting documented and unofficial sources. *Police Quarterly,* 5 (2002) 3, 290; Harris, D. A.: The Stories, the Statistics, and the Law: Why "Driving While Black" Matters. *Minnesota Law Review,* 84 (1999), 267.

Justice Initiative Program of the Open Society Institute (OSI)[46] found that in both Bulgaria and Hungary, Roma are about three times more likely than non-Roma to be stopped by police and are more likely to report unpleasant experiences. In Germany, racial profiling has been used in the context of the post 9/11 terrorism threats. Between 2001–2003, German police undertook a massive data-mining or Rasterfahndung operation to identify potential terrorist sleeper cells. As mentioned above, the police collected the personal data of approximately 8.3 million people and "trawled" the data using an ethnic profile that included the Muslim religion and nationality or country of birth from a list of 26 states with predominantly Muslim populations. The "hits" generated by the database as potential terrorists were then singled out for further investigation.

Figures for 2003/2004 showed that in the UK the rate of stop and search for black people was nearly six and-a-half times that for whites, while for Asians, the ratio was nearly twice that for whites.[47] Stephen Humphreys noted that the consistent overrepresentation of minorities in United States custodial and correctional facilities is not contested. According to official Justice Department statistics, more than 60% of federal prisoners in 2002 were from minority groups, although they make up only 25% of the population. This figure, the department noted, has been unchanged since 1996. Blacks alone have consistently made up 44–45% of the prison population since 1995, despite comprising only 12% of the total population. By 2002, there were 134,000 more blacks than whites in the country's prisons, despite there being six times as many whites as blacks in the country as a whole. At the same time, the prison population has risen relentlessly. Between 1995 and 2002 the total number in custody increased by 30% (from 1,585,586 to 2,085,620). Altogether, blacks were seven times as likely as whites to be in prison, comprising 56% of all convicted drug offenders. According to the U.S. Department of Justice, "Overall, the increasing number of drug offenses [to 2001] accounted for 27% of the total growth among black inmates, 7% of the total growth among Hispanic inmates, and 15% of the growth among white inmates". Human Rights Watch describes the war on drugs as "devastating to black Americans", partly because it provides the background for ethnic profiling. In Spain, according to one study, about 25% of women in prison are Roma (while constituting only 1.4% of the Spanish population). In Italy, foreigners make up some 30% of prisoners.[48] In the USA, the targeting of minorities for traffic stops became so ubiquitous that it earned its own nick-name: "driving while black or brown" or "DWB"– a twist on the crime of driving while intoxicated or DWI.

After the attacks of September 11th 2001, the "war on terror" extended the practice of racial profiling to include Muslims and those perceived to be of Arab or Middle Eastern descent. Racial or religious profiling has been identified as occurring through car stops, aggressive enforcement of immigration laws and alien registration, intrusive security

[46] Miller, J.–Bernát, A.–Dencső, B.–Gounev, P.–Pap, A. L.–Pernas, B.–Simonovits, B.–Wagman, D.: "And I can stop and search whoever I want": Police stops of ethnic minorities in Bulgaria, Hungary and Spain. *Justice Initiatives*, New York, 2007.

[47] Delsol, R.–Shiner, M.: Regulating Stop and Search: A Challenge for Police and Community Relations in England and Wales. *Critical Criminology*, 14 (2006) 3, 241–263. Also, disproportionality is greater under powers that do not require reasonable suspicion, such as those for terrorism and suspicion of violent crime, indicating that where levels of police discretion are highest, generalisations and negative stereotypes play an even greater role.

[48] Humphreys, S.: The Case for Monitoring Ethnic Profiling in Europe. *Justice initiatives*, June 2005, 45, 46 and 48.

screening in airports and removal from planes. Since then, "flying while Arab" has also entered the lexicon of profiling.

Justices of the US Supreme Court have also acknowledged the negative impact of unregulated police discretion on communities of colour. In his dissent in the mentioned United States vs. Martinez-Fuerte-case,[49] Justice Brennan predicted that the majority's decision, which permitted the use of Mexican ancestry as a primary factor in checkpoint stops to investigate undocumented immigration, would frustrate the Mexican American community, and warned "[t]hat deep resentment will be stirred by a sense of unfair discrimination is not difficult to foresee". Later, in Florida vs. Bostick,[50] Justice Marshall's dissent invoked the concern that the police used race as a factor in deciding which individuals to target in conducting ostensibly "random" bus sweeps. Justices in Illinois vs. Wardlow[51] and Atwater vs. City of Lago Vista[52] also discussed the impact of increased police powers on people of colour who might have legitimate reasons to fear and flee from the police, or who might experience police harassment as a result of enforcement of a minor traffic law.[53]

III. The assessment of profiling and some empirical findings

As ethno-racial profiling proliferated, a fierce academic and political debate erupted over the issue.[54] Criticism of such practices is manifold. Some emphasize that ethnic profiling is in principle unacceptable, because it results in the harassment of the innocent minority middle class, which is thus subjected to a kind of "racial tax" that affects all aspects of people's lives. For example, ECRI's General Policy Recommendation No 11 on Combating Racism and Racial Discrimination finds that racial profiling constitutes a specific form of racial discrimination. By defining racial profiling as the use by the police of certain grounds in control, surveillance or investigation activities, without objective and reasonable justification, it claims that the use of these grounds has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. Thus, even when, in abstract terms, a legitimate aim exists (for instance the prevention of disorder

[49] 428 U.S. 543 (1976)

[50] 501 U.S. 429 (1991)

[51] 528 U.S. 119 (2000)

[52] 532 U.S. 318 (2001)

[53] Sinha, P.: Police Use of Race in Suspect Descriptions: Constitutional Considerations. *New York University Review of Law and Social Change*, 31 (2006) 1, 156.

[54] Consider, for example the debate surrounding the European Commission's proposal for a European Passenger Name Record (PNR), where the European Parliament has raised repeated concerns related to profiling, in particular regarding race, ethnicity and religion, in the context of data protection, law enforcement cooperation, exchange of data and intelligence, aviation and transport security, immigration and border management and treatment of minorities. See for example Pap, A. L.: *Ethnicity- and race-based profiling in counter-terrorism, law enforcement and border control.* Ad-hoc briefing paper, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, European Parliament, Brussels, November 2008, PE 408.326, or the *Working Document on problem of profiling, notably on the basis of ethnicity and race, in counterterrorism, law enforcement, immigration, customs and border control by the Committee on Civil Liberties, Justice and Home Affairs.* Rapporteur: Sarah Ludford, 30.9.2008, DT\745085EN.doc PE413.954v02-00. 2. and 4.

or crime), the use of these grounds in control, surveillance or investigation activities can hardly be justified outside the case where the police act on the basis of a specific suspect description within the relevant time-limits, i.e. when it pursues a specific lead concerning the identifying characteristics of a person involved in a specific criminal activity. In order for the police to avoid racial profiling, control, surveillance or investigation activities should be strictly based on individual behaviour and/or accumulated intelligence. The notion of objective and reasonable justification should be interpreted as restrictively as possible with respect to differential treatment based on any of the enumerated grounds, thus different considerations should be taken into account in order to assess whether the proportionality test between the means employed and the aims sought to be realized is satisfied in the context of racial profiling. The Recommendation notes that in the same way as racial discrimination, racial profiling can take the form of indirect racial discrimination. In other words, the police may use (without objective and reasonable justification) criteria which are apparently neutral, but impact disproportionately on a group of persons designated by grounds such as race, colour, language, religion, nationality or national or ethnic origin. For instance, a profile that tells the police to stop all women who wear a headscarf could constitute racial profiling inasmuch as it would impact disproportionately on Muslim women and would not have an objective and reasonable justification. The prohibition of racial profiling should also cover these indirect forms of racial profiling. Furthermore, the Recommendation notes that in the same way as racial discrimination, racial profiling can take the form of discrimination by association. This occurs when a person is discriminated against on the basis of his or her association or contacts with persons designated by one of the grounds mentioned above.[55]

In its General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005), the Committee for the Elimination of Racial Discrimination also held that ethnic profiling constitutes *per se* a form of racial discrimination. In line with this, the EU Network of Independent Experts on Fundamental Rights[56] draw attention to the fact in its opinion 2006/4 that the use of "racial" or ethnic characteristics as part of a set of factors that are systematically associated with particular offences and used as a basis for making law enforcement decisions is clearly discriminatory, not only because of the absence of any proven statistically significant correlation between indicators linked to race or ethnicity, religion or national origin, on the one hand, and propensity to commit certain criminal offences on the other hand, but also because the principle of non-discrimination requires that only in exceptional circumstances should the race or ethnicity, the religion or the nationality of a person, influence the decision about how to treat or not to treat that person.[57]

[55] Paras 27–34 and 38.

[56] See Opinion 2006/4 on ethnic profiling.

[57] Under the case law of the ECHR, Art. 14 of the European Convention on Human Rights, "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures". ECHR, *Timishev v. Russia* (no. 55762/00 and 55974/00) (2nd section), judgment of 13 December 2005 (final on 13 March 2006), Para. 58. Also, as concerns differential treatment on the ground of nationality, the European Court of Human Rights includes this ground among those for which *"very weighty reasons"* are required in order for differential treatment to be justified, ECHR, *Gaygusuz v. Austria* (no. 17371/90), judgment of 16 September 1996, Para. 42.

The Network's opinion demonstrates that European case-law is somewhat uneven in the matter: For example, in the United Kingdom, by the House of Lords in R (on the application of European Roma Rights Centre) vs. Immigration Officer at Prague Airport[58] immigration officers operating at Prague Airport were held to have discriminated on racial grounds–contrary to the Race Relations Act 1976, Sec. 1(1)(a)–against Roma seeking to travel from that airport to the United Kingdom by treating them more sceptically than non-Roma when determining whether to grant them leave to enter the United Kingdom. The decision was in stark contrast to a judgment passed by the Second Chamber of the Spanish Constitutional Court on 29 January 2001.[59] Here the Court took the view that the arrest of a woman in a train station, in order to identify her and to control the legality of her administrative situation, could not be considered discriminatory, although she was dark-skinned. The woman concerned was an African-American of naturalized Spanish citizenship. The identity check by the police took place upon her leaving a train. She had no identity documents with her but assured the police that she was of Spanish nationality, and that the documents were at her home. She was travelling with her husband, who was white and was not checked. In contrast to this position, a complaint for discrimination filed in similar circumstances did succeed before the Austrian Constitutional Court.[60] An Austrian citizen born in Ghana and her four-year-old daughter travelled by train from the Netherlands to Austria. During the train ride her luggage was controlled by law enforcement officers without any result. After arriving in Vienna she was controlled a second time without any result and had to declare her consent to an X-ray examination, which passed also without any result. The woman submitted a complaint to the Independent Administrative Tribunal in Vienna, arguing that the above-mentioned treatment has only happened by reason of their colour and place of birth. Their complaint was dismissed but later reversed by the Constitutional Court.

A further unwanted result of ethnic profiling is the strengthening of racial/ethnic essentialism, reductionism to black and white (Roma and Hungarian; Arab and non-Arab, etc.). Another related argument mentions the risks inherent in alienating crucial minority communities in the context of law enforcement (policing and prevention). The model of community policing emphasizes that local policing is most effectively done with active participation from the community. Law enforcement thus should not be an antagonistic, unjust, oppressive power, but a protector of peaceful, law-abiding people, with the criminals pitted as the enemy. With respect to terrorism, we should not overlook the importance of community cooperation. It is no coincidence that the Bush government identified truck drivers, cab drivers and parking meter attendants as high-priority potential informants (helpful in identifying bombers or suicide bombers), and, above all, the Muslim community, which can detect suspicious behaviour.[61] Indeed, most of the American terrorists identified up until recently were caught based on community reports. It is worth considering that one of the very few terrorist arrests where the suspect was eventually charged, in Lackawana,

[58] [2004] UKHL 55, 9 December 2004.

[59] Tribunal Constitucional, Sala Segunda, Sentencia 13/2001 de 29 Ene. 2001, rec. 490/1997.

[60] See Opinion 2006/4 of the Network of Independent Experts on Fundamental Rights on ethnic profiling.

[61] See, for example Brandl, S.: Back to the future: The implications of September 11, 2001 on law enforcement practice and policy. *Ohio State Journal of Criminal Law*, 1 (2003) 1, Osler, M.: Capone and Bin Laden: The failure of government at the cusp of war and crime. *Baylor Law Review*, 55 (2003) 2.

New York, a report from the local Muslim community tipped off the authorities, leading to the arrest.[62] Further, false positives raise a special problem with respect to terrorism: it seems untenable to assume that only Arabs are involved in terrorist attacks. We need only mention a couple of incidents that happened on American soil: Richard Reid (the "shoe bomber"), a Brit from the West Indies; Jose Padilla (the "dirty bomb" terrorist of Chicago's O'Hare Airport), a Hispanic man who converted to Islam while in jail; not to mention white Americans like John Walker Lindh (the American Taliban), Timothy McVeigh, and Charles Bishop.[63]

Yet another, straightforwardly pragmatic criticism towards ethnic profiling, however, has been calling attention to the practical ineffectiveness of racial profiling: inherent in the prima facie plausible reasoning based on statistics is a profound (and provable) error. From the practical point of view, racial profiling could only be justified based on the assumption that the race or ethnicity of the person being profiled is knowable and that there is a consistent and statistically significant relationship between race or ethnicity and propensity to commit crime. In fact, neither of these is consistently true. Ethnic profiling assumes a consistent association, if not a causal relationship, between race/ethnicity and certain kinds of criminal activity. But policies premised on the notion that members of certain ethnic groups are more or less likely to sell drugs, carry firearms, or commit terrorist acts, are both under- and over-inclusive. They thus risk focusing undue law enforcement attention and resources on those who fit the profile, while overlooking others who don not.[64] Racial profiles are, thus, both over-inclusive and under-inclusive–over-inclusive in the sense that many, indeed most, of the people who fit into the category are entirely innocent, and under-inclusive in the sense that many other types of criminals or terrorists who do not fit the profile will thereby escape police attention. James Goldston argues that is it mistaken to believe that ethnic profiling is also problematic in the respect that it assumes that the race/ethnicity of the person profiled is knowable and determinate. But this is not always so.[65] Racial profiling also faces the problems of predictability and evasion: the more predictable police profiles become, the easier it is for perpetrators to adapt to circumvent the profile. In the past decade or so, considerable research[66] focused on the efficacy of ethnic profiling.

[62] Harris, D. A.: New Risks; New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001. *Utah Law Review*, (2004), 933.

[63] Harris: *op. cit.* 940, see also Baynes, L.: Racial Profiling, September 11th and the Media. A Critical Race Theory Analysis. *Virginia Sports and Entertainment Law Journal*, 2 (2002) 1; or Joo, Th. W.: Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11. *Columbia Human Rights Law Review*, 34 (2002) 1.

[64] Goldston, J.: Toward a Europe Without Ethnic Profiling. *Justice Initiatives*. June 2005.

[65] Goldston: *ibid.* For example, according to a study by the World Bank in Romania, 61% of those classified as Roma by the interviewers, did not claim themselves as such (the discrepancy in the identification rates was 24% in Bulgaria and 38% in Hungary). The country has a population of 23 million, with 2–2.5 million Roma, according to unofficial estimates, yet only 409,111 identified themselves as such at the 1992 census. See Ringold, D.– Orenstein, M. A.–Wilkens, E.: Roma in an expanding Europe. Breaking the poverty cycle. (A World Bank Study 2003) 29., http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/01/07/000094946_02122404075867/Rendered/INDEX/multi0page.txt. When a person interviewed identifies herself as Roma, it will always be in accordance with the interviewer's classification. Ahmed, A.–Feliciano, C.–Emigh, R. J.: *Ethnic Classification in Eastern Europe*. 10, http://www.sscnet.ucla.edu/soc/groups/ccsa/ahmed.PDF

[66] Stuntz, W. J.: Local Policing After the Terror. *Yale Law Review*, 111 (2002) 8; Gross, S. R.–Livingston, D.: Racial Profiling Under Attack. *Columbia Law Review*, 102 (2002) 5; Cuéllar, M.-F.:

Studies conducted in New Jersey and elsewhere have targeted stops based on racial profiling, involving vehicle checks and body searches. The aim was to discern how effective these measures were in detecting drug possession and illegal possession of weapons. The studies have clearly demonstrated that there was no significant, tangible difference between the proportional hit rate within the white population and the non-white population. Not only did the study find that the authorities habitually stopped a disproportionate number of non-white drivers, but they have also confirmed that the hit rate does not justify the utility of ethnic profiling. Evidence thus refutes the proposition that minorities are more likely to be involved in crime and highlights that racial profiling is an ineffective use of police resources, by engaging in stopping and searching practices that are likely to be unproductive. For example, despite the collection and trawling of the data of 8.3 million people, the mentioned Rasterfahndung operation in Germany "failed to identify a single terrorist". In 1998, the U.S. Custom Service responded to allegations of racial and gender profiling and low hit rates across all ethnic groups. In 1998, 43% of searches that Customs performed were on African-Americans and Latino/as. US Customs changed its stop and search procedures removing race from the factors considered when stops were made and introduced observational techniques focusing on behaviours such as nervousness and inconsistencies in passenger explanations; intelligence improved the supervision of stop and search decisions. By 2000, the racial disparities in Customs searches had nearly disappeared. Customs conducted 75% fewer searches and their hit rate improved from under 5% to over 13%, the hit rate for all ethnic groups had become almost even. Using intelligence-based, race-neutral criteria allowed Customs to improve its effectiveness while stopping fewer innocent people, the vast majority of whom were people of colour.[67] Other attempts to address profiling have included improving internal supervision, training and the development of early warning systems to identify officers who are potentially racially profiling. We might sum up the results thus: the retrospectively judged effectiveness (which was always assumed, rather than checked and confirmed) turns out to be illusory and does not provide an appropriate policing, prevention and security policy.

Racial profiling thus relies on the assumption that ethnicity and a high rate of criminality are connected, so the hit rate must be higher among, say, African-Americans. For a long time, no-one was asking for a proof of this seemingly sensible connection; after all, a sufficient number of criminals were found among the disproportionately high number of minority members stopped. But researchers argue that this does not yield a cost-effective

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Choosing Anti-Terror Targets by National Origin and Race. *Harvard Latino Law Review*, 6 (2003) 9; Harris, D. A.: Using Race as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description Yes; Prediction, No. *Mississippi Law Journal*, special ed., 73 (2003); Banks, R.: Beyond racial Profiling: Race, Policing, and the Drug War. *Stanford Law Review*, December, 56 (2003) 3; Banks, R.: Racial profiling and antiterrorism efforts. *Cornell Law Review*, 89 (2004) 2; Harris, D. A: Racial profiling revisited: "Just common sense" in the fight against terror? *Criminal Justice*, 17 (2002) 2; Davies, Sh.: Reflections on the Criminal Justice System after September 11, 2001.*Ohio State Journal of Criminal Law*, 1 (2003) 1; Ramirez, D.–Hoopes, J.–Quinlan, T. L.: Defining Racial Profiling in a Post-September 11 World. *American Criminal Law Review*, 40 (2003) 3; Braber, L.: Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security. *Villanova Law Review*, 47 (2002) 2.

[67] ENAR-OSJI: Ethnic Profiling. 2009, 14. http://www.soros.org/initiatives/justice/focus/equality_citizenship/articles_publications/publications/ethnic_20100512/Factsheet-ethnic-profiling-20091001-ENG.pdf

method because the number of false negatives and false positives is bound to be much too high.[68] In other words, the measures have a disproportionate negative impact on the black (Roma, Arab) population that is law-abiding, while also reducing the possibility of finding perpetrators that belong to the majority population.[69]

A recent pilot research project[70] organized by the Helsinki Committee (HHC)[71] focusing on police stop and search practices and their discriminatory effects on Hungary's largest ethnic minority, the Roma showed results that are very much in line with findings in other countries. Since previous research has showed that discriminatory ID check methods are relevant to the differential treatment of the Roma,[72] Strategies for Effective Police Stop and Search (STEPSS), an international project supported by the AGIS Program of the European Commission and the Open Society Institute and organized by the Open Society Justice Initiative was launched to change police stop and search policy and practice. For the purposes of the research, for the first time in Hungary, broad-spectrum data collection on the ethnic aspects and general efficiency of ID checks has been conducted.

The project involved the close cooperation of the HHC, the National Police Headquarters (NPH), the Hungarian Police College (HPC) and selected representatives from the Roma community who performed the internal monitoring of the project. The research was carried out for six months in three pilot sites across Hungary: Budapest's 6th District, Szeged and Kaposvár. These three locations represent a broad range of different police districts with differing populations, crime profiles and resources. Budapest's 6th District covers a busy city-centre area and includes the capital's main railway station. Szeged, with a population of 200,000, is a medium-sized district on the Romanian border. Kaposvár is a relatively rural police district with 120,000 inhabitants.

The projects most important findings were the following: the effectiveness of ID checks was determined by examining what percentage of ID checks are followed by further police measures. The project identified three main types of follow-up procedures (i.e.

[68] See, for example Cuéllar: *op. cit.*; Baynes: *op. cit.* 12–13; Ramirez, D.–Hoopes, J.–Quinlan, T. L.: *op. cit.* 1213.

[69] Consider the fact that the name of Yigal Amir, Yizchak Rabin's assassin would not have cropped up based on any kind of assassin profile; nor would the person who first blew up a commercial aircraft–she was a woman who wanted her husband dead in 1949. Nojeim, G. T.: Aviation Security Profiling and Passengers' Civil Liberties. *Air and Space Lawyer*, 13 (1998) 3, 5.

[70] For more detailed descriptions see Kádár, A.–Pap, A. L.: A Police Ethnic Profiling in Hungary–An empirical research. *Acta Juridica Hungarica*, 50 (2009) 3, 253–267 or Kádár, A.–Pap, A. L.–Tóth, B.: Police ethnic profiling in Hungary. *European Police Science and Research Bulletin CEPOL*, November, (2009) 2, 4–6.

[71] For the full report see Kádár, A.–Körner, J.–Moldova, Zs.–Tóth, B.: Control(led) Group. Final Report on the Strategies for Effective Police Stop and Search (STEPSS) Project. Budapest, 2008. The report is available on the Helsinki Committee's website:
http://helsinki.hu/dokumentum/MHB_STEPSS_US.pdf

[72] In 2005, a research carried out under the aegis of the Open Society Justice Initiative found that the Roma are indeed discriminated against in the context of ID checks by the police. Discrimination was especially conspicuous in the practice of stopping pedestrians, with Roma pedestrians disproportionately stopped are more likely to experience disrespectful treatment. See: Pap, A. L.–Miller, J.–Gounev, P.–Wagman, D.– Balogi, A.–Bezlov, T.–Simonovits, B.–Vargha, L.: Racism and Police Stops–Adapting US and British Debates to Continental Europe. *European Journal of Criminology*, (2008) 5, 161–191 and Pap, A. L.: Police ethnic profiling in Hungary–Lessons from an international research. *Regio*, 10 (2007), 117–140.

positive results proving that the check was well-grounded): (i) arrests, (ii) short-term arrests and (iii) petty offence procedures initiated (including on-the-spot fines).

Overall, including traffic related checks, only 1% of ID checks led to an arrest, 2% led to a short-term arrest and 18% to petty offence procedures. If ID checks related to traffic offences are removed, the remaining checks result in 2% arrest, 3% short-term arrest, 19% petty offense procedure and 76% no further action taken. For comparison, in the UK nationally 10–13% of stop and searches lead to arrest.[73] On the whole, it appears that the police use of ID checks is ineffective; large numbers of people are being inconvenienced with little result. This data refutes the argument that extensive checks are an efficient tool against criminality, and highlights the sheer amount of police time wasted conducting stops.

It is noteworthy, that there was significant variation in the rate of efficiency depending upon what ground was recorded as the basis for the ID check. Most ID checks, 37%, took place during the course of traffic controls. A relatively high proportion of checks, 19%, were based upon the suspicion of a petty offence, 8% of all checks were pursuant to intensive controls, and only 2% of checks were related to the suspicion of a criminal act. ID checks recorded under the "other" category make up a third of all stops; this proportion rises to 50% when we removed traffic control stops from the data. The examination of the efficiency rate of the ID checks relative to their different grounds showed that the most frequently quoted grounds were the least efficient.

Arrests and significant percentages of short-term arrests only followed those ID checks that were related to the suspicion of a crime, petty offence or finding a wanted person. Out of these latter cases, however, only those checks that were initiated due to the suspicion of a petty offence made up a substantial portion of all the checks. Overall, traffic control constituted the largest reason for the ID checks, though in 84% of these cases no further action was taken.

Based on the data collected, it appears that the majority of ID checks take place on public premises (streets, parks and roads account for 78%), while relatively few checks are performed in pubs, discos or similar places (6%). The temporal distribution of the checks is relatively even, with 21% occurring in the morning (from 6 a.m. till noon), 29% in the afternoon (from noon till 6 p.m.), 30% in the evening (from 6 p.m. to 10 p.m.), and the remaining 20% at night.

Police officers stop and check more men than women (75% and 25%, respectively), and in line with international trends, young people are more likely to be checked. Individuals belonging to the age group 14–29 represent 43% of all checks, whereas their ratio within the population is 22%.[74] Based on the overall data collected, police in Hungary are most likely to check young men between the ages 14–29.

The data also shows that Roma are disproportionately targeted for ID checks. Within the framework of the project, 22% of all persons checked by the police were of Roma origin (according to the assessment of the officer performing the check), as opposed to 75% being identified as "white". The remaining 3% were identified as "black", "Asian", "Arab" or other. According to reliable sociological research, the estimated proportion of Roma

[73] See: Jones, A.–Singer, L.: *Statistics on Race and the Criminal Justice System–2006/7*. London, 2008.

[74] Based on the figures of the 2001 census, see www.nepszamlalas.hu/hun/kotetek/18/tables/load1_12.html.

people within the total Hungarian population (of 10,045,000) is approximately 6,2% (i.e. their actual number is around 620,000).[75] Thus, Roma are more than three times more likely to be stopped than their percentage of the general population would indicate.

The results show that Roma youth are especially likely to be targeted for ID checks. The proportion of Roma youth between age 14 and 16 who were stopped and checked during the project period was significantly higher than the already high general representation of Roma within the sample (32% as opposed to 22%).

The data in the research shows that ID checks of Roma are no more likely to yield results than measures enforced in relation to non-Roma. It is often argued that a disproportionate targeting of ethnic minority groups is justified by differential rates of criminal involvement. The hit rate of police checks, however, shows no significant differences by ethnic group. On a national level, 78% of ID checks involving Roma were "unsuccessful" in the sense that no further measure was required after the check. For non-Roma this ratio was 79%. The percentage of checks followed by a petty offense proceeding for Roma and non-Roma was 19% and 18%, respectively. Rates of arrests and short-term arrests are practically the same within the Roma and the non-Roma sample. In the country's capital, Budapest: 80% of the checks of Roma did not require any further police action, whereas the same proportion for non-Roma was 59%. If we compare this with the fact that 33% of all the persons checked are of Roma origin (which is a serious over-representation relative to their proportion of 5–10% in Budapest), we can see that the problem is more acute in Budapest than in the other pilot sites.

In sum, in Hungary, the annual number of ID checks (per 1,000 people) is high when compared with other nations in Europe. The police practice behind this result is based on the conviction that randomly initiated ID checks constitute an efficient crime prevention and detection strategy. However, in the sample, only approximately 20% of the ID checks were followed up by any measure, and of these measures, 18% merely involved the initiation of a petty offense proceeding (i.e. proceedings launched due to transgressions of minor significance). Arrests followed only 1% of the checks in our sample. Another important conclusion of the research is that Roma are disproportionately targeted by ID checks. Even though their proportion of the general population is only between 6 and 8%, persons perceived to be of Roma origin by the acting officers constituted 22% of those who were ID checked. The research also refuted the ostensibly rational argument that is frequently presented to justify disproportionality; namely that the Roma are over-represented among offenders, therefore the practice of checking them more often is objectively reasonable.

Concluding remarks

Using Rebekah Delsol's words, to summarize the racial profiling discourse, we can say that there is no evidence that profiling works, considerable evidence that it does not, and some disturbing indications that it may actually hamper law enforcement. When police or immigration officials act on prejudice, they blind themselves to genuinely suspicious forms of behaviour. Profiles are both under- and over-inclusive; that is, they risk being too narrow and missing real suspects or they are too broad, in which case they are expensive to apply

[75] Hablicsek, L.–Gyenei, M.–Kemény, I.: *Kísérleti számítások a roma lakosság területi jellemzőinek alakulására és 2021-ig történő előrebecslésére*, (Experimental methods for predicting the territorial characteristics of the Roma population until 2021). 63, see http://www.nepinfo.hu/index.php?p=605&m=1003 (hereafter: Hablicsek).

in terms of manpower and target large numbers of completely innocent people. More broadly, profiling feeds and aggravates existing mistrust and consequent hostility and lack of cooperation in fighting crime and terrorism among the very communities where support is most needed for counter-terrorism and immigration control.[76] Critics have noted that racial/ethnic profiling exacts a high price on individuals, groups, and communities that are singled out for disproportionate attention. For the individual stopped and detained the experience, sometimes of frequent encounters with the police, can be frightening and humiliating. Racial/ethnic profiling stigmatizes whole groups, contributing to the over-representation of ethnic minorities in other parts of the criminal justice system, legitimising racism, scapegoating and fostering mistrust between communities and the police. This in turn destroys the trust of those communities in the police and reduces their willingness to cooperate in criminal or terrorism investigations and turn to the police to control crime in their neighbourhoods.[77]

Given the elusive nature of "security" in general and the peculiarity of the post 9/11-world, the practice of racial profiling nonetheless remains persistent and to a considerable degree popular amongst not only law enforcement officers, but also the civilian majority middle class. It is ironic that it was right around the time of the World Trade Center attacks that racial profiling suffered decisive rejection within professional as well as political circles in the USA. In the fall of 1999, 81% of those asked opposed stops and vehicle control based on ethnic profiling. By contrast, in a poll conducted a few weeks after September 11, 2001, 58% approved of the idea that Arabs (including American citizens) be subject to stricter security checks before a flight.[78]

This article has argued that besides the doctrinal debate between "security" and "liberty", there is another important and slightly overlooked question to be investigated: the actual efficacy value of policies and law enforcement measures that trigger the entire "liberty vs. security" polemics. What needs to be kept in mind is that "security" itself is a social construct, and affected by prejudices and preconceptions within society. We also need to bear in mind that neither "security" nor "efficacy" can be seen as absolute and isolated concepts. Even if the majority would actually feel secure when law enforcement officers stop members of a minority which is being perceived as potentially dangerous or prone to criminality, this cannot and should not make these measures constitutionally acceptable–not even if, given the peculiarities of the securitarian dynamics, the efficacy standards would have been met. A possible solution would be to abandon the shallow and hollow rhetoric of "liberty vs. security" and return to the well-beaten path of traditional constitutional jurisprudence–and reinstate balancing mechanisms which operate with flexible and complex schemes (including for example dignity or equality) when assessing the harm criterion.

[76] Delsol, R.: Presentation to the LIBE Committee of the European Parliament. Brussels, 30 June 2008, http://www.europarl.europa.eu/document/activities/cont/200806/20080625ATT32712/20080625ATT32712EN.pdf

[77] *Ibid.*

[78] Gross, S. R.–Livingston, D.: *op. cit.* 1413.

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LÍDIA BALOGH*

Racist and Related Hate Crimes in Hungary – Recent Empirical Findings

I. An overview of the situation concerning hate crimes in Hungary

Affected communities

In Hungary the Roma constitute the largest minority (the estimated number of the Roma population is 700 000,[1] which is approximately 7% of Hungary's total population), and practically the Roma are the only "visible" minority (given the small proportion of migrants in the population).[2] Given that the Roma are often used as scapegoats for social and economic problems, and prejudices and negative attitudes against Roma are pervasive in the mainstream Hungarian society, hate crimes or hate speech as an issue might come up first of all in the context of anti-Roma tensions in Hungary.

Anti-Semitism is to be considered as a prevalent phenomenon in Hungary (including the political discourse), and there are numerous cases of attacks against the members of the Jewish community, which is estimated to be between 80 000 and 100 000,[3] or vandalism against Jewish property.

Other racist manifestations are not significant. The only known Islamophobic incident in 2009, when civil protesters, supported by local politicians, opposed the opening of a Muslim cultural centre in Budapest, might not be considered as an example for hate crime.

Manifestations of hate crimes are reported against LGBT people in Hungary. Allegedly, a large proportion of homophobic hate crimes (including violent attack against persons and verbal abuses) is committed around the time of the annual Gay Pride March in Budapest. This trend started in 2007, and there was an enormous amount of violent attacks against the Pride March in 2008.

* Ph.D. candidate, Eötvös Loránd University, Budapest.
E-mail: lidia.balogh@gmail.com

[1] Council of Europe's data: http://www.coe.int/t/dg3/romatravellers/default_en.asp

[2] According to the the Central Statistical Office, the proportion of foreigners is 1.7% in the whole population living in Hungary, among them a large proportion is of ethnic Hungarians, coming from the neighbouring countries. See details on the methods of measuring migrant population in Hungary: Hárs, Á.: A harmadik országokból Magyarországon tartózkodó külföldi állampolgárok a statisztikai adatok tükrében (The statistics of third-country nationals residing in Hungary). In: *Bevándorlók Magyarországon. Az MTA Etnikai-nemzeti Kisebbségkutató Intézet ICCR Budapest Alapítvány által végzett kutatás zárótanulmányai* (Immigrants in Hungary. Final report of the research implemented by the Institute for Ethnic and National Minority Studies of the Hungarian Academy of Sciences and the ICCR Budapest Foundation). Budapest, 2009, 28.

[3] U.S. Bureau of Democracy, Human Rights, and Labor: *2009 Human Rights Report: Hungary*, 2010, available at http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136035.htm

Notable contexts of racist manifestations

In 2009, during the EP election campaign, the National Election Commission held that the extreme-rightist Jobbik party's slogan "Hungary belongs to Hungarians" is unconstitutional.[4] However, no further sanctions were issued, and the slogan was continued to be used. Homophobic statements were also recurring themes in Jobbik rallies during the 2009 EP-elections campaign. A week after the MEP elections Jobbik announced at a press conference that they would work in close cooperation with other right-wing extremist political groups to stop the Gay Pride March by all means necessary.

Also 2009, the Ethics Committee of the Association of Hungarian Journalists condemned a rightist weekly *Magyar Fórum*[5] for portraying a prime minister candidate on its cover framed in a Star of David saying "Jewish Prime minister". The Association held that the cover violates the constitution and human dignity and asked the Parliamentary Commissioner of Civil and Political Rights to investigate the case.

Extremist news media releases[6] often refer to crimes involving alleged Roma perpetrators, as "a crime of the Gypsies", and the term is used even for cases when there is a lonely perpetrator, or when the ethnicity of the perpetrator(s) is unknown.[7]

Despite some governmental efforts aimed at combating racist incitement on the internet, extremist websites (in Hungarian language) are still operating. In June 2009, human rights NGOs filed a report, with the National Police and the Capital Prosecutor's Office, claiming investigation and indictment for inciting ethnic hatred, against a notorious and widely known right-wing extremist blogger (who posted to his blog that Roma people should be "subjugated, expelled from public and cultural life and any utterance of ethnic nature has to be eliminated without mercy. Their spines have to be broken").[8]

Racist/intolerant manifestation in sports–first of all verbal abuse, and banners displaying hate speech or holocaust denial on the grandstands–appears practically only in the context of football in Hungary. The Hungarian Football Federation[9] regularly fines the violators of the regulations regarding "acceptable behaviour".

[4] OVB: Az országos választási bizottság 2009. június 3-án megtartott ülésének jegyzőkönyve. Budapest, 2009 (Record on the meeting of the National Election Commission held on 3rd of June, 2009), available at http://www.valasztas.hu/hu/ep2009/content/of/20090603.pdf

[5] MÚOSZ: Etikai Bizottság: törvénysértő a Magyar Fórum címlapja. 2009 (Ethics Committee: The front page of Magyar Fórum violatest the law) (27.03.2009) available at http://muosz.hu/cikk.php?page=bizottsagok&id=1908&fo=8&iid=5

[6] For example the extreme rightist web page www.kuruc.info is operated from various international servers; it has been banned several times due to complaints, but is restarted again and again from a different server.

[7] Balogh, L.: Etnikai adatok kezelése a magyarországi sajtóban (Ethnic data handling in the Hungarian media). In: *Föld-rész*, 2, (2009) 3–4, 89–90.

[8] Jogi Fórum/Magyar Helsinki Bizottság: Jogvédő szervezetek feljelentést tettek a BRFK-n és a Fővárosi Főügyészségen közösség elleni izgatás miatt (Human rights NGO filed a complaint at the Budapest Police Headquarter and at the Budapest Chief Prosecutor's Office on incitement against community). *Jogi Fórum* (26.06.2009) available at: http://www.jogiforum.hu/hirek/21009

[9] Magyar Labdarúgó Szövetség: www.mlsz.hu

Attention received by racist crime and other forms of hate crime

In the last two years, apparently hate crimes against the Roma attracted the most significant media attention, compared to other forms of hate crimes. However, as a recent study shows,[10] the media attention was significantly higher regarding those cases where allegedly Roma perpetrator committed violent crimes against non-Roma victims, compared to the attention regarding hate crimes against Roma victims. As for anti-Semitic and homophobic hate crimes, there are occasional reporting of such incidents in the media, however, according to NGO sources, a large proportion of hate crimes do not receive any media attention, because these incidents tend to remain unreported.

Besides awareness raising activities and demonstrations organised by civil society actors responding to hate crimes affecting members of the Roma or Jewish communities,[11] notable NGO actions, reacting to inappropriate police responses to hate crimes, took place. In 2009, three NGOs (European Roma Rights Centre, Legal Defence Bureau for National and Ethnic Minorities the Hungarian Civil Liberties Union) released a joint report[12] about the misconducts of the relevant authorities regarding the investigation of the fatal attack against a Roma family in Tatárszentgyörgy. In 2010, the Hungarian Civil Liberties Union submitted a petition to the Head of the National Police and the Head of the Budapest Police Headquarters regarding an attack against the home of a Jewish family on Seder evening, which was considered and investigated by the police as "vandalism", instead of "violence against members of a community".[13] Also in 2010, an open letter was sent to the Head of the Budapest Police Headquarters by the Hungarian Civil Liberties Union,[14] regarding the attacks against the participants 2010 Gay Pride March in Budapest, which were considered and investigated by the police as "disorderly conducts" or "minor bodily injuries" instead of "violence against members of a community".

[10] Karácsony, G.–Róna, D.: A Jobbik titka. A szélsőjobb magyarországi megerősödésének lehetséges okairól (The secret of Jobbik Party: on the possible causes of the sweep of Right Wing on Hungary). *Politikatudományi Szemle*, 19 (2010) 1, 31–66.

[11] For example on 23 February 2010, the Méltóságot Mindenkinek Mozgalom (Dignity for All Movement) organised a Remembrance Day on the anniversary of the double murder in Tatárszentgyörgy, where a 27-year-old Roma man and his five-year-old son were shot and killed; in April 2010, the Szabad Emberek Magyarországért (Free Persons for Hungary) organised a peaceful "walk in kipa or headscarf", aimed at protesting against the inappropriate police response and showing solidarity towards religious Jews living in Hungary.

[12] European Roma Rights Centre, Legal Defence Bureau for National and Ethnic Minorities and Hungarian Civil Liberties Union: *Report on the circumstances of the double murder committed at Tatárszentgyörgy on 23 February 2009 and the conduct of the acting authorities (the police, ambulance and fire services)*, 2009, available at http://www.errc.org/cms/upload/media/03/DA/m000003DA.pdf

[13] TASZ: *Nem rongálás, közösség tagja elleni erőszak–rendőrséghez fordul a TASZ a Széder estet ünneplők megtámadása ügyében* (Not vandalism, but violence against members of a community–Hungarian Civil Liberties Union turns to the police regarding the attack against participants of a Seder Eve celebration). (01.04.2010), available at http://tasz.hu/szolasszabadsag/nem-rongalas-kozosseg-tagja-elleni-eroszak-rendorseghez-fordul-tasz-szeder-estet-unn

[14] TASZ: *A melegeket ért támadások miatt a BRFK-hoz fordultunk* (We turned to the Budapest Police Headquarter because of the attack against gays). (06.07.2010), available at http://tasz.hu/hirek/tasz-level-budapest-rendorfokapitanyanak

As for the attention of international organisations, apparently the issue of anti-Roma hate crimes (committed in 2008–2009) received the most of attention.

In June and July 2009, Andrzej Mirga, the Senior Advisor on Roma and Sinti Issues, Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe, led a nine-day field assessment visit to Hungary to explore possible factors leading or contributing to the attacks on and killings of Roma and the responses of the authorities to these incidents. The delegation visited 12 localities in Hungary, and met with representatives of the central, regional and local government, of the police and of the civil society.[15]

The Council of Europe Commissioner for Human Rights visited Hungary in October 2009 to discuss issues related to fight against intolerance affecting members of minority groups.[16] Regarding the Hungarian situation, the Commissioner "stressed the need to increase public awareness on the situation of minorities which suffer from systematic discrimination or intolerance, such as the Roma, the Jewish community and LGBT (lesbian, gay, bisexual, transgender) people".[17]

II. The legal context regarding hate crimes in Hungary

Current legal framework on and recent developments

Regarding the relevant time period (2005–2010), the Hungarian Criminal Code[18] criminalised six types of behaviour that may fall under the racially/hate motivated category. These are: genocide;[19] apartheid;[20] violence against member(s) of a community;[21] incitement against community;[22] ban of using totalitarian symbols;[23] ban of denying, doubting, or trivialising genocide or crimes against humanity committed by totalitarian regimes.[24]

The article of the Criminal Code on violence against member(s) of a community[25] was amended in 2008.[26] As a result, this article of the Criminal Code, governing previously "violence against a member of a national, ethnic, racial or religious group", was extended to cover any group of the population. The name of the offence was also modified to "violence against member(s) of a community". As a result of the amendment, individuals engaged in the preparation of violence against a member of a community shall also be held criminally

[15] See ODIHR: *E-newsletter*. July-August 2009, available at http://archive.constantcontact.com/fs026/1101200403519/archive/1102659952399.html

[16] The focus of the discussions was on anti-Roma hate-crimes in Hungary.

[17] Office of the Commissioner for Human Rights Communication Unit: *Hungary: Commissioner Hammarberg recommends further action to eradicate intolerance and discrimination*, 2009. (Press Release–762(2009), available at: https://wcd.coe.int/ViewDoc.jsp?id=1520817&Site=DC

[18] Act No. IV of 1978.

[19] *Ibid.* Art. 155.

[20] *Ibid.* Art. 157.

[21] *Ibid.* Art. 174/B.

[22] *Ibid.* Art. 269.

[23] *Ibid.* Art. 269/B (since the amendment of the Criminal Code in 1993).

[24] *Ibid.* Art. 269/C.

[25] *Ibid.* Art. 174/B.

[26] On 10 November 2008, the Hungarian National Assembly adopted Act No. LXXIX of 2008, on Certain Amendments Necessary to Protect Public Order and the Operation of the Judiciary, which modified Article 174/B of the Criminal Code, effective from 1 February 2009.

liable.[27] Based on the amendments, the new provision is the following: (1) Any person who assaults another person for being part, whether in fact or under presumption, of a national, ethnic, racial, or religious group, or certain groups of the population, or compels her/him by applying coercion or duress to do, not to do, or to endure something, is guilty of a felony punishable by imprisonment for up to five years. (2) The punishment shall be imprisonment between two to eight years if the act or crime is committed: a) by force of arms; b) with a deadly weapon; c) causing a considerable injury of interest; d) with the torment of the injured party; e) as part of a group; or, f) as part of a criminal conspiracy. (3) Any person who engages in preparing violence against a member of a community is guilty of a misdemeanour punishable by imprisonment for up to two years.

The article of the Criminal Code on incitement against community[28] provides with protection against non-violent conduct motivated by racism, xenophobia or other bias motive (e.g. homophobia[29]), according to which anyone publicly inciting hatred against the Hungarian nation or any national, ethnic, racial or other groups of the population shall face punishment for a felony offence with imprisonment for up to three years.

The article of the Criminal Code on ban of denying, doubting, or trivialising genocide or crimes against humanity committed by totalitarian regimes[30] originally dealt only with holocaust denial or trivialising (it came into force in February 2010). A few months later, as a result of legislative initiatives of the newly elected Hungarian government, this sub-paragraph was amended (entered into force in July 2010). The new version of this paragraph is extended to the crimes of both "national socialist" and "communist regimes", and the term "holocaust" is no longer there in the text.

Other relevant development is the amendment to Criminal Code in February 2010, which punishes participating in the leadership or in some cases the mere activities of banned associations (e.g. in extremist associations: consider the amendment of the Act on Petty Offences) with up to three years of imprisonment.[31]

Certain articles of the Criminal Code, such as those covering murder (homicide)[32] or the causing of grievous bodily harm (battery)[33] expressly grant judges the discretion to take into account "base motivations" when sentencing offenders, therefore judges in such cases may thus take racist or other bias motivation into account as an aggravating circumstance.

Concerns and debates regarding legislation in the field of racist and other hate crimes

While judges may take racist or other bias motivation into account as a "base motivation", however, racist or other bias motivation is not expressly listed in the relevant provisions of the Criminal Code. No general provision exists in Hungarian law under which racist or

[27] Act No. LXXIX of 2008, Art. 2.

[28] Act No. IV of 1978, Art. 269.

[29] See the interpretation of the law regarding homophobic hate crimes on the website of the (former) Ministry of Social Affairs and Labour: *Jogi háttér–Magyar jogszabályok* (Legal background – Hungarian laws). available at http://szmm.gov.hu/main.php?folderID=21369&articleID=42416&ctag=articlelist&iid=1

[30] Act No. IV of 1978, Art. 269/C.

[31] Act No. XXXV of 2010 on the Amendment of the Criminal Code (Act No. IV. of 1978), amending Art. 212/A of the Criminal Code.

[32] Act No. IV of 1978, Art. 166.

[33] *Ibid.* Art. 170.

MAGYAR
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other bias motivation constitutes an express aggravating circumstance in ordinary criminal offences. Concerning this situation, the ECRI recommends[34] that the Hungarian authorities draft a "specific provision that would make racist motivations aggravating circumstances for ordinary offences", "as without such a systematic approach, the racial motivations of offenders are not assessed on a consistent basis".

As for the new provisions of the Criminal Code on the ban of denying, doubting, or trivialising genocide or crimes against humanity committed by totalitarian regimes,[35] the Hungarian Civil Liberties Union expressed concerns in May 2010, stating that the (by that time, planned) measure curtails the rights to freedom of opinion and freedom of expression, and violates the principle of academic freedom as well.[36]

Although the Act on Assembly prohibits demonstrations that would violate criminal provisions,[37] the same act only allows for the police to prohibit demonstrations if it would obstruct the functioning of crucial state institutions or would practically impede traffic.[38] Thus, demonstrations obviously carrying the risk of foreseeable violence and the intimidation of a great number of people cannot be banned, only disbanded. (Consider the example of August 2009, when international neo-Nazi organisations were planning a demonstration in Budapest to commemorate the death of Hitler's deputy, Rudolf Hess.)[39]

After the Gay Pride March in July 2008, former interpretation of relevant law, according to which throwing eggs at people appearing at public events was considered to be within the boundaries of the freedom of expression[40] was changed, and throwing objects at participants at public events was considered as "infamation" by the Chief Prosecutor of Budapest, and later by the Supreme Prosecutor as well.[41] Previously, the Pest Central District Court ruled that throwing eggs is protected by the right to freedom of expression. The judgement, was criticised by several human rights NGOs, along with a number of politicians and prominent members of the judiciary, concerned dozens of rightist protesters who threw eggs, bottles and rocks at the gay pride marchers and the police. [42]

[34] ECRI: *Report on Hungary, fourth monitoring cycle.* 2009, (adopted on 20 June 2008, published on 24 February 2009), 14, available at http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/hungary/HUN-CbC-IV-2009-003-ENG.pdf

[35] Act No. IV of 1978, Art. 269/C.

[36] TASZ: *A Társaság a Szabadságjogokért jogvédő szervezet véleménye A büntető törvénykönyv módosítására vonatkozó T/25. számú törvényjavaslatról* (The opinion of the Hungarian Civil Liberties Union on the proposal no. T/25. on the amandement of the Penal Code). 2010, available at http://tasz.hu/files/tasz/imce/tasz_nemzetiszocialista_kommunista_bunok_btk2010.pdf

[37] Act No. III of 1989, Art. 2.

[38] Act No. III of 1989.

[39] Pap, A. L.: *Dogmatism, hypocrisy and the inadequacy of legal and social responses combating hate crimes and extremism–the CEE experience.* Proceedings of the Conference: "Extremism and the Roma and Sinti in Europe: Challenges, Risks and Responses". OSCE–ODIHR University College London, London, 10–11 Sept. 2009. (forthcoming).

[40] See Resolution No. B.4488/2007/2-I, of the Prosecutor of the V. and XIII. district of Budapest.

[41] MTV-információ: Becsületsértő a tojásdobálás–ügyészi válasz a liberális politikusoknak (Throwing eggs constitutes defamation–the Prosecutor's answer to liberal politicians). *Jogi Fórum*, 2008. available at http://www.jogiforum.hu/hirek/18311

[42] TASZ: *Reakció a PKKB tegnapi ítéletére* (Reaction to the decision of the Pest County Central Court from yesterday). 2008, available at http://tasz.hu/gyulekezesi-jog/reakcio-pkkb-tegnapi-iteletere

III. Data and information on racist and related hate crimes

Assessment of available data and information regarding hate crimes

Data on racist violence is limited as the police, prosecutors and courts do not usually recognise racial motivation. It is close to impossible to draw valid conclusions regarding the extent, trends and forms of racist violence and crime on the basis of official criminal justice data and information, due to the small number of cases that are actually recorded. This should by no means imply that racial crimes and violence are non-existent in Hungary. In Hungary no specific legally binding instructions exist for the determination of racially motivated criminal activity. Another debate concerns the legal status of perceived ethnicity; however, some argue that collection and handling of data relating to one's perceived ethnic origin is not explicitly prohibited by the law.[43]

It has to be mentioned that there are no monitoring system specialised for racist incidents in Hungary, although there are mechanisms aimed at monitoring the phenomena and racism and the situation of ethnic/national minorities, functioning in different international organisations' frameworks (i.e. UN, CoE).

Allegedly, a large proportion of anti-Rom and anti-Semitic incidents (e.g. verbal abuses, harassment) remain unreported to the police. Similarly, according to unofficial NGO-sources, majority of homophobic hate crimes remains invisible and perpetrators remain unpunished, because the victims often do not report the crime to the police due to fear of public exposure of their sexual orientation and of potential further discrimination, or in several cases the police refused to start an investigation or stopped the investigation for the lack of finding perpetrators. Initiatives aimed to establish an LGBT police organisation (which would not only empower the affected police officers themselves, but allegedly improve the situation of the victims of homophobic hate crimes as well) has not been successful so far in Hungary.

While there is no data or information on hate crimes against migrants or refugees, it should be noted that interviewees of a study about the social situation of third-country nationals living in Hungary opted not to answer the question about personal experiences about racist attacks or abuses.[44]

Categories of incidents and crimes

Due to the already reported data collection restrictions, it is not possible to obtain official numbers beyond the statistics of the six listed types of criminal offences (genocide; apartheid; violence against a member of a community, incitement against community; using totalitarian symbols, denying, doubting, or trivialising genocide or crimes against humanity committed by totalitarian regimes) that might contain a racial or other bias element. For example, instances of aggravated bodily harm or ill-treatment in official proceeding may

[43] The Hungarian Data Protection Law (Act No. LXIII of 1992) differentiates the concept of 'sensitive data' within the category of personal data. Sensitive data, among others data on race or membership in an ethnic community, constitute a type of personal data referring to an essential trait and thus a vulnerable part of the subject's personal identity (Art. 2, Clause 2).

[44] Bognár, K.: Kapcsolatok és erőforrások, bevándorlók és befogadók (Relations, resources, immigrants and receivers). In: *Bevándorlók Magyarországon. Az MTA Etnikai-nemzeti Kisebbségkutató Intézet ICCR Budapest Alapítvány által végzett kutatás zárótanulmányai.* (Immigrants in Hungary. Final report of a research implemented by the Institute for Ethnic and National Minority Studies of the Hungarian Academy of Sciences and the ICCR Budapest Foundation). Budapest, 2009, 147.

have racial or other bias motivations, but in the absence of relevant statistics on the aggrieved party, the patterns of racist or other bias motivations are impossible to trace.[45]

As for violent crimes against the person, out of the six offences, "violence against members of communities" may be drawn under this term. As it was mentioned above, potential racial or other bias motivations of other offences involving violence against the person (e.g. different degrees of bodily harm, homicide, etc.) are not recorded.

In the Hungarian Criminal Cod, there is no offence separately sanctioning violence against property motivated by racism or other bias motivation. Therefore, no official statistics are available. In individual cases (e.g. vandalism in Jewish cemeteries) the judge may in theory assess potential bias motivations as an aggravating circumstance, as a form of "base motivation", but such considerations will not appear in the court statistics, so without targeted research focusing on individual court cases no data can be provided in this respect.

Concerning verbal threats and abusive behaviour, out of the six offences listed, "incitement against community" may be drawn under this term. (The term of "harassment",[46] which typically covers verbal manifestations, is used in the context of the law on equal opportunities.)

Victim and offender characteristics: Data on the demographic features of the victims and offenders is scarce, and due to the mainstream interpretation of data protection rules, never contain any reference to ethnicity/race. Out of the six relevant offences, only "violence against members of communities" might have actual victims, however, the authorities do not collect data even on the citizenship of the victims of these offences. No data is gathered either on which community is concerned by specific instances of "incitement against community".

Cases recorded by the police

The source of the statistical data on cases registered by the police is the Unified Investigation and Prosecution Statistical Database.[47] Data about cases is recorded in the system of Unified Investigation and Prosecution Statistical Database once the case is "finished" from the aspects of investigation or prosecution: till the rejection of a report or till a charge is filed, respectively.

The database refers to the relevant laws, therefore the data is presented here by the categories of offences, as defined by the Criminal Code. As mentioned above, the official data does not include a breakdown on the communities concerned, therefore no information is available on the actual proportion of anti-Semitic, Islamophobic or other hate motivated crimes among the cases.

According to the available data, in 2008 and 2009 no cases were recorded regarding "apartheid", or "denying, doubting, or trivialising genocide or crimes against humanity

[45] The latest ODIHR report on hate crimes indicates as well, referring to the information provided by Hungarian authorities, that the data is not classified according to the types of crimes. See OSCE-ODIHR (2009) *Hate crimes in the OSCE region–incidents and responses. Annual Report for 2008*, 77, available at http://www.osce.org/odihr/item_11_41314.html

[46] Act No. CXXV of 2003, Art. 10(1).

[47] Egységes Nyomozóhatósági és Ügyészségi Bűnügyi Statisztika (ENYÜBS).

committed by totalitarian regimes".[48] Concerning "genocide", the two cases reported by the public in 2009 were rejected[49] by the police.

With respect to "violence against a member of an ethnic etc. group", one out of 13 complaints was rejected in 2008, and two of 23 cases in 2009. The investigation resulted in the establishment of a petty offence in one case in 2009. Concerning "incitement against community": 12 of the 24 cases were rejected by the police in 2008; and 24 out of 48 was rejected in 2009. The investigation resulted in the establishment of a petty offence in 2 cases, both in 2009. Regarding "use of totalitarian symbols", only eight complaints were rejected out of 255 in 2008, and 5 out of 104 in 2009. As a result of the investigation, a petty offence was established in 3 cases (all in 2009).

Cases recorded by the prosecution service

The source of the statistical data on cases recorded by the prosecution service is also the Unified Investigation and Prosecution Statistical Database.

According to the available data, in 2008 and 2009, no cases were recorded regarding "genocide","apartheid", or "denying, doubting, or trivialising genocide or crimes against humanity committed by totalitarian regimes".[50]

With respect to "violence against a member of an ethnic etc. group", eight cases in 2008 and seven cases in 2009 were filed with the prosecution service, out of which resulted in order for trial only in one case, in 2009. Concerning "incitement against community", 1–1 cases were filed in 2008 and 2009 (both resulted in indictments). Regarding "use of totalitarian symbols", 156 charges were filed in 2008, and 25 in 2009, out of which resulted in order for trial in 106 cases in 2008 and in only one case in 2009.

Cases recorded by courts

The source of the statistical data on cases recorded by courts is the Collection of Court Decisions,[51] which refers to the relevant legislation.[52] This database contains data and the text of anonymised[53] court decisions that are to be made public according to the Act on the Freedom of Information.[54]

According to the accessible information in the database, between 2008 and 2010, no decision in the database refers to the Criminal Code concerning "genocide", "apartheid",

[48] The relevant article of the Criminal Code first came into force in February 2010 and then the amended version came into force in July 2010.

[49] According to the Hungarian Criminal Procedure Code (Act No. XIX of 1998) on the Criminal Procedure Code, the police may reject a report if the reported behaviour is not a criminal offence or the suspicion of a criminal offence is absent (Art. 174).

[50] The relevant article of the Criminal Code first came into force in February 2010, and then the amended version came into force in July 2010.

[51] The Collection of Court Decisions is available online at: http://www.birosag.hu/engine.aspx?page=anonim

[52] The database is searchable by the referred articles of acts, or by the texts of the decisions.

[53] The names of the parties are deleted.

[54] Act No. XC of 2005 on the Freedom of Information, Sec. 4 on the Collection of Court Decisions.

"incitement against community" or "denying, doubting, or trivialising genocide or crimes against humanity committed by totalitarian regimes".[55]

Concerning the illegal "use of totalitarian symbols", altogether six decisions in the database referred to the relevant part of the Criminal Code (2008: four decisions, one-one decisions in 2009 and 2010).[56] Decisions show altogether nine defendants, out of which five were not found guilty. In 2008, two perpetrators were sentenced to probation, and one perpetrator was reprehended[57] by the court. In 2010 one perpetrator was reprehended by the court.cConcerning "violence against a member of an ethnic etc. group", the database shows one-one cases in 2008 and 2009 (involving possible bias motivation against Roma victims, which was eventually not established by the court).

Comments on developments by official sources with respect to hate crime in Hungary

The reports and other documents issued by the Parliamentary Commissioner for the Rights of Ethnic and National Minorities provide with comments on trends and developments of racist hate crimes.

The 2005 report[58] of the Commissioner does not contain a special section on hate speech or hate crimes, and there is only one reference, mentioning that several complaints were filed by parents of Roma origin about alleged physical abuse of pupils by teachers, motivated by anti-Roma hate. The report about 2006[59] contains some articles about the role of the media in stirring ethnic hatred,[60] emphasizing that the responsibility of journalists is even larger "especially in such times burdened with tension".[61] A hate speech case is also mentioned: the Parliamentary Commissioner *ex officio* reported a webpage with content (e.g. lyrics) explicitly inciting violence against the Roma.[62]

[55] The relevant article of the Criminal Code first came into force in February 2010 and then the amended version came into force in July 2010.

[56] Actually, according to the available texts of the decisions regarding the illegal use of totalitarian symbols, all of these cases in the concerned period, 2008–2010, involved communist symbols (five-pointed red stars, etc.), therefore these cases would not qualify for genuine racist/bias motivated hate crimes.

[57] "Reprehension" might be considered as the most moderate disciplinary measure, aimed at expressing disapproval of the issuing authority.

[58] Parliamentary Commissioner for National and Ethnic Minority Rights of Hungary: *A nemzeti és etnikai kisebbségi jogok országgyűlési biztosának beszámolója a 2005-es évről* (Report of the Parliamentary Commissioner for National and Ethnic Minority Rights on the year 2005). Budapest, 2006, available at http://www.kisebbsegiombudsman.hu/word/04-29-2008_10_43_30/besz_2005.html

[59] Parliamentary Commissioner for National and Ethnic Minority Rights of Hungary: *Beszámoló a nemzeti és etnikai kisebbségi jogok országgyűlési biztosának tevékenységéről a 2006-es évben* (Report on the activity of the Parliamentary Commissioner for National and Ethnic Minority Rights in 2006). Budapest, 2007 available at http://www.kisebbsegiombudsman.hu/data/files/145405078.pdf

[60] *Ibid.* 63.

[61] *Ibid.* 68. 2006 was the year when demonstrations broke out after leaking of an audio recording with a speech of the then prime minister Ferenc Gyurcsány held before a closed-door meeting of the Socialist Party, stating the party had lied to the public regarding the country's economic status to win the 2006 Parliamentary elections and criticised the Socialist Party's governing. The demonstrations involved occasional violent actions, as well as extreme rightist and anti-Semitic voices.

[62] *Ibid.* 69.

The report on 2007 presents developments regarding the sweep of the extreme rightist Jobbik Magyarországért Mozgalom (For a Better Hungary Movement)[63] party, and its political rhetoric which associates Roma ethnicity with inherent criminality, by using the term "Gypsy criminality". The report includes a chapter on hate speech issues.[64]

The 2008 report[65] contains a comprehensive chapter on hate speech, mentioning that besides anti-Roma manifestations, anti-Semitism is also prevalent,[66] and includes a section on the increase in physical violence against Roma as well. As for physical attacks against Roma (or property owned by Roma), the report mentions ten cases (noting that the media reported on an even larger number of cases).[67]

In November 2008, the Parliamentary Commissioner considered an attack against a Roma family in Pécs as a crime with "significant impact on public concerns over safety", and expressed his worries because the police almost immediately dismissed the possibility of racist motivations.[68] The Parliamentary Commissioner released a statement as well, concerning other attacks against Roma, following consultation with several Roma public figures, calling the authorities to pay special attention to exploring the possible bias motivation behind the crimes.[69]

The Parliamentary Commissioner's report on 2009 calls on[70] authorities to collect individual data of the perpetrators and victims of hate crimes, as well to establish a monitoring system regarding racist attacks and incidents.

In a 2010 report on an investigation[71] initiated *ex officio* by the Parliamentary Commissioner, ineffective police response is criticised concerning an incident, involving a rural Roma community, which took place in the context of local ethnic tensions.

[63] Hereinafter referred to as Jobbik.

[64] Parliamentary Commissioner for National and Ethnic Minority Rights of Hungary: *Beszámoló a nemzeti és etnikai kisebbségi jogok országgyűlési biztosának tevékenységéről, 2007* (Report on the activity of the Parliamentary Commissioner for National and Ethnic Minority Rights in 2007). Budapest, 2008, 79, available at http://3ddigitalispublikacio.hu/media/ombudsman/beszamolo_2007.pdf

[65] Parliamentary Commissioner for National and Ethnic Minority Rights of Hungary: *Beszámoló a nemzeti és etnikai kisebbségi jogok országgyűlési biztosának tevékenységéről, 2008* (Report on the activity of the Parliamentary Commissioner for National and Ethnic Minority Rights in 2008). Budapest, 2009, available at http://www.kisebbsegiombudsman.hu/data/files/144644490.pdf

[66] *Ibid.* 152.

[67] *Ibid.* 166.

[68] Parliamentary Commissioner for National and Ethnic Minority Rights of Hungary: *Újabb romák elleni támadás* (Another attack against Roma) (Press release, 19th of November, 2008), available at http://www.kisebbsegiombudsman.hu/hir-385-jabb-romak-elleni-tamadas.html

[69] Parliamentary Commissioner for National and Ethnic Minority Rights of Hungary: *Véletlen, sorozatos egybeesés vagy aggodalomra okot adó tendencia?* (Accidental series of coincidencies or a worrisome tendency?) (Statement, 19th of November, 2008), available at: http://www.kisebbsegiombudsman.hu/hir-386-allasfoglalas-az-elmult-evben-tortent.html

[70] Parliamentary Commissioner for National and Ethnic Minority Rights of Hungary: *Beszámoló a nemzeti és etnikai kisebbségi jogok országgyűlési biztosának tevékenységéről, 2009* (Report on the activities of the Parliamentary Commissioner for National and Ethnic Minority Rights in 2098).. Budapest, 2010, 40, available at http://www.kisebbsegiombudsman.hu/data/files/185232828.pdf

[71] Parliamentary Commissioner for National and Ethnic Minority Rights of Hungary: *A nemzeti és etnikai kisebbségi jogok országgyűlési biztosának jelentése a 2009. november 15–16-i sajóbábonyi eseményekről és az azzal összefüggő jogértelmezési problémáról* (Report of the Parliamentary Commissioner for National and Ethnic Minority Rights on the incidents on 15–16 November 2009 in

The last yearbook[72] of the National Security Office, published in 2009,[73] contains a detailed chapter devoted to extremist groups, focusing on the sweep of the extreme-rightist, anti-Roma political forces, the phenomenon of the paramilitary organisation Hungarian Guard (and its activities, e.g. marches aimed at intimidating Roma communities). The report indicates an increase in attacks against LGBT people as well (referring to the violent incidents around the 2008 Gay Pride March in Budapest).

Unofficial data and information on anti-Roma hate crimes

The reports published by the European Comparative Minority Research Foundation are a rich source of information on Roma issues, including hate crimes.[74] Mainstream media also reported on hate crimes against Roma, especially concerning a series of nine attacks[75] committed in 2008 and 2009, allegedly by an organised group of criminals.

The media dealt first of all with the above-mentioned nine attacks, resulted in deaths, injuries and loss of the properties of Roma people. These crimes were apparently targeted against the homes of Roma people living in the outskirts of rural settlements (in neighbourhoods with a significant Roma population). The perpetrators used self-made fire-bombs ("Molotov cocktails"), to set the buildings on fire, and handguns for the fatal attacks.

Sajóbábony and the related problems regarding legal interpretation) (reg. no. 18/2010), available at http://www.kisebbsegiombudsman.hu/hir-550-jelentes-2009-november-15-16-i.html

[72] NBH: *A Nemzetbiztonsági Hivatal Évkönyve. 2008* (Yearbook of the National Security Office, 2008). Budapest, 2009, available at http://www.nbh.hu/oldpage/evk2008/001menu.htm.

[73] The yearbook was last published in 2009. After the governmental changes in 2010, the National Security office was reorganised (and renamed to Constitution Protection Office).

[74] Their latest report is EÖKK: *Cigánynak lenni Magyarországon. Jelentés 2008* (To be a Roma in Hungary. Report 2008). Budapest, 2009.

[75] The 1st attack in the series of nine took place in Galgagyörk, a village near Budapest, where shortly after midnight, 10–15 shots were fired at three houses owned by Roma. No one was injured. The 2nd attack was committed in Piricse, where Molotov cocktails were thrown at two houses owned by Roma people. A woman was shot on her leg when she stepped out of one of the houses. The 3rd attack was perpetrated in Nyíradony, where gunshots were targeted at a house inhabited by Roma. No one was injured. The 4th attack took place in Tarnabod, where Molotov cocktails were thrown and gunshots fired at three homes in a neighbourhood with a significant Roma population. No one was injured. On 3 November 2008, the 5th attack was committed in Nagycsécs, where a 43-year-old Roma man and a 40-year-old Roma woman were shot dead in their home in Nagycsécs. According to the official investigation, petrol bombs (Molotov cocktails) were thrown into the house before the perpetrators used firearms to kill the members of the family. On 15 December 2008, the 6th attack took place in Alsózsolca, where several shots were fired at a 19-year-old Roma man and his partner in front of their home in Alsózsolca. The young man suffered life-threatening injuries. On 23 February 2009, the 7th attack was committed in Tatárszentgyörgy: a 27-year-old Roma father and his 5-year-old son were shot dead as they ran out of their burning home in Tatárszentgyörgy. The man's wife and the couple's two other children were also seriously injured in the attack and had to be treated for severe burns. On 22 April 2009, the 8th attack was committed in Tiszalök when an 54-year-old Roma man was shot in the chest outside his home. On 3 August 2009, the 9th–last–crime took place in Kisléta, where a 45-year-old Roma woman was shot dead, and her 13-year-old daughter seriously injured in an attack against their home in Kisléta. The girl, suffering life-threatening injuries, remained in hospital for several weeks.

Besides these crimes, "sporadic" incidents, with alleged/possible anti-Roma motivation in the background, were reported by the media in numerous cases, especially in 2008 and 2009.

Unofficial data and information on anti-Semitic hate crimes

The Hungarian mainstream media provides with information on anti-Semitic incidents: violence against persons[76] and property.[77] The Alliance of the Jewish Religious Communities of Hungary collects information on anti-Semitic attacks and abuses.

Unofficial data and information on other racist or other religiously motivated hate crimes

There is no information about systematic collection of unofficial data regarding on other racist (e.g. against people of colour) or other religiously motivated (e.g. Islamophobic) hate crimes in Hungary.

According to the available sources, no violent incidents against foreigners were reported during the last two years by migrants or refugees. However, according to 2009 research report on migrants living in Hungary, the interviewed third country nationals "preferred not to talk about any racist incidents experienced by them, however, during the conversations, some of them mentioned that radicalisation–in connection with recent the political tendencies–and the sweep of the right-wing is perceivable".[78]

Unofficial data and information on homophobic hate crimes

The sources of unofficial data and information on homophobic hate crimes provided in Hungarian context are: personal accounts of members of LGBT organisations; websites of LGBT organisations and human rights and NGOs providing legal support for victims;[79] the "Háttér Archives" (maintained by Háttér Society);[80] which is a rich source of media reports, press releases, legal and other documents; press releases, complaints and cases published by

[76] The mainstream media dealt with two cases: in July 2009, three men abused a 27-year-old Jewish man in a neighbourhood of Budapest where a significant Jewish population lives (7th district, Dohány street), because he admitted his Jewish origin; in March 2010, the police warning came after a rabbi's home was attacked by anti-Semitic vandals who smashed the windows with stones during a seder holiday meal.

[77] The mainstream media reported the following cases: in December 2009, the day after a conference held in the Parliament, where Elie Wiesel, Nobel Prize winner novelist was present as a keynote speaker, unknown perpetrators vandalised 12 gravestones and a statue in the Jewish cemetery of Székesfehérvár, and painted on the wall of the Memorial Hall the words "We don't need a Jewish Casino"; in July 2010 altogether 13 (150–200 years old) gravestones were vandalised by unknown perpetrators in the Jewish cemetery of Tolna.

[78] Within the framework of a comprehensive research on migrants (third country nationals), 70 interviews were proceeded with migrants and experts (among the latter group there were migrants as well). The interviewees came altogether from 23 foreign countries (Vietnam, China, Turkey, Nigeria, Senegal, Gambia, Ghana, Iran, Libya, Russian Federation, Syria, Ukraine, Afghanistan, Benin, Egypt, The Emirates, Ethiopia, Iraq, Kenya, Mongolia, Peru, Romania, and Tibet). See Bognár: *op. cit.* 147.

[79] Labrisz Lesbian Association, Háttér Society for LGBT People, Szimpozion Association: http://www.szimpozion, PATENT Human Rights Association, Amnesty International Hungary, Hungarian Civil Liberties Union.

[80] Háttér Archívum, http://www.hatter.hu/hatter-archivum

the above mentioned organisations; the mainstream media;[81] the community media (LGBT news sites, Facebook and other community sites where LGBT and other human rights organisations are present); and blogs. Extremist websites in Hungary also regularly report homophobic hate crimes considered as "success stories' and 'acts of justice".[82]

Information on anti-Roma hate crime from foreign sources and international organizations

The European Commission against Racism and Intolerance (ECRI), the Council of Europe's independent human rights monitoring body published its latest Report on Hungary[83] in February, 2009, where it "urges the Hungarian authorities to intensify their efforts to ensure a more vigorous implementation of criminal law provisions relating to the fight against racism",[84] and "reiterates its recommendation that further human and financial resources be allocated to measures aimed at ensuring that the investigation and prosecution of racist crimes are carried out in a thorough and systematic fashion".[85]

According to the 2010 report of the Minority Rights Group,[86] "Jobbik blames Jews and Roma for the social and economic problems facing Hungary post-transition and post-EU accession" and "It has also coined the term 'Gypsy crime' to denote certain types of crimes supposedly committed exclusively by Roma".

The U.S. Bureau of Democracy, Human Rights, and Labor[87] provides with an assessment regarding the legal framework of hate crimes and hate speech, and of the implementation of the law as well: "Courts have failed to convict persons of inciting hatred when no physical assault followed. Under the civil code, a person specifically targeted by hate speech may file a civil suit, but, as long as the speech remains abstract and does not

[81] For example. the following cases were reported by mainstream media. In May, 2009, at the Heroes'Square in Budapest, a group of skinhead-looking people (one of them wearing the hat of the Hungarian Guard) verbally insulted the participants of a film-shooting, preparing a video spot announcing the forthcoming Gay Pride, and spat at one of the participants, a young, foreigner woman. In 2009 (5 September), 41 extremists were arrested in relation to violent activities during the Gay Pride. Prosecution was started against 27 of them. Near the venue of the afterparty of the Pride extremists were gathering, and launching verbal attacks, and threw stones at one police car patrolling around the venue. Two men leaving the after-party on bicycles were attacked by extremists, the victims suffered serious injuries. After the Gay Pride March in 2009 (5 September), one woman wearing the organisers' T-shirt was attacked on the street by two or three men on her way home.

[82] About a week after the Gay Pride, in July 2010, a group of extremists announced on their website, using hate speech, that they "desecrated" the gravestone of Károly Kertbeny. (Károly Kertbeny was a 19th century Hungarian writer who invented the words "homosexuality" and "heterosexuality". A gravestone was erected for him in 2002 by the LGBT community, and it is visited every year by participants of the LGBT Festival.) The extremists covered the memorial with a black sack and attached a quote from the Bible saying that men having sexual relations with men have to die.

[83] ECRI: *Report on Hungary, fourth monitoring cycle* (adopted on 20 June 2008, published on 24 February 2009), available at http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/hungary/HUN-CbC-IV-2009-003-ENG.pdf

[84] *Ibid.* Para. 25.

[85] *Ibid.* Para. 26.

[86] MRG International: *State of the World's Minorities and Indigenous Peoples 2010. Events of 2009*. London, 2010, 161, available at: www.minorityrights.org/download.php?id=840

[87] U.S. Bureau of Democracy, Human Rights, and Labor: *2009 Human Rights Report: Hungary*. 2010, available at http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136035.htm

mention any specific individual, there is no legal recourse". The series of physical attacks against Roma (between June 2008 and 3 August 2009) are also reported, and the criticism raised among anti-racist activists by the shortcomings of the investigation, and that the police ordered an internal disciplinary proceeding to examine the alleged mistakes, and these resulted in sanctions against two police officers. The report mentions that after the arrest of four suspects on 21 August 2009, "No additional attacks of this nature occurred". The report provides with details regarding notable racist manifestations in the public life.[88]

The Amnesty International 2010 report[89] states that violent attacks against Roma continued in 2009,[90] presents details on three murder cases, and mentiones that: "In September, about 400 Romani women initiated legal proceedings against Oszkár Molnár, a Member of Parliament of the opposition FIDESZ party and Mayor of Edeleny, over his alleged defamatory remarks on Romani women".[91]

The Freedom House reports[92] "increasing violence against Roma led to four deaths in 2009, and rising insecurity forced Romany men to patrol their own neighbourhoods", and mentions that "four men were arrested in August 2009 in connection with the murders".

[88] *Ibid.* [30 January 2009] "Albert Pásztor, the head of the Miskolc police headquarters, stated in a press conference, 'Hungarians appear to rob banks or gas stations, but all the other robberies are committed by Gypsies' [...] and that 'cute Gypsy children often become rude and cruel perpetrators'. Upon the instruction of the minister of justice and law enforcement, the HNP [Hungarian National Police] initiated an inquiry into the incident, and Pásztor was suspended from his position. However, two days later the investigation concluded that Pásztor did not break any law, and the HNP terminated his suspension; the decision to reinstate Pásztor was approved by the minister of justice and law enforcement."; [2 April 2009] "Parliamentary Commissioner for Civil Rights Szabó stated in an interview that 'Gypsy crime' existed and defined it as a type of crime performed to earn a living. [...] He also presented himself as the parliamentary commissioner of the 'majority' rather than the parliamentary commissioner for the rights of national and ethnic minorities. Although he withdrew his statement the next day following strong criticism by human rights groups, Szabó's professional acceptance greatly weakened following this incident."; [3 September 2009] "Oszkár Molnár, the mayor of Edeleny and a FIDESZ parliamentarian, stated during a press conference that pregnant Romani women hit their bellies with rubber hammers and took harmful medicines to increase the chance their child would be born with disabilities in order to receive increased state financial aid. Responding to the statement, FIDESZ party leaders initially labelled it as a 'local issue'. However, in December the center-right FIDESZ party dropped Molnár from its slate for the April 2010 parliamentary elections."

[89] Amnesty International: *Amnesty International Report 2010. The State of The World's Human Rights*, 2010, 166, available at http://thereport.amnesty.org/sites/default/files/AIR2010_EN.pdf, "Robert Csorba and his son, aged five, were killed in Tatárszentgyörgy in February. After an initial examination, the local police announced that they had been found dead after a fire caused by an electrical fault in their house. Later that same day, however, the police acknowledged that evidence of gunshot wounds had been found on the bodies, but only opened a murder investigation 10 hours later." "Jenő Koka, a 54-year-old Romani man, was killed in Tiszalöks Roma neighbourhood in April. He was reportedly shot dead as he left his home to start the night shift in the local chemical factory where he worked." "Maria Balogh, a 45-year-old Romani woman, was shot dead and her 13-year-old daughter seriously injured in the village of Kisléta in August".

[90] *Ibid.* 165–166.

[91] *Ibid.*

[92] Freedom House: *Country Report, Hungary*. 2010, available at http://www.freedomhouse.org/template.cfm?page=22&year=2010&country=7838

Information on anti-Semitic hate crime from foreign sources and international organizations

The European Commission against Racism and Intolerance stated in its report, concerning the situation before June 2008,[93] that "antisemitic attacks against persons appear to be rare, incidents of vandalism against synagogues and Jewish cemeteries are not uncommon",[94] and reports that for "Antisemitism has also been openly espoused by certain political parties, NGOs report that even some mainstream parties do little to distance themselves from such opinions. Overall, the sense is that the expression of antisemitic views is currently on the rise in Hungary".[95]

The latest report of the U.S. Bureau of Democracy report on human rights[96] states that during 2009 anti-Semitic incidents, including vandalism, continued, but the Federation of Jewish Communities in Hungary reported that anti-Semitism did not increase in the year compared with 2008: "According to police there were 124 reports of vandalism or destruction of Jewish and Christian properties (nine in houses of worship and 115 in cemeteries) during the first ten months of the year compared with 365 cases reported in 2008". Besides mentioning that anti-Semitism is present in the media, anti-Semitic incidents[97] were also reported by the U.S. Bureau of Democracy.

[93] ECRI: *Report on Hungary (fourth monitoring cycle).* Adopted on 20 June 2008, published on 24 February 2009, available at http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/hungary/HUN-CbC-IV-2009-003-ENG.pdf

[94] *Ibid.* Article 72.

[95] *Ibid.* Article 73.

[96] U.S. Bureau of Democracy, Human Rights, and Labor: *2009 Human Rights Report: Hungary.* 2010, available at: http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136035.htm

[97] [24 February 2009] "The World Jewish Congress joined MAZSIHISZ in criticising anti-Semitic comments made by a local government official, Attila Kiss from Rajka. Kiss called on other officials to take up 'sickles and swords' and 'exorcise' the local synagogue. MAZSIHISZ lodged an official complaint against Kiss, which the Prosecutor's Office subsequently rejected."; [4 April 2009] "Jobbik, Magyar Garda, and the Hungarian National Front co-organised an event commemorating the 1882 'blood libel' trial in which residents of Tiszaeszlar accused the local Jewish community of killing a 14-year-old Christian peasant girl in order to use her blood for a religious ceremony. The police ordered an investigation into the event after the media reported that the approximately 80 participants made anti-Semitic comments. On December 3, the police concluded the investigation due to the lack of evidence of the crime of 'incitement against a community'."; [18 April 2009] "A day before the March of the Living procession organised by the Jewish communities, far-right demonstrators marched to the German embassy in Budapest to deny the Holocaust and to raise their voices against 'Zionist world-rule'. An estimated 250 persons, including 60 wearing Magyar Garda uniforms, held posters reading, 'Down with the Holocaust doctrine' and 'the Third Reich strikes back'. Others wore shirts that said 'Dare to be white'. MGA [Magyar Gárda–Hungarian Guard] Captain Istvan Dosa said in a speech that "nothing from the Holocaust is true", and then he read a petition addressed to the German embassy. The Budapest police initiated legal procedures against Dosa and another speaker for "incitement against a community". However, the participants also made an official complaint concerning police actions in connection with the march, which the prosecutor's office supported. Consequently, the police dropped their investigation of the march."; [30 June 2009] "Three men beat a 27-year-old Jewish man after asking if he was a Jew. The victim suffered minor injuries. The prime minister asked the minister of justice and law enforcement to supervise and accelerate the investigation and to present proposals on how to avoid similar incidents. On December 23 the police arrested two persons, one 16 years old and the other 18 years old, in connection with the attack and initiated an

The Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe launched a report in June 2010[98] about the outcomes of a field assessment visit in Jun–July 2009, aimed at exploring the context of the violent attacks against Roma in Hungary in 2008–2009. According to the report: "Convictions on charges of inciting hatred against a community are rare, as the relevant practice of the Constitutional Court requires the prosecution to show a direct causal connection between hate speech and an incident of violence. The delegation heard concerns that current hate-speech laws provide 'unlimited' free speech, leaving broad opportunities for the dissemination of racist propaganda". The report mentions that there are apparently "no specific instructions or guidelines on the investigation of hate motivation or its consideration as an aggravating circumstance in crimes." The report contains detailed recommendations[99] to the relevant Hungarian authorities, with regard to combating racist hate crimes and preventing further incidents. In Appendix,[100] a comprehensive list is presented of 45 incidents with an alleged racist motivation, involving Roma victims (22 cases from 2008, 23 cases from 2009). As for 2010, the report states "in the first quarter of this year, two new attacks against Roma were reported by civil society".[101]

Information on other racist hate crime from foreign sources and international organizations

The only information on "other" racist hate crime is reported by U.S. Bureau of Democracy: "Five Roma were charged with a racist assault after allegedly beating an ethnic Hungarian on September 23. The four men and a woman were placed in pre-trial detention. According to a police spokesman, this was the country's first racist incident in which the victim was not a member of a minority".[102]

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investigation of violence against a member of a community"; [5 September 2009] "During a pride parade, approximately 20 demonstrators whom police had pushed out of Városház Square began shouting 'nasty Jews' in the direction of Budapest's largest synagogue. The demonstrators threw an empty beer bottle at the synagogue and tore down a hanging banner advertising the Jewish Summer Festival. They set the banner, along with a temporary reed fence near the synagogue, on fire. Police quickly extinguished the fire. They opened an investigation into the incident"; [26 October 2009] "A 22-year-old man smashed a memorial plaque dedicated to Armin Kecskeméti, chief rabbi of Mako for more than 40 years, who died in a concentration camp in 1944. The perpetrator also wrote 'what six million?' and "lying swine" on the wall. Two days later the police captured a suspect and initiated proceedings against him on vandalism charges."

[98] OSCE-ODIHR: *Addressing Violence, Promoting Integration. Field Assessment of Violent Incidents against Roma in Hungary: Key Developments, Findings and Recommendations. June–July 2009.* Warsaw, 15 June 2010, available at http://www.osce.org/documents/odihr/2010/06/44569_en.pdf

[99] *Ibid.* Chapter 7, "Recommendations".

[100] *Ibid.* Appendix 1, "Incidents and Violence against Roma in Hungary in 2008–2009".

[101] *Ibid.* 4.

[102] U.S. Bureau of Democracy, Human Rights, and Labor: *2009 Human Rights Report: Hungary.* 2010, available at http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136035.htm

Information on homophobic hate crime from foreign sources and international organizations

The latest Amnesty International report[103] mentions that the 2009 LGBT Pride March in Budapest on 5 September 2009 was protected adequately by the police with and no incidents reported during the march, however "a young woman was allegedly attacked by two or three anti-gay protesters after the march; she suffered injuries on her head and arms".

The 2010 report of the U.S. Bureau of Democracy report on human rights[104] states that "extremist groups continued to subject gay men and lesbians to physical abuse and attacks", and reports the same attack (attack against a young woman), noting that after the Hungarian Civil Liberties Union complained to the national police chief that the reason for the assault was related to the woman's membership in a societal group, police changed the legal grounds of the investigation to "violence against a member of a community".

The 2009 report of the Danish Institute for Human Rights on Hungary[105] concludes that hate speech is only "covered by the law when it amounts to incitement to hatred against a community". The report indicates that "No good practices have been identified in Hungary"[106] in the field of combating homophobia and discrimination on the grounds of sexual orientation and gender identity.

As for the Hungarian legislation regarding homophobic hate crimes, the ILGA Europe's[107] Country Index[108] emphasizes that the relevant criminal law does not refer explicitly to homophobia as a bias motive.

IV. Positive initiatives aimed at preventing and hate crimes

The regulation of operations, ethics, and procedures with respect to content providing (Code of Content Providing),[109] issued by the Hungarian Association of Content Providers (last supervised in 2009) takes stance against hate speech, and provides editors with guidance regarding extremist manifestations and insulting expressions: "The Content Provider should strictly avoid expressions that are insulting to particular persons or groups of persons, as well as extremist manifestations of other kinds. Where it is appropriate, it may, however, give space to such views expressed by public persons: in such cases, it should be made

[103] AI: *Amnesty International Report 2010. The State of The World's Human Rights,* 2010, 166, available at http://thereport.amnesty.org/sites/default/files/AIR2010_EN.pdf

[104] U.S. Bureau of Democracy, Human Rights, and Labor: *2009 Human Rights Report: Hungary.* 2010, available at http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136035.htm

[105] Danish Institute for Human Rights, COWI: *The social situation concerning homophobia and discrimination on grounds of sexual orientation in Hungary.* March 2009, available at http://fra.europa.eu/fraWebsite/attachments/FRA-hdgso-part2-NR_HU.pdf

[106] *Ibid.* Art. 43.

[107] International Lesbian, Gay, Bisexual, Trans and Intersex Association, Europe, http://www.ilga-europe.org/

[108] ILGA (2010) *Rainbow Europe Map and Country Index (May 2010),* available at: http://www.ilga-europe.org/home/publications/reports_and_other_materials/rainbow_europe_map_and_country_index_may_2010.

[109] MTE: A Magyarországi Tartalomszolgáltatók Egyesületének a Tartalomszolgáltatásra Vonatkozó Működési, Etikai és Eljárási Szabályzata (Code of Conduct, Ethics and Procedures of Content Providing, issued by the Hungarian Association of Content Providers). 2009, (last supervised: 21 October 2009): http://www.mte.hu/etikaikodex.html

clear that the Content Provider does not agree with this view, considering it incompatible with its own basic principles. It is the duty of the editors to determine the most appropriate way of noting this in every case".[110]

As (racist or anti-Semitic) extremism among football fans is a prevalent phenomenon in Hungary, the Hungarian Football Federation implemented regulations, to prevent/eliminate hate speech and racist incidents before/during/after matches. The contents of these documents are in accordance with the recommendations of the international football organisations (UEFA–Union of European Football Associations, FIFA Fédération Internationale de Football Association), with a detailed regulation on the responsibility of sport organisations, on the tolerable behaviour of spectators, and on the applicable sanctions (including fines). According to the Security Regulations which regulated the rules and conditions of the participation at matches, it should be printed on the tickets that racist or ant-Semitic expressions are forbidden,[111] and, in cases of racist or scandalous manifestations, the match might be interrupted or even closed.[112] The Code of Discipline contains regulations on the "banner permission" (only those banners might be brought into the grandstands that are checked by a special commission–e.g. racist/anti-Semitic slogans are forbidden[113] Racist/intolerant behaviour or expressions (and defamation as well) are considered as misdemeanours to be sanctioned.[114] The Disciplinary Committee of the Federation regularly fines sport organisations those fans violate of the regulations.[115]

There are NGOs providing legal counselling and assistance to victims of hate crimes: e.g. the Hungarian Civil Liberties Union[116] and the Háttér Society for LGBT People[117] (the latter focuses on victims of homophobic attacks.

The Háttér Society for LGBT People launched a project within the framework of the EU PROGRESS Programme[118] aimed at providing police officers with trainings regarding homophobic hate crimes. The project, started in May 2009, contains a module which

[110] *Ibid.* Sec. V: "Separation of the public and private spheres", Art. 1 "Protection of personality rights".

[111] Magyar Labdarúgó Szövetség Biztonsági Szabályzata (Security regulations of the Hungarian Football Federation) (adapted on 16 April 2009) http://www.mlsz.hu/anyagok/szabalyzat/2009-2010/Biztonsagi_Szabalyzat.pdf, Appendix 8, Article 4.4.

[112] *Ibid.* Appendix 8, Art. 5.

[113] Magyar Labdarúgó Szövetség Fegyelmi Szabályzata (Code of Discipline of the Hungarian Football Federation) (came into force on 1 July 2009, last modified: 25 June 2010) http://www.mlsz.hu/anyagok/szabalyzat/2009-2010/Fegyelmi_Szabalyzat, Appendix 9.

[114] *Ibid.* Disciplinary Sanctions, Sec. III, Art. 10. The Code sets the maximum limits of fines. In cases of such misdemeanours, players should be excluded at least 5 matches from participation, members of the audience might be banned from the stadium for 2 years. Clubs might be fined and/or ordered to organise closed-door matches because of the misdemeanour of their fans; or might be sanctioned with championship score reduction, or even with re-classification to a lower league.

[115] In 2010, the media reported several disciplinary decisions against football clubs because of anti-Semitic/racist hate speech on the grandstands, involving fines of 100–400,000 HUF (approx. 400–1,600 EUR).

[116] http://tasz.hu/jogsegely

[117] http://www.hatter.hu/jog

[118] The project is implemented within the framework of Hungarian programme "Együtt az egyenlőségért 2009–2010" (Together for Equality 2009–2010), co-funded by the EU PROGRESS Programme. The call for proposals was launched by the Hungarian Ministry of Social Affairs and Labour (applications were selected by public procurement procedure).

addresses police officers, and focuses on combating homophobic hate crimes and awareness-raising on LMBT issues. The training materials are prepared by expert groups, with the participation of researchers (Open Society Institute, Central European University, Max Planck Institute) and NGO activist (Háttér Society Legal Defence Bureau for National and Ethnic Minorities), and a member of the Advisory Committee of the Hungarian Equal Treatment Authority.

V. Conclusions

In the Hungarian context, it is almost impossible to draw valid conclusions regarding the extent, trends and forms of racist violence and other forms of hate crimes on the basis of official criminal justice data and information. Very few reports are filed on criminal offences that contain a racial or other bias motivation element, and even fewer lead to indictment. Similarly, due to the small number of cases that are actually recorded as criminal offences by the prosecution no valid conclusions could be drawn with regard to the specific characteristics of offenders. Data on the demographic features of victims are not collected by the Hungarian authorities.

Given the lack of a specified monitoring mechanism on hate crimes, and appropriate official information, other sources like reports of NGOs and international organizations have to be considered as well. Regarding homophobic hate crimes, LMBT organizations report a decrease of the number of extremist homophobic offenders at the Pride March 2009 and 2010, compared to 2008, due to the police strategy (isolating the route of the March) and to a change in legislation. As for anti-Roma hate crimes, unofficial sources (first of all, the media and NGOs) agree on the perception of unprecedented sweep of violence against the Roma community in Hungary in 2008–2009. This tendency ended, apparently in August 2009, with the arrest of four suspects of a series of nine attacks against Roma.

However, by the time of closing the manuscript of the present article, new forms of hate motivated hate crimes are emerging in Hungary, targeting especially certain Roma communities in rural areas. These worrisome tendencies are being followed by legislative changes and initiatives, however, there are still apparent shortcomings with implementation of the current laws to combat hate crimes.

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SILVANA MOSCATELLI*

The Multiple Discrimination in the European and Italian Context

1. Definition

The term "multiple discrimination" indicates any combination of discrimination on the grounds of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The concept of multiple discrimination has been pioneered in the 80s in the US by an American scholar, Kimberlé Crenshaw, in order to identify new forms of discrimination. Crenshaw called attention to the many ways in which race and gender interacted to shape experiences of black women. The argument put forward was that individuals can belong to several disadvantaged groups and potentially suffer specific forms of discrimination at the same time.[1]

Crenshaw and other scholars began criticizing the single ground approach for neither providing adequate protection nor a full picture of the phenomenon because, according their opinion, an analysis on a single issue of discrimination did not reflect reality. They also criticized how that analysis generally dealt with one ground of discrimination and not the combination or the addition of more grounds. For this reason, they found that the legislation did not properly address the type of discrimination suffered mainly by many African-American women.[2]

The notion of multiple discrimination was further developed by a Finnish scholar, Timo Makkonen.[3] According to him, the term "multiple discrimination" describes the first of three situations where a person can be subjected to discrimination on more than one ground. This kind of discrimination occurs when a person is discriminated by different factors (race, gender, etc.) in various times. It can be mentioned, for example, the case of a disabled woman who may be discriminated because of gender for the acquisition of a job position and her difficulty of entering a public building not accessible to people using wheelchair. The victim accumulated various experiences of discrimination which differentiate from the time of suffering and the factor that causes it. Makkonen argues that

* Research Fellow, Institute for International Legal Studies, National Reasearch Council (ISGI-CNR), Italy.
E-mail: silvana.moscatelli@uniroma1.it

[1] Crenshaw, K.: Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. *University of Chicago Legal Forum*, 1989, 67–139. See also Crenshaw et al. (eds): *Critical Race Theory. The Key Writings that Formed the Movement*. New York, 1995.

[2] Martinez, F. R.: *La discriminación múltiple, una realidad antigua, un concepto nuevo*. 4 et seq., http://www.oberaxe.es/files/datos/492a7ea083086/discriminacionmultiple.pdf.

[3] Makkonen, T.: *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore*. Institute For Human Rights, Abo Akademi University, April, 2002, http://web.abo.fi/instut/imr/norfa/timo.pdf

in these cases it is appropriate the use of adjective "multiple" because of its mathematical connotations: the victim is discriminated by factors acting simultaneously or jointly, but separately, as a sum: gender+disabilities.[4] This concept of multiple discrimination does not coincide with that one of Crenshaw.

According to Makkonen, there are other form of discrimination. For instance, the term *compound discrimination* describes rather a situation where a person suffers discrimination on the basis of two or more grounds at the same time, and where one ground adds to discrimination on another ground. It particularly refers to a situation in which one or more discrimination factors are added to others in a specific case producing a barrier or adding an existing difficulty.[5] For example, in a labour market that segregates on the basis of gender (some jobs are reserved to men) and nationality (some jobs are available only to nationals), the chances that a immigrant woman finds a job according to her education are considerably reduced.[6]

With reference to the different kind of discrimination, it is also to mention the *intersectional discrimination*. This refers to a situation in which various discriminatory factors interact simultaneously, producing a specific form of discrimination. For example, the discrimination of a gypsy woman is the result of the combination of gender and ethnicity, which differs from discrimination against non-gipsy women or gipsy men.[7]

The conceptual disorganization involved, as several different concepts, such as "multiple discrimination", "double/triple discrimination", "multidimensional discrimination", "intersectional discrimination" and "intersectional vulnerability" have been used to describe essentially similar or comparable situations. In the academic field, the concept of "intersectional discrimination" is favoured while references to "multiple discrimination" are scarce, while in the field of human rights the opposite is true.[8]

[4] *Ibid.* 10.

[5] *Ibid.* 11.

[6] An example of compound discrimination is case of *Perera vs. Civil Service Commission, No. 2* (1983) in the UK. In *Perera* case an advertisement for a legal assistant stated that candidates with a good command of the English language, experience in the UK and with British nationality would be at an advantage. That puts a higher than average proportion of some racial groups at a disadvantage. Nevertheless, in *Perera vs. The Civil Service Commission*, the Court of Appeal held that an advertisement for a legal assistant that stated that candidates with a good command of the English language, experience in the UK and with British nationality would be at an advantage did not amount to a requirement or condition within the meaning of the Race Relations Act 1976, section 1(1)(b). To come within the Act the preference should be elevated to a requirement or "absolute bar" which has to be complied with.

[7] The concept of intersectional discrimination is also known in the Canadian system. The Ontario Human Rights Commission in Canada has been active in promoting an understanding of multiple discrimination by incorporating an intersectional approach in their equality work. Apart from the need to develop the intersectional approach and other legal mechanisms to tackle multiple discrimination there is a need to identify substantive practice to prevent and combat multiple discrimination. On the basis of a study pursued by the Ontario Human Rights Commission, complaints filed between April 1997 and December 2000 indicate that 48% of the complaints included more than one ground, while 52% cited only one ground of discrimination, 56% of age complaints included other grounds; 19% of complaints filed on the ground of handicap included multiple grounds; 27% of cases filed on the ground of sex included multiple grounds; 94% of complaints citing the ground of receipt of public assistance, including other grounds. http://www.ohrc.on.ca/en/resources/discussion_consultation/DissIntersectionalityFtnts?page=DissIntersectionalityFtnts-OTHER.html.

[8] Makkonen: *op. cit.* 8.

In some branches of socio-legal research there has been a progressive acknowledgement of the role that multiple discrimination. However, the law has been slow to recognise and respond to the concept of multiple discrimination in practice and, consequently, there are few cases addressing discrimination on more than one ground.[9] The ability of a legal system to adequately address cases where claimants have suffered discrimination on multiple grounds is vital if the law is to be able to prevent disadvantage and to compensate sufferers sufficiently. While law in the United States have shown a developing recognition of the issue of multiple discrimination, in many EU Member States, legislation does not dealt with the needs of victims experiencing multiple discrimination.[10]

2. The international legal foundation of multiple discrimination

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on 10 November 1948, states the principle of equality and non-discrimination. Even though the Declaration is a non-legally binding document it has been accepted as international customary law, whereas some articles, such as the non-discrimination provision in Art. 2, have even acquired the status of *jus cogens.*[11]

The non-discrimination provision in Art. 2 of the UDHR reads that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The article does not have independent standing, but is, in a way, accessory to the other articles of the Declaration.[12]

The principle of non-discrimination is also recognised by the International Covenant on Civil and Political Rights (ICCPR), under Art. 2 which affirms that each State Party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[13] The same provision is encompassed under Art. 2 of the Covenant on Economic, Social and Cultural Rights (ICESCR).[14]

Beyond the mentioned instruments, the principle of non-discrimination is also contained in the Convention on the Elimination of All Forms of Racial Discrimination (CERD) concluded in 1965 and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted in 1979.

[9] European Union Agency for Fundamental Rights, *Multiple Discrimination,* Data in Focus Report, EU-MIDIS, 2010, 6.

[10] Britton, E.: *Multiple Discrimination in the USA: A Growing Recognition of the Interlocking Nature of Disadvantage.* http://www.suite101.com/content/multiple-discrimination-in-the-usa-a45059 #ixzz1ORA3O2t.

[11] On the Universal Declaration of Human Rights see, inter alia Morskin, J.: *Universal Declaration of Human Rights: Origins, Drafting, and Intent.* Philadelphia, 1999.

[12] Makkonen, T.: *The Principle of Non-discrimination in International Human Rights Law and EU Law.* 5, http://iom.fi/elearning/files/national_law/estonia/essential_reading/Principle_of_Non_ Discrimination.pdf.

[13] On the scope of application of Art. 2 ICCPR see Committe on Human Rights, General Comment No. 18, adopted on 10 November 1989.

[14] On the ICESCR see inter alia Craven, M.: *The International Covenant on Economic, Social and Cultural Rights. A Perspective on Its Development.* Oxford, 1995.

Nevertheless, in the above-mentioned instrument there is no reference to the notion of multiple discrimination. One of the first reference to multiple discrimination is encompassed in the Beijing Declaration and Platform for Action, which were adopted by the Fourth World Conference on Women in September 1995 explicitly address the specific situation and experience of e.g. disabled women, immigrant women, indigenous women and rural women, in addition to which intersectional issues such as trafficking and violation of the rights of women during armed conflicts are discussed. The Declaration uses the terms to "multiple barriers" and even though it does not clearly deal with multiple or intersectional discrimination, it is widely regarded that this was the first instance ever in which these issues were addressed on such a high level.[15]

At international level, the concept of multiple discrimination has been clearly recognised by the Durban Declaration adopted at the World Conference against Racism, Racial Discrimination, Xenophobia an Related Intolerance in 2001. The Declaration and the Programme of Action adopted at the Conference contain numerous explicit references to the concept of multiple discrimination, in addition to which some provisions deal with concrete issues such as women in armed conflicts, trafficking and the right of an indigenous or minority child to enjoy his or her own culture and practice his or her own religion.

Already the preamble to the Declaration emphasizes that states have a duty to protect and promote the human rights and fundamental freedoms of all victims of racism and racial discrimination, and that they should apply a gender perspective and recognise the multiple forms of discrimination which women can face. Under Art. 2, the Declaration specifically affirms that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, colour, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status.[16]

Although the list of related grounds is open-ended, some grounds are expressly included in the list of related grounds.[17] The list of related grounds does not contain, most notably, disability, sexual orientation or age, which are all grounds that have been quite firmly recognised in international and EU law.[18]

The Programme of Action expressly recognises multiple discrimination by way of recognizing, *inter alia*, that people of African descent experience particularly severe problems of religious intolerance and prejudice that can combine with other forms of discrimination to constitute multiple discrimination (Art. 14), that multiple discrimination can take place in the context of employment, health care, housing, social services and education (Art. 49).

It is worth to underline that the Durban Conference and the documents adopted therein clearly evidence overwhelming international recognition of intersectional and multiple discrimination. As regards the field of human rights, the adoption of the Durban Declaration and Programme of Action in the UN World Conference against Racism in 2001 represented a major milestone in recognizing the way discrimination on the basis of origin and

[15] Makkonen: *The Principle of Non-discrimination ... op. cit.* 3, 37.

[16] *Ibid.* 3, 46.

[17] *Ibid.*

[18] Disability, sexual orientation and age have been recognised as explicitly forbidden grounds of discrimination, e.g. in the EU Council Directive 2000/78/EC prohibiting discrimination in employment

respectively on the basis of sex/gender can interact and produce previously unrecognised forms and manifestations of discrimination.[19]

In the international context, it is also important to mention that the 2006 Convention of the United Nations on the Rights of People with Disabilities which recognises multiple discrimination. Already the Preamble of the Convention affirms that the State Parties are *concerned* about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.[20] Under Art. 6, the Convention specifically affirms that women and girls with disabilities are subject to multiple discrimination, and in this regard State Parties shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. Regarding to the Convention, it is worth to remind that it is a legally binding instrument and State parties have the duty to fulfil the obligations defined by the Convention. Thus, each State Party has to take measure in order to avoid multiple discrimination towards women and girls takes place.[21]

3. The recognition of multiple discrimination in the European context

At European level, the nationality and gender were the only equality issues on the legal agenda from the outset and for about 40 years. Prohibition of discrimination both on grounds of nationality and gender was originally introduced in EU law as a means to develop the internal market. In this discourse, multiple discrimination was practically not faced in official EU legal texts until the 1990s. Since 1999, the European Union has created a body of legislation aimed at combating discrimination on the grounds of ethnic and racial origin, religion and belief, sexual orientation, disability and age.[22]

With the incorporation of Art. 13 into the EC Treaty, entered into force in 1999, the adoption of the two anti-discrimination directives in 2000, the Community action programme to combat discrimination,[23] PROGRESS and the 2007 European Year of Equal Opportunities for All, the EU and its Member States have experienced a dynamic development in anti-discrimination legislation and substantial initiatives to raise awareness of discrimination.

Whit this regard it is also to mention Art. 2 TEU which provides that the "Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

[19] Makkonen: *The Principle of Non-discrimination ... op. cit.* 3, 55.

[20] Hendriks, A.: The UN Disability Convention and (Multiple) Discrimination: Should EU Non-Discrimination Law Be Modelled Accordingly. European Yearbook of Disability Law, 2 (2010), 7–27.

[21] On this aspect see Della Fina, V.: *Articolo 6, Donne con disabilità* (Article 6, Women with disability). In Cera, R.–Della Fina, V.–Marchisio, S. (eds): *La Convenzione delle Nazioni Unite sui diritti delle persone con disabilità* (The UN Convention on the rights of people with disabilities Commentary). Roma, 2010, 105–118.

[22] Nielsen, R.: *EU Law and Multiple Discrimination.* CBS Law Studies, WP 2006-01, 1.

[23] Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006).

At the level of the European Union the mentioned principles are also enshrined in Art. 21 of the Charter of Fundamental Rights of the European Union. According to this article, any discrimination based on grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Furthermore, Art. 19 TFEU gives the Union the competence to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.

With the addition of the new grounds of discrimination, such as race or ethnic origin, age, disability, religion or belief and sexual orientation, the concept of multiple discrimination has grown in importance.

As observed above, the adoption of some directives contributed to address discrimination across a range of grounds and in different contexts encompassing employment through to goods and services.

The Race Equality Directive (2000/43/EC), adopted in 2000, prohibits discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment. The scope of the Directive is very broad In the preamble to the Directive there is reference to the general human rights provisions. It applies to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment, to self-employment and to occupation and access to and supply of goods and services which are available to the public, including housing.

It is also important to mention the Employment Equality Directive (2000/78/EC) which establishes a framework for equal treatment in employment and occupation and in Art. 1 lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation.

Finally, Gender Directive (2004/113/EC) which expands protection against gender discrimination to access to and the provision of goods and services.

Although the directives do not expressly provide for the consideration of multiple discrimination they do not prohibit, but expressly recognise that different grounds may intersect. Recital 14 of the Race Directive affirms that in implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

Following the passing of the Racial Equality Directive and the Framework Equality Employment Directive, the Council of the EU, launched a Community Action Programme to promote measures to combat direct or indirect discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation. In recital 4 to the Council decision it is stated, in accordance with the gender mainstreaming provision in Art. 3(2) EC (Art. 8 TFEU), that in the implementation of the programme, the Community will seek, in accordance with the Treaty, to eliminate inequalities and promote equality between men and women, particularly because women are often the victims of multiple discrimination.[24]

In recital 5 to the Decision establishing the Programme it is furthermore stated that the different forms of discrimination cannot be ranked because they are all equally intolerable. The programme is intended both to exchange existing good practice in the Member States

[24] Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006).

and to develop new practice and policy for combating discrimination) including multiple discrimination, promoting gender mainstreaming provision in accordance to Art. 3(2) EC (Art. 8 TFEU).[25]

In 2006, the European Commission required a study on multiple discrimination. It requested the European Network of Legal Experts in the Field of Gender Equality to provide a complementary report to cover 30 states, and to focus on legal problems related to gender equality and multiple discrimination. The mandate of this report was to highlight legal perspectives on discrimination against women based on grounds additional to their sex, and to make recommendations for further research or policy measures.[26]

Also the European Parliament has frequently highlighted the problem of multiple discrimination. In its resolution on the Stockholm Programme[27], it stressed that while EU law and policy markers have adopted an extensive body of law to combat the multiple discrimination suffered by woman from minority backgrounds, especially Roma women, no significant progress can be demonstrated: it therefore called on the EU Member States "to review the implementation of all policies related to the phenomenon of multiple discrimination"[28].

The importance of recognising multiple discrimination lies with the fact that it takes into account the complexity of discrimination as it is experienced by some people.

Some problems perceived in the field of multiple discrimination may not be due to the problems with this specific field but rather stem from implementation and divergences between national legal orders.[29]

4. The Italian legal framework

In Italy, the principle of non-discrimination is defined under Art. 3, Para. 2, of the Italian Constitution which recognises that "all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions". For this reason, it is "the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country".[30]

[25] *Ibid.*

[26] European Network of Legal Experts in the Field of Gender Equality: *Multiple Discrimination in EU Law, Opportunities for Legal Reponses to Intersectional Gender Discrimination?* 2009, 10.

[27] The Stockholm Programme was adopted during the Swedish Presidency for the period 2010–2014. The Programme emphasises the ambition is to create a more secure and more open Europe, where the rights of the individual are protected and cooperation focuses on measures that provide added value for individuals. The Programme also gives great importance to how the EU should work to guarantee respect for fundamental freedoms and privacy, while guaranteeing security in Europe.

[28] European Parliament Resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council–An Era of Freedom, Security and Justice serving the Citizen–Stockholm Programme, Para. 31.

[29] Ashiagbor, D.: Multiple Discrimination in a Multicultural Europe: Achieving Labour Market Equality Through New Governance. *Current Legal Problems*, 61 (2008) 1, 265–288.

[30] On the anti-discrimination law in Italy see Barbera, M. (ed.): *Il nuovo diritto antidiscriminatorio.* (The new anti-discriminatory law). Milano, 2007. For a comparative analysis with other countries see Schiek, D.–Waddington, L.– Bell, M. (eds): *Non-discrimination Law.* Oxford–Portland, 2007.

The concept of multiple discrimination remained outside the framework of discrimination on the basis of race, ethnicity and nationality under Arts 43 and 44 of Consolidated Act 286/1998 on Immigration. Multiple discrimination only entered Italian legislation in the form of double discrimination.[31] The only references to it are in legislative decrees Nos. 215 and 216 of 2003, transposing Directives 2000/43/EC and 2000/78/EC, and in the corresponding Delegation Act.

In particular, Art. 1 of Decree No. 215/2003 provides that the implementation of equal treatment irrespective of race and ethnic origin must take place "also in a perspective that takes into account the different impact that the same forms of discrimination can have on women and men, and the existence of forms of racism with a cultural and religious character". The implementation of Directive 2000/43/EC covered the legal vacuum of Italian legislation in the field of discrimination with reference to direct and indirect gender discrimination.[32]

Referring to the mentioned Decree, it is worth to remind that it fulfils the guideline provided by Delegation Act No. 39/2002, which in Art. 29 requires that the implementation of Directive 43/2000 take into account the existence of discrimination on the double ground of gender and race and ethnic origin.

A similar concept of multiple discrimination is provided by Art. 1 of Decree No. 216/2003, which states that the implementation of equal treatment, irrespective of religion or belief, disability, age or sexual orientation, as regards employment and occupation must be carried out in "perspective that also takes into account the different impact that the same forms of discrimination can have on women and men". Multiple discrimination, therefore, is not properly defined and it is perceived by the legislator only as an intersection between the grounds of gender and other discriminatory factors. In this regard, some scholars made it clear that in this case, multiple discrimination does not represent a mere sum of factors, but rather factors that interact with each other, producing negative exponential effects".[33]

With regard to the case law, it is to notice that in Italy there is a group of cases in which gender discrimination could be recorded in combination with another ground of discrimination. These cases related to the pensionable age, which, in the Italian system, is lower for women than it is for men, although women can choose to keep working until the age provided for men. The criterion of reaching the age of retirement, irrespective of the lower pensionable age of women, is discriminatory both on the ground of gender and age. For this reason women can retire in younger age and earlier than man, despite the fact that women can choose to keep working until the retirement age provided for men.[34]

Despite the explicit recognition of a double combination of two risk factors, one of which is always represented by gender, in Italian case law some issue related to the double disadvantage were addressed regarding combination alien-disable. In 1998, the Constitutional Court extended to aliens lawfully residing in the Italian territory the form of "special protection of disadvantaged groups of citizens" (*Sentenza n. 454 del 30.12.1998,* in CC, 1998). In 2005, the Constitutional Court also declared unconstitutional the provision of the

[31] Gottardi, D.: *Le discriminazioni basate sulla razza e sull'origine etnica* (Disriminations based on race and ethnic origin). In: Barbera, M. (ed.): *Il nuovo ... op. cit.* 1-42, at 24.

[32] Gottardi, D.: *Dalle discriminazioni di genere alle discriminazioni doppie e sovrapposte: le transizioni* (From gender discrimination to double and overlapping discrimination: the transitions) Milano, 2003, 250.

[33] *Ibid.* 251.

[34] The European Network of Legal Experts in the Field of Gender Equality, note 24, at.77.

regional law of Lombardy concerning local public transport in so far it did not include foreign residents among the persons entitled to free travel on public transport services reserved to totally disabled persons (*Sentenza n. 432 del 2.12.2005,* in CC, 2005).[35]

Nevertheless, the case law that deals with this issue, which is very limited, does not deal with the hypothesis of multiple discrimination. Thus, in Italian case law, there are no cases of multiple discrimination involving gender discrimination and one or more other grounds of discrimination.[36]

5. Concluding remarks

The legal protection against discrimination based on the different grounds varies from one EU country to another. Many states have not provided for any interpretation or definition of grounds, limiting themselves to including the various grounds in the national implementation legislation without paying attention to their meaning. The discrimination on some grounds (age, disability and sexual orientation) is less covered by national laws than other grounds. In fact, national legislation may prohibit discrimination for all the grounds but only in some areas of life.

A growing body of academic and community-based research shows that across the EU especially homosexuals face relevant discrimination in access to social protection, health care and services, education, housing, goods and services. In this respect, EU anti-discrimination law has not yet fully recognised and provided protection for multiple discrimination outside the employment field, except in relation to race and gender.

At European level, plans should be made for the introduction specific provisions to tackle multiple discrimination. The most important issue is finding a shared definition of multiple discrimination.[37] Thus, an EU definition of multiple discrimination and a specific prohibition of it to be implemented by national legislation would be crucial to introduce into domestic legislation the protection against this form of discrimination.[38] Furthermore, an EU definition would play an important role in creating a common understanding of the concept, as has happened before in relation to concepts contained in the Directives on discrimination.[39]

[35] See Gottardi, D.: *Le discriminazioni ... op. cit.* note 28, at. 25.

[36] As observed by Simonetta Renga, in The European Network of Legal Experts in the Field of Gender Equality, Multiple Discrimination in EU Law (see note 24), in Italy there are cases where the criterion of reaching retirement is regarded as discriminatory exclusively on grounds of age, the gender ground being ignored (*Tribunale Milano* 27/4/2005) and cases where the existence of gender discrimination is denied and the age ground is not taken into consideration at all either (*Cassazione* No. 9866/2007; *Cassazione* No. 20455/2006; *Tribunale Genova* 30/9/1997), 78.

[37] See the European Network of Legal Experts in the Field of Gender Equality, note 24, 81.

[38] *Ibid.*

[39] *Ibid.*

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ILJA RICHARD PAVONE*

The Italian Legislation on Roma and Sinti and its Compliance with European and International Standards

1. Introduction

Thomas Hammarberg, Council of Europe's High Commissioner on Human Rights, in a report issued on 7 September 2011, expressed grave concerns about anti-gypsyism widely diffused in the Italian society.[1]

According to Mr. Hammarberg, policies adopted by the Italian government against criminality, and in particular forced evictions of Roma and Sinti from illegal settlements carried out in several Italian municipalities since 2008, raised some concerns about their compatibility with international human rights' law, and in particular with the right to an adequate housing, to the right not to be discriminated on an ethnic basis and with the right to education of children.

The aim of this paper is to analyze the compatibility of the Italian anti-discrimination legislation with European and international standards and if and in which degree Italy has violated or violates fundamental rights of Roma and Sinti.[2]

In this vein, it starts with a brief overview of international human rights' standards applicable to Roma and Sinti, with particular reference to economic, social and cultural rights. The survey will encompass the activity of the United Nations (UN) as well as of regional organizations, such as the Council of Europe (CoE) and the European Union (EU). The second part of the article is devoted to the Italian legislation, with particular reference to the legal status of Roma and Sinti and to the main legal measures adopted in response to violence committed by them against Italian citizens in 2008 and 2009 (the declared state of "Nomad Emergency"). Particular attention will be also paid to anti-discrimination existing laws.

2. Roma and Sinti and International Human Rights' Law

In recent years, issues related to Roma people have regularly come up in activities within international forums, such as the United Nations and several European institutions (namely, Council of Europe, OSCE and EU). The problem of Roma and Sinti is one of the most

* Ph.D., Researcher of International Law at the Institute for International Legal Studies, National Research Council (ISGI–CNR), Italy.
E-mail: iljapavone@libero.it

[1] *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Italy from 26 to 27 May 2011*. Strasbourg, 7 September 2011, CommDH(2011)26.

[2] In line with OSCE documents, this paper uses the term Roma and Sinti in order to describe the population which in official Italian documents are commonly referred to "nomadi" (nomads) or "zingari" (gypsies).

delicate challenges posed to the human rights and institutional framework of the last decade and is strictly related to the rights of migrants. Far from showing a lack of applicable standards, the current international scene presents a large set of provisions relevant to the situation of Roman people, couched in a plurality of forms and reflecting varying degrees of legal significance. Although a specific treaty regarding Roma and Sinti does not exist, guidance on their rights can be mainly found in multilateral treaties concerning rights of minorities.

In this respect, equality and non-discrimination, well-established principles of international human rights law are also of particular importance to Roma and Sinti and their members. They are prescribed in the UN Charter (Art. 1 para. 33 and Art. 55 subpara. (c) and the Universal Declaration on Human Rights (Art. 2). The International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights contain general and specific clauses to the same effect. Specialised instruments too, contain anti-discrimination clauses, including the ICERD (1965), the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (1981), the UN Convention on the Rights of the Child (1989), ILO Convention No. 11 concerning Discrimination in Respect of Employment and Occupation (1958), the UNESCO Declaration on Race and Racial Prejudice (1978), and the UNESCO Convention Discrimination in Education (1960). Regional human rights instruments, such as the ECHR (Art. 14), include comparable clauses. As noted earlier, the Additional Protocol No. 12 to the ECHR embodies a general prohibition of discrimination, which provides a scope of protection broader than that of Art. 14 of the ECHR. The EU addressed specifically the topic of discrimination and xenophobia against Roma people in several documents. Among them, the Declaration on the Use of Racist, Antisemitic and Xenophobic elements in political discourse by the European Commission against Racism and Intolerance (ECRI)[3] provides guidance to member States on how to improve their legislations in this field. Also, ECRI's General Policy Recommendation No. 11 provides extensive guidance on both improving the response of the police to racist offences and combating racially-motivated misconduct by the police.

The principles of equality and non-discrimination are also widely acknowledged, at least in racial matters, as forming part of customary international law binding all States. Support for this view comes from authoritative instruments such as those cited, authoritative legal institutions such as the UN International Law Commission and the ICJ *Barcelona Traction* case (Second Phase) (ICJ Reports 1970:32) and advisory opinion in the case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (ICJ Reports 1971: 56–57).

It is thus clear that any meaningful existence of minority rights, although "functionally" supported by physical existence and anti-discrimination standards, poses issues which are separated addressed by international law. In other words, physical existence and anti-discrimination entitlements are not "minority rights" but rather essential starting points to enable their protection. The first multilateral treaty specifically recognizing minorities'

[3] *European Commission against Racism and Intolerance, The Use of Racist, Antisemitic and Xenophobic Elements in Political Discourse*. December 2005.

rights is the ICCPR (Art. 27).[4] However, the most important treaty devoted to minorities' protection is the Council of Europe's Framework Convention of the Protection of National Minorities of 1995.[5]

The discussion on Roma and Sinti's fundamental rights is also focused on economic, social and cultural rights, due to their condition of poverty and illiteracy. Among them, the most prominent is the right to an adequate housing.[6] International human rights law recognizes everyone's right to an adequate standard of living, including adequate housing. This right is often recalled in the debate on Roma and Sinti's fundamental rights because forced evictions of illegal settlements have been carried out in several EU Countries, such as Italy and France.

The UN Committee on Economic, Social and Cultural Rights has underlined that the right to adequate housing, although foresees exemption clauses for security reasons, should not be interpreted narrowly. Rather, it should be seen as the right to live somewhere in security, peace and dignity. The characteristics of the right to adequate housing are clarified mainly in the Committee's general comments No. 4 (1991) on the right to adequate housing and No. 7 (1997) on forced evictions.

In particular, the content of this right is quite clear: States Parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and that alternative accommodation is available. The law must also establish eviction procedures, specifying when they may not be carried out (for example, at night or during winter), provide legal remedies and offer legal aid to those who need it to seek redress from the courts. Compensation for illegal evictions must also be provided.

More details on the issue are included in the Recommendation of the Committee of Ministers of the Council of Europe on improving the housing conditions of Roma and Travellers in Europe, which contains a series of recommendations relating to general principles, legal frameworks, preventing and combating discrimination, protection and improvement of existing housing, frameworks for housing policies, financing of housing and housing standards.[7] The Strasbourg Declaration on Roma, adopted by the Committee of Ministers on 20 October 2010[8] is also a significant document because contains an

[4] Article 27 of the ICCIP states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or use their own language".

[5] See Pentassuglia, G.: *Minorities in International Law*. Strasbourg, 2002.

[6] These include: the International Covenant on Economic, Social and Cultural Rights (ICESCR, Art. 11 para. 1); the International Covenant on Civil and Political Rights (Art. 17); the Convention on the Rights of the Child (Art. 27 para. 3); the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5e); and the revised European Social Charter. The UN Committee on Economic, Social and Cultural Rights has also emphasized that "the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or which views shelter exclusively as a commodity. Rather, it should be seen as the right to live somewhere in security, peace and dignity."

[7] Recommendation *Rec(2005)4* of the Committee of Ministers to Member States on Improving The Housing Conditions of Roma and Travellers in Europe, adopted by the Committee of Ministers on 23 February 2005.

[8] *Council of Europe High Level Meeting on Roma, Strasbourg, 20 October 2010 "The Strasbourg Declaration on Roma", CM(2010)133 final.*

"unequivocal condemnation of racism, stigmatization, and hate speech directed against Roma, particularly in public and political discourse". The Council also called for "measures to foster knowledge of the culture, history, and languages of Roma and understanding thereof".

3. Roma and Sinti in the Italian Legal Framework

The Italian legal framework encompasses special measures on public security specifically addressed to Roma and Sinti, as well as an anti-discrimination *corpus* of laws against xenophobia and racism which indirectly relates to the gypsies'community. Since May 2008, a number of government decisions have been issued concerning the Roma and Sinti communities, or "nomads", as they are commonly referred to in Italy. These measures were in part justified by concerns regarding crime, because Romanian Roma migrants have attracted considerable public attention and negative media coverage due to a growing prejudice and link between Roma and Sinti migrants, criminality and threats to public security. In fact, data show an increase in the crime rate coinciding with the inflow of Roma and Sinti population into Italy, especially after Romania joined the EU. This policy is legally justified by the "margin of appreciation" enjoyed in principle by national authorities in the choice and implementation of security policies that allow a derogation to some fundamental rights for security reasons. However, in the last months, the government has realized that a policy specifically devoted to the social problems related to the presence of Roma people, supporting the anti-crime measures, was necessary. To this aim, the third Biennial National Plan of Actions and Interventions to protect the rights of individuals and children's development[9] contains several measures to promote inter-culturalism, including measures to help Roma, Sinti and Travellers children.[10]

3.1. The Legal Status of Roma and Sinti

Groups of Roma and Sinti migrated to Italy during different periods, beginning in the 14th century and they have been discriminated and stigmatized in the past by the fascist regime. In fact, since 1940 the fascist regime interned many of them in concentration camps in Italy and many of them were deported to concentration camps in Germany.[11] Porrajmos is the Romani term introduced by Romani scholar and activists to describe attempts by Nazi Germany, the Independent State of Croatia, Horthy's Hungary and their allies to exterminate most of the Romani people of Europe as part of the Holocaust.

These events testify that many Roma people have been living in Italy since centuries and their offspring continues to live in Italy, but their descendants, in spite of having been

[9] Adopted by *Presidential Decree* January 21, 2011, and published in the *Official Gazette N. 106 of May 9, 2011.*

[10] In particular the attention has drawn to the following: Action for the foreigners' family reunification; action for support, education and employment for accompanying minors involved in criminal proceedings, including Roma, Sinti, Travellers children as well as minor migrants children; action for the prevention of school dropout of children, including Roma, Sinti and Travellers children as well as immigrant minors, and implementation of social inclusion interventions; action to protect the right to health for Roma, Sinti and Travellers children and teenagers; action for the promotion of intercultural trainings for teaching staffs and headmasters.

[11] In 2011, Pope Benedict XVI, during a meeting with Roma and Sinti's representatives, stated that the mass murder of Roma people by the Nazis was "still a little known drama".

born and lived there all their lives are *de facto* stateless.[12] Furthermore, in the Italian legal framework, Roma and Sinti are not yet considered as a minority group and do not enjoy of the rights guaranteed to the minorities. In fact, Law No. 482/1999 promulgated on 15 December 1999 in order to put into practice the fundamental principle on the defence of minorities provided for by Art. 6 of the Constitution, recognizes 12 linguistic minorities at Art. 2 para. 1, but Roma and Sinti are not included in this list.[13] According to the Italian legislation, Roma and Sinti cannot be given national minority status because they are not linked to a specific part of the Italian territory and therefore cannot be recognized as a historic and linguistic minority. The Italian government explained that: "The basic criteria for the label of "linguistic minority" depend on the stability and duration of the settlement in a delimited area of the country, which is not the case for Roma populations." There have been efforts to recognize Italian Roma and Sinti as a minority, but they have not been successful. This would allows for the application of the specific juridical consequences established by the regulations and those that the jurisprudence of the Constitutional Court has tied *sic et simpliciter* to this status.

However, as outlined by many scholars, nomadism commonly considered as a distinctive label of Roma and Sinti populations, is no more a specific feature of this population: social and economical transformations of the last century have determined the disappearance or the drastic reorganization of many activities at the basis of nomadism; their language, the *Romanes*, is only spoken by few people that identify themselves as Roma, a common State such as a common religion do not exist (although many of them have the Italian citizenship); the same cultural traditions are different depending on the different migratory trajectories of every familiar group.[14] The non-recognition of their status of minority implies that many of them are technically subjected to Italian migration law and their legal position varies depending on several factors.

The 150,000 Roma and Sinti resident in Italy, according to data provided by the Ministry of Interior, include Italian citizens, as well as citizens of both EU and non-EU countries,[15] with three different legal status. After Romania's accession to the EU in January 2007, the Romanian Roma became EU citizens and gained the right to free movement within the European Union. They enjoy therefore the rights related to their status of citizens of the European Union, including the right of free movement without the Italian territory and the right not to be expulsed.

Among the non-European citizens, families belonging to different ethnic groups and religions were forced to flee to Italy because of the civil war in the former Yugoslavia, in the 1980s and 1990s. The *khorahané* of Islamic religion come from the southern and central

[12] To this regards, Mr. Hammarberg in his report of 7 September 2011, urged Italy to ratify the European Convention on Nationalities without apposing reservations.

[13] Legge 15 dicembre 1999, n. 482, "Norme in materia di tutela delle minoranze linguistiche storiche", published in the *Gazzetta Ufficiale* of 20.12.1999.

[14] Due to this difficulty to get correct data on Roma people, some states, such as Romania and the United Kingdom, have proposed an ethnic census. Such a measure, according to the European Commission (2000/43/EC), is legal admissible only if its goal is to avoid any form of discrimination. In the United Kingdom the collection of ethnical information is mainly based on laws that in particular, the Law on Statistics, the Data Protection Act and the Race Relation (Amendment) Act of 2000.

[15] On this issue see Loy, G.: La condizione dei Rom in Italia (The condition of Roma in Italiy). In: Cherchi, R.–Loy, G. (eds): *Rom e Sinti in Italia* (Roma and Sinti in Italy). Roma, 2009.

regions of Yugoslavia, the *dasikané* Christian-Orthodox from Serbia, the *zergarja*, yet Muslims, from Bosnia, the *rundasha* from Montenegro.

Many of them have the status of asylum seekers and are resident on the Italian territory with a regular permit of stay, others are instead "irregular", that means without a permit of stay.

Considered that Roma from Western Balkans are non-EU nationals, many of them have no documents providing their identity or places of origin rendering them *de facto* stateless (with particular negative consequences for children). They are therefore technically subject to Italian immigration legislation.

The Italian immigration law (Act 286/1998) is based on annual quotas for people who want to enter Italy to work. Prior to seeking citizenship, a non-citizen must obtain a permit of stay and then apply to the local municipality for a legal residence. Permits of stay are given to foreigners based on proof of a minimum level of income; in case of Roma this poses a challenge, as most Roma live in illegal settlements and they cannot or don't want to have job opportunities.[16] In practice, it is very difficult to change one's status from illegal to legal; so many migrants remain without papers, accepting very bad working and living conditions. In 2009, Italy adopted Law No. 94 on public security,[17] in response to the huge inflow of migrants from Northern Africa and Eastern Europe, which is one of the strictest laws on migrants in Europe. Law No. 94/2009 presents considerable amendments in matters concerning immigration, among which the most important is the introduction of the new crime of "illegal entry and sojourn in the territory of the State" (Art. 1, subpara. 16), entrusted to the competence of the Justice of Peace, which punishes the behaviour of a foreigner who enters or remains in the State. The offence is accompanied by the expulsion of the alien. These expulsions are "security measures" that can be imposed by a judge in cases where a non-citizen is found guilty of a crime and sentenced to at least two years imprisonment. Previously, 10 years was the minimum sentence required to enact this kind of measure. Failure to comply with a removal or expulsion order is itself a crime entailing imprisonment for between one and four years. Another new crime regards housing: renting homes to foreigners residing irregularly in Italy is a criminal offence and landlords may be sentenced to prison for between six months and three years, and face the confiscation of the home in the case of a final verdict. Another feature of the law provides increased powers to mayors. In particular, they can adopt urgent measures "for the purpose of preventing and eliminating serious dangers that threaten public safety and urban security", ensuring also the cooperation of local police forces with the state police force. As outlined by Mr. Hammarberg, in his report of 2011, the security package, in combination with the "emergency legislation", has considerably worsened the conditions of Roma people in Italy.

3.2. The Nomad Emergency Measures and the Right to Housing

Since May 2008, following the violent murder of an Italian woman in the suburbs of Roma by a nomad, a number of government decisions have been issued concerning the Roma and Sinti communities. The Prime Minister issued a decree declaring a "state of emergency" in

[16] In Hungary, the government has foreseen a compulsory job placement for Roma and Sinti in activities with a relevant social impact.

[17] Legge 15 luglio 2009, n. 94, "Disposizioni in materia di sicurezza pubblica" "on Public Security". *Gazzetta Ufficiale*, N. 170 del 24 Luglio 2009.

relation to settlements of "nomad" communities in some regions (measure based on Law n. 225/1992 which deals with emergency situations arising from severe natural disasters), that together with the legislation and extraordinary powers flowing from it have provided the bedrock for forced evictions of illegal settlements. "Ordinances" introducing special and exceptional measures concerning "nomad settlements" in the three regions (Lazio, Lombardy, Campania) have also been adopted. The ordinances appointed the prefects of Rome, Milan and Naples as "delegated commissioners" empowered to "realize all the interventions needed to overcome the state of emergency" declared in the Prime Minister's decree.[18] Furthermore, in 2008 the Ministry of Interior signed security pacts with local authorities. They include references to security issues related to the presence of irregular migrants and nomads and issued related to illegal settlements and they give tot the prefects various powers, including the power to establish working groups.

The state of emergency, which is still in force in five regions,[19] brought to forced eviction of illegal settlements in several municipalities[20] that have raised concerns on the impact of these practices on the right to housing and other human rights of Roma people.[21] The critics are not related to the measure itself, because the States have the right to pursue forced evictions if they are deemed as necessary due to security issues and constitute an adequate and proportional response to the issues of criminality related to Roma people. They concern mainly the lack of procedural safeguards, because they were often carried out with no prior notice and no possibility to file an appeal, and involving the full dismantling of the settlement and destruction of inhabitants' personal belongings. In most cases, no alternative accommodation was provided.[22]

It should be noted that according to the Ministry of Interior's guidelines of 17 July 2008, forced evictions are not a punitive measure but an instrument for discouraging other Roma from settling illegally and providing them with better accommodations.[23]

[18] See Pavone, I. R.: *Italian experiences in combating hate crimes and hate speech in light of recent violence by and against Roma. Acta Juridica Hungarica*, 51 (2010) 3, 187–197.

[19] A *Decree of the President of the Council of Ministers* of 17 December 2010 (Official Gazette No. 304 of 30/12/2010) extended the "state of emergency for the continuation of initiatives relating to Nomad communities settlements on the territories of the regions of Campania, Latium, Lombardy, Piedmont and Veneto" until 31 December 2011.

[20] For instance, in Rome, the local "Nomad Plan" of 2009 has foreseen the forced eviction of several illegal settlement in the city and the relocation of about 6 000 nomads.

[21] See the *Memorandum of Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to Italy, 19-20 June 2008, CommDH(2008)18*; *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Italy, 13–15 January 2009, CommDH(2009)40.*

[22] See OSCE, Office for Democratic Institutions and Human Rights, High Commissioner on National Minorities: *Assessment of the Human Rights Situation of Roma and Sinti in Italy. Report of a Fact-Finding Mission to Milan, Naples and Roma on 20–26 July 2008.* Warsaw, The Hague, March 2009, 9.

[23] Linee guida del Ministero dell'Interno, 17 luglio 2011, per l'attuazione delle ordinanze del Presidente del Consiglio dei Ministri del 30 maggio 2008, n. 3676, 3677 e 3678, concernenti insediamenti di comunità nomadi nelle regioni Campania, Lazio e Lombardia, Ministry of Interior, Rome, 17 July 2008. The report is available at the following website: http://www.interno.it/mininterno/exports/sites/default/it/assets/files/15/0095_censimento_campi_nomadi_le_linee_guida_pdf.

In 2010, the European Committee of Social Rights, the monitoring body foreseen by the European Charter on Social Rights, received a collective complaint against Italy.[24] In its decision of June 2010, the Committee established that the practice of forced evictions of Roma people as well as the violent act accompanying such evictions constituted an aggravated violation of Art. E (right not to be discriminated)[25] taken in conjunction with Art. 31.1 (on the reduction of homelessness) (paras 53–59); that the living conditions of Roma and Sinti in camps, which had worsened following the "security measures", constituted a violation of Art. E taken in conjunction with Art. 31.2 (on access to housing of an adequate standard) and that the segregation of Roma and Sinti in camps, resulting from local and national housing policies which assume Roma to be nomads and fail to meet their needs, violated Art. E taken in conjunction with Art. 31.3 (on affordable housing) (paras 80–91).

The Committee adopted therefore a recommendation addressed to Italy in which it suggested some political and legislative measures aimed at improving the living conditions of Roma people in Italy.

It is worth mentioning that the same policy of forced evictions pursued in France in spring 2011 has raised some issues about its compliance with Art. 27.2 of Directive 2004/38/CE,[26] that establishes that: "Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned". In fact, this policy, according to its critics, would affect one particular ethnic group instead of examining the behaviour of the single individual.

3.3. Xenophobia and Intolerance in the Political Discourse

The principle of non-discrimination is one of the main pillars of Italian Constitution (Art. 3) upon which the domestic legislative system is based and enforced, particularly by the domestic Courts. The Criminal Code of Italy contains provisions that expressly enable the racist or other bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing. In particular, Sec. 3(1)(b) of Law 654/1975, as amended by Sec. 3 of the Law 205/1993 introduces a general aggravating circumstance for all offences committed with a view to discrimination on racial, ethnic, national or religious ground or in order to help organizations with such purposes. It is also worth mentioning that Legislative Decree No. 215 of 9 July 2003 established the UNAR (National Office

[24] The Complainant Organisation alleged that the housing situation of Roma in Italy amounted to a violation of Art. 31 of the Charter (right to housing). Article 31 states: "Everyone has the right to housing. With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: to promote access to housing of an adequate standard; to prevent and reduce homelessness with a view to its gradual elimination; to make the price of housing accessible to those without adequate resources.".

[25] Art. E enshrines the prohibition of discrimination and establishes an obligation to ensure that, in the absence of objective and reasonable justifications, any group with particular characteristics, including Roma, benefit in practice from the rights in the Charter.

[26] *Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*, OJ L 158/77 (30.04.2004).

against Racial Discriminations), as a monitoring body, with the competence of receiving and analyzing individual petitions of victims of racial discriminations.

The UNAR carries out in an autonomous and independent way activity of promotion against any form of racism and intolerance. In particular it provides judicial assistance, it carries out inquiries and it disseminates information and knowledge on this topic.

The Italian government considers that the fight against racism and xenophobia is a long-term process and that legislative and judicial measures had to be complemented by efforts at all levels, particularly through the education system, which is why the Ministry of Education, University and Research had developed specific educational programmes with a marked intercultural approach.[27]

However, in spite of the completeness of the Italian legal framework on this topic, racist and xenophobic political discourse in Italy, targeting notably Roma and Sinti, is unfortunately, yet widely diffused. This type of discourse is a powerful vector of anti-Gypsyism in Italian society and as a result, it also offsets the benefits of social inclusion work for Roma and Sinti carried out in Italy. Several international bodies called on the Italian authorities to act urgently this phenomenon. The Committee on Social Rights, in its decision on a collective complaint against Italy referred to above, underlined that the use of xenophobic political discourse against Roma and Sinti violated Art. E (non-discrimination) of the treaty.[28] The Committee considered this as an aggravated violation, noting that "the racist misleading propaganda against migrant Roma and Sinti [was] indirectly allowed or directly emanating from the Italian authorities.[29] Furthermore, in its October 2010 Opinion, the Advisory Committee on the Framework Convention for the Protection of National Minorities, was "deeply concerned" at the increasingly common presence of racially inflammatory public discourse targeting notably the Roma and Sinti, Muslims and migrants in the discourse of certain prominent political figures and considered this situation to be incompatible with Art. 6 of the Convention. Also, Mr. Hammarberg, in his 2011 report, continued to be concerned at the presence of racist and xenophobic political discourse in Italy, targeting notably Roma and Sinti.

As underlined by the Italian Observation on the Report by the reply drafted by the Italian Ministry of Foreign Affairs,[30] the Italian legal system already envisages a specific system of criminal protection to counter expressions of racism and xenophobia, which include expressions of thoughts aimed at disseminating ideas based on racial or ethnic superiority, hatred language as well as at the incitement to commit acts of discrimination or of violence for racial, ethnic and/or religious reasons.

4. Concluding Remarks

As outlined in the present paper, the Italian legal framework already encompasses principles and standards foreseen by multilateral treaties on human rights. With particular reference to xenophobia, intolerance and anti-Gypsyism in the political discourse, the Italy already

[27] See www.miur.it.

[28] *European Committee of Social Rights, Decision on the merits, Centre on Housing Rights and Evictions (COHRE) v. Italy, Complaint No. 58/2009*, 25 June 2010, para. 136–140.

[29] *Ibid.* para. 139.

[30] *Ministry of Foreign Affairs, Inter-ministerial Committee of Human Rights. Italian Observation on the Report by the Commissioner for Human Rights of the Council of Europe, T. Hammarberg, following his visit to Italy (May, 26–27, 2011).*

complies with European and international standards. However, as underlined by international bodies, some shortcomings should be addresses. The UN Human Rights Council, as well as Mr. Hammarberg in his report of 7 September 2011, suggested Italy to re-establish adequate penalties against incitement to racial discrimination and violence, following the mitigation of the sanctions fro these offences introduced in Italy through Law 85/2006. This is undoubtedly the most urgent legislative measure to be adopted.

Further improvements are however essentials. First of all, the lack of a national strategy for the social inclusion of Roma people has been highlighted as the main flaw at international and at national level.[31] It would provide coherence and support to the efforts carried out at regional and at local level. In fact, in Italy there are currently 11 regional laws concerning Roma, Sinti and Caminanti and several local and municipal ordinances, but coordination among this set of measures is missing.

Despite these critics, the Italian authorities are committed to adopting specific measures, to improve security for all citizens and to better address integration and/or immigration-related issues. Most recent measures, such as those included in the "security package", are meant to curb criminal behaviours of individuals. No provision is envisaged against any community, group or class, nor is linked to any form of discrimination and xenophobia. The stigmatization of minorities has always been a source of concern, and the recent episodes of violence against Roma communities had been condemned by all political forces and were subject to judicial investigation. However, with regard to forced evictions of people living in unauthorized camps, Italy noted that they were sometimes necessary to ensure appropriate and legal living conditions and that, wherever possible, the persons involved were consulted in advance.

[31] Senato della Commissione Straordinaria per la tutela e la promozione dei diritti umani. See, also, the special report presented in 2011 at the Italian Senate (Rapporto conclusivo dell'indagine sulla condizione di Rom, Sinti e Caminanti in Italia, 9 febbraio 2011).

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ANDREA CRESCENZI*

The Role of the Equality Bodies. The Italian National Office against Racial Discriminations

1. The EU Directive on Racial Equality

EU Members States have been required to create laws for the promotion of equal treatment on the grounds of race or ethnic origin and in order to put into effect the principle of equal treatment between men and women since the Racial Equality Directive and the amended Gender Equal Treatment Directive came into force in 2000 and 2002, respectively.[1]

Fighting discrimination and enforcing legislation against discriminatory treatment is only one facet of the strategy: the EU founding treaties and directives call on Member States to endorse preventive and proactive anti-discrimination policies, by conferring their bodies specific competences in the field of equality promotion.[2]

There is an ample evidence that strategies based solely on litigation and court decisions would fail to promote equality and bring about a significant reduction of discriminatory practices. Most national equality bodies (many of which predate the issuing of EU anti-discrimination directives) have appraised this evidence and recognized the need for more effective strategies, integrating enforcement and development.

Some EU Member States have therefore issued laws that require public services and enterprises to uphold compulsory positive duties. The national equality bodies, in turn, may be expected to participate in the implementation process and to help monitor the compliance of affected institutions. While this strategy has proved the most effective in addressing indirect discrimination, other countries have opted instead for a softer approach, whereby the adoption of positive action measures relies entirely on the good will of stakeholders.

That is the scenario that has recently lead a few equality bodies to place additional resources in order to identify the most effective ways to prevent discrimination, promote and foster substantive equality, and possibly reduce the number of complaints.

* Research Fellow, Institute for International Legal Studies, National Research Council (ISGI-CNR), Italy.
E-mail: andreacrescenzi1@virgilio.it

[1] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L. 180, pp. 22–26. See also Brennan, F.: The Race Directive. *The Cambridge yearbook of European LegalSstudies*, 2002–2003, 311–331; Barbera M. (ed.): *Il nuovo diritto antidiscriminatorio* (The New Antidiscrimination Law). Milano, 2007, 6; Howard, E.: *The EU Race Directive. Developing the Protection Against Racial Discrimination within the EU*. London, 2010.

[2] On the principles of equality and non-discrimination in general see: Vandenhole, W.: *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*. Oxford, 2005.

2. Several Typologies of Equality Bodies

Most Member States responded to the EU directives either by creating new bodies for the promotion of equality, or by increasing the powers of any existing ones.[3] A few Member States (Belgium, Cyprus, Sweden, Ireland and the Netherlands) have exceeded the requirements of Directive 2000/43/EC by creating equality bodies in charge of all aspects of discrimination covered by EU anti-discrimination laws as well as more general human rights issues. The minimum Directive requirement is for the bodies to be able to provide independent support to discrimination victims, carry out independent surveys of discrimination issues, publish unbiased reports and bring forth relevant recommendations.

Equality bodies in the Member States include Labour Inspectorates, Commissions and Ombudsmen, which may be called on to share the tasks defined by the Directive. In Greece, for instance, the Labour Inspectorate is in charge of equality promotion in the employment field, while the Ombudsman is tasked of dealing with non-employment matters, issuing reports and making recommendations as needed.[4]

It should be now apparent that while equality bodies are entitled to provide legal counsel to individual discrimination victims, they can only support a limited number of cases before the courts. Factor of choice include the strategic importance of the legal point in question, the financial and human resources of the equality body, and the availability of other sources of support for the victim, for instance from associations or trade unions. A number of equality bodies overtly aim to exclusively support strategic litigation. In addition, a few equality bodies will provide informed opinions–at the request of individual of legal persons–as to the compliance of a given practice with national anti-discrimination laws; in most countries such opinions are not legally binding, but provide a recognised standard of good practice. Individuals wishing to obtain a legally binding decision will thus have to pursue the matter before the courts.

In some Member States, greater focus is placed on promoting equal opportunities and preventing discrimination rather than providing legal support for individual cases. This is the case of the Finnish Ombudsman for Minorities, which deals with a number of awareness-raising initiatives.

Funding is a major limiting factor for the efficacy of an equality body, and significant differences in financial and human resource allocation have been observed throughout the Member States. The presence of federal and regional government structures in some Member States can further affect a body's work, to the point of rendering it powerless to act on matters outside its own specific area of competence.

3. The Italian Office Against Racial Discrimination

There were approximately four millions documented non-nationals residing in Italy on the 1st of January 2010.

[3] The European Network of Equality Bodies (EQUINET), established in 2007, brings together 33 member organisations from 28 European countries. Equality Bodies were established across the Member States of the European Union to promote equality and to combat discrimination in the areas covered by the EU Equal Treatment Directives; http://www.equineteurope.org

[4] Ammer, M.–Crowley, N.–Liegl, B.–Holzleithner, E.–Wladasch, K.–Yesilkagit, K.:*Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC*. 2010, pp. 64 ss.

Nearly half of these figure come from elsewhere in Europe and nearly a quarter from Africa. Romanians, Albanians, Moroccans, Chinese and Ukrainians are the largest groups.

Most of them work in the services sector (*53.8%*), but with substantial numbers also in the industry (*35.3%*), and in the agriculture (*7.3%*). More than 80% are employed in small businesses. The vast majority of migrant workers are employed in low-skilled and low-paid jobs, usually as unskilled workers, construction labourers, farm labourers, domestic help, waiters, cleaning staff, and care workers for the elderly. Migrant women are concentrated in domestic work and in care-provision.[5]

Italy created the National Office against Racial Discrimination UNAR in 2003, in response to the EU Race Directive that obliged member states to designate a body for promoting equal treatment irrespective of race and ethnicity.[6]

The Office is under the Department for Equal Opportunities of the Presidency of the Council of Ministers. The Office is intended to be a reference point for people who claim to be victims of racial and ethnic discrimination, as well as an institutional body to monitor the effectiveness of instruments for the protection of equal treatment. The UNAR has a staff of civil servants and external consultants, including lawyers, judges, and experts in the social sciences. It works in co-operation with trade unions and business associations to promote positive action through training courses, information campaigns and the promotion of codes of conduct in the workplace. The UNAR is also supposed to provide information and advice to policy makers in order to assist them addressing racial discrimination.

The National Office Against Racial Discriminations is starting a new program of actions to be implemented at the national level, thank to a joint effort of Regions and local authorities, in order to create an integrated system to prevent and contrast racial discriminations.

The first main action concerns the transformation of the existing Call Centre Service into a web-based Contact Centre with access for potential victims or witnesses of discriminations, who will compile a form in their own language which will be immediately processed.

A second field of intervention refers to the conversion of the current UNAR Office in UNA, National Office against Discriminations (i.e. not only discrimination on racial or ethnic grounds) is currently under consideration.

With reference to regional centres provided for by Legislative Decree No. 286/1998, Art. 44 para. 12, UNAR started on July 2005 a national monitoring over all existing centres together with National Coordination Body for Social Integration Policies for Foreign Nationals (NCB), set up within the National Council for the Economy and Labour (CNEL). This action contemplates to create a national and permanent network among these centres in order to promote the dissemination of data and remedies concerning discriminatory offences. While using data from regional centres, which contribute to have a local understanding of the phenomena, UNAR can give a technical advice to victims of racial or ethnic discriminations. In recent years–according to the monitoring–the number of regional centres has increased, particularly in the Centre and in the South of Italy.

[5] Caritas Migrantes: *Immigrazione, Dossier statistico* 2010, pp. 6 ss.

[6] Article 7 of the Council of Ministers' Legislative Decree 215/2003 establishing the National Office against Racial Discrimination (UNAR). Cfr. Decreto legislativo 9 luglio 2003, n. 215 Attuazione della direttiva 2000/43/CE per la parità di trattamento tra le persone indipendentemente dalla razza e dall'origine etnica (Published in Gazzetta Ufficiale n. 186 of August 12, 2003) http://www.unar.it/.

4. The Functions of UNAR

The intersectionality of race, gender, religion and culture is explicitly pointed out in the 215/2003 Decree. Article 1 defines the purpose of UNAR as enforcing equal treatment regardless of race or ethnic origin and dealing with "*both* the differential impact that similar forms of discrimination can have on *women and men* and the existence of forms of *racism with a cultural and religious character*". As a governmental measure following EU Directive 43/2000/EC, UNAR has been unanimously welcomed by civil society organizations involved in anti-racism campaigns.[7]

The main tasks of UNAR are:

– to promote measures aiming to prevent or assuage disadvantageous, race- or ethnic origin-related situations;

– to spread information about protective measures, raise awareness and implement information/communication campaigns;

– to carry out studies, research and training and to share expertise with relevant associations and institutions, specialised research units and NGOs with a common aim to develop guidelines for contrasting discrimination;

– to provide jurisdictional and administrative support in undertaking proceedings to people who report being the target of discriminatory behaviours;

– to carry out enquiries into the existence and extent of discriminatory episodes, with respect for the functions and prerogatives of the judicial authorities;

– to promote the adoption by public and private bodies (particularly those enrolled in the register) of relevant positive measures aiming to avoid or dampen situations of disadvantage related to race of ethnicity;

– to spread knowledge about the means of safeguard currently available, possibly by informing public opinion about the principles of equal treatment and by running information/ communication campaigns;

– to draft recommendations and reviews on issues relevant to race and ethnic discrimination, along with proposals towards modifying the current legislation.

The national equality body UNAR published a guideline on how to report websites and on-line materials that have discriminatory contents with regard to racism on the Internet. UNAR reports the website to the police in order to start a legal action; otherwise, it acts directly adopting the most appropriate measure, if the contents of such websites are considered to violate criminal law.

The National Office for Racial Antidiscrimination compiles an annual report for the Parliament and the President of the Council of Ministers on the work carried out and promotes studies, research, training courses and exchanges, in collaboration with the associations and bodies enrolled in the register, with other non-governmental organisations operating in the same sphere and with the institutes specialised in gathering statistical data, also for drawing up guidelines in the battle against discrimination.

The Office has created a Register of associations working against discrimination and cooperates with them in providing legal assistance and support to victims.

Associations and bodies promoting social integration and fighting discrimination are entitled to proceed according to Art. 5 of Legislative Decree No. 215/2003; authorisation is

[7] UNAR, Relazione al Presidente del Consiglio dei Ministri sull'attività svolta nel 2010, http:// www.unar.it.

specifically granted to associations and bodies recognised by the Inter-ministerial Decree issued by the Minister of Labour and Social Policies and the Minister for Equal Opportunities on 16th December 2005 and published on the Official Bulletin of the Italian Republic on 12th January 2006.

At present, nearly four hundred associations and bodies are included in the Registry of the Ministry of Labour and Social Policies. The minimum entry requirements for registration are: a) establishment of the body by public or private deed at least two years prior two registration; b) two-year continual track-record in promoting social integration and intercultural education; c) publication of a biennial balance sheet.

A Free Call Centre is available in different languages to offer support to victims who have often difficulties to afford the costs of legal assistance. It also provides during the proceedings, oral or written information, advices and observations regarding discriminatory acts or behaviours, and encourages informal conciliatory activity, providing solutions for the eradication of discriminatory situations, also through the creation of a network of Territorial Anti-discrimination Points.

The Italian authorities have indicated that most of these complaints concerned employment, housing, access to public services and relations with the police and that none of them has resulted in the opening of judicial or administrative proceedings so far.

The last UNAR Report (2010) has shown that the largest number of discrimination concerns mobbing, "access to work" and "working conditions".

The issue of access to work relates principally to the channels through which private work is offered. This is not always an obvious form of discrimination, especially with regards to offers of temporary work presented by work agencies, or in the recruitment of personnel and the capacity to manage, or mediating actions of unequal treatment in apparent respect of the law.

An initial screening is often carried out at the telephone interview stage, based upon the caller's accent. In other cases, candidates are turned down following a request for a photograph or for personal information, as was customary for Italian citizens.

The other aspect of discrimination in the working environment relates to working conditions. Often foreign workers are subjected to harassment in the work place that can manifest itself in the forms of verbal harassment (offence, defamation and insinuation) and physical harassment in the form of mobbing (maltreatment over a long period of time).

The UNAR highlighted that discrimination suffered by immigrants in access to and use of health services are of three types: 1) bureaucratic difficulties (sometimes immigrants are requested to meet additional conditions not requested to Italians); 2) difficulties in access to specialists medical examinations and 3) they encounter problems when dealing with medical personnel and nursing staff.

With regard to the housing, a common theme can be identified which binds relevant cases together: the problems of relationships between neighbours or the rental conditions imposed by the property owner. Different complaints pertaining to episodes involving the police have been reported to UNAR. This is a very tricky issue. The police are the main actor in managing immigration, both in regards to entry into the country and control activities within the territory.

UNAR case-analyses highlight the difficult relationships between immigrants with a poor command of the Italian language, as well as the fact that a person's skin colour is often regarded by the police as a discriminating factor.

Discrimination episodes also seem rife in private companies supplying services. Conflict has arisen between the management and immigrants about the access to and use of

bars, nightclubs and restaurants: immigrants' expectations for services, food and leisure are often disregarded by the management, or not met to the same quality standards as Italian citizens'.

At the moment, the Office, in its few public statements, in general has considered Roma issues as a priority.

A very recent problem is that one of the adoption of formally ethnic-blind rules or policies that in practice mostly affect members of Romani communities, and are developed out of political debates where prejudice against the Roma is evident. This can be observed in several policies at both national and local level, ranging from measures concerning free movement of EU citizens (in relation to migration flows of Roma from Romania) to a mass of urban policing initiatives developed in a number of municipalities.

Wide space has been devoted to Roma issues in the Office's reports to the Parliament. The Office has also implemented a sensitization campaign on discrimination against persons of Romani ethnicity, and has participated (although in an informal capacity) in following a few critical situations. However, it is hard to identify a clearly defined approach. Given the high intensity of Roma-related conflicts, the Office's policy easily comes across as passive; this in turn might cast doubts over the Office's bonds of loyalty to the executive, especially regarding manifestations of anti-Romani hostility that have been substantially backed up by political forces.

Concluding Remarks

After its institution, the new National Office Against Racial Discriminations started a number of initiatives aimed at rising awareness (seminars, public relations actions), some of which has a relevant impact. According to the first yearly reports, the office has obtained a good degree of visibility, and this has also been accompanied by an increasing attention for antidiscrimination issues in legal scholarship. More problematic is the issue of dissemination with regard to the grounds of discrimination which are out of the competence of the new office, since the absence of a specialised body leaves implementation of dissemination to ordinary authorities which until now seem to have a quite passive attitude.

The level of independence of the anti-racist body required by the EU Race Directive has been criticised. The Italian UNAR anti-racist body is placed under the Department of Rights and Equal Opportunities within the homonymous Ministry which depends on the Presidency of the Council of Ministers. The Director is appointed by the Prime Minister. This institutional configuration makes UNAR greatly dependent on the government's political preferences and its work affected by changes in government. Thus, UNAR has no institutional autonomy and operational independence as Directive 43/2000/EC prescribes.

It is obvious that UNAR is limited by funding and power. However it offers an efficient service which can bring forth unjust cases of race and discrimination.

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SÁNDOR VIDA*

Trademark Infringement by Domain Name Registrars

Abstract. section 27(4) of the Trademark Act, as amended in 2005, provides enforcement against intermediaries whose services are used by a third party (that is usually the infringer itself) for the infringement. In the HYUNDAI case the registrars of the domain names, trusted by the resellers of cars having formerly been members of the HYUNDAI commercial chain in Hungary, were sued together with the resellers for the reason that they did not cancel the registration of the domain names after the commercial chain had been ceased. The Hungarian courts of first and second instance built their judgements on the ECJ's BMW judgement (C-63/97). Emphasis is given also on a case relating to infringement by an operator of an Internet home page, as the latter was condemned by the Hungarian Court of first instance for not complying with the Act on Electronic Commerce. Nevertheless, the court of second instance condemned him not therefore but for the tort in respect of the provisions of the Civil Code, e.g. for injury of reputation. Finally, the article is closed by an outlook on ideas on the development of EC law relating to liability of intermediaries.

Keywords: trademarks, domain names, infringement, liability, intermediaries.

Infringement of a trademark is an unlawful conduct. As a result of globalisation of commerce today it is more widespread than it was fifty years ago. The most common form of infringement is affixing another's mark to goods or packaging without the consent of the trademark proprietor or using it in advertising.

A special kind of trademark infringement is the unlawful use of a mark in computers. The most spectacular cases of this kind are the recent GOOGLE judgements rendered by the ECJ[1] and the French Supreme Court.[2] In the latter kind of infringement there appears a further person on the side of the traditional infringers and advertisers: the intermediary service provider, who is often creator of the domain name.

I. Legal framework in Hungary

The Hungarian Trademark Act of 1997, as amended in 2005, provides in Sec. 27(4) that the claimant for infringement can apply for an injunction also against an intermediary whose services are used by a third party for infringement.

This provision is in conformity with Art. 8(3) of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.[3] The Hungarian Act on Electronic Commerce and on Information Society of 2001 in Sec. 2 l) contains precise notions of different intermediaries, namely:

> *"l) 'Intermediary service provider' shall mean any provider of information society services:*
> *la) engaged in the transmission of information supplied by the recipient of the service through a telecommunications network, or who provides* access *to a telecommunications network (mere conduit and network access);*

* LL.M., Professor of Law.

[1] European Court of Justice C-236-238/08, 23 March 2010.

[2] Cass. com. 13 July 2010.

[3] OJ 2001 L 167.

Ib) engaged in the transmission of information supplied by the recipient of the service in a telecommunications network, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request (caching);
Ic) engaged in the storage of the information supplied by the recipient of the service (hosting);
Id) engaged in providing tools to the recipient of the service for the location of information (location tool services);"

In the Hungarian Act on Electronic Commerce there are further rules on liability of intermediaries, namely

(1) The intermediary service providers referred to as "mere conduit and network access" shall not be held liable for the information transmitted, on condition that the provider:
a) did not initiate the transmission;
b) did not select the receiver of the transmission; and
c) did not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access referred to in Subsection (1) include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission. (Sec. 8)

The intermediary service providers referred to as "caching" shall not be held liable for damages resulting from the automatic, intermediate and transient storage of the information transmitted on condition that:
a) the provider did not modify the information;
b) access to the stored information was provided in compliance with conditions on access to the information;
c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry;
d) the intermediate storage did not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information; and
e) the provider acted expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabed, or that a court or any other authority has ordered such removal or disablement. (Sec. 9)

The intermediary service providers referred to as "hosting" shall not be held liable for the information stored at the request of a recipient of the service, on condition that:
a) the provider does not have actual knowledge of illegal activity in connection with the information and is not aware of facts or circumstances from which the illegal activity or information is apparent; or
b) the provider, upon obtaining knowledge or awareness of what is contained in Para. a) acts expeditiously to remove or to disable access to the information. (Sec. 10)

The intermediary service providers referred to as "location tool service" shall not be held liable for damages resulting from allowing access to the information according to Para. Id) of Sec. 2, on condition that:
o) the provider does not have actual knowledge of illegal activity in connection with the information and is not aware of facts or circumstances from which the illegal activity or information is apparent; or
b) the provider, upon obtaining knowledge or awareness of what is contained in Para. o) acts expeditiously to remove or to disable access to the information. (Sec. 11)

The rules on mere conduit, catching, hosting correspond to those used in Art. 12–14 of the Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce in the Internal Market.[4]

II. The HONDAI case

Introducing the case history, I observe that the activity of the registrars were closely connected to that of the Hungarian car retailers. As a result I start to deal their conduct together, as the Court did, too.

1. The facts were not usual: earlier before the situation turned to infringement the retailers, the defendants had been regular commercial partners of the owner of the Hyundai marks. The claimant and defendant No. 1 concluded a Distributorship Agreement for Hungary on 1st January 2001, with exclusivity, for a period of 2 years. Section 14 of the Distributorship Agreement provided in respect of the marks that "the distributor does neither acquire nor seek to acquire the trademarks, trade names for the goods relating to the Agreement; moreover, the distributor uses the marks only in selling these goods". Parallel with executing this contract, defendant No. 1 built up a commercial chain for Hyundai vehicles and the other defendants No. 2–No. 18 used the mark in publicity, commercial papers, correspondence, buildings, auto shops, service stations etc. Moreover, three further defendants let the domain names "hiundayauto.hu", "hyundai-speed.hu" and "hyundai-spur.hu" registered.

However, a few years later the situation changed: On 1st November 2004, the EC regulation on the application of Art. 81(3) of the EC Treaty on categories of vertical agreements and concentrated practices in the motor vehicle sector No. 1400/2002/EC entered into force in Hungary. As a result, the claimant and the defendant agreed on the termination of the Distributorship Agreement. The claimant informed defendant No. 1 already in September 2004 that further deliveries within EC countries will be made to his German daughter company. However, as long as the latter has not established his service stations, i.e. until the end of January 2005 the claimant delivered motor vehicle parts and accessories to Hungary cooperating with his former partners.

After this period ended, the claimant invited the defendants No. 1–23 to stop the use of claimant's marks. As the defendants did not comply with this invitation, the claimant filed the suit for trademark infringement.

[4] OJ 2001 L 178.

2. In his judgement of 21st November 2007, the Metropolitan Court ordered the defendants to discontinue the use of the HYUNDAI marks.

Hereafter stands only a summarized report on the grounds of the judgement in an extent which I believe is necessary for the understanding in respect of the three intermediaries, i.e. the registrars (defendants No. 19, 22, 23) whose activity was in my opinion only contributory. As the judgement states, it was not contested by the parties that at the beginning the defendants were not unfair by using the marks for selling Hyundai vehicles, making publicity.

But after the termination of their commercial relationship the situation changed, and the claimant alleged that the defendant could make publicity only insomuch that they did not give the impression of being members of the claimant's commercial chain. In this respect, the claimant referred to the ECJ's judgement (C63/97) rendered in the BMW case, which he believed to be applicable in this case, too. Moreover, he stressed that the publicity on the Internet does not allow the use of domain names with the word HYUNDAI.

The Court accepted this standpoint and quoted the EC1's BMW judgement as a test of the possibilities, and the borders of the rights of resellers being independent from the car producer. Namely,

> *"The proprietor of a trademark is not entitled to prohibit a third party from using the mark for the purpose of informing the public that he carries out the repair and maintenance of goods covered by that mark and put on the market under that mark by the proprietor or with his consent or that he has specialised or is a specialist in the sale or the repair and maintenance of such goods, unless the mark is used in a way that may create to the impression that there is a commercial connection between the other undertaking and the trademark proprietor, and in particular that the reseller's business is affiliated to the trade mark proprietor's distribution network or that there is a special relationship between the two undertakings."*[5]

The Metropolitan Court added to this quotation that without the use of the HYUNDAI sign the reseller could not inform the public that he was specialised or was a specialist in the sale of such vehicles. As a result, the sign in question has an informative character and its use is necessary as a guarantee of the rights of the reseller who does not acquire unfair advantage from the distinctive character or reputation of the mark. Thereafter, the Metropolitan Court examined whether defendant No. 1 used the marks in question in a form which could make the impression to the public that he belonged to the official chain of the claimant. The Court held in this respect that, e.g. the use of the marks as a domain name surpassed the reasonable degree. It cannot be accepted that this form of use was necessary. Moreover, use of the trade name was also an infringement. Furthermore, as the defendants were earlier members of the commercial chain and rendered services within this, this fact has to be considered as well. Under such circumstances the requirement of good faith must also be complied. As a result, these facts are speaking against the defendants.

3. Against the judgement of the Metropolitan Court, the defendants–except one of them–filed an appeal, including the registrars, too. The Metropolitan Court of Appeal made its judgement on 17th March 2009 and dismissed the appeals reducing the procedural fees.

[5] Para. 64. and operative part of the ECJ's judgement.

It is worthwhile to report that the Court of Appeal, appreciating the "detailed reference" to the ECJ's BMW judgement. It stated that in the suit, only the conclusions of the BMW judgement served as directives, since the use of the marks by the defendants was suitable for making the public suppose that there was a special tie with the owner of the mark. The court of first instance, appreciating the considerations of the BMW judgement disclosed and qualified the acts of use of the defendants correctly one by one in details, considering whether they correspond to the right on notice of information or exceed the frames of this right. An example of the detailed and convincing reasons of the judgement of the court of first instance is e.g. the appreciation of the use of the HYUNDAI marks by defendant No. 8. informing the public on sale of Hyundai cars alongside with others objected in the judgement.

Relating to the registrars, i.e. defendants No. 19, 22, 23 the Court of Appeal says only that they repeated their statement on good faith and told that they would comply with the judgement. By the way their appeal was filed only against the procedural fees. In this respect the Court of Appeal said that a complete dispensation with the procedural fees had not been possible considering the rule of Sec. 80(1) of the Code of Civil Procedure. Namely, it could not be established that they had not given any cause for the procedure, moreover they had not acknowledged the claim with the first trial (8. Pf.20.533/2008).

4. The majority of the defendants requested the revision at the Supreme Court. The Supreme Court rejected the revision requests including also those filed by the registrars (Pf. IV.20.796/2009).

Comments

a) Applying the ECJ's BMW judgement as a leading case was not only suitable a but also convincing. It is not surprising that the parties requested this, too. From time to time the ECJ comes back to the same as well, this was the case, e.g. in the OPEL (C-48/05)[6] judgement, or in the GILLETTE (C-228/03)[7] one. It can be reported that the Hungarian Courts follow ECJ's teaching, too, including reference cases in trademark law.[8]

[6] It is true that BMW concerned the use of a sign identical to the trade mark for services which were not identical to those for which that trade mark was registered, since the BMW trade mark, at issue in the main proceedings, was registered for vehicles but not for vehicle repair services. However, the vehicles marketed under the BMW trade mark by the proprietor of that mark constituted the subject-matter of the services–the repairing of vehicles–supplied by the third party, so that it was essential to identify the origin of the BMW cars, he subject-matter of those services. It was having regard to that specific and dissociate link between the products bearing the trade mark and the services provided by the third party that the Court of Justice held that in the specific circumstances of the BMW case, use by the third party of the sign identical to the trade mark in respect of goods marketed not by the third party but by the holder of the trade mark fell within Art. 5(1) of the directive (Para. 27).

[7] The use of the trade mark will not comply with honest practices in industrial or commercial matters where, first, it is not done in such a manner that it may give the impression that there is a commercial connection between the reseller ad the trademark proprietor (BMW, Paras 51–42 of this judgement).

[8] Cf. Vida, S.: The impact of the judgements of the ECJ on the Hungarian trademark law. *AIPPI Proceedings* (Hungary). 2010, 53.

b) The defence of the registrars (in the appeal proceeding) was limited to lack of confusion of the domain names composed of the mark HYUNDAI. It is obvious that this was a weak defence. Reference to good faith was also unsuccessful as trademark infringement is judged in consideration of objective criteria. It is not surprising that they were condemned by the three jurisdictions. The Court of Appeal, in stating the infringement, applied the rules of the Act on Electronic Commerce with tacit analogy saying that "they did not acknowledge the claim with the first trial". Moreover, in the term of the Act of Electronic Commerce this would not have been sufficient.

c) Neither the Metropolitan Court, nor the Metropolitan Court of Appeal applied Sec. 27(4) of the Trademark Act in respect of the registrars. I believe the ground for this was that the claim was filed against a joinder of parties. If the claim had been filed separately against the registrars they would have been condemned probably with references to Sec. 27(4) of the Trademark Act.

d) In respect of judging the infringing use of other's marks as domain names, it was probably a relief that relating to this subject there were some precedents at disposal.[9] The judicial practice in this respect corresponds to that of other Member States of the EU.[10]

III. Excursion: Infringement by an operator of an internet home page

Both regarding the facts and the enforcement, some similar questions were to be judged in a procedure against the operator of the Internet home page "www.fusz.hu", though in this case the claim was not in connection with trademark infringement. A reader's letter was published on the internet home page of the defendant, offending the honour and reputation of the claimant. It is a fact that after a registration everybody was free to put there, according to taste, any tests, comments or reader's letters. Though the County Court of Szabolcs–Szatmár–Bereg stated that the defendant is a hosting service provider and in conformity with Sec. 2(1) c) of the Act on Electronic Commerce he is exempted from liability supposing that upon obtaining awareness of the illegality of the text displayed on his home page he acts immediately to remove it. This ought to be made on receipt of the claim at the latest. Omitting this, he became guilty in respect of injuring Sec. 75(1), 76 and 78(1) of the Civil Code. As a result, the Court obliged him to remove the contested reader's letter and to pay damages (2.P. 20.307/2008).

Comments

a) The facts in respect of liability of an internet home page operator, in respect of injury of reputation, even if the latter relates to a private person, is a typical element which appears in trademark infringement cases, too. Even if we do not think only to "great" or "famous" trademarks but to marks that are at the beginning of getting acquainted it is obvious that even owners of such marks are careful about the reputation of their marks. The loss of

[9] Supreme Court, see BH 2005.145; see also Bacher, G.: Összefoglaló a doménnév regisztrációról és a doménnevekkel összefüggő jogérvényesítésről tartott kerekasztal-beszélgetésről (Summary on the round-table on due process in connection with domain names and domain registration). *Iparjogvédelmi és Szerzői Jogi Szemle,* 112 (2007) 1, Különszám, 78.

[10] For German Court decisions see Ingerl, R.–Rohnke, Ch.: *Markengesetz.* 3rd ed., München, 2010, after Para. 15 Rn. 167. For British ones see Morcom, R.–Roughton, A.–Malyncz, S.: *The Modern Law of Trade Marks.* 3rd ed., London, 2008, 17.18–17.25.

reputation, moreover, bad reputation has an unfavourable effect in business, furthermore, often in respect of legal protection.

b) In the present case the Internet home page was not operated in the frame of business life. Though even if the operator was not aware of the injurious character of the reader's letter (I have serious doubts in this respect), as a result of the requirements of good faith and fairness he should have removed the contested reader's letter immediately after receipt of the claim (there was no warning letter in the case). As he did not do this and he acted only after being condemned by the court this omission was an obvious negligence, even if the Act on Electronic Commerce was not applicable in the case.

c) In respect of enforcement there is a further parallelism between the judgement rendered in the HYUNDAI case and that relating to the Internet home page (www.fusz.hu). In neither of them were the final judgements rendered with reference to the Act on Electronic Commerce. Moreover, exemption of liability, even applying the provisions of the said Act by analogy, would not have been stated by the courts.

Outlook: Intermediaries in the EC law

As told at the beginning, the above referred Hungarian provisions follow those of the European Union. It is not surprising that in the judicial practice of other Member States of the EU more complicated questions arise in this respect. As a result the *International Association for Competition Law* (LIDC) put the study of liability of intermediaries[11] on the agenda of its Oxford Congress of 2011. The Hungarian Group of this Association prepared a respectable[12] report to the exhaustive Questionnaire. From the final recommendations of the Hungarian Groups, I refer only to some, namely,

– the rules on infringement of the intellectual property as stipulated in the Enforcement Directive of the EC[13] (Art. 9.1.a) shall be applied in case of an unfair competition as well,

– liability in respect of mere conduit should be applied similarly to hosting,

– caching and search engine providers, impeding the accessibility of websites and docking domain names can be specific forms of injunctions, etc.

I look forward to learn what kind of other propositions will be made in respect of this brand-new subject.

[11] To what extent should on-line intermediaries (such as ISPS and operators of offline market place) be responsible for the control or prohibition of unfair competitive practices (in particular sales of products contrary to the law) carried out on their systems?

[12] 9th May 2011, Hungarian National Rapporteur: Adam Liber.

[13] OJ 2004 L 157.

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Gyula Koi*

The First Three Decades of Legal Reforms in the People's Republic of China (1978/1979–2008/2009)**

Abstract. This paper outlines the current problems of the different levels of Chinese administrative reforms implemented in the first three decades from 1978–1979 to 2008–2009. The discipline of legal sinology is a relatively new scientific field in Hungary and we have adopted its methods in the research leading to this study. The first and second parts of the study are based on the grounds of the most modern historical sources on the antecedents of the reforms. The third part of this work analyses the reform of the State Constitution of the People's Republic of China. The most important result of this process was the recognition and protection of basic human rights under the State Constitution of the People's Republic of China. The fourth part highlights recent administrative reforms from period to period. The administrative reform included the reform of the State Council (Government of the People's Republic of China), as a result of which the number of the staff of the State Council diminished from 51,000 to 16,700. The final part of this study introduces the reforms of Civil Law. In 1949, the Guomindang Laws (inclusive of the Civil Code) were suspended by Chinese Communists; therefore, putting the new Civil Code into force was urgently necessary. The Draft Civil Code was completed in 2004.

Keywords: legal sinology, law in the People's Republic of China, Chinese legal reforms, constitutional reforms in the People's Republic of China, amendments of the State Constitution of the People's Republic of China, administrative reforms, the number of the staff of Chinese public administration, reforms of civil law, Maoism, Chinese communists, Guomindang, human rights.

1. Preliminary Notes

One of the most intriguing phenomena in the contemporary world is the development implemented by the People's Republic of China (hereinafter: PRC). That entails the requirement of a change in the conception of the tasks within legal sinology. However, Hungarian legal sinology including its scattered antecedents is being shaped *in statu nascendi*.[1] Without the revealing analyses conducted in legal studies, administrative sciences, economics, political science and sociology the processes taking place in the most populated country of the world with the fourth largest territory cannot be understood. The undergoing progress in PRC raises questions like what position and role PRC will take with respect to emerging economies such as Brazil and India, what effects the growth of PRC will entail with respect to such significant powers such as Russia or the European Union seeking its identity, furthermore, in what way the USA currently safely considering

* Junior research fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30.; tutor, Department of Defence Administration of the Military Technical Faculty at the National Defence University, H-1101 Budapest, Hungária krt. 9–11.
Email: koigyula@gmail.com

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[1] As for the term of legal sinology, see Koi, Gy.: Jogi sinológia (Legal Sinology). In: Lamm, V. (ed.): *Jogi lexikon* (Encyclopaedia of Legal Studies). Budapest, 2009, 350. Second, enlarged and revised edition.

itself to be the first superpower of the world will be able to interfere with this process. The objectives of this study are to focus on the continual reforms of PRC taking place for the past 30 years with special regard to the legal and public administrative reforms and to allow insight into the results of economic reforms, as well. China has grown from an underdeveloped agricultural country into a superpower determining world processes, whereas, it has not changed concerning its spiritual roots (Maoism), although, its political system has become more compliant and it has accomplished outstanding economic and social achievements. These achievements bid fair prospects of high economic growth even during the world recession bringing the world to heel.[2] It cannot be precluded that in view of the current processes unless their tendency changes, PRC may become the most significant power of the world within a few decades. In parallel to these processes, the above-mentioned research in Hungarian legal sinology commenced and was perpetuated. Although, this was delayed in line with the recognition of the significance and unnegligibility of PRC by the Hungarian political and economic elite after the change of regime, which did have consequences.[3]

In what follows we will apply the method that first we will introduce the annals history of Chinese reforms, while focusing on the major intersections, then, the processes of the constitutional reform, the administrative (including civil service) reform and finally, the reform of civil law will be elucidated.

[2] See the video recording of the speech of Wen Jiabao, Prime Minister of PRC in Chinese at the Davos Annual Meeting 2009 of the Davos World Economic Forum at the following link: http://www.youtube.com/watch?v=Rs9fqfvYiXw (last visited on 20.12.2009). At that time, in comparison with the GDP figure in 2008, an annual growth of 8% was predicted for 2009 with regard to the difficulties.

[3] This is unambiguously highlighted by the following quotation from an authentic Hungarian sinologist: "By the mid-1990s, the circumstance that Hungary became the Central-Eastern-European centre of the distribution network of Chinese goods was a free gift of history. Despite the historical aspiration of Hungary to become the economic-financial hub of the region, we could not take advantage of this stroke of luck and practically, we did not even recognise this fact. It was only after a decade's delay that Hungary attempted to transform into a Chinese bridge-head in the EU, when we had largely missed the opportunity under the changed circumstances. As for the current scope of action, the accommodation of the Chinese whole-traders enriched here as full members in Hungarian society could be accomplished, which could prevent their abandoning the country by withdrawing their wealth, as well." We need to mention that the sinologist author had held this opinion before the public recognition of the moment (15 September 2008: Lehmann Brothers, the fourth largest commercial bank of the USA pleaded Chapter Eleven) of the process of the global financial crisis proceeding from the subprime mortgage crisis and expanding into the world economic recession of 2008–2009. It is also intriguing that all this supervened about 80 years after the Great Depression of 1929–1933, thereby justifying economic cycle theories. Quotation from: Polonyi, P.: Gondolatok a magyarországi kínai kolóniáról (Thoughts about the Chinese Colony in Hungary). In: Polonyi, P.: *Múlt a jövőben. Írások Kínáról* (Past in the Future. Essays on China). Budapest, 2007, 301. Nevertheless, the fact that the Yingke-Várnai Law Firm, that is, the first legal enterprise expanding in Europe besides PRC opened in Hungary in mid-September 2010 can be acknowledged as a positive development.

2. The Antecedents and Commencement of the Reforms

The outset of the "Reform and Openness" policy (in Chinese: *Zhongguo de gaigé kaifang*) is disputed. The death of Mao Zedong (1893–1976) can be regarded as a major antecedent of evolution of the reform process, which struck the 82-year-old party leader on 9th September 1976 subsequently to protracted illness occurring after a heart attack.[4] (Mao had been the number one leader of the Chinese Communist Party[5] (in Chinese: *Zhongguo Gongchan Dang*) (hereinafter: CCP) for 41 years out of its history of 55 years at that time, being one of the handful founding members numbering 12 according to mistaken tradition, in fact, their number was 13).[6] Several candidates were prepared to assume power after the death of the dictator including the notorious Gang of Four (in Chinese: *Siren bang*; in

[4] More amply, see Gernet, J.: *Le Monde chinois*. Gallimard, Paris, 1972, 502–503; Popov, A. P.: *Политические системы и политические режими в Китае XX века* (Political Systems and Political Regimes in China in the 20th Century). Moscow, 2007, 174–175.

[5] Officially, the Party was established on 1 July 1921 by Chinese Marxists educated in the so-called "Fourth of May Movement" under the influence of the Russian Bolshevik Revolution of 1917. Initially, more significant figures of the movement included Li Dazhao and Zhen Tuhsiu. Concerning the public and party history between 1949 and 1976 see Saich, T.: *Governance and Politics of China*. New York, 2004, 25–56.

[6] In fact, 12 delegates represented 53 founding members; the former ones can be partially identified by name in the Russian source-material: „Коммунистическая партия Китая была основана в 1921 году в качестве кружка единомышленников. Официально партия ведет отчет своей истории с I съезда состоявшегося нелегально в конце июня–начале июля 1921 года в Шанхае. На съезде присутсвовало 53 человека, в том числе 12 делегатов. Съезд провозгласил конечной целью партии построение в Китае социализма. Ключевую роль в съезде и создании партии сыграли Ли Дачжао, Чэнь Дусю, Чэнь Гунбо, Тань Пиншань, Чжан Готао, Хэ Мэнсюн, Лоу Чжанлун и Дэн Чжунся. На съезде в качестве одного из двух делегатов от провинции Хунань присутствовал и Мао Цзэдун. Среди других участиков съезда были Дун Биу, Ли Ханьцзюнь, Ли Да, Чэн Таньцю, Лю Жэньцзин, Чжоу Фобай, Хэ Шухэн, Дэн Эньмин, а также два представителя Коминтерна." "The Chinese Communist Party was founded in 1921 as a group of associates. Officially, the party has kept records of its history since its Congress held illegally at the end of June and early July 1921 in Shanghai. The Congress was attended by 53 people including 12 delegates. The Congress proclaimed the ultimate purpose of the Party: building socialism in China. The key roles in the Congress and the establishment of the Party were fulfilled by Li Dachrao, Chen Duxiu, Chen Gunbo, Tan Pingshan, Zhang Guodao, He Mensun, Lou Zhranlun and Deng Zhongsa. The Congress was attended by Mao Zedong as one of two delegates from Hunan Province. Other regional congressmen included Tung Biwu, Li Hanqun, Li Da, Chen Danxiu, Liu Renqing, Zhou Fobai, He Shuhen, Deng Yenmin as well as two representatives of the Comintern."

See История Коммунистической партии Китая (History of the Chinese Communist Party) entry at http://ru.wikipedia.org/wiki/История_Коммунистической_партии_Китая (last viewing: 1 January 2011).

According to the second source, seven communist groups included approximately 60 members and the number of the delegates was 13. The second source names the following delegates: Zhang Guodao, Liu Renqing (from Beijing); Li Hanqun, Li Da (from Shanghai); Tung Biwu, Chen Danxiu (from Wuhan); Mao Zedong, He Shuhen (from Changsha); Deng Yenmin, Wang Qinmei (from Xian); Chen Gunbo, Bao Huisheng (from Canton/Guangzhou); Zhou Fobai (from Tokyo). The key figures of the CCP-movement, Li Dazhao and Zhen Tuhsiu stayed away from the Congress. In the work of the Congress Mr. Maring (from the Comintern) and Mr. Nikolsky (from the Profintern) participated, however, according to the second source, Nikolsky is a pseudonym. See Glunin, V. I. (ed.): *A Kínai Kommunista Párt története 1921–1969* (History of the Chinese Communist Party 1921–1969). Budapest, 1974, 18, 601.

Russian: *Банда четырёх*),[7] however, Mao Zedong appointed his successor in his life,[8] scilicet, Hua Guofeng (1921–2008), who became the party leader and (formally) the President of the Central Military Commission, but he was never assigned to the latter position.[9] During his rule, Hua took the advice of the more sober part (less supportive of the Great Proletarian Cultural Revolution) of Chinese military leadership (still alive veteran generals). The "Gang of Four" was so reckless that they spread in the groves of the party about Hua that he was an uneducated rural cadre, whose promotion could be attributed to being a party secretary of the native village of Mao Zedong,[10] where he had established a Mao Museum constituting a place of pilgrimage, therefore, he had risen through the ranks. Consequently, the military leadership, especially Marshall Je Jianying supporting Deng Xiaoping rapidly convinced Hua that the "Gang of Four" may induce a situation of civil war, therefore, they quoted the 1968 Party Decision of CCP, which stipulated expressly that a situation of civil war needed to be prevented by all means. Therefore, the "Gang of Four" was arrested on the night from 6th to 7th October 1976, which had been hastened by the news received from Shanghai (the nest of the gang) that the local people's militia had been preparing the way for a takeover of power. By that time, however, the gang had itself understood the weakness of its position. By the time the trial of the "Gang of Four" was instituted (it lasted from November 1980 to January 1981),[11] the 5th National People's

[7] Allegedly, the gang was designated by reason of their manifest power aspirations and intriguing disposition by Mao Zedong himself, who initially and partly supported the formation established as "The Sanghai Group", which opposed primarily Zhou Enlait and Deng Xiaoping. The members of the group were extreme left cultural revolutionaries, otherwise four members of the Political Committee of CCP: Jiang Qing, who died at the age of 77 in 1991 (i.e. Mao's fourth wife known as "Madame Mao" in the West); Zhang Chungqiao, Yao Wenyuan as full members of the Political Committee, finally, Wang Hongwen as a co-opted member of the Political Committee. Saich: *op. cit.* 54. sqq.

[8] This is justified by written proof. The seriously ill dictator in his last days was practically unable to speak; therefore, he issued orders in writing. Presumably, the small scrap of paper (without an addressee) dates from May 1976, which in the unmistakably peculiar and hardly falsifiable handwriting of Mao reads as follows: "(On condition that) You manage matters, I'll be reassured." (in Chinese: *Ni zou shih, wo fang xin*). The photocopied version of the scrap of paper made the headlines of all Chinese newspapers on the day following Mao's death.

[9] Jordán, Gy.: *Kína története* (The History of China). Budapest, 1999, 388.

[10] His homeland was Shaoshan in Hunan province. For more ample data about this administrative unit in English, see Shaoshan as a Wikipedia entry in English: http://www.wikipedia.org/wiki/Shaoshan (last visited: 20 December 2009).

[11] During the trial, the Gang of Four and formerly arrested persons (ten military leaders) belonging to the group of the "Lin Biao conspirators", furthermore, the personal assistant of Mao, Chen Boda (1904–1989) were indicted. Besides being the lawful revelation of the Cultural Revolution, the trial conducted by special judiciary was simultaneously a show trial broadcasted by the state television for two months, owing to which the principal defendants were convicted. Jiang set up the mere implementation of Mao's orders as a defence. Nevertheless, the trial did not conclude in the strong condemnation of Mao's activity, whereas, not only the accused but also the extraordinarily pestiferous and utterly meaningless Cultural Revolution was also condemned. As an outcome of the trial, the principal defendants were found guilty for the persecution of up to 730,000 people and the death of 35,000 people. Jiang Qing (Madame Mao) and Zhang Chungqiao were sentenced to death, but the execution of the sentence was suspended and in 1983 it was commuted to life imprisonment. The other accused were condemned to 16–18 years' imprisonment. The "show" nature of the trial is unequivocally exposed by the following text: "In 1981, the four deposed leaders were subjected to a

Congress (Chinese Parliament) during its third session between 30th August and 10th September 1980 relieved Hua Guofeng of his office as a Prime Minister (but he was only later dismissed from senior leadership during the Congress of CCP in September 1982), who was replaced by Zhao Ziyang (1919–2005) for the period of 1980–87. Policy-making became finally controlled by the genuine successor of Mao, the pragmatist Deng Xiaoping (1904–1997), who was appointed to be the third president of CCP (the position was not occupied between 1976 and 1978).

Around December 1978, 18 Chinese peasants organised a secret night gathering with advance arrangements in the village of Xiaogang in Anhui province (in China, secret gatherings, religious associations, political societies and movements date back traditionally to ancient times). However, this one was a so-called formless gathering (in Latin: *concio*), where the participants agreed that they would withhold the product surplus and would not contribute it to the collective, whereas, they would carry on paying mandatory taxes and arising costs. Later, politicians approved of the matter posteriorly. There may have been other similar actions, at any rate, this went down in history and can be deemed to be the outset of the thirty years' reforms. However, it apparently was not a conscious commencement, those who participated did not suspect what they were initiators of and the reforms would not have amounted to much unless politics traced back the beginnings to this event and the political historical events, which we will elucidate in the following.[12]

A significant antecedent consists in the "Ten Years' National Economic Development Program" based on the experience of the economic boom of 1977 and designed for the years of 1976–1985, the basis of which had been elaborated already in 1974. The Program was adopted by the 2nd Plenary Session of the 10th Central Committee of CCP held between 18–23 February.[13] The 3rd Plenary Session of the 11th Central Committee of CCP (18–22 December 1978) meant the "tensile test" on the one hand between the orthodox extreme left and the Maoist party workers promoting the Cultural Revolution aligned with Hua Guofeng, on the other hand, the centrist realist forces clustered around Deng Xiaoping considered right-wing (within the party). Some years later, this plenum was reasonably declared a milestone by writers of party-history, since this led to the evolution and consolidation of the "Reform and Openness" policy. At that time, the main slogan besides personal rehabilitations (which remarkably and massively rehabilitated a proportion of the politicians persecuted preceding the Maoist Great Proletarian Cultural Revolution (in Chinese: *Wúchănjiējí Wénhuà Dàgémìng*) was "socialist modernisation" and the "Ten Years' National Economic Development Program" designed for the years of 1976–1985 by Hua was not even mentioned, whereas, it anticipated a demand for change. At the same time, the session bestowed great attention on the issues of the democratic rights of the masses, the freedom of criticism, the reinforcement and extension of democracy and the legal order, furthermore, on the restoration of legality. Following the polemical article of a social scientist, the issues "whether the only criterion of the establishment of truth is indeed a practice",[14] furthermore,

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show trial and convicted of anti-party activities". See Gang of Four (Wikipedia entry in English) at http://en.wikipedia.org/wiki/Gang_of_Four (last visited: 20 December 2009).

[12] The policy of "Reform and Openess" is expounded in extensive Hungarian literature see Jordán, Gy.–Tálas, B.: *Kína a modernizáció útján a XIX–XX. században* (China on the way of modernisation in 19th and 20th century). Budapest, 2005, 255–348.

[13] Jordán–Tálas: *op. cit.* 238. sqq.

[14] This was raised in opposition to the following formula of Hua Guofeng published in *Renmin Ribao* on 7 February 1977: "Whatever President Mao's decision could be, we will support it, whatever

"whether truth should be sought after starting from facts" were raised. The participants deemed it important that the people's way of thinking should be liberated since: "If everybody in a party, in a country and within a nation acts verbatim, the way of thinking will harden, progress will become impossible, life and the party will come to an end and the country will decline". At any rate, the imperishable merits of Mao Zedong were recorded with the comment that the demand that a revolutionary leader should be impeccable is not Marxist.[15]

It is debated even in technical literature which year should be regarded as the first year of the reforms. A Russian source in a renowned journal of legal studies points out that the initial year of the reforms was 1978.[16] The article of a Chinese author written in English and published in a prestigious journal of public administration considers 1979 to be the initial year of the reforms.[17] We deem it important to point out that the prevalence of the reform became practically manifest only by 1980 and its outset was only subsequently established. Therefore, it is very appropriate to mark the years of 1978–1979 as "a continual beginning", which entailed amazing changes in the life of PRC.[18] These processes are designated as Leninist Transitions by certain Western scholars[19] (Although, in our view, the system of the Chinese Proletarian Dictatorship was rather peculiarly Chinese and later much more and expressly Maoist than Leninist. Instead of Leninist, Marxist–Leninist would have been the appropriate terminology according to the concepts of scientific socialism.)

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guidance President Mao gave us, we will unwaveringly follow it". This was the so-called formula of the "two whatevers" (in Chinese: *liang ge fanshi*), concerning which Deng Xiaoping declared in May 1977 that it did not comply with Marxism. Concerning the formula see Jordán–Tálas: *op. cit.* 236. On the statement of Deng see Deng, X.: *"Liang ge fanshi"* bu fuhe makesizhuyi (The *"two whatevers"* does not meet the Marxism). In: *Deng Xiaoping Xuanji (1975–1982)* (Selected Works of Deng Xiaoping, 1975–1982). Beijing, 1983, 35–36. Quoted in Jordán–Tálas: *op. cit.* 237, footnote 2. On the assessment of Hua's policy see Saich: *op. cit.* 55–56.

[15] On the quotation, see *Zhongguo Jingji Nianjian* (China Economic Yearbook). 1981, II/24.

[16] Kumanin, E. V.: Китайское право в условиях реформ (The Chinese Law from the perspective of the reform). *Советское государство и право*, 61 (1988) 9, 91 sqq.

[17] You, Ch.: Current Administrative Reform in China. *International Review of Administrative Sciences*, 52 (1986) 3, 123 sqq.

[18] For example, it suffices to mention concerning city development that Shanghai with up to 17 million permanent and 4 million temporary residents has become the financial centre of the Far East, or we could refer to Shenzhen under Deng, formerly a fishing village, then a megapolis has become part of the Special Economic Zone mainly because it borders on Hong Kong. In the recent two decades, 30 billion USD has flown into this city, which is currently the largest harbour of China and one of the most dynamically developing cities of the world. Today it has a population of approximately 8,700,000. Within its population, the proportion of people under 30 is strikingly high, while 20%. of the Chinese Ph.D. holders live here. In 2011, Shenzhen accommodated the 26th Summer Sports Universiade. An important source concerning Shenzen: *Má li Shenzhen. Glamourous Shenzhen.* Shenzhen shi renmin zhenhfu xinwen hangong shi. Shenzhen, 2009, 24. (with a supplementary Chinese–English CD).

[19] Winckler, E. A.: Describing Leninist Transitions. In: Winckler, E. A. (ed.): *Transition from Communism in China. Institutional and Comparative Analyses.* Boulder (COL, US)–London, 1999, 3–48; Winckler, E. A.: Explaining Leninist Transitions: In: Winckler, E. A. (ed.): *Transition from Communism in China. Institutional and Comparative Analyses.* Boulder (COL)–London, 1999, 259–294.

3. The Constitutional Reform

Both the traditional Chinese legal system,[20] scilicet, the imperial period of China (221 B.C.–1911 A.D.) recognised and the legal systems of the Chinese Republic (1912–1949) as well as of the currently prevailing People's Republic of China (since 1949) have incorporated the legal institution of a written constitution. The enumeration of the Chinese written constitutions is not an easy task.[21] For a long period, France used to exist in such a constitutional uncertainty just as the People's Republic of China did between 1954 and 1982, when it had four written constitutions within a short period of 28 years (according to the sources: state constitutions), however, we need to mention that the state constitution of 1982 (hereinafter: the Constitution) has been practically in force for so many years. The significance of constitutional law in China (in Chinese: *xianfa*) is increasing. With regard to their longevity, we can claim that the Constitution is in compliance with the reforms. Therefore, we will expound the pre-history of the effective Constitution more amply.

The draft of the Constitution was subjected to a four-months' national debate on 28 April 1982. Formerly, the National People's Congress had appointed a Constitutional Review Committee of 100 members on 7 September 1980. Beng Chen, the Vice-President of the Constitutional Review Committee specified the most important basic principles of

[20] See technical literature on the topic: Balazs, É.–Maspero, H.: *Histoire et institutions de la Chine ancienne des origines au XIIe siècle après Jésus-Christ.* Paris, 1967, 303. passim. Bodde, D.–Morris, C.: *Law in Imperial China. Exemplified by 190 Qing Dynasty Cases. With Historical, Social, and Judicial Commentaries* (Translated by the Xingan Huilan). Cambridge (MA), 1967. XIII, 615.

[21] The constitutions are enumerated chronologically in the following works of English-language technical literature written by Chinese authors: Zhian, T.: *The Government and Politics of China.* Cambridge (Mass.), 1950, 435. Concerning constitutional history in the republican age see Chen, R.: *Zhongguo xianfa shi* (History of the Chinese Constitution). Shanghai, 1933; Kuhn, P. A.: *Les origines de l'Etat chinois moderne.* Paris, 1999, 205; McHenry, R. (ed.): *Britannica Hungarica Világenciklopédia* (Britannica Hungarica World Encyclopaedia).Vol. 10, Entry China. Budapest, 1998, 483. Column 2: refers mistakenly to the first Constitution of 1908 as a new constitution put in force by the Manchurian Court in 1906. Concerning the Constitution of 1946 see Peaslee, A. J. (ed.): *Constitutions of Nations. Vol. I. From Afghanistan to Finland.* The Hague, 2nd ed., 1956, 506–515. For the text of the constitution: *ibid.* 515–535. See the Constitution of 1946 in Taiwan: *A Brief Introduction to the Republic of China.* Taipei, 1998, 19. sqq. Concerning the Constitution of 1954 see Popov: *op. cit.* 197–202; Su, J.-H.–Tomson, E.: *Regierung und Verwaltung der Volksrepublik China.* Köln, 1972, 17–36, 70–113. According to our knowledge, the whole text of the Constitution of China of 1954 was published in Hungarian see Zhou, E.–Liu, S.–Mao, Z.: *A Kínai Népköztársaság Országos Népi Gyűlésének I. ülésszaka 1954. szeptember 15–28. A Kínai Népköztársaság alkotmánya* (The First Session of the National People's Congress between 15–28 September 1954. The Constitution of the People's Republic of China). Budapest, 1954. Concerning the constitution of 1975 see Popov: *op. cit.* 202–203. Concerning the constitution of 1978 see Lesage, M.: *Les institutions Chinoises.* Paris, 1978, 21; Popov: *op. cit.* 203–221. Concerning the (effective) Constitution of 1982 see Popov: *op. cit.* 221–224; Jakóbiec, W.–Rowinski, J.: *System konstytucyjny Chinskiej Republiki Ludowej* (The Constitutional System of the People's Republic of China). Warsaw, 2007, 98; Saich: *op. cit.* 123–124. and passim. Separate monographs expounding the subject: Lin F.: *Constitutional Law in China.* Hong-Kong–Malaysia–Singapore, 2000, 378; Palmer, M.: *The Chinese Constitution. A Contextual Analysis.* Oxford, 2011 (publication in process).

the future basic law: insistence on the four (basic) principles,[22] the principal task of the Chinese people is to focus its efforts on socialist modernisation, the development of socialist morals is indispensable for material development, the basic rights of the citizens shall be safeguarded in compliance with socialist democracy and the socialist legal system, the system of people's gatherings shall be reinforced and the scope of their power shall be extended, ethnic autonomy shall be developed, basic-level political power shall be reinforced etc. Special emphasis was placed on equality before the law, the protection of personal dignity, on the principle that no organisation or individual shall enjoy rights unless they are guaranteed under the constitution or separate law and on the requirement of the reinforcement of the socialist economic system. Finally, the constitution was adopted by the 5th Session of the National People's Congress on 4 December 1982. At that moment, the constitution contained 138 Articles divided into 4 Chapters: I. General Principles, II. The Basic Rights and Obligations of the Citizens, III. The Organisation of the State, IV. The National Flag, the National Coat of Arms and the Capital. The Constitution as promulgated was published in Hungarian translation relatively soon, but it was not easily accessible.[23] It is worthwhile to expand on the four major (comprehensive) constitutional amendments before engaging in the actual analysis.[24]

3.1. The First Amendment of 12 April 1988

The new amendment of Art. 11 sets forth: "The state shall permit the existence and development of the private sector of the economy within the limitations prescribed by law. The private sector of the economy shall be complementary to socialist public economy. The state shall protect the lawful rights and interests of the private sector of the economy and shall exercise guidance, supervision and control over the private sector of the economy".[25] Jordán claims that this amendment reinforces the legal status of the private sector so that

[22] We need to expand on the above-mentioned so-called four principles (*Four Cardinal Principles*, in French: *quatre principes fondamentaux*) contained under the Constitution. These are as follows:

- The Principle of the Leadership of the Communist Party; in French: La reconnaissance du rôle dirigeant du Parti communiste chinois,
- The Principle of the Guidance of Marxism–Leninism and Mao Zedong Thoughts; in French: Les instructions du marxisme–léninisme et des idées du Mao Zedong,
- The Principle of the People's Democratic Dictatorship; in French: L'attachement á la dictature démocratique populaire,
- The Principle of Adherence to Socialism; in French: L'attachement á la voie socialiste.

See Lin: *op. cit.* 25–35. (points 2.06.–2.13.); Bányai, L.: Quelques problèmes de la modernisation du système politique de la République Populaire de Chine. In: Lukic, R. (ed.): *La modernisation du droit*. Beograd, 1990, 6.

[23] MTI International Documents, 26 (1983) 3, 3–25. Currently, the Hungarian translation of the significantly amended Constitution and its annotation are under publication. See the English-language version of the constitution: *The Constitution of the People's Republic of China*. Beijing, 1983. See further one of the Chinese text editions: *Zhonghua Renmin Gongheguo Falu Fagui Quanshu*, 1 (1994), 20. sqq.

[24] Popov: *op. cit.* 221. sqq. passim. Jakóbiec, W.–Rowinski, J.: *op. cit.* 34. Only the Polish source mentions the exact dates of the 3rd and 4th amendments.

[25] The earlier text was this: "No organisation or individual may appropiate, buy, sell, or lease land, or otherwise engage in the transfer of land by unlawful means."

the private sector shall function as a supplement to the state sector.[26] Lin highlights the following amendment (Para. 4) of Art. 10: "No organisation or individual may appropriate, purchase, sell or otherwise engage in the transfer of the land by unlawful means. The right to the use of the land may be transferred according to law". In the opinion of Lin, the recognition of the existence of the private enterprise and the private sector and the regulation of the transfer of the right of the use of land are of crucial importance. The amendments reveal that Chinese economy tends to be market-oriented and some socialist dogmas have been replaced by practical thinking.[27]

3.2. The Second Amendment of 19–29 March 1993[28]

The 1993 Amendment amounted to changes in the constitution at nine points (Lin). According to the technical literature at our disposal, it is only Jordán who outlines three highly significant amendments of the preamble seeming inconsequential at first sight. As Jordán formulates: "The amendment adopted on 19 March 1993 declared in compliance with the turning point supervening in economic policy in 1992 that China shall abide by market economy instead of planned economy, nevertheless, it also included other important supplements". The requirement of building socialism with Chinese characteristics, which is basically applicable in nearly all respects, was incorporated in the section of the preamble stipulating the tasks of socialist modernisation. Mentioning Chinese characteristics, features or quality does not only refer to the consideration of the conditions and features of China upon seeking solutions, but this is also a manifestation of Chinese nationalism becoming more and more determinant. Other phrases of the amendment highlighted democracy and building a democratic socialist nation. This manifests itself in the following amendment: "The system of multi-party cooperation and political consultation led by the Chinese Communist Party shall prevail and develop in the distant future, as well". The Preamble was also supplemented by a short affirmative sentence: "China is at the primary stage of socialism". The statement, which does not seem to be too consequential, had had a relatively long prehistory, but the conclusions and references deriving from it are even more important. The incorporation of the tenet into the constitution was actually delayed, since it was the theoretical conclusion of the 13th Congress of CCP at the end of October 1987 that China was at the primary stage of socialism and this feature would mark at least the next 100 years as of the 1950s. The tenet secured a relatively wide scope of action to government as

[26] Jordán: *„Az ég magas, a császár messze van." Igazságszolgáltatás, jog, és politika Kínában* ("The Skies Are High, the Emperor is Far Away." Jurisdiction, Law and Politics in China). Budapest, 2008, 208.

[27] "They are concerned with the economic system and with the intention to legitimise the prevalence of private enterprise and the transfer of land-use rights. These amendments have demonstrated that Chinese economy is more market-oriented and that some of the socialist dogmas have given way to pragmatism." Lin: *op. cit.* 17. (Point 1.23.). The Polish publication on the amendment of 1988 is in accordance with the other two sources with respect to private enterprise: "W nowelizacji z 1988 roku uznano sektor prywatny za uzuplenienie gospodarki opartej na systemie wlasnosci publicznej (Art. 11)." In English: "In Amendment of 1988, the private sector was a complementary economy-based system of public ownership (Art. 11)". Jakóbiec–Rowinski: *ibid.*

[28] 19 March 1993 is mentioned: Jordán: *„Az ég magas ..." op. cit.* 208; 29 March 1993 is specified as the date of the amendment: Jakóbiec–Rowinski: *ibid.* The contradiction currently cannot be dissolved in a reassuring manner, since the other sources at our disposal ignore the specification of dates.

for its basic economic and political reform steps and their ideological acceptance. This could be quoted upon the widespread permission of private enterprise and the private sector, upon the application of other forms of distribution (profit, dividend etc.) besides distribution according to "socialist" work, upon taking over certain capitalist methods (instead of the former total contraposition of capitalism and socialism) and upon the justification of the admission of foreign operating capital funds and other forms of cooperation (Jordán). Our Polish source highlights terms in re the supplementary law of 1993 such as the "Reform and Openness" [policy] (in Chinese: *gaigé kaifang*; in Polish: *reformy i otwarcie*), socialism with Chinese characteristics (in Chinese: *you Zhongguo tese shehuizhuyi*; in Polish: *socjalizm o chinskiej specyfice*).

Under Art. 7, issues concerning the state sector of the economy are regulated. Here, instead of "expansion" of the sector, the word "development" is used, since the reform entailed dwindling and massive shrinking of the economy supervised by the state (Jordán).

Under Art. 8, the rural commune having dissolved a decade before (at the beginning of the 1980s) was replaced by the system of rural contractual liability. Jordán restricts himself to the assessment of the amendments under Arts 15 and 17, whereas, the Polish volume expands on the amendment of Art. 16, as well. Under Arts 15 and 17, the term of planned economy and those pertaining to state planning were deleted. Art. 15 regulates issues related to the public sector of the economy. The new version uses the expression "strengthening" instead of the former "growth" in connection with economic sector. The reform in this case means diminishing planned economy (economy supervised by the state).[29]

Under Art. 16, rural communes dissolved at the beginning of the 1980s were replaced by the system of rural contractual liability.

Our Polish source outlines the amendments pursuant to Art. 16.[30] From Arts 15 and 17, the terms of "planned economy" and "state planning" were deleted.

Paragraph 3 of Art. 42 was amended, as well. The term of "state enterprise" was changed to "state-owned enterprise".[31]

As Art. 98 stipulated: "The term of mandates at the people's congresses at the regional level shall be five years". Whereas, the term of mandates at the lowest level of people's

[29] Article 15: The state shall accomplish socialist market economy. The state shall strengthen economic legislation and improve macro-economic supervision. State laws shall prohibit disturbance of the social-economic order by any person.

[30] Article 16: State-owned enterprises shall accomplish management by themselves within the limitations prescribed by law. State-owned enterprises shall implement democratic management via congresses of workers' representatives and in other ways in accordance with the law.

Article 17: Collective economic associations shall conduct economic activities independently and have decision-making powers in compliance with relevant laws. Collective economic associations shall implement democratic management and assign or recall the members of management as well as decide on major issues of organisation management in accordance with the law. In the territory of China, foreign companies and other foreign economic associations such as Chinese-foreign joint ventures shall observe the laws of the People's Republic of China. The lawful rights and interests of joint ventures shall be protected by the laws of the People's Republic of China.

[31] Article 42: Work shall be a matter of honour for every citizen who is able to work. All the people working in state-owned enterprises as well as in urban or rural economic collectives shall relate to their work as masters of the country they are citizens of. The state shall promote socialist labour emulation as well as shall commend and reward exemplary and outstanding workers. The state shall encourage citizens to take part in voluntary labour.

congresses remained three years.[32] In case of the people's congresses of counties and administrative units of the same level, the term was raised to five years, just as the term of the mandates at people's congresses of the provinces and at the People's National Congress, scilicet, Chinese Parliament lasted.[33] Lin does not expand on the amendment in detail, although, he mentions that it was conceived in the spirit of the socialism with Chinese characteristics and market economy. The 1993 Amendment demonstrated that CCP was genuinely following the way of lawful procedure.[34]

3.3. The Third Amendment of 15 March 1999

According to Lin, six amendments were made, out of these, Jordán and our Polish source mentions four ones. It was the 15th Congress of CCP that made a decision on the amendments. They included "the theory" of "the eternal pragmatist", Deng Xiaoping among the basic principles under Section 7 of the Preamble besides the concepts of Mao Zedong. The basic principle of the rule of law (in Polish: *rzady prawa* or *praworzadnosc*)[35] was incorporated under Para. 1 of Art. 5 as an eloquent proof that China shows due regard not only for continental law, but also for Anglo-Saxon law. Three amendments concerned the transition to the Chinese-type market economy, whereby the private sector was declared to be an important and equal component of market economy instead of being a supplementary component of socialist economy. On such grounds, the dominance of distribution according to labour under Art. 6 was qualified, since it shall co-exist with other methods of distribution. Article 11 regulates the above-mentioned reinforcement of private enterprise, accordingly, the original phrase "The private enterprise of municipal and rural workers, which shall operate within the limitations of law, shall be a supplement to the publicly-owned socialist enterprise" was replaced by what follows: "The individual, private and other not publicly-owned enterprise, which shall exist within the limitations of law, shall be major components of socialist market economy". Furthermore, it also anticipated the protection of the state for both the individual and the private enterprises.[36] In accordance with the amendment of the Chinese Criminal Code, the reference to counter-revolutionary crime was deleted from Art. 28, instead, the phrase of crime threatening national security has been introduced.[37]

3.4. The Fourth Amendment of 14 March 2004

Zhiang Zemin's ideology of the Three Represents' (in Chinese: *Sāngè Dàibiǎo*; in Polish: *trzech reprezentacji*) was adopted in the Preamble of the amended Constitution. This ideology legalised the possibility of party membership for most capitalists. The reason was as follows: "The party should represent progressive productive forces, as well" (this is

[32] The lowest levels refer to the people's congresses of townships, ethnic townships and towns.

[33] On the Amendment of 1993, see Lin, *op. cit.* 18. (Point 1.23a.); 87. (Point 4.14.). Jakóbiec–Rowinski: *op. cit.* 35.

[34] On the Amendment of 1993, see Lin: *op. cit.* 18. (Point 1.23a.); 87. (Point 4.14.). Jakóbiec–Rowinski: *op. cit.* 35.

[35] The *rule of law* and the *Rechtsstaat* are not the same concepts. The *Rechtsstaat* is a typical concept of continental law (specifically, of German law). It can be translated into English as the "legal state" or the "state of law", but it cannot be referred to as the "rule of law" in English texts.

[36] Jordán: „*Az ég magas ...*" *op. cit.*; Jakóbiec–Rowinski: *op. cit.* 36–37.

[37] Lin: *op. cit.* 18. (Point 1.23a.), 364–365. See English version of the Third Amendment, Art. 16 as amended.

antagonistically contrary to the principle of class struggle of Maoism). The provision of Art. 10 was supplemented as follows: "[...] the legally obtained private property of citizens shall not be violated". Article 11 promotes the most powerful protection of market economy. Article 13 protects more accentually the right of citizens to inherit private property. Article 14 supports building the social security system. Paragraph 1 of Art. 33 contains a new sentence of historical value: "The state shall respect and protect human rights". Under Art. 67, the new expression of "state of emergency" appears in line with the former one of "state of war". This new concept modified the roles of the President of PRC and the State Council (Arts 80, 89). Article 98 extends the term of mandate in all the lowest level (local) people's congresses to five years.[38] Article 136 stipulated that the Chinese national anthem shall be *March of the Volunteers* (in Chinese: *Yìyǒngjūn Jìnxíngqǔ*; in Polish: *Marsz ochotników*); the reason for this affirmation was the lack of reference to Mao Zedong.[39] In the following, we will analyse two important subject-matters of The State Constitution of PRC.

3.5. (Self-) Definition of the People's Republic of China (Art. 1)

According to this section, the People's Republic of China shall be governed by the working class, which amounts to a socialist state of the people's democratic dictatorship (dictatorship of the proletariat[40]), the foundation of which has been laid by the alliance of workers and peasants. It is highlighted that the socialist system is the foundational state establishment, which allows for no departure. The final sentence refers to the destruction of the socialist system, which is prohibited both in re-natural persons (humans) and associations (unity of persons and capital either incorporated or not, scilicet, legal entities and other organisations without legal entity). The text does not point it out, nevertheless, it can be presumed that the prohibition of destruction[41] refers merely to the ordinary meaning of destruction, not to the criminal legal sense of the term as a fact of the case under criminal law in Hungary pertaining to treason. PRC shall be a single-party state.

3.6. The basic rights and duties of citizens under Arts 33–56

With respect to PRC, the issue of basic human rights is of major importance. The Constitution provides basic human rights and duties under the same chapter, which is dogmatically appropriate. However, we need to clear up a misunderstanding, scilicet, that it was revealed upon the translation of the UN Charter that the term of right does not have an equivalent in Chinese. The equivalent of the term of substantive law (in Latin: *ius, norma agendi*; in English: *law*) is *falü*. Indeed, the term of civic rights (in Latin: *facultas agendi*; in English: *right*) did not use to have an ingrained equivalent, which could substantiate the divergent construction of human rights (besides a different conception of power).

[38] Jakóbiec–Rowinski: *op. cit.*; Jordán: *Kína története. op. cit.* 209–210.

[39] Jakóbiec–Rowinski: *op. cit.* 37; Jordán: *ibid.* 210.

[40] This is a typical concept of Karl Marx (in German *Diktatur des Proletariats*) in Fourth Chapter of *Critique of the Gotha Program* (in German *Kritik des Gothaer Programms*) from 1875.

[41] Article 1: The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People's Republic of China. Disruption of the socialist system by any organisation or individual is prohibited.

Nevertheless, these do not amount to the fact that the term of human rights does not have an equivalent in contemporary Chinese, since it means *rénquán*.[42]

The Constitution specifies the following rights:

– The right to citizenship (Art. 33),

– Equality before the law (Art. 33),

– The right to vote and the right to be elected (Art. 34),

– The citizens of PRC enjoy freedom of speech, the freedoms of the press and of assembly, the freedoms of organisation, procession and demonstration (Art. 35),

– The freedom of religion (Art. 36),

– Citizenship rights (Art. 37),

– The right to human dignity (Art. 38),

– Inviolability of the residence of citizens (Art. 39),

– The freedom and privacy of correspondence (Art. 40),

– The right to criticism and making suggestions (Art. 41),

– The right to petition (Art. 41),

– Citizens who have suffered losses via the infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with the law (Art. 41),

– The right to work (Art. 42),

– The right to rest (Art. 43),

– The right to retirement (Art. 44),

– The right to material assistance for elderly, ill and disabled persons (Art. 45),

– The right to education (Art. 46),

– Freedom to engage in scientific research, literary and artistic creation and other cultural pursuits (Art. 47),

– Women's rights (Art. 48).

The Constitution specifies the following duties:

– Every citizen shall enjoy the rights and comply with the duties prescribed under the Constitution and other law (Art. 33),

– The state shall respect and protect human rights (Art. 33),

– The insult, libel, false accusation or false incrimination directed against citizens by any means shall be prohibited (Art. 38),

– The duty of work (Art. 42),

– The duty of education (Arts. 45–46),

– Compliance with the "one child policy", or in official terms with family planning (Arts 25, 49, 107),[43]

– Parents shall comply with the duty to raise and educate their minor children and grown-up children shall comply with the duty to support and assist their parents (Art. 49),

– Violation of the freedom of marriage shall be prohibited, as well as maltreatment of old people, women and children shall be prohibited (Art. 49),

[42] See Lu, Y. S. (ed.): *The English–Chinese Dictionary (Unabridged) in 2 vols.* Vol. I. Shanghai, 1991, 1571, 2. column, entry 8.

[43] In Chinese: *jihua shengyu* literally means "planned birth".

– PRC shall protect the lawful rights and interests of Chinese citizens residing abroad and of the family members of Chinese citizens residing abroad as well as the lawful rights and interests of overseas Chinese returning home (Art. 50),

– Upon the exercise of their freedoms and rights, the citizens of PRC may not infringe the interests of the state, society, the collective or the lawful freedoms and rights of other citizens (Art. 51),

– Safeguarding the unity of the country and of all its ethnic groups (Art. 52),

– The citizens of the PRC shall abide by the Constitution and separate law, they shall keep state secrets, protect public property, they shall observe labour discipline and public order as well as respect social morals (Art. 53),

– Defence of the motherland and doing military service (Art. 55),

– Paying taxes (Art. 56).

Numerically, 19 rights are juxtaposed with 14 obligations, so that work and education simultaneously constitute rights and obligations. We could meticulously expand on the specific rights and obligations; instead, we will call the readers' attention to technical literature on Chinese human rights.[44] We cannot fail to mention that the constitutional amendment of 2004 momentously transformed the Chinese catalogue of human rights. Nevertheless, hardly half a decade has passed; therefore, the evolution of considerable judicial practice cannot be expected. Among the criticisms concerning human rights in China, we refer merely to the "problem map" of European Parliament of 2006: it reproaches China with the high number of death sentences (with the comment that all cases in which a death sentence has been imposed in the lower instance are automatically submitted for review to the People's High Court of Justice). The report focuses on politically motivated imprisonment and forced labour. Besides the issue of the freedoms of speech and religion, the Tibetan issue and trade in organs as well as the camp system of *Laodong Gaizao* (literally "reform through labour") are objected to.[45]

4. The Administrative Reform

Formerly we mentioned that in the article of You, 1979 is indicated as the beginning year of administrative reforms. Others argue that the administrative reform commenced in August 1980 with a speech of Deng Xiaoping,[46] whereas, administrative reforms have been characteristic in PRC since 1949.[47] The division of Chinese administrative reforms into different periods is well-known, which is partly factual, partly didactic, therefore, its publication cannot be neglected. The following periods of public administrative reforms are

[44] Lin: *op. cit.* 265–284 (Points 10.32–10.76); Biddulph, S.: *Legal Reform and Administrative Detention Powers in China.* Cambridge, 2007, 143–145. Cambridge Studies in Law and Society; Saich: *op. cit.* 266–267.

[45] See the following source concerning the human rights report of the European Parliament of 2006: http://www.europarl.europa.eu/sides/getDoc.do?type=IMPRESS&reference=20070426IPR05964&language=HU (last visited: 20 December 2009).

[46] Burns, J. P.: The Civil Service System of China: The Impact of the Environment. In: Burns, J. P.–Bowornwathana, B. (eds): *Civil Service Systems in Asia.* Cheltenham (UK)–Northampton (USA), 2001, 103.

[47] See the following German technical literature concerning public administration before 1978–1979 in Su–Tomson: *op. cit.* 37–69, 114–155, 156–197.

differentiated: the reform of 1982 (1982–1988); the reform of 1988 (1988–93); the reform of 1993 (1993–1998) and the reforms ever since 1998.

4.1. The Reform of 1982[48]

This is considered to be the first reform of greater scale entailed by the "Reform and Openness" policy. At that time, the relations between the central administration and local governance,[49] the aging of civil servants and life-long assignments (mainly due to the Great Proletarian Cultural Revolution) and the over-dimensioned government were all deemed problematic. Within the framework of the reform, the following steps were taken: the economic administration was decentralised and as for the personnel of civil service, both the number of the staff and the respective earmarked budget were decreased. Simultaneously, the "Four Goals" (in Chinese: *Si Hua*) were introduced, which summarised the desirable qualities of cadres (in Chinese: *ganbu*) such as revolutionary, young, educated and competent. The State Council, scilicet, Chinese Government, which had been outnumbered only by the Soviet Union as to its personnel, could record a considerable decrease in the number of background institutions and its personnel. Out of the 100 background institutions and agencies, 61 persisted in the 1980s and the personnel decreased by one-third.[50] After 1984, the majority of reforms focused on the local level in rural China. In 1987, Deng announced the introduction of the merit-based-system of civil service.[51]

4.2. The Reform of 1988

The reform of the State Council continued after 1988. The number of departments decreased from 45 to 41 and as for background institutions, they decreased from 22 to 19, whereas, the personnel of the State Council diminished by a further 19.2%. The reforms could not be implemented in local governments at the local level at such a scale as it had been planned. The demolition of the traditional planned economy also commenced separately in the scope of municipal reforms and rural reforms, however, the implementation of municipal reforms proved to be more complex.[52] By 1988, the number of the personnel of the State Council decreased to 29,600.[53]

[48] The processes are elucidated chronologically: Tang, T.: China's Administrative Systems Reforms and Trends in their Development. In: Gordon, M. T.–Meininger, M.-C.–Chen, W. (eds): *Windows on China*. Amsterdam–Berlin–Oxford–Tokyo–Washington DC, 2004, X–XII.

[49] On Chinese local governments see Xiong, Y.: Redefining the Role of Local Governments. In: Gordon, M. T.–Meininger, M.-C.–Chen, W. (eds): *Windows on China*. Amsterdam–Berlin–Oxford–Tokyo–Washington DC, 2004, 127–133.

[50] Concerning the reform of the State Council see Xiong: *op. cit.* X; You: *op. cit.* 138; Koi, Gy: A kínai közigazgatási reform egyes kérdései (Specific Issues of the Administrative Reforms in China). *Állam- és Jogtudomány*, 47 (2006) 3, 504, The number of the personnel of the State Council decreased from 51,000 to 39,000. At the end of 1984, the number of deputy ministers decreased from 13 to 4 per department. The number of departments decreased from 52 to 43. (According to other sources, the exact number is 45. See the facts about the reform of 1988 in the body text.)

[51] Koi: A kínai közigazgatási reform... *op. cit.* 505.

[52] Xiong: *op. cit.* X–XI.

[53] Koi: A kínai közigazgatási reform... *op. cit.* 504.

4.3. The Reform of 1993

At that stage, the development of socialist market economy was more accentuated, therefore, an important slogan was "the separation of government and enterprises". Macro-economic control and the supervision of associations were increased, whereas, the entitlements of government to direct corporate management were reduced. The number of the general offices of the State Council was decreased from 42 to 1(!). Out of 19 background institutions, 13 were maintained, while the number of government agencies decreased from 9 to 5.[54] By 1993, the regime of cadres was replaced by the system of civil service, cadres converted into public servants (in Chinese: *gongwuyuan*), thenceforth, public administration was not based on sheer direct party loyalty.[55]

4.4. Reforms since 1998

By the time of the Ninth Five-Year Plan, the reforms had reached a new stage, therefore, new problems started to emerge. The reform of the economic system required the further reform of government functions and the further decrease of the number of background institutions. Since 1998, the essential content of the reforms can be summarised as follows: the importance of macro-economic control, direction of the society and the provision of public services is sustained. Simplification, unification and the principle of effectiveness are fundamental in Chinese public administration and the insistence on the efforts of the numerical decrease of government is characteristic. The distinct allocation of the functions among organisations is encouraged. The legal foundation of the system of public administration should be reinforced.[56] Due to the reforms of 1998, the personnel of the State Council were downsized to 16,700 (we should bear in mind that upon its establishment, the personnel numbered 51,000 people, thus, two thirds of that has been cut down.)[57]

4.5. The Personnel of Chinese Public Administration in figures

The apparatus of 8 million around 1958 swelled to 18 million by the 1980s. According to certain sources, this stratum numbers 35 million people today, which amounts to 2.5% of the total population as opposed to the world average of about 1%. According to the data of 1996, within that stratum 6,285,000 are leaders (from team leaders to ministers), which amounts to 18% of the total personnel and the number of women is merely 1 million. (In Chinese public administration, the proportion of men is 70% as opposed to the proportion of women of 30%.)

We can conclude that the issue of the number of the personnel will impose numerous tasks on PRC in the future, as well.[58] Undoubtedly, the instruments of public administrative law (in Chinese: *xingzhengfa*) need to be applied to solve the persistent problems.

[54] Xiong: *op. cit.* XI.

[55] Koi: A kínai közigazgatási reform... *op. cit.* 505. Concerning the Chinese equivalent see Koi: A kínai közigazgatási reform... *op. cit.* 503. On the Reform of 1993 see *Gōnggòng guǎnlǐ yǔ zhōngguó xíngzhèng gǎigé. Public Administration and Administrative Reforms in China* (Bilingual Monography). [s.l.] [s.a.] 49–93.

[56] Xiong: *op. cit.* XI–XII.

[57] Koi: A kínai közigazgatási reform... *op. cit.* 495–509, 505. Concerning the Chinese equivalent, see Koi: A kínai közigazgatási reform... *op. cit.* 504.

[58] Concerning Chinese civil service more amply, see Koi: A kínai közigazgatási reform... *op. cit.* 500–507.

5. The Reform of Civil Law

The majority of traditional Chinese law constitutes criminal law, whereas, the minor part is public administrative law. Within this framework, civil law hardly has a role.[59] In this part, we will examine the creation of the Chinese Civil Code thus, family law, commercial or labour law will be not subject to a detailed examination.[60]

Drafting the first Chinese Civil Code commenced in 1906, when with the involvement of Japanese legal experts, the Qing-dynasty of Manchurian origin launched the compilation of a new criminal code, the first Civil Code and commercial code. The draft was prepared by 1911. The Chinese Civil Code was taking effect gradually between 1929 and 1931.[61] Before its entry into effect, three parts of the draft had been compiled by 1911, two parts by 1916 and they are known as the Private Law Draft of the Qing-dynasty.[62] Subsequently to the entries into effect in 1929 and 1931, the law can be regarded as being in full effect only as of 1936.[63] Its text was published in English[64] and in Latin, as well.[65] This Chinese Civil Code has persisted only in Taiwan.[66] Concerning that Civil Code, Jordán comments that it was based on the Swiss Civil Code,[67] whereas, Hamza points out the impact of the Japanese Civil Code, the German BGB, the Swiss Civil Code (ZGB), the Swiss contract code (OR), the Siamese Civil Code, the Soviet-Russian Civil Code and of the Turkish Civil Code. Eventually, the law follows the Swiss model of the code unique.[68] This Civil Code of 1936

[59] Concerning Chinese traditional law and Chinese private law effective 3–4 decades ago, see the following main works on comparative law in Hungarian or translated into Hungarian on advice: David, R.: A kínai jog. In: David, R.: *A jelenkor nagy jogrendszerei. Összehasonlító jog* (Law in China. Contemporary Great Legal Systems. Comparative Law). From *Les grands systèmes de droit contemporains* transleted by Nagy Lajosné Dusa Margit. Budapest, 422–433; Hamza, G.: Kína (A Kínai Népköztársaság és Tajvan) (China. The People's Republic of China and Taiwan). In: Hamza, G.: *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján* (Trends in the Development of Private Law in Europe. The Role of the Civilian Tradition in the shaping of Modern Systems of Private Law). Budapest, 2002, 301–303. With reference to Chinese civil law and the Civil Code, see Jordán: *„Az ég magas..." op. cit.* 6, 27, 31, 32, 53–54, 107, 224–225, 234. A study on the method of comparative law see Péteri, Z.: Goals and Methods of Legal Comparison. In: Péteri, Z. (ed.): *The Comparison of Law. La comparaison de droit.* Selected Essays for the 9th International Congress on Comparative Law. Essais choisis pour le 9ᵉ Congrès International de droit comparé. Budapest, 1974, 45–58.

[60] On Chinese family law (and the law of marriage therein separately) in detail see Jordán: *„Az ég magas..." op. cit.* 213–240.

[61] Hamza: *op. cit.* 302.

[62] Koi, Gy.: Francia monográfia a modern kínai magánjogról (A French Monograph on Modern Chinese Private Law) [Piquet, Hélène: *La Chine au carrefour des traditions juridiques.* Bruxelles, 2005, 332.]. *Acta Facultatis Politico–Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae,* 44 (2007), 233–242, in detail see 237.

[63] Piquet, H.: *La Chine au carrefour des traditions juridiques.* Bruxelles, 2005,118.

[64] See the English-language version: *The Civil Code of the Republic of China I–V.* Shanghai, 1931. Quoted in: Hamza: *op. cit.* 301, footnote 369.

[65] See the Latin version: Jarre, C. R.: *Codex Juris Civilis Reipublicae Sinicae (translatus in linguam latinam).* Zhinanfu, 1934. Quoted in: Hamza: *op. cit.* 301, footnote 369.

[66] Hamza: *op. cit.* 303; Jordán: *„Az ég magas ..." op. cit.* 31–32; Koi: Francia monográfia a modern kínai magánjogról ... *op. cit.* 238.

[67] Jordán: *„Az ég magas ..." op. cit.* 32.

[68] Hamza: *op. cit.* 302.

was also called Six Codes (Sexapartitum), since it consisted of six parts.[69] In 1949, after the formation of PRC, a legal problem emerged. It was the Six Codes (it literally means "Six Code Completed Books" (in Chinese: *liufa;* in Japanese: *Roppo*)[70] that contained the most important six legal codes of the Republic of China (Taiwan).[71] This is not the same as the Six (Civil) Codes.[72] Since the Government of PRC in its General Program (Art. 17)[73] put into force a Directive Overruling the Guomindang Six Code Completed Book,[74] according to which all the repressive laws, decrees and courts of Guomindang shall be withdrawn.[75] Since PRC consequently persisted without a Civil Code, the need for drafting a new one emerged urgently. The respective work commenced as early as in 1954.[76] Following the death of Mao Zedong (1976), four drafts were promulgated between 1979 and 1982, the third one was published in 1981, whereas, the fourth one in 1982.[77] In 1986, the document framed between 1980 and 1986 designated as "General Principles of the Civil Law of the People's Republic of China" consisting of 9 Chapters and 156 Articles,[78] was adopted in 1986 and promulgated as a decree in 1987.[79] In December 2002, an important step forward was made, scilicet, the draft of the Civil Code was adopted by legislation, the People's National Assembly. This draft is 216 pages long and consists of 1209 sections. It includes the following 9 volumes:

- General Principles,
- Property Law,
- Contracts,
- Human Dignity and Civil Rights,
- Marriage,
- Adoption,
- Law Pertaining to Inheritance,
- The Order of Civil Law Liability,
- International Private Law.[80]

[69] Piquet: *op. cit.* 122.

[70] The six Japanese Codes are as follows: The Civil Code (in Japanese: *Minpo*), The Commercial Code (in Japanese: *Shoho*), The Penal Code (in Japanese: *Keiho*), The Constitution of Japan (in Japanese: *Nippon-koku-kenpo*), the Code of the Criminal Procedure (in Japanese: *Keiji-sosho-ho*), The Code of the Civil Procedure (in Japanese: *Minji sosho-ho*).

[71] The Six Codes of the Republic of China (Taiwan) are: The Constitution of Republic of China (in Chinese: *Xianfa*), The Civil Code (in Chinese: *Minfa*), The Code of the Civil Procedure (in Chinese: *Minshi susong fa*), The Penal Code (in Chinese: *Xingfa*), The Code of the Criminal Procedure (in Chinese: *Xingshi susong fa*), Administrative Laws (in Chinese: *Xingzhengfa*).

[72] Jordán: *Kína története. op. cit.* 53–54.

[73] "All laws, regulations and courts of the Guomindang which oppressed the people shall be overruled."

[74] Jordán: *Kína története. op. cit.* 53.

[75] Jordán: „Az ég magas ..." *op. cit.* 53.

[76] Koi: Francia monográfia a modern kínai magánjogról... *op. cit.* 239, footnote 21.

[77] Hamza: *op. cit.* 303, footnote 371.

[78] Hamza: *op. cit.* 303; Földi, A.–Hamza, G.: *A római jog története és institúciói* (History and the Institutions of Roman Law). Budapest, 12th ed., 2007, 131; Koi: Francia monográfia a modern kínai magánjogról ... *op. cit.* 238.

[79] Koi: Francia monográfia a modern kínai magánjogról... *ibid.*

[80] Piquet: *op. cit.* 201.

We need to draw the attention to the fact that contracts and the tenets of liability are dealt with separately in the text on general principles. This is practically due to the impact of common law. We can only wish that PRC drafts its Civil Code as soon as possible.

6. Closing Remarks

As an outset of this study, we stated that the evolution of Hungarian legal sinology is under a heavy handicap with regard to technical literature both written in Hungarian and translated into Hungarian in comparison for example with historical sinology. Therefore, a compendium with a legal viewpoint concerning the ongoing Chinese reforms for the recent 30 years with special respect to the People's Republic of China prevailing for 60 years would be urgently necessary. Historians and economists (especially those interested in world economy) have specialised in China both at the level of education and research rather than legal scientists flouting processes. This discipline demonstrated some interest in China substantiated by technical literature merely in the 1950s, however, this hardly overreached the scope of descriptive booklets translated from Russian. By this day, however, the People's Republic of China is an unevadable world power, a macro-economic factor and if you please, a factor determining international law. After yielding to the conception of class struggle following Mao's death, the reforms beginning 30 years ago linked up the Maoist state with the elements of social market economy, promoting thereby the fulfilment of the inherent nature of the Chinese peasant population, the majority of whom were born for trading. Our work has elucidated that the outset of the reforms as it was spontaneous cannot be attached either to 1978 or to 1979, therefore, it was not sparked off either by the secret product surplus appropriating movement or the CCP legitimating such organisations posteriorly, which considered the commencement of the reforms subsequently as a fact. The years of 1978–79 can be deemed as continuous commencement of the reform, in which the crucial role was played by the victory of Deng Xiaoping's pragmatist policy in 1978. This can be construed exclusively in the light of the death of Mao in 1976, who appointed his successor to be the orthodox Marxist Hua Guofeng supporting the Cultural Revolution. Considering the legal policy of the reforms, we examined three areas after an analysis of the historical roots, scilicet, the constitutional reform, the reform of public administration and of civil law. As a result of the reform of constitutional law, the 4th Constitution of PRC (9th Constitution of the state of China) took effect in 1982 during the reforms. It was amended 4 times in 1988, 1993, 1999 and 2004. In the scope of major policies, we need to highlight that socialist market economy has replaced the system of planned economy, as a result, the protection of private property, the effectuation of compensation for expropriation constitute the most essential changes of principle. It was a genuine Copernican turning point in constitutional law that Para. (1) of Art. 33 of the Constitution of PRC in 2004 provided that the state shall protect and respect human rights. We dealt with the reform of public administration in its temporality. Accordingly, 1982, 1988, 1993 and 1998 can be considered the dividing years of the reform, when the number of the staff of Chinese Government, i.e. the State Council implementing services and official functions as well as the number of politicians was massively reduced. The apparatus of the State Council formerly numbering 51,000 members decreased to 16,700 in 16 years (by 66%). The reforms considerably affected local governance, although the respective figures are less known. Notwithstanding, public administration can still be considered overstaffed.

The reforms of civil law are also significant, the objective of which was drafting new codices after the voidance of the bourgeois laws of the Guomindang. The work commenced in 1954, but the first four drafts were promulgated as late as between 1979 and 1982,

scilicet, during the period of the reforms. The document designated as the General Principles of the Civil Law of the People's Republic of China was framed between 1980 and 1986, it took effect in 1987 and has been functioning practically as a decree. The draft of the Chinese Civil Code was publicised in 2004. The reforms are bound to continue in the future, as well. However, the current Maoist political trend is unlikely to come to an end. Notwithstanding, the signs of democratisation are manifest in the territory of PRC, as well.

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BOOK REVIEW

GÁBOR HAMZA

Nótári Tamás: Marcus Tullis Cicero összes perbeszédei

(Marcus Tullius Cicero's complete pleadings).
Translated, notes and introduction by Tamás Nótári.
Szeged, Lectum Kiadó, 2010, 1276 p.

It is the first time that Marcus Tullius Cicero's complete pleadings have been published in Hungarian. These *orationes* are not just masterpieces of elocution but documents that provide insight behind the scenes of historical events of the 1st century B.C. At the same time, one cannot underestimate that the legal history source value of Cicero's life-work as a *corpus* that constitutes an integral part of Roman legal science *(iurisprudentia)* is a uniquely rich treasury of our knowledge of the public law, the state and legal theory thinking of the last century of the age of the Republic. The prime virtue of this volume lies just in this complexity: the analysis of the facts of the case providing the basis of lawsuits with philological precision through a lawyer's eyes in the course of translating and commenting upon the texts characterises both the introduction and explanations written with scientific demand and the translation polished with great care.

Although this work presents pleadings, the volume contains pleadings translated into Hungarian with an introductory study and notes, it is absolutely expedient to say a few words about the thoughts of the great son of Arpinum–especially about the timeliness of these thoughts. Cicero's life-work is extremely timely: *anno Domini* 2011 it is still worth concentrating on one scope of issues, specifically on the point that in Cicero's life-work, where pleadings constitute an organic part, the state and law, what is more, we should add, morals are conceived in a sense in a form as categories that presume a certain organised system, so to say institution system. Thus, the state, law organically linked to the state, and *mos*, *mores*, that is, morals inseparable from law cannot be examined without the institutions. This, however, does not mean that it is institutions only that make the state a state; instead, it is law inseparable from morals. In harmony with that one can quote Horatius's thought: *"leges sine moribus vanae proficiunt"* (carm. 3, 24, 35), that is, in free translation, laws without morals are categories without any value.

This thought of *Horatius* undoubtedly goes back to Cicero's "morals–state–law" idea. Actually, the concept of constitution, constitutional state can be traced back to Cicero too. Essential thoughts such as *consensus*, thus, *accord*, social accord–which will be further developed in the 18th century by French political thinkers and lawyers, among others Montesquieu–*consensus omnium (bonorum)* are expounded primarily in Cicero's *De re publica*, although these ideas play a role in the pleadings already (for example, in *Pro Sestio* and *Pro Milone*). Cicero did not restrict the concept of *consensus omnium bonorum* to certain privileged layers of society: he meant this category to include craftsmen, artisans as well as slaves loyal to the social order; in other words, actually even in terms of social thinking he can be considered a forerunner of modern thoughts. In addition to *consensus*

omnium bonorum, the other highly significant thought in Cicero's works is *utilitas publica*, that is, the idea of utility, public good that every citizen, each *civis Romanus* is lawfully entitled to. *Consensus* and *utilitas publica* are the principles that legitimise the State and law–and not primarily institutions.

A few words about Cicero's reception in Hungary. Cicero's thoughts assumed special role in Hungarian legal and legal philosophy literature, in Werbőczy's *Tripartitum*, in János Újfalusy Nepomuk's works, in the oeuvre of the famous legal philosophers Tivadar Pauler, Rudolf Werner, the noted criminal law expert Ferenc Finkey as well as Gyula Moór and one of the most outstanding figures of Hungarian legal philosophy, Barna Horváth. On the international scene, the effects of Cicero's highly rich and far-reaching thoughts can be demonstrated in Dante, Christian Wolff, Kant in specific forms.

Back to the Antiquity: in the age of *Iustinianus*'s codification, in the 6th century A.D., in the *Institutiones*, which had *vigor legis*, legal force, the words *lex* and *mos* are mentioned twice, at emphatic points, both in book 1 and book 4, although there is no reference to Cicero's name. The thought of *"omnes populi, qui legibus et moribus reguntur"* (1, 1), that is, *"every people that is governed by laws and morals"* goes back to Cicero. And what has similar significance with regard to the pleadings: in *caput* 17 of book 4 the following can be read concerning judges' obligations *(De officio iudicis)*: *"...in primis illud observare debet iudex, ne aliter iudicet, quam legibus atque constitutionibus aut moribus proditum est"*, that is, "in passing judgment judges must primarily take into account what is contained, manifested in laws, imperial decrees as well as customs and morals". Consequently, in the fourth book of *Iustinianus*'s *Institutiones* the instruction on judges' duties *(officia)*, office clearly reflects the effect of Cicero's thoughts–approximately six hundred years after Cicero's death.

Finally, I should like to refer to the last great Humanist, the Swiss Jacob Burckhardt, whose thoughts on *Richteramt* undoubtedly reflect Cicero's ideas. And in this respect the pleadings are again to be taken into account, that is, not the dialogues or Cicero's other works but specifically the pleadings published for the first time in Hungarian in Tamás Nótári's translation: from them we can build a bridge between law, unwritten law, statutes, the State, morals and Cicero. In Cicero's pleadings all this can be demonstrated in specific forms at several points: all the thoughts that are set out by him regarding the State, morals and law in his philosophical and political works are used by him in specific forms in his pleadings–among others especially with regard to judges' office. In this sense this is the particular connection, this is the bridge between judges' activity, one of the branches of power, and Cicero's thoughts; at the same time, it is another topical issue regarding Cicero's thoughts. It is, among others, for this reason that the rich material that is available in Cicero's pleadings–now also in Hungarian translation–is significant for the present time.

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ERRATUM

Editorial Statement

We would like to inform our readers that the revoked study of Attila Gábor Tóth with the title *From Uneasy Compromises to Democratic Partnership: The Prospects of Central European Constitutionalism* has been published because of technical error in Volume 52 Number 3 (pp. 220–235) of Acta Juridica Hungarica. The final version of the study can be found in Volume 13 Number 1 (pp. 80–96) of European Journal of Law Reform.

ACTA JURIDICA HUNGARICA, Vol. 52.

CONTENTS

STUDIES

BALOGH, Lídia:	Racist and Related Hate Crimes in Hungary–Recent Empirical Findings	296
BRAGYOVA, András:	Kant and the Constitutional Review Kantian Principles of the Neo-constitutionalist Constitutionalism	97
CRESCENZI, Andrea:	The Role of the Equality Bodies. The Italian National Office against Racial Discriminations	335
DEÁK, Dániel:	Removing Tax Barriers from the Clearing and Settlement of Cross-Border Capital Market Transactions	183
FRIEDERY, Réka:	Insight into a Special Relation: the European Parliament and the European Ombudsman	115
GRANGER, Marie-Pierre:	The Preamble(s) of the French Constitution: Content, Status, Uses and Amendment	1
HALÁSZ, Iván:	Symbolic Elements in the Preambles to the Constitutions of the Visegrad Countries	126
HOLLÁN, Miklós:	Trading in Influence: Requirements of the Council of Europe Convention and the Hungarian Criminal Law	235
KISTELEKI, Károly:	Changes in the Hungarian Regulation of Citizenship and the Hungarian Concept of Nation	133
KOI, Gyula:	The First Three Decades of Legal Reforms in the People's Republic of China (1978/1979–2008/2009)	348
KUDRNA, Jan:	Two Preambles in the Czech Constitutional System	19
LINDER, Viktória:	Balancing between the Career and Position-based Systems. Some Aspects of Recent Developments in Civil Service Legislation in Hungary	64
MOSCATELLI, Silvana:	The Multiple Discrimination in the European and Italian Context	316
NÓTÁRI, Tamás:	Translatio imperii–Thoughts on Continuity of Empires in European Political Traditions	146
PAP, András L.:	Ethnic Profiling and Discrimination: The International Context and Hungarian Empirical Research Findings	273

PIOTROWSKI, Ryszard:	The Importance of Preamble in Constitutional Court jurisprudence	29
PAVONE, Ilja Richard:	The Italian Legislation on Roma and Sinti and its compliance with European and international standards	325
POPŁAWSKA, Ewa:	Preamble to the Constitution as an Expression of the New Axiology of the Republic of Poland	40
ŠEJVL, Michal:	The Changing Role of the State: The State as a Mirror of the Individual?	157
SILAGI, Michael:	The Preamble of the German Grundgesetz– Constitutional Status and Importance of Preambles in German law	54
ŠTASTNÝ, Vít:	The Continuity and Discontinuity of the Titles of Supreme State Organs in the European Countries of the Communist Bloc with special attention to the Situation in Czechoslovakia	166
SZATHMÁRY, Zoltán:	Information Society and Its Deviances	256
SZMODIS, Jenő:	Taking Legal Philosophy Seriously	247
VARGA, Csaba:	Literature? In Substitution for Legal Philosophy? (Variations to and Uses of "Law and Literature")	207
VIDA, Alexander:	Trademark Infringement by Domain Name Registrars	341

OBITUARY

LAMM, Vanda:	LAJOS LŐRINCZ (1935–2010)	271

KALEIDOSCOPE

LITOVKINA, Anna T.:	"Where There's a Will There's a Lawyer's Bill": Lawyers in Anglo-American Anti-Proverbs	73
SZABADFALVI, József:	From Original Sources–Neo-Kantian Legal Philosophical Thinking in Hungary	82
PAPP, Tekla:	New Trends of Atypical Contracts in Hungary	171

BOOK REVIEWS

HAMZA, Gábor:	Tamás Nótári: Marcus Tullis Cicero összes perbeszédei (Marcus Tullius Cicero's complete pleadings)	369

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