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FREIE BEWEISWÜRDIGUNG UND DAS GUTACHTEN

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Die moderne Rechtspflege ist ohne Mitwirkung von Sachverständigen unvorstellbar. Taterfassungen beweisen, dass auch in Ungarn bei Strafsachen in immer zunehmenderen Anzahl jene Hilfe beansprucht wird, die die Vertreter der verschiedenen Wissenschaften und der einzelnen Fachzweige bei der Feststellung des Tatbestandes oder bei der Beweisführung, mittels Anwendung ihrer speziellen Fachkentnisse, den verfahrenden Behörden zu reichen fähig sind.

Die steigende Inanspruchnahme ist durch die mehrfache Wirkung der wissenschaftlich-technischen Revolution auf die fachmännische Expertentätigkeit zu erklären. Teils wird durch die raschem Tempo zunehmenden Kenntnisse, die neuen Untersuchungsmethoden und die hochempfindlichen Geräte die Verfertigung von immer zuversichtlichere Gutachten ermöglicht. Anderenteils erscheinen, infolge der Spezialisation, Vertreter verschiedener Fachgebiete unter den Gerichtsexperten, die in Fragen, die früher überhaupt nicht auftauchen konnten, den vorgehenden Behörden zur Verfügung stehen. Die explosionartige Erweiterung des Kenntnismaterials bedeutet wieder auf der Seite der Rechtantwendungsorgane, dass sie immer häufiger auf die Mitwirkung der Experten angewiesen sind. Es gibt immer weniger Angelegenheiten, bei denen auch die allgemeine Bildung zur Feststellung des wahrheitsgetreuen Tatbestandes hinreichend ist.

Die Aufwertung der Rolle des Experten erweckte notwendigweise des steigende Interesse der Fachliteratur. Es erschienen nacheinander die die Fragen der Beweisführung umfassend, beziehungsweise aus dem Gesichtspunkte der einzelnen Sachgebiete behandelnden Abhandlungen.[1] Neben zahlreichen in beruhigender

[1]Die Reihe der sich mit dem Expertenbeweis befassenden neuesten Bearbeitungen wurde von SZÉKELY, J. eröffnet Szakértők az igazságszolgáltatásban (Experten in der Rechtspflege) Köz-

Art gelösten theoretischen und praktischen Problemen gibt es aber noch zu beantwortende Fragen. Unter diese gehört eine der viel umstrittenen Fragen des modernen Strafverfahrensrechts: wie kommt das Prinzip der freien Beweiswürdigung in Bezug auf die Fachbegutachtungen zur Geltung. Das Problem ergibt sich daraus, dass Experten in Anspruch genommen werden müssen, wenn zur Feststellung oder Beurteilung der zu beweisenden Tatsachen Kenntnisse notwendig sind, über die der Richter nicht verfügt. Wie kann nachher der Richter die Fachbegutachtung würdigen, wenn zur Feststellung oder Beurteilung Fachkenntnisse notwendig sind, über die er nicht verfügt, und diese Tatsache durch Bestellung des Experten deklariert wurde. Die richtige Antwort kann durch Ergründung der Entwicklung der Theorie der Beweisführung von der Carolina bis zum heutigen Tag, durch Überblickung der Rolle der Erfahrungssätze im Zuge der Beweisführung ermittelt werden.

1. Die mit der Wertung des Sachverständigengutachtens zusammenhängenden Grundprobleme stammen aus dem Widerspruch zwei wichtiger Thesen der modernen Strafverfahrensrechte. Die erste ist die Wahrheitsfeststellungspflicht des Richters, die andere das Prinzip der freien Beweiswürdigung.

In dem das Verfahrensrecht den Richter dazu verpflichtet, dass er den zur Grundlage der Urteilung dienenden geschichtlichen Tatbestand wahrheitsgetreu feststellt, stellt es ihn vor eine Aufgabe, die er, gestützt auf eigenes Wissen, auf seine fachlichen Kenntnisse, nicht immer zu lösen vermag. Deshalb gewährt ihm das Recht - in gewissen Fällen schreibt es ihm sogar vor - dass er sich der Fachkenntnis anderer bei der Feststellung des Tatbestandes bedient, das heisst, er soll einen Experten in das Verfahren einbeziehen. Die Gestattung der Expertenmitwirkung gründet also auf der zwangmässigen Einsicht des Umstandes, dass der Richter der Gegenwart nicht über all jene Kenntnisse verfügen kann, die die Erfüllung seiner gesell-

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gazdasági és Jogi Könyvkiadó, Budapest 1967. Die letzte umfassende Monografie verfasste ERDEI, A. Tény és jog a szakvéleményben (Tatfrage und Rechtfrage im Gutachten) Közgazdasági és Jogi Könyvkiadó, Budapest, 1987 deren ausführliche Literaturverzeichnis fast die volle in ungarischer Sprache veröffentlichte Literatur umfasst

schaftlichen Funktion von ihm fordert.

Das Wesen des Prinzips der freien Beweiswürdigung ist aber, dass im Verfahren - die Worte unseres in Kraft stehenden Strafverfahrensgesetzes anwendend - "haben die Beweismittel keine im Vorhinein bestimmte Beweiskraft". Die vorgehende Behörde stellt entsprechend ihrer inneren Überzeugung die Beweiskraft der durch die einzelnen Beweismittel vermittelten Tatsachen fest. Um diesem Erfordernis nachkommen zu können, muss sie dazu jedes einzelne Beweismittel erwägen und zu werten wissen.

Der Widerspruch ist also gegeben: in dem der Richter den Experten bestellt, hat er es anerkannt, dass es zur Feststellung der zu beweisenden Tatsache oder Beurteilung solcher Fachkenntnisse bedarf, über die er nicht verfügt. Als er aber dann das Gutachten erhält, muss er es im Sinne des Gesetzes als Beweismittel werten, obwohl er durch die Tatsache der Bestellung des Experten signaliesiert hatte, dass er über die Kenntnisse nicht verfügt, aufgrund deren er selbst fähig gewesen wäre, die zu beweisende Tatsache festzustellen oder zu beurteilen. Wenn er aber nicht fähig ist, sich in den aufgetauchten Fragen zurecht zu finden, wie kann von ihm erwartet werden, dass er in der Frage Stellung nimmt, ob der Experte seine Aufgabe richtig oder fehlerhaft gelöst hat und dementsprechend die im Gutachten niedergelegten Tatsachen als Beweis in Betracht gezogen werden können, oder nicht.

2. Dieser Widerspruch ist nach einigen Ansichten der Fachliteratur unauflösbar, der Richter sei dazu ungeeignet, dass er die fachmännische Stellungnahme ebenso beurteilt, wie die sonstigen Beweise. Das sei aber gar nicht nötig - erklären weiter die Vertreter dieses Standpunktes - da doch der Experte eben deshalb bestellt wurde, dass er aufgrund seiner Fachkenntnis das Problem löst und den Richter über das Resultat informiert, dessen Rolle nunmehr nichts weiter ist, als das nicht anfechtbare Urteil des "wissenschaftlichen Richters" zur Kenntnis zu nehmen. Die Theorie "Experte-wissenschaftlicher Richter" steckt hinter all jenen Publikationen der Fachliteratur, die die Notwendigkeit der Wertung des Sachverständigengutachtens akzeptieren, dessen Möglichkeit aus dem Gesichtspunkt der Ge-

samtheit des Beweismaterials behaupten, jedoch für ausgeschlossen erachten, dass die Behörde die Wertung aus eng verstandenen fachlichen Gesichtspunkten durchführen kann.

Ein grösserer Teil der Fachleute erblickt aber bloss einen scheinbaren Widerspruch darin, dass die Behörde Experten bestellt, weil sie zur Beurteilung des Fachproblems über keine hinreichende Fachkenntnis verfügt, nachher aber die Tätigkeit des Experten doch überprüft. Die Vertreter dieses in der heimischen Literatur als vorherrschend geltenden Standpunktes erklären einstimmig, dass die Beurteilung des Sachverständigengutachtens ein unausschaltbarer Teil der inneren Überzeugung ist und die Behörden seien auch fähig das Sachverständigengutachten in einer Weise zu beurteilen, die den Ansprüchen der Rechtspflege entspricht.

I. Das Prinzip der freien Beweiswürdigung

3. Wenn wir den Wortlaut des § 61 Abs. /3/ unseres Strafverfahrensgesetzes gesondert, in sich untersuchen, wo es heisst: "die Beweismittel haben keinen im vorhinein bestimmte Beweiskraft", dann bedeutet es nichts anderes, als die gesetzliche Festhaltung dessen, dass das Strafverfahren nicht die Theorie der formalen Beweise befolgt. Dass aber die freie Erwägung der Beweise zum Grundprinzip des Strafverfahrens wurde, bedeutet mehr, als einfach die Verwerfung des Systems der gesetzlichen Beweisregeln. Wie es in der Fachliteratur heisst: "Die freie Beweisführung... ist nicht gleich mit der begründungsunnötigen, eventuell auf Eindrücke gründenden inneren Überzeugung"[2], "sondern die die Anwendung des Systems der gesetzlichen Beweisregeln verbietende Bestimmung gewährt Möglichkeit zu einer die rationale Überzeugung herausformenden Beurteilung"[3]. Wie es aus

[2] VÁMBÉRY, R.: A bünvádi perrendtartás tankönyve (Lehrbuch des Strafprozessrechts) Grill, K., Budapest, 1916. p. 131.

[3] NAGY, L.: A büntető eljárás magyarázata (Darlegung des ungarischen Strafverfahrens) Közgazdasági és Jogi Könyvkiadó, Budapest, 1982. p. 193.

den beiden Zitaten hervorgeht, kann das Prinzip der freien Beweiswürdigung in sich nicht erklärt werden; der wirkliche Inhalt wird nur dann klar, wenn wir die Umstände seines Entstehens nachgehen, die Änderungen seiner verschiedenen Auslegungen und seines Inhalts beachten.

Zur Demonstration der Vorstellungen betreffend das Wesen der Beweisführung im Strafverfahren - der Beweissysteme - und deren Änderungen, werden wir nicht die ungarische Rechtsentwicklung ins Auge fassen, sondern wir werden äusserst skizzenhaft auf jene Knotenpunkte hinweisen, die zu den heute für richtig geltenden Anschauungen geführt haben. Der Grund dafür ist, dass die ungarische Rechtsentwicklung keine Sonderwege begangen hat, sondern teilte das Schicksal des kontinentalen Rechts, als ein Teil desselben. Die Befolgung der europäischen Rechtsentwicklung war aber nicht immer freiwillig. Gerade bei dem Strafverfahrensrecht kann beobachtet werden, dass dieses uns aufgedrungen wurde, falls wir ihn nicht freiwillig übernehmen wollten. Beispiel dafür ist die Praxis Criminalis vom Ferdinand III, oder das österrichische Strafverfahrensrecht, das in einzelnen Teilen Ungarns (Siebenbürgen und Fiume) bis 1900 geltend gewesen ist.

4. Die sich im Laufe der Rechtsgeschichte herausgebildeten Beweissysteme werden in den Lehrbüchern in drei Gruppen geteilt. Diese sind: das gesetzliche (oder formelle), das freie und das gemischte System.[4]

5. Im gesetzlichen (oder formellen) Beweissystem wird die Beweiskraft der prozessualen Beweise im Gesetz im Voraus bestimmt. Der Richter war nicht dazu befugt, die Beweise nach eigenem Ermessen zu erwägen; seine Aufgabe bestand darin, das im Gesetz im Vorhinein bestimmte Mass bei den ihm als Beweis vorgelegten Tatsachen anzuwenden und daraus die ebenfalls gesetzlich vorgeschriebenen Konsequenzen zu ziehen.

Die gesetzliche Beweistheorie hatte drei klar separierbare Formen: a/ die zur Zeit des frühen Feudalismus in ganz

[4] Cf. z.B. FINKEY, F.: A magyar büntető eljárás tankönyve (Lehrbuch des ungarischen Strafverfahrens). Politzer Kiadó, Budapest, 1908. p. 241.

Europa verbreitete rein formelle, b/ die darauf folgende positive Beweistheorie und c/ die zeitmässig als letzte erscheinende negative Beweistheorie.

ad a/ Über die älteste Form des Systems der gesetzlichen Beweisregeln blieb kein einziges Element erhalten, das das heutige Gesicht der Beweisführung beeinflussen würde. Der an äusserst strengen Formen gebundene Beweisführung war nämlich nicht auf die Erkennung der Wahrheit gerichtet, die gestatteten Mittel des Beweises (Eid, Gottesgericht, Duell) eigneten sich auch gar nicht dazu. Planck bemerkt richtig: "Das Beweisen besteht darin, dass die Partei den Gegnerischen Widerspruch gegen ihre Behauptung durch Erfüllung der vom Gesetz zu diesem Zweck vorgeschriebenen Form beseitigt ... Der Gegenstand des Beweisens ist die Parteibehauptung in ihrer juristischen Fassung, nicht die derselben zu Grunde liegenden Tatsachen."[5]

ad b/ Durch die positive Beweistheorie wurde im Gesetz im Voraus bestimmt, was als Wahrheit gelten soll: falls die gesetzlich vorgeschriebenen Beweise zur Verfügung standen, musste der Richter den Beschuldigten verurteilen, völlig unabhängig davon, das derselbe, nach seinem Ermessen, schuldig war, oder nicht. Und umgekehrt, der Richter wäre anhand der triftigen Indizien umsonst von der Schuldigkeit des Angeklagten überzeugt gewesen, erhätte ihn nicht verurteilen können, bis die formellen Beweise nicht erbracht worden waren. Diese Struktur des Beweisens ist auch dem heutigen Recht nicht völlig fremd: bei den unanfechtbaren Vermutungen kann der Richter bei der Wahrnehmung der vermuteten Tatsache auch nichts anderes tun, als die vermutete Tatsache kraft des gesetzes festzustellen und die daraus folgende rechtliche Konsequenz zu ziehen.

Die positive Beweistheorie wurde das erste mal seitens Schwarzberg in seiner Gänze in dem durch den römischdeutschen Kaiser Karl V. herausgegebenen Strafkodex, in der Constitutio Criminalis Carolina abgefasst. Die Carolina betrachtete für ein vollwertiges Beweismittel - auf welches ein Urteil ge-

[5] PLANCK, J.W.: Das deutsche Gerichtsverfahren im Mittelalter. C.A. Schwetschke und Sohn. Braunschweig, 1879. Band II pp. 2-3.

gründet werden kann - nur das Geständnis des Beschuldigten und die durch zwei oder drei glaubwürdigen, guten Zeugen (wie die Carolina den in der Fachliteratur seither mit der Bezeichnung "klassisch" bezeichneten Begriff der Zeugen formuliert) getätigte Beweisung.

Zwar wurde die Carolina, mit ihren strengen Beweisgebundenheiten schon Jahrhunderte vorher durch die Rechtsentwicklung überholt, lebt das Geständnis und die überzeugende Kraft einer übereinstimmenden Zeugenaussage von zwei vertrauenswürdigen Zeugen heute noch hartnäckig im Bewusstsein der Gesellschaft. Gut erkennbar ist das in der zu Sprichwort gewordenen Formel "ein Zeuge ist kein Zeuge", oder die Tatsache, dass die schreienden Ungerechtigkeiten der Konzeptionsprozesse durch das "Geständnis" der Beschuldigten gerechtfertigt werden sollte. Es wäre aber scheinheilig, wenn wir behaupten wollten dass die Rechtspflege unserer Tage von diesen, im öffentlichen Bewusstsein eingebürgerten Prinzipien der gesetzlichen Beweistheorie völlig unabhängig wäre. Aus dem Gesichtspunkt der Beweisung wird auch heute noch das Geständnis als führend betrachtet und auch die Zeugenaussage ist im Verhältnis zu den übrigen Beweismitteln in einer präferierten Lage.[6]

Die Carolina beurteilte, über die vollwärtigen Beweise hinaus, sämtliche Angaben oder Tatsachen, die auf die Verübung oder die Person des Täters hinwies, im Bereich der Indizien. Die Normen der prozessualen Anwendung der Indizien kamen durch Kodifizierung jener Lebenserfahrungen, empirischer Feststellungen zustande, die hunderte von Richtern in tausenden von Prozessen im Zusammenhang mit den einzelnen für möglich geltenden Beweismitteln im Laufe der Zeit erwarben. Die Indizien spielten teils bei der Einleitung des Verfahrens, teils bei der "kriminellen Vernehmung", der Verordnung der Folter, eine Rolle.

Der grosse Fehler des Beweissystems der Carolina war die Möglichkeit der Erzwingung des Geständnisses. Das ist der er-

[6]Cf. SZABÓNÉ NAGY, T.: A büntető igazságszolgáltatás hatékonysága (Die Wirksamkeit der Strafrechtspflege). Közgazdasági és Jogi Könyvkiadó, Budapest, 1985. pp. 128 et seq.

ste Grund für die allgemeinbekannte Tatsache, dass Kodexe mit positiv gebundenen Beweissystemen praktisch[7] nicht zu dem geworden sind, wofür sie gemeint waren, nämlich zu verhindernden Faktoren von eigenmächtigen Richtersprüchen. Jedoch mit den auf völlig irrationalen Beweisen gründenden Verfahren des frühen Mittelalters verglichen, war diese Form der gesetzlichen Beweistheorie doch ein Fortschritt, richtete sich doch hier die Beweisung schon auf das Delikt und das Urteil ist das Ergebnis der - durch das Gesetz zwischen strenge Schranken gezwungenen - wahrheitsforschenden Tätigkeit des Richters.[8] Trotz all seine Fehler war dieses System der erste Schritt zur Herausformung der modernen Beweisungstheorie.

ad c/ Die negative Beweistheorie kam - transmissiv zwar, doch unter Wirkung der Ideen der Aufklärung - auf deutschem Gebiet zustande, wo der Ausfall der bürgerlichen Revolution auch auf dem Gebiet des Rechts bloss eine langsame Evolution ermöglichte. In Deutschland ging zuerst die Abschwächung der positive Beweistheorie vor sich. Durch Abschaffung der Tortur kamen von der zweiten Hälfte des XVIII. Jahrhunderts die Richter in eine Situation, die die Verrichtung ihrer Aufgaben praktisch beinahe unmöglich machte. Die Carolina (Art. 22) beziehungsweise die darauf folgenden partikulären Gesetze gestatteten nicht die Verurteilung aufgrund von Indizien, was in Ermangelung der klassischen Zeugen notwendigerweise zur Freisprechung des nichtgeständigen Beschuldigten führte, gab es doch keine Möglichkeit mehr, ihn der Folter zwecks Erzwingung des Geständnisses zu unterwerfen. Das verursachte im Strafrecht eine wohl fühlbare Lücke, worüber teils durch Missinterprätation des Art. 22 der Carolina, teils dadurch hinwegkommen wollte, "... dass man eine 'Verdachtsstrafe' oder die ihr praktisch nicht viel

[7] Bezüglich der Gerichtspraxis in Ungarn für die Periode 1770-1795 s. HAJDU, L.: Büntett és büntetés Magyarországon a XVIII. század utolsó harmadában (Straftat und Strafe in Ungarn im letzten Drittel des XVIII. Jahrhunderts). Magvető Kiadó, Budapest, 1985. pp. 45-110.

[8] HENKEL, H.: Strafverfahrensrecht (Ein Lehrbuch). W. Kohlhammer Verlag, Stuttgart etc. 1968. p. 43.

nachstehende 'Entbindung von der Instanz', d.h vorläufige Lossprechung mit der Möglichkeit jederzeitiger Fortsetzung des Verfahrens erkannte."[9] Es gab Gebiete, wo der Gesetzgeber die Indizium-Beweisung auch zur Verurteilung gestattete - wie z.B. die Josefina - die Hand des Richters freilich mit Unmengen von Regeln bezüglich der Würdigung der Indizien bindend.[10] Eine Lösung brachte schliesslich, dass die Rolle der richterlichen Überzeugung anerkannt werden musste.

Durch die negative Beweistheorie wurde jene lange Zeit hindurch geltende Anschauung durchbrochen, dass die persönliche richterliche Überzeugung bei der Urteilfällung unnötig, ja gar nachteilig ist, und sie hatte immer mehr die Oberhand. Die Einsicht dessen wurde richtunggebend, dass sämtliche Normen objektiven Charakters eine subjektive Wertung in sich bergen. Demnach konnte also der Richter aufgrund vollwertiger Beweise verurteilen, falls er selber von dem Verschulden des Angeklagten überzeugt war, er war aber - im Gegensatz zur positiven Beweistheorie - nicht mehr verpflichtet dazu, d.h. er konnte auch aufgrund vollwertiger Beweise lossprechen. Andererseits aber bedurfte es dem Richter zur Verurteilung - über die Überzeugung von der Schuldigkeit des Angeklagten hinaus - eines im Gesetz festgelegten Beweisquantums.

Die Bedeutung der negativen Beweistheorie kann also für die heutigen verfahrensrechtlichen Überlegungen darin erfasst werden, dass anhand einer längeren evolutionären Entwicklung die Rolle der richterlichen Überzeugung bei der Feststellung der Wahrheit anerkannt wird, hinweisend gleichzeitig darauf, dass die Rolle der die Überzeugung auslösenden prozessuellen Beweise auch nicht als secundär betrachtet werden kann. Die Betonung dieses letzteren Gedanken ist deshalb wichtig, weil die die Rolle der richterlichen Überzeugung in radikaler Weise

[9] KRAUSE, D-W.: Zum Urkundenbeweis im Strafprozess. Hansichen Gildenverlag, Hamburg, 1966. p. 13.

[10] KATONA, G.: Bizonyítási eszközök a XVIII-XIX. században. A Kriminalisztika magyarországi előzményei (Beweismittel in den Jahrhunderten XVIII-XIX. Die Vorläufer der Kriminalistik in Ungarn). Közgazdasági és Jogi Könyvkiadó, Budapest, 1977. p.385.

deklarierende französische revolutionäre Gesetzgebung denselben zugunsten der "conviction intime" zu vernachlässigen schien.

6. Die Theorie der freien Beweiswürdigung gründete auf der inneren Überzeugung, der "conviction intime": der Richter wiegt den Wert des in der Strafsache untersuchten Beweise in seinem eigenen Gewissen und entscheidet, ob diese zur Feststellung der Schuldigkeit genügen oder nicht. Jene Debatten, im Laufe deren die Konstituierende Versammlung das vor der Revolution auch in Frankreich in Geltung gewesene, auf die Theorie der formalen Beweise beruhendes inquisitorielle Strafverfahren verwarf und anstelle dessen das auf der inneren Überzeugung gründende freie Beweissystem übernahm, und für dessen Verfahrensform das die wesentlichen Züge des englischen Anklagesystems, nämlich das Schwurgericht wählte, ist es Sitte, diese Debatten anhand des Werkes von F. Helie "Traité de l'instruction criminelle"[11] zu beschreiben. Diese Tradition brechen, zitiere ich nicht sämtliche - übrigens sehr lehrreiche - Details dieser Debatte. Ich habe bloss hervor, dass das grundlegende Argument der Verteidiger der gesetzlichen Beweistheorie war, dass die freie Beweiswürdigung zur Unkontrollierbarkeit, zur richterlichen Eigenmächtigkeit führen kann. In der Debatte siegten schliesslich die Fürsprecher der freien Beweiswürdigung und es kam jener Gesetzestext zustande, der dann später im Artikel 342 des Code d'instruction criminelle erschien.[12]

[11] Adolphe Wahlen et Companie, Bruxelles, 1845.

[12] "La loi ne demande pas compte au jurés des moyens par lesquels ils se sont convaincus; elle ne leur prescrit point de règles desquelles ils doivent faire particulièrement dépendre la plénitude et la suffisance d'une preuve; elle leur prescrit de s'interroger eux-mémes dans le silence et le receuillement, et de chercher, dans la sincérité sur leur conscience, quelle impression on faite sur leur raison les preuves rapportées contre l'accusé, et les moyens de sa défence. La loi ne leur dit point: 'Vous tiendrez pour vrai tout fait attesté par tel ou tel nombre de témoins'; elle ne leur dit pas non plus: 'Vous ne regarderez pas comme suffisamment établie toute preuve qui ne sera pas formée de tel procès-verbal, de telles pièces, de tant de témoins ou de tant d'indices'; elle ne leur fait que cette seule question, qui referme toute la mesure de leurs devoirs: 'Avez-vous une intime conviction?'"

Die Gegner der freien Beweisführung erblickten im Gesetzestext die Aufhebung der formellen Gebundenheit des Verfahrens, die Unregulierbarkeit der Beweisführung. Der in der Debatte des Convents vertretener Argumentierung treu folgend beschreiben die damaligen deutschen Autoren - als Apologeten der negativen Beweistheorie - die auf der inneren Überzeugung gründende freie Erwägung der Beweise ebenfalls als "orakelhafte moralische Überzeugung", "als unklare, keine verständige Prüfung der Beweise fordernde Anweisung an die Geschworenen", mindestens aber "als urkontrollierbare Gewissenentscheidung".[13] Im Zuge der mit ihnen geführten Debatte gelangte die deutsche Dogmatik von der "conviction intime", diese mit dem positiven Kern der gesetzlichen Beweistheorie, zur "conviction raisonnée", d.h. zur Forderung der rationalen richterlichen Überzeugung. "Wenn aber Überzeugung mehr ist, als 'dunkles, instinctartiges Gefühl', nämlich Ergebnis rationaler Forschung und logischer Schlussfolgerungen, wenn anders die Beweisregeln mehr sind als lediglich positive Rechtsnormen, nämlich das Aussprechen von 'logischen Gesetzen', von 'sich von selbst Verstehendem', von 'Grundsätzen der Erfahrung', dann haben sich die beiden ursprünglich so feindlich gegenüberstehenden Beweistheorien, die gesetzliche und die freie, angenähert, gegenseitig befruchtet und der Synthese der 'conviction raisennée' aufgehoben".[14]

7. Das Prinzip der freien Beweiswürdigung steht derartig nicht mehr in krassem Gegensatz mit der Theorie der formalen Beweise, sondern es ist eine Art organische Fortsetzung derselben. Aus der Synthese der beiden entstand das gemischte System, wodurch diese Linie der Entwicklung als abgeschlossen betrachtet werden konnte.

Das Beweisrecht des gemischten Systems bindet zwar den Richter nicht an eine für sämtliche Fälle geltende, gebundene, steife, abstrakte gesetzliche Regelung in Bezug auf die Wertung des Beweismaterials, er ist aber an die Gesetze der Überlegung

[13] KÄSSER, W.: Wahrheitsforschung im Strafprozess. J. Schweitzer Verlag, Berlin, 1974. p. 38.

[14] KÄSSER: op. cit. p. 40.

und an die Tatsachen der Erfahrung gebunden. Dazu aber, dass der im Prozess zur Entscheidung berufene Richter die Thesen der Erfahrung in Betracht ziehen kann, muss er diese irgend wie kennenlernen. Früher war das im System der gesetzlichen Beweisregeln kein Problem, kam doch die Indiciumlehre des Gesetzes eben dadurch zustande, dass die Erfahrungssätze und deren Beweiswert kodifiziert wurden. Das heisst die aus dem Gesichtspunkt der Rechtspflege für wesentlich erachteten Thesen wurden Bestandteile des Rechts und die Kenntnis derselben wurde von einem gelehrten Richter erwartet (jura novit curia).

Die gesetzliche Beweistheorie und mit ihr die gesetzliche Indiciumlehre verschwand und die überwiegende Menge der Erfahrungssätze wurden ausserrechtlich. Dazu kam noch der Umstand, dass sich die explosionsartige Ausbreitung des der Menschheit zur Verfügung stehenden Kenntnisvermögens grösstenteils in dieser Periode abspielte. Die Trennung der Wissenschaften und Spezialisierung der Kultivatoren derselben, die Aufhäufung der Kenntnisse machte es unmöglich, dass der Richter im Besitze der Gesamtheit der Erfahrungssätze sei, und auch das Gesetz gewährte nunmehr für die auftauchenden Probleme keine Direktiven. Diese Situation stellte einen auch früher schon gekannten, jedoch nur selten angewandten Funktionär des Prozesses notwendigerweise in den Vordergrund, nämlich den Experten, der die Lücken der Kenntnisse des Richters ausfüllen konnte. Die Aufwertung seiner Rolle stellte dann die Fragen der Beweisführung durch Sachverständigen auch in der Theorie in den Vordergrund. Wohl spiegelt sich das in den Anfang des XIX. Jahrhunderts bezüglich der rechtlichen Natur des Experten und des seitens desselben gelieferten Beweises entstandene Debatte, deren Nachleben in der Handhabung des Experten als faktischer Richter (judex facit) auch heute noch aufscheinen.[15]

8. Hinsichtlich seines Beweisführungssystems befolgt unser in Kraft stehendes Recht - ähnlich den sozialistischen

[15]Darlegung: POPPEN, E.: Die Geschichte des Sachverständigenbeweises im Strafprozess des deutschsprachigen Raumes. Musterschmidt Verlag, Göttingen, 1984. pp. 233 et seq.

Strafverfahrenskodexen - das gemischte System. Dementsprechend ist die Freiheit der Beweisführung sowie die freie Beweiswürdigung als wichtigste Charakteristiken des freien Beweissystems in Abs. /3/ des § 5, bzw. Abs. /3/ des § 61 des Strafverfahrengesetzes festgehalten. Und Abs. /1/ des § 61 enthält den Katalog der im Beweisverfahren gestattete Beweismittel, beziehungsweise schreibt das Gesstz zur Entscheidung einzelner Fragen die Inanspruchnahme bestimmter Beweismittel pflichtartig vor (z.B. eben in dem uns berührenden Thema, wo es in Abs /2/ des § 68 heisst: "Die Zuziehung eines Sachverständigen ist zwingend, wenn die zu entscheidende Frage a/ einen pathologischen Geisteszustand, b/ die Notwendigkeit einer Zwangsheilbehandlung oder einer Zwangsbehandlung von Alkoholikern betrifft", welche Normen aber aus dem System der gesetzlichen Beweisregeln stammen).

Dadurch, dass das Gesetz zur Entscheidung gewisser Fragen die Sachverständigenmitwirkung pflichtmässig vorschreibt, kann aber das Prinzip der freien Beweiswürdigung keinen Abbruch erleiden. Gegenstand der freien Erwägung ist also eine Angabe oder eine Tatsache auch in dem Fall - schreibt Frau Szabó, Therese Nagy im Kommentar des geltenden Gesetzes -, wenn diese aus Beweismitteln stammen, deren Anwendung im Gesetz als Pflicht vorgeschrieben ist.[16]

Unsere Kommentarliteratur betont mit Nachdruck, dass die freie Erwägung der Beweise keinesfalls ein von der subjektiven Meinung der Richter abhängige Verfahren, ihre Willkür bedeuten kann. Die für frei geltende Würdigung ist durch die Gesetze der Logik, sowie durch die in der Sache zur Verfügung stehenden Beweise gebunden. Es ist Lehrbuchthese, dass "in der Wertung kommen die Normen der Logik, der Wissenschaften, die durch die gesellschaftliche Praxis bestätigten Erfahrungen zur Geltung. Bei der Wertung haben die Behörden insofern keine unbeschränkte Freiheit, als sie soch an die erwähnten Regeln halten müssen".[17]

[16] A büntető eljárás magyarázata. (Darlegung des ungarischen Strafverfahrens). Közgazdasági és Jogi Könyvkiadó, Budapest, 1982. p. 37.

[17] Magyar büntető eljárási jog (Ungarisches Strafverfahrensrecht) Tankönyvkiadó, Budapest, 1982. p. 256.

Von einer Erwägungs-, Wertungsfreiheit können wir nur dort sprechen, wo echte Alternativen existieren, wo eine Wahl möglich ist. Dort, wo zum Beispiel, unter Einhaltung der Regeln der Logik nur eine Folgerung möglich ist, ist die freie Erwägung begrifflich ausgeschlossen, da ja nur eine Wahl möglich ist: die Erkennung der Notwendigkeit, jede andere Alternative ist falsch. Es ist freilich denkbar, dass der Richter auch in einem solchen Fall eine reale Wahlmöglichkeit zu entdecken glaubt und sich "frei" erwägend, irrt. In diesen Fall aber entbehrt das Urteil der Grundlage und das zieht sämtliche Rechtsfolgen nach sich.

II. Die Erfahrungssätze

9. Die Erfahrungssätze sind Feststellungen allgemeinen Inhalts, die Beobachtungen und Erfahrungen des alltäglichen Lebens, der allgemeinen Bildung, beziehungsweise der Fachkenntnis der unterschiedlichsten Wissenschaftszweige in sich fassen, und ihrer Erscheinungsform nach Definitionen oder hypotätische Urteile sind. Konkrete individuelle Fälle kommen aus der Vielzahl der Beobachtungen durch Induktion zustande. Sie gründen auf der Beobachtung, dass sich unter identischen Bedingungen des identische Ergebnis (Folge) immer in identischer Art einstellt. Durch diese Erfahrung wird die Voraussetzung bestätigt, dass in den künftigen, bisher noch nicht wahrgenommenen identischen Fällen die Fo gen identisch sein werden. Wenn wir also die Vorbedingungen und die Ergebnisse verallgemeinert abfassen, entsteht der Erfahrungssatz.

Die Erfahrungssätze können offensichtlich sein, wenn diese in einem breiteren Kreis bekannt sind, beziehungsweise, wenn sich über deren Richtigkeit jedermann leicht überzeugen kann, es ist aber auch möglich, dass sie einen bestimmten Bildungs- oder Beschäftigungskreis voraussetzen. Die zur ersten Gruppe gehörenden Erfahrungssätze sind die aus dem Gesichtspunkt der Rechtsanwendung allgemein bekannte Tatsachen, die im Strafverfahren keiner speziellen Beweisung bedürfen, während die in der zweiten Gruppe beschriebenen gemäss des Strafverfahrensgesetzes den Inhalt der von den Experten zu erwartenden "speziellen Fachkenntnisse" bilden.

Im Interesse der Erleichterung ihrer Anwendung in der Beweisführung wurde versucht die unzähligen, auf den verschiedensten Gebieten des Lebens existierenden Erfahrungssätze in der verfahrensrechtlichen Literatur nach den verschiedensten Gesichtspunkten zu gruppieren. KASPER[18] unterscheidet die folgenden drei Gruppen:

a/ Die einfachen Erfahrungssätze, für die es charakteristisch ist, dass sie gemäss der allgemeinen Lebenserfahrungen zwar eine bestimmte Warscheinlichkeit enthalten, aber keineswegs Allgemeingültigkeit beanspruchen können. Von der in ihnen abgefassten Regeln gibt es immer eine reale Ausnahme, oder ist eine solche zumindest vorstellbar. Die Mehrheit der Erfahrungsthesen gehört unter die einfachen. Ihre gemeinsame Eigenschaft ist die mangelnde Verlässlichkeit und Präzision in Einzellfall sowie die nur ungenaue, unscharfe und allgemeine Fassung an den Voraussetzungen. Ihre Formel ist "wenn - dann oft oder manchmal, aber keineswegs immer". Ebendeshalb verfügen die einfachen Erfahrungsthesen in sich über verhältnismässig geringe Beweiskraft.

b/ Die absoluten oder allgemeingültigen Erfahrungssätze verkörpern das höchste Grad der überhaupt erreichbaren Sicherheit und nach menschlichem Ermessen gibt es von ihnen keine Ausnahmen. Hierher gehören vor allem die Naturgesetze und die durch methodischen Forschungen ermittelten, exakt begründeten und widerspruchslos niedergelegten wissenschaftlichen Ergebnisse. Sie können auch von den allgemeinen Lebenserfahrungen abstammen. Ein solches ist zum Beispiel das Beispiel der Alibi-Beweise, oder die Tatsache, dass jeder Mensch sterblich ist. Von diesen gelang es noch nie eine Ausnahme zu finden und eine solche Ausnahme ist auch unvorstellbar. Ohne dem Verfasser widersprechen zu wollen, möchte ich bloss darauf hinweisen, dass mir seine Beispiele deshalb nicht überzeugend anmuten, weil hinter denen immer präzis definierte Naturgesetze stehen und ich meinerseits könnte für die "allgemeine Lebenserfahrung" überhaupt kein Beispiel vorbringen, die durch die Wissenschaft nicht erklärt wor-

[18] KASPER, S.G.: Freie Beweiswürdigung und moderne Kriminaltechnik. Kriminalistik Verlag, Hamburg, 1975 pp. 39 et seq.

den wäre. Aufgrund dessen darf es vorausgesetzt werden, dass die allgemeinen Lebenserfahrungen nichts anders sind, als die alltäglichen Abfassungen von wissenschaftlichen Thesen.

Die Hauptkennzeichen der absoluten Erfahrungssätze sind zufolge KASPER, dass sie keine Ausnahme erleiden, deshalb sind sie auf der gegebenen wissenschaftlichen Ebene der Gesellschaft praktisch unüberschreitbar.

Die Grenze also zwischen den einfachen und den allgemeingültigen Erfahrungssätze ist der Umstand, ob gemäss des gegenwärtigen Niveaus des menschlichen Wissens Ausnahmen existieren, oder solche nicht existieren. Bejahendenfalls sind sie: einfache, im verneinenden Fall: allgemeingültige. Angesichts dessen jedoch, dass die Grenzen bei weitem nicht immer so einfach gezogen werden können, erscheint es zweckmässig, die Grenzfälle in eine Sondergruppe einzuordnen. Diese ist:

c/ die besonders sicheren Erfahrungssätze oder "Erfahrungsgrundsätze". Diese stehen, ihrer Vorbedingungen und ihrer Wirkung nach, den absoluten Erfahrungssätzen nahe, obzwar sie den Sicherheitsgrad derselben (ausnahmslose Geltung), nie erreichen. Wie bei sämtlichen Gattungen der Erfahrungssätze, geht es auch hier um die "Abstrahierung des Vorganges", die, wenn auch nicht immer, aber im allgemeinen identisch verläuft. Die Erfahrungsgrundsätze können von den einfachen durch das Kennzeichen der regelmässigen Wiederholung, und von den allgemeingültigen aufgrund der realen Möglichkeit der Ausnahme unterschieden werden.

10. Aus dem Gesichtspunkt einer erfolgreichen Rechtspflege werden die Erfahrungstsätze der Kriminalistik und innerhalb deren die der Kriminaltechnik für wichtig erachtetet. Der Grund dafür ist, dass das wissenschaftlich begründete und streng objektive Kenntnismaterial der Kriminaltechnik viel dazu beigetragen hatte, dass die Wertung der Beweise aus der Dunkelheit der Subjektivität herausgehoben werden, und dass die Feststellung der Wahrheit in immer grösserem Umfang objektiv kontrollierbar wurde.

Der objektive Beweis gelangt meistens durch die Anwendung der Kriminaltechnik in das Verfahren, ihre Untersuchung geht durch die entsprechend adaptierten phisikalischen, chemischen

und mathematischen usw., das heisst naturwissenschaftlichen Methoden vor sich. Die Untersuchung kann derweise sowohl in ihrer Durchführung als auch in der Endfolgerung jederzeit auch nachträglich kontrolliert werden. Der objektive Beweis ist also zur Objektivierung des Verfahrens geeignet, da durch ihn die freie Erwägung des Richters beschränkt wird, so dass letzterer im Zuge der Feststellung des Tatbestandes die durch die Kriminaltechnik gelieferten Ergebnisse etwa übersetzt. Durch die kriminalistischen Methoden wird, durch ihre immer breitere Anwendung, die richterliche Erwägung auf die durchgehende Beachtung und Kontrollierung des naturwissenschaftlichen Denkprozesses beschränkt. Mit anderen Worten: die Freiheit der Beurteilung der Beweise nimmt in dem Mass ab, als die Beweismittel objektiviert werden.

Die Objektivierung der Beweismittel geht freilich nicht bloss durch die Anwendung der Kriminaltechnik, durch die in die Vordergrundstellung der objektiven Beweise vor sich. Der komplizierte Vorgang der Fällung einer Entscheidung erfordert den Ausbau eines geschlossenen Systems der Gesetzmässigkeiten der Logik, durch welches die einzelnen Schritte der Entscheidungsfällung objektiviert und optimal gestaltet werden. Dazu kann die Entscheidungs- und Systementheorie, die Operationsforschung, die Kibernetik und zahlreiche weitere Elemente und die Kenntnis der modernen Wissenschaft beitragen. Derweise werden die Aussagen der Zeugen und der Verdächtigten immer mehr kontrollierbar, die Tendenz der Entwicklung ist, dass solche Aussagen bloss durch naturwissenschaftlich verifizierbaren Methoden kontrolliert Grundlage der Entscheidung bilden sollen.[19]

11. Die Resultate der Wissenschaft werden im Wesentlichen auf zwei Arten im Strafverfahren nutzhaft. Sie können durch die vorgehenden Behörden angewandt werden. In diesen Fällen erscheinen die wissenschaftlichen Tatsachen im Beweisverfahren als allgemeine Thesen irgend einer Operation. Diese Thesen brauchen gar nicht bewiesen zu werden, sie erlangen von selbst Beweis-

[19] HEROLD, H.: Erwartungen von Polizei und Justiz in der Kriminaltechnik. Kriminalistik 1/1979.

kraft. Dessen Grund ist, - legt Tibor KIRÁLY[20] fest - dass die wissenschaftlichen Thesen durch wissenschaftlich-logische Beweise bereits bestätigt sind un so allgemein akzeptiert werden.

Eine andere Art der Nutzung der wiasenschaftlichen Thesen ist die Mitwirkung von Experten. Die wissenschaftlichen Ergebnisse, Erfahrungssätze erscheinen - als Teile "spezieller Fachkentnisse" - eingebaut in das Sachverständigengutachten im Beweisverfahren. Ihre Rolle bei der Herausformung der Folgerung des Sachverständigen (die eigentliche Meinung) ist, wie die der wissenschaftlichen Wahrheiten, die die Rechtsanwendungsorgane im Beweisverfahren selbst anwenden: sie erscheinen meist als höhere These des Syllogismus. (Diese offensichtliche Ähnlichkeit ist eine der Grundlagen der Theorie, vonach der Experte wissenschaftlicher Richter ist). Es bezieht sich auch auf die den Inhalt der Fachkenntnisse darstellenden Feststellungen und Erfahrungsthesen, dass sie keiner Beweisung bedürfen, ja die Sachverständigenfolgerung kann eben deshalb als Beweis gelten (als logisches Argument im Beweisprozes), weil sie auf diesen gründet. Aus dem Missverständnis oder Nichtverstehen dieses Umstandes stammt das meist umstrittene Problem der Wertung der Gutachtens seitens der Rechtsanwendungsorgane: wie, auf welcher Basis soll die Behörde bezüglich der fachlichen Fundiertheit des Gutachtens Stellung nehmen.

Die Beurteilung der fachlichen Fundiertheit des Gutachtens als Beweismittel ist ein Teil der Erwägung der Rechtsanwendungsorgane. Mit der Frage der Erwägung des Gutachtens befasst sich auch unsere Fachliteratur in reichem Ausmass. Die sich mit dem Problem befassenden Autoren[21] unterscheiden zwischen analytischer und synthetischer Erwägung, unter analytische Erwägung

[20] KIRÁLY, T.: Büntetőítélet a jog határán (Strafurteil an der Grenze des Rechts). Közgazdasági és Jogi Könyvkiadó, Budapest, 1972. p. 88.

[21] SZÉKELY: op. cit. p. 407. VASS, K.: A szakértői bizonyítás néhány kérdéséről (Über einige Fragen des Sachverständigenbeweises). Ugyészségi Értesítő, 1/1978. KISS, L.: Az igazságügyi kézírásvizsgálat alapjai (Die Grundlagen der forensischen Schriftuntersuchung). Közgazdasági és Jogi Könyvkiadó, Budapest, 1977. p. 383.

die analytische Untersuchung, selbstständige Beurteilung des Sachverständigengutachtens verstanden, während der Ausdruck synthetische Erwägung jener logischen Operation vorbehalten ist, im Zuge deren die Rechtsanwendungsorgane das Gutachten mit der Gesamtheit des Beweismaterials abstimmen. Die Auseinanderhaltung diesen zwei Arten der Beurteilung des Gutachtens stimmt auch Árpád ERDEI zu[22], fügt aber hinzu, dass er innerhalb der analytischen Beurteilung die Ausernanderhaltung der Beurteilung des Gutachtens aus "fachlichem" Gesichtspunkt und aus sonstigen Gesichtspunkten (z,B. logische, etnische, strukturelle Gesichtspunkte) für nötig erachtet.

Die Separierung der "fachlichen" Beurteilung hält ERDEI deshalb für nötig, weil er es bezweifelt, dass die Behörde fähig wäre, diesen in allen Fällen durchzuführen, gegenüber sämtlichen sonstigen, im Bereich der analythischen und synthetischen Beurteilung beschriebenen Fällen, bezüglich welcher er keine derartigen Vorbehalte hat. Aus dem Umstand aber, dass in den, sich auf die Beurteilung der Sachverständigengutachten beziehenden, in der Fachliteratur erscheinenden Methodenlehreempfehlungen gerade die Gesichtspunkte der selbstständigen fachlichen Beurteilungen am wenigsten ausgearbeitet sind, zieht er die Folgerung, dass er mit seinen Bedenken nicht allein dasteht. Auch diejenigen, die die Notwendigkeit und Möglichkeit dessen behaupten, dass die Behörden zu der in engem Sinn verstandenen fachlichen Beurteilung fähig sind, glauben nicht so richtig daran. Wenn sie nämlich ihre eigene Behauptung ernst nehmen würden, hätten sie wahrscheinlich auch die Methodik der fachlichen Beurteilung gründlicher ausgearbeitet und hätten sich nicht mit der Detailierung von sonstigen Beurteilungsgesichtspunkten begnügt. Darin also, dass auch die den ausführlichsten Methodenlehreanleitung abfassenden SZÉKELY und VASS der fachlichen Beurteilung nur wenig Platz widmen, leuchtet auf die zwangsmässige Anerkennung dessen hin, "... dass ein in einem Fach unkundige Person eine Fachleistung nicht so sehr aus fachlichen, als eher aus sonstigen Gesichtspunkten einer Kritik

[22]ERDEI: op.cit. p. 234.

unterwerfen kann."[23]

Mir will es scheinen, dass ERDEI an offenen Toren klopft. Das nämlich zu entscheiden, ob eine Meinung fachlich begründet ist oder nicht, kann offensichtlich nur aufgrund fachlicher Kenntnisse geschehen. Auch der von Kálmán VASS ausgearbeitete Methodenlehreanleitung setzt eine gründliche Kenntnis des betreffenden Fachs voraus, diesbezüglich folgendes steht:

"8. Die seitens des Experten angewandten fachlichen Thesen. Es muss die fachliche (wissenschaftliche) Stichhaltigkeit der seitens des Sachverständigen angewandten Erfahrungssätze gewertet werden. Hier muss in Betracht gezogen werden, wie weit diese Thesen als akzeptiert gelten, beziehungsweise in welchen Beziehungen diese unter Debatte stehen, ferner auf welcher Grundlage sie debattiert werden: durch wissenschaftliche Gegenargumente, oder bloss "nur so", "wissenschaftlich tuerisch", eventuell deshalb, weil der Debatter in der wissenschaftlichen Entwicklung in Rückstand gerät, die neuesten wissenschaftlichen Ergebnisse nicht kennt. Zur Beurteilung gibt die Analyse des inhaltlichen Reichtums der Argumentierung des Experten, sowie die Vertrauenswürdigkeit der seitens des Experten vorgebrachten fachlichen Quellen die Grundlage."[24]

Wenn wir ein beliebiges Element dieses Leitfadens herausgreifen und analysieren wollen, wird es sich sofort feststellen lassen, dass das ohne Kenntnis das betreffenden Faches - und gar nicht einmal bloss oberflächliche, sondern tiefere Kenntnis - in der Praxis undurchführbar ist. Wie kann sich der Richter z.B. darüber überzeugen, ob die seitens des Experten angewandten fachlichen Thesen akzeptiert sind oder ob sie unter Debatte stehen, wenn er die Literatur des Fachproblems, auch hinsichtlich der neuen Resultate tagfertig nicht kennt.

Andererseits steht auch fest, - mindestens im grösseren Teil der Fälle - und um es zu beweisen weist auch János SZÉKELY in seinen mehrfach zitierten Werk an verschiedenen Stellen hin,

[23] ERDEI: op. cit. p. 234.

[24] VASS: op. cit.

dass der Rechtsanwendungsorgan, und zwar auch ein Rechtsanwendungsorgan mit durchschnittlicher Vorbildung, die Stellungnahme in dem Fachproblem zu erwägen selbst fähig ist,

— weil die analytische Wertung des Gutachtens - wenn ein Anspruch auf die selbstständige Erwägung der fachlichen Thesen auftaucht - durch die Elemente der synthetischen Wertung durchwoben sind, die Wahrscheinlichkeit bieten können, dass die seitens des Experten angewandten Thesen richtig sind, weil seine Feststellungen mit den anderen Beweisen übereinstimmen;

— weil die juristische, logische, allgemeine mathematische und naturwissenschaftliche Bildung zur Entscheidung der Frage oft verhelfen kann;

— weil es tatsächlich Unsinn wäre sich auf den Standpunkt des völligen Misstrauens zu stellen und ohne irgendeinen vernünftigen Zweifel die fachliche Fundiertheit des Gutachtens in Zweifel zu ziehen;

— weil bei der Verfertigung des Gutachtens im allgemeinen nicht der kompliziertеste, mit bestrittenen theoretischen Abstraktionen belastete Teil des betreffenden Faches angewandt wird.

Es kann aber mit Recht auch die Frage gestellt werden, was geschehen soll, wenn sich der Richter mit der Kehrseite dieser Fälle gegenübergestellt sieht. Er muss auch dann Stellung nehmen, wenn das Gutachten ein kompliziertes und bestrittenes fachliches Problem beinhaltet, wenn es sich um einen seltenen Grenzfall handelt, wo die allgemeine mathematische und naturwissenschaftliche Kenntnis nicht zur Hilfe gezogen werden kann. In dieses Fällen ist nur eine Lösung möglich: zur Wertung der fachlichen Thesen muss eine entsprechende Kenntnis erworben werden. Das Rechtsanwendungsorgan verfügt entweder über diese Kenntnisse (weil er sich im konkreten Fall auf dem Gebiet des problematischen Fachgebiets verbreitet, die Literatur durchstudiert hat usw.), oder, - falls er sich überzeugt hat, dass er zur Lösung des Problems aus eigenen Stücken nicht fähig ist - muss er sich auf die Fachkenntnis anderer stützen.

Die ideale Lösung wäre natürlich, wenn die vorgehenden Richter über entsprechende Kenntnisse verfügen würden zur Entscheidung dieser fachlichen Probleme. Dieser Anspruch muss

eigentlich für natürlich gelten, wenn das in einheimischen Relationen auch nicht immer als natürlich erscheint.

Als über eine selbstverständliche Sache schreibt M. HELFENSTEIN darüber, dass "Die praktische Durchführbarkeit einer solchen unmittelbaren Überprüfung des Inhalts einer Expertiese setzt aber voraus, dass sich der Richter auf die Gutachterfrage vorbereitet und sich über Gegenstand, Methodik und Theoriegrundlage des Gutachtens unterrichtet. Dies gilt vor allem für Fragen, welche im Strafprozess häufig wiederkehren, wie Fragen der Daktiloskopie, Blutgruppen- und Blutalkoholbestimmung, Schriftvergleichung sowie medizinische, insbesondere psychiatrische Fragen. Nur so kann vermieden werden, dass der Richter zur kritiklosen Hinnahme der Feststellungen des Experten gezwungen und schrittweise entmachtet wird, indem die Entscheidungsverantwortung auf den Sachverständigen verlagert wird."[25]

Mit seinem Standpunkt erkläre ich mich völlig einig, obzwar ich weiss, dass das eher die Welt des "soll" als die des "sein" darstellt.

ЗАКЛЮЧЕНИЕ ЭКСПЕРТА И СВОБОДНАЯ ОЦЕНКА ДОКАЗАТЕЛЬСТВ

Л. Пустаи

Современное правосудие немыслимо без участия экспертов. Обследования фактов свидетельствуют о том, что и в Венгрии возрастает число тех уголовных дел, при рассмотрении которых используется помощь представителей различных дисциплин и профессий, предоставляющих свои специальные знания в распоряжение ведуших дела органов власти при установлении состава преступления и доказывания виновности.

Усиливающееся обращение к экспертам объясняется разносторонним влиянием НТР на судебнух экспертизу. С одной стороны, бурно растущие знания, новые способы экспертизы и высокочувствительные приборы обеспечивают возможность для составления еще

[25] HELFENSTEIN, M.: Der Sachverständigenbeweis im schweizerischen Strafprozess. Schulthess Poligraphischer Verlag, Zürich, 1978. p. 252.

более достоверных заключений и в традиционных сферах экспертизы. С другой стороны, в результате специализации, среди судебных экспертов появляются представители новых самостоятельных областей, которые представляют себя в распоряжение ведущих дела органов власти по таким вопросам, которые раньше не подлежали постановке.

Со стороны же правоприменителей бурный рост знаний означает то, что они все чаще нуждаются в участии экспертов, что постоянно сокращается число таких дел, в которых и общее образование достаточно для правдивого установления состава.

Повышение роли эксперта, в силу необходимости, влечет за собой и повышающий интерес специальной литературы. Один за другим появились труды по вопросам доказывания с помощью экспертов, изучающие данную тему комплексно или только с точек зрения конкретных отраслей науки. Однако рядом с теоретическими и практическими вопросами, получившими успокоительное решение, есть еще и нерешенные вопросы. К ним относится и один из весьма спорных вопросов современного уголовно-процессуального права: как осуществляется принцип свободной оценки доказательств в отношении заключения эксперта? Проблема вытекает из того, что обращение к эксперту необходимо в случае, если для определения или оценки подлежащего доказыванию факта требуются такие специальные знания, которыми судья не располагает. А назначив эксперта судья признает, что данная профессиональная проблема превышает его знания. После этого как он способен оценивать заключение эксперта? Путь к правильному ответу ведет через изучение развития теории доказывания от "каролины" до наших дней, рассмотрение роли эмпирических положений в доказывании.

THE EXPERT OPINION AND THE FREE EVALUATION OF EVIDENCE

L. Pusztai

The modern jurisdiction is incomprehensible without the contribution of experts. Case evaluation proves that in Hungary in more and more cases they are supported by the aid given by the representatives of various sciences and skills by making available their special abilities at proving criminal for the competent authorities.

This increasing need can be explained by the multiple effect of the scientific-technological revolution on the activity of experts of forensic sciences. On one hand the rapidly increasing knowledge, the new methods of investigation and the high-sensitivity equipments make possible the more and more dependable opinions in the traditional fields of expertise, on the other hand through the specialization representatives of new and independent fields appear among the experts. They are available for the competent authorities in such questions which could not even be raised earlier. On the side of law application the explosion-like increase of knowledge means that they are more and more dependent on the contribution of the experts,

the number of such cases is less and less where the general knowledge is appropriate to establish the re-listic matter of facts.

The increasing value of the role of expert brings along the increasing interest of the literature as well. One after the other comprehensive volume and special field volumes appeared which deal with the problems of expert evidence--gathering. Beside the several already settled theoretical and practical problems, however, there are open questions to be answered, among them a much-debated question of the modern procedure law: how the principle of free evaluation of evidence prevails concerning the expert opinions. The problem emerges from the fact that expert is needed whenever such skills are required to establish or evaluate facts to be proved which are not possessed by the judge. How can the judge evaluate the expert opinion, if by summoning the expert he declared that the given special problem goes beyond his own knowledge. The way to the proper answer goes through the study of the theory of evidence since Carolina till these days and the survey of the role of experienced facts in the proof gathering.

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ERMÄCHTIGUNG UND REGIERUNG IM VERORDNUNGSWEG (1944-1949)

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"Die Regierung ist für das Land
da, über sie kann also die Na-
tion zu jeder Zeit verfügen."
M. Táncsics

Im Regierungssystem der Epoche der Volksdemokratie wurden die Garantien der Rechtssetzung im Verordnungswege durch die Gesetzgebung mit besonderer Aufmerksamkeit festgelegt.

Die Ermächtigungsgesetze galten mit Begrenzungen nach Gegenständen, bzw. zur ungehinderter Führung des Staatshaushaltes - Indemnitätsermächtigung.

Die Verpflichtung zur Vorlage der Verordnungen zwecks nachträglicher Bestätigung wurde der Koalitionsregierung auferlegt. Ab 1947 wurde das Recht zur Überprüfung der Verordnungen der Politischen Kommission des Parlamemts eingeräumt.

Die Abhandlung stellt die Entwicklung des Rechtsinstituts zwischen 1945-1949 auf Grund Archivdokumente dar.

Nationalversammlung - Politische Kommission

"Die Provisorische Nationalversammlung erklärt feierlich, dass sie die Erledigung der Angelegenheiten des herrenlos gebliebenen Landes übernimmt, als Ausdruck des Willens der Nation und Besitzer der ungarischen staatlichen Souveränität..."[1]

Aus der Übernahme dieser öffentlich-rechtlichen Rolle folgend hat die Nationalversammlung eine ihr ungeteiltes Ver-

[1] BEÉR, J. - CSIZMADIA, A.: Történelmünk a jogalkotás tükrében (Unsere Geschichte im Spiegel der Rechtschaffung). Budapest, 1966. p. 564.

trauen geniessende und der Nation verantwortliche engere Körperschaft, die Politische Kommission ins Leben gerufen. Die Politische Kommission ist ursprünglich zur Vorbereitung der Wahl der Regierung geschaffen worden. Auf ihren Vorschlag hin hat die Nationalversammlung ihr Vertrauen der gebildeten Regierung gegenüber ausgesprochen und ihr die Ermächtigung zum Absczluss des Waffenstillstandes und zur Führung der Landesangelegenheiten erteilt.[2]

Die Aufgabe der Politischen Kommission wurde bis zur erneuten Einberufung der Nationalversammlung (6. September 1945) abweichend von der geplanten beträchtlich erweitert. Im stellvertretenden Kompetenzbereich des ausschliesslichen Vertreters der ungarischen staatlichen Souveränität kontrollierte sie die Regierung und wirkte auf eine spezifische Weise an der Regierungstätigkeit mit. Ihre Beschlüsse wurden für unanfechtbar erklärt und diese zur Billigung der Nationalversammlung unterbreitet.

Mit dem Ablauf des Auftrages der Provisorischen Nationalversammlung anerkannte die aufgrund der im Sinne des Gesetzesartikels VIII von 1945 abgehaltenen Wahlen gebildete Nationalversammlung die Tätigkeit der Politischen Kommission in der Weise, dass sie die Vorbereitung wichtiger politischer Entscheidungen in dem Kompetenzbereich dieser Körperschaft verwies und weiterhin mit der Versehung sonstiger Aufgaben betrauen wollte, die ihr den Rechtsregeln zufolge übertragen waren (Gesetzesartikel XI von 1945).

Während nach den ersten Wahlen die die Regierung zur Verordnungsgesetzgebung ermächtigenden Gesetze eine nachträgliche Billigung durch die Nationalversammlung vorschrieben, übte nach den weiteren Wahlen bereits die Politische Kommission diesen Kompetenzbereich aus. Der Gesetzesartikel VIII von 1945 wurde durch den Gesetzesartikel XXII von 1947 über die Wahlen zum Parlament modifiziert. Und danach wurde vom Gesetzesartikel

[2] GERGELY, E.: Az Ideiglenes Nemzetgyűlés Politikai Bizottsága (Die Politische Kommission der Provisorischen Nationalversammlung). Jogtörténeti Tanulmányok Bd. III, Budapest, 1974. pp. 89-91.

XXVI des Jahres 1947, der über die wiederholte Verlängerung der Bevollmächtigung der Regierung verfügte, fixiert, dass die Regierung verpflichtet ist, ihre erlassene Verordnungen innerhalb von fünfzehn Tagen nach der Annahme durch den Ministerrat der Politischen Kommission des Parlaments - zwecks nachträglicher Billigung - vorzulagen. Da beide Wahlgesetze im wesentlichen als Rechtsregel für je einen Fall entstanden waren, ist vom Gesichtspunkt unseres Themas aus das ebenfalls als individuell betrachtete Gesetz IX. von 1949 bezüglich der Modifizierung der gesetzlichen Bestimmungen über die Parlamentswahlen nicht unwesentlich. Es ist nämlich allgemein bekannt, dass die Landesnationalkommission ihre Auflösung - zusammen mit ihren örtlichen Organen - für den 1. Februar 1949 ausgesprochen hat. Deshalb musste in dieser dritten wahlrechtlichen Regelung dafür gesorgt werden, dass die durch Gesetze in ihren Kompetenzbereich verwiesenen Aufgaben vom Landesrat der Ungarischen Unabhängigen Volksfront ergebnisvoll versehen werden können, als von dem Organ, das im allgemeinen die Aufgabenbereiche der Nationalkommissionen und der Ungarischen Nationalen Unabhängigen Front übernommen hatte.[3] Auch an dieses Wahlrechtsgesetz schloss sich eine Ermächtigungsnorm an, und zwar in unserer untersuchten Periode die letzte (Gesetzesartikel XVII von 1949 - bis 31. Dezember 1949), welche die in der vorangehenden Rechtsregel ähnlichen Themas (1947) enthaltenen Bestimmungen wiederholte. Es bekräftigte die Berechtigung der Politischen Kommission des Parlaments zur Billigung der aufgrund der Ausnahmeermächtigung erlassenen Regierungsverordnungen.

Regieren ohne Parlament?

Der sich mit verfassungsrechtlichen Fragen beschäftigende Rat des Verwaltungsgerichtes wandte sich bezüglich des Gesetzesartikels I von 1946 über die Staatsform der Republik in einer Adresse an die Nationalversammlung.[4] Er schlug eine derartige

[3] Ministerielle Begründung zum Gesetzesentwurf. Törvények és törvényerejű rendeletek (Gesetze und Verordnungen mit Gesetzeskraft) I. 1949, S. 30-32.

[4] Uj Magyar Központi Levéltár Törvényelőkészítő Osztály (Kodifikationesabteilung im Neuen Ungarischen Zentralarchiv) XIX-E 1 c. (im weiteren: UMKL-TO) 2094/1946.

Ergänzung des Gesetzes zur Überlegung vor, welche den Präsidenten der Republik das Recht zur Auflösung und Einberufung der Nationalversammlung überträgt und zugleich bestimmt, innerhalb welcher Zeit die neue Nationalversammlung im Falle der Auflösung oder des Ablaufes ihres Mandates einberufen werden muss.

Das berufene Gesetz hat dem Präsidenten der Republik - unter bestimmten Schranken - während einer Sitzungsperiode und für einen Fall das Recht zur Vertragung und weiterhin auch die Auflösung der Nationalversammlung gewährt, wenn das die Regierung zur Vorlage bringt oder wenn dies zumindest zwei Fünftel der Abgeordneten der Nationalversammlung beantragen. Das Gesetz schweigt über die Regelung der Einberufung der neuen Nationalversammlung, es hat nur für den Fall des Freiwerdens des Präsidentenamtes verfügt; und zwar in einer solchen Weise, dass die Abhaltung der Wahlen zur Nationalversammlung zur Pflicht der Regierung erklärt wird, so dass "der neue Präsident der Republik gerechnet vom Eintreten des Umstandes, welcher die Wahl erforderlich macht, innerhalb von sechzig Tagen wählbar sein soll" (§ 15).

Aus der Deklarierung der Staatsform der Republik folgte gleichzeitig rationell, dass sämtliche Rechtsregeln, die sich auf das abgeschaffte Königstum und die Institution des Reichsverwesers bezogen haben, ihre Gültigkeit verloren hatten. So ist hinsichtlich des Kompetenzbereiches des Reichsverwesers die Pflicht, in der über die Auflösung verfügender Verordnung innerhalb von drei Monaten um die Einberufung der neuen Nationalversammlung bzw. das Parlament zu sorgen. Gleichzeitig verlor die Bestimmung des 5. § des IV. Gesetzesartikels von 1848 betreffs der Ausübung der königlichen Macht ihre Geltung, sowie auch die im X. Gesetzesartikel von 1867 enthaltene Verfassungsbeschränkung, derzufolge das Parlament zu einem solchen Zeitpunkt einberufen werden musste, dass die Diskussion des Haushaltes des folgenden Jahres gewährleistet sei.Es kann also kaum bestritten werden, dass die mangelhafte Formulierung des Kompetenzbereiches des Staatsoberhauptes eine Möglichkeit des "Regierens ohne Parlament" möglich gemacht hätte. Es ist nämlich durchaus vorstellbar, dass der Präsident der Republik bereits in der ersten Zeit seines Mandates das Recht zur Auflösung des

Parlaments in Anspruch nimmt, und nachdem das Gesetz weder dem Präsidenten der Republik, noch der Regierung die Pflicht zur Einberufung der neuen Nationalversammlung auferlegt hat bzw. die Ausschreibung der Wahlen - mit Ausnahme des Falles des Freiwerdens des Präsidentenamtes vorgesehen hat, - wäre es möglich gewesen aufgrund der wörtlichen Interpretation des Gesetzes über Jahre hinweg vom Parlament abzusehen.

Das Verwaltungsgericht initiierte in seiner Vorlage bzw. in deren Begründung die Ergänzung durch Einberufung neben der Auflösung, sowie das Vorschreiben von drei Monaten in der Verordnung, welche über die Auflösung verfügte. Zur genaueren Formulierung des Gesetzestextes wurde - um einen ex-lex-Zustand zu vermeiden - folgender Vorschlag unterbreitet:

"Wenn der Präsident der Republik die Nationalversammlung zu einer solchen Zeit auflöst, vertagt oder unterbricht, wenn das Gesetz über den Haushalt des folgenden Jahres oder über die Verteilung der öffentlichen Lasten und die Deckung der staatlichen Ausgaben für das nächste Jahr oder für einen Teil des Jahres von der Nationalversammlung noch nicht geschaffen worden ist oder aber die Nationalversammlung aufgrund des 9. § des Gesetzesartikels I von 1946 in der Angelegenheit eines solchen zurückgewiesenen Gesetzes noch keinen neueren Beschluss getroffen hat, dann beruft der Präsident der Republik die Nationalversammlung zu einem solchen Zeitpunkt ein, dass das Haushaltsgesetz noch vor Verstreichen des Jahres bzw. das Gesetz über die Verteilung der öffentlichen Lasten und die Deckung der staatlichen Ausgaben noch vor Ablauf der vorhandenen Haushalts- oder sonstigen Finanzermächtigung behandelt werden kann. Diese Bestimmungen müssen auch entsprechend angewandt werden, um zu gewährleisten, dass die Staatsschlussrechnung des vergangenen Jahres von der Nationalversammlung noch vor Verstreichen des Kalenderjahres behandelt werden kann."[5]

Zur rechtlichen Lösung des Inhaltes dieser Begründung haben sich mehrere Möglichkeiten ergeben. Über die vorgeschlagene Ergänzung des Gesetzes hinaus stellte die Erweiterung der Hausordnung der Nationalversammlung, bzw. die Modifizierung des Ge-

[5] Ebd.

setzesartikels VIII des Jahres 1945 oder aber die Schaffung eines neuen Wahlrechtsgesetzes eine Alternative dar. Der Expertenbericht der Kodifikationeshauptabteilung des Justizministeriums bevorzugte die letzteren Varianten. Unter Einschätzung der verfassungsrechtlichen Lage wurde davon ausgegangen, dass die Quelle des grundlegenden Problemes der Gesetzesartikel über das Wahlrecht darstellt, da dieser ein "für einen einzigen Fall lautendes Gesetz" ist und im Falle der Auflösung der Nationalversammlung - mangels eines auch für die Zukunft gültigen Wahlrechtsgesetzes - keine Wahlen abgehalten werden könnten. Und unter solchen Umständen könnte die Regierung nicht den Vorschriften des Grundgesetzes über die Staatsform der Republik entsprechen (13. §), weil sich das geltende Ermächtigungsgesetz (Gesetzesartikel VI von 1946) nicht auf die Schaffung von Rechtsregeln mit öffentlich-rechtlicher Natur erstreckte und so auch auf dem Verordnungswege kein Ausweg aus dieser Zwangslage gefunden werden konnte.

Die Durchführung des Grundgesetzes wurde weiterhin unmöglich in die exekutive Richtung auch für dem Fall, dass bei Auflösung der Nationalversammlung bzw. bei deren Aufhebung in der Zeit danach der Ministerpräsident zurückgetreten oder zur Versehung seines Amtes unfähig geworden wäre und die Ernennung des neuen Ministerpräsidenten dadurch verhindert wurde, dass der Präsident der Republik keine Gelegenheit hatte, die Politische Kommission anzuhören. Aufgrund des Gesetzesartikels I von 1946 wurde nämlich der Ministerpräsident vom Staatsoberhaupt nach Anhören der Politischen Kommission der Nationalversammlung und aufgrund der Vorlage des Ministerpräsidenten die Minister ernannt (dispensiert). Um dies zu vermeiden, wurde ein Vorschlag zur Ergänzung der Hausordnung unterbreitet, und zwar nachträglich die Aufnahme einer solchen Bestimmung, derzufolge die Politische Kommission auch in diesen bestimmten Fällen ihre Funktion bis zur Bildung des neuen Parlaments bzw. bis zur Wahl der neuen Politischen Kommission fortsetzen kann.

Die endgültige Antwort auf diesen oben skizzierten Vorschlag des Verwaltungsgerichtes wurde vom Gesetzesartikel XXII des Jahres 1947 gegeben, welcher den Gesetzesartikel VIII von 1945 modifizierte. Auf dem Wege der neuen Wahlrechtsregelung

wurde der Kompetenzbereich der Nationalversammlung dem aus einer Kammer bestehenden Parlament übertragen. Und als Ergänzung des Gesetzes von 1946 wurde der Kompetenzbereich des Staatsoberhauptes durch die Pflicht zur Einberufung und Auflösung des Parlaments ergänzt. Die Beschlüsse erschienen als Präsidialentscheidungen.

Ermächtigung zum Erlass von Verordnungen

Die genaue Beschreibung der zur Führung der Landesangelegenheiten erteilte früheren vollen Ermächtigung der Regierung erfolgte im Gesetzesartikel XI des Jahres 1945 über die provisorische Regelung der Ausübung der Staatsmacht. Als Exekutivorgan der durch die Wahlen neu gebildeten Nationalversammlung funktionierte die Regierung auch weiterhin als verantworliches Ministerium. Über die Verantwortung der Minister entschied - aufgrund des Gesetzesartikels III von 1848 - die Nationalversammlung. Das am 16. Dezember 1945 in Kraft getretene Gesetz ermächtigte das Ministerium zur Erlassung von Verordnungen in gleich welchen privatrechtlichen, strafrechtlichen, Verwaltungs- und anderen, zum Kompetenzbereich der Gesetzgebung gehörenden Angelegenheiten. Die Ermächtigung erfolgte im Interesse der Gewährleistung der wirtschaftlichen, finanziellen und Verwaltungsordnung des Staates.

Die Schranken der Ermächtigung sind in dieser Rechtsregel fixiert. Auch in den späteren Ermächtigungsgesetzen ist als ständiges Element verblieben, dass diese Verordnungen den von der Nationalversammlung geschaffenen Gesetzen nicht widersprechen können, dagegen konnten sie den - früheren Gesetzen widersprechende Bestimmungen enthalten, denn dies war ja im wesentlichen der Grund für ihre Schaffung. Die andere konstante Bedingung schloss sich an die Zeitdauer, bzw. an die vor deren Ablauf eingetretene Regierungsveränderung an.

Die unbeständige Konditionen, die Vorlegung zur Billigung an die Kommissionen (Ausschüsse) der Nationalversammlung, weiterhin das Verbot der Veränderung der Organisation, der obersten Gewalt der Staatsstruktur bedeuteten gleichzeitig auch - mit Ausnahme der Bestimmungen zur Wiederherstellung des Gleichgewichtes des Staatshaushaltes und zur Gewährleistung der öffent-

lichen Versorgung - die Durchsetzung des Prinzips nullum crimen sine lege und nulla poena sine lege.

Der erwähnte Gesetzesartikel XI von 1945 fixierte allein die Unveränderlichkeit der Organisation der obersten Staatsgewalt als beschränkende Bedingung. Die Hervorhebung dieser Beschränkung ist verständlich, da dies durch den sich in der Frage der Staatsform ausgebrochenen politischen Kampf eindeutig begründet wurde. In Verbindung mit letzterem ist die Regierungsverordnung beachtungswert, die am 9. Januar 1946 in Kraft trat und zum Ausdruck brachte, dass das Ministerium seine zur Gewährleistung der Bedürfnisse des Wirtschaftslebens und dessen ordentlichem Gang erforderliche Tätigkeit mit Hilfe des Obersten Wirtschaftstrates ausübt.[6] Das engere Kabinett hat seine diesbezügliche Aufgabe unter anderem mit dem Erlass von Verordnungen erfüllt. Zur Bestimmung des Regelungsmöglichkeiten der in Wirtschaftsangelegenheiten erlassenen Verordnungen wurde eine neuere Regierungsverordnung erlassen.[7] Ähnlich problematisch ist - unter Beachtung der Zeit der Ermächtigung - auch die sich auf den strafrechtlichen Schutz der zu erlassenden Verordnungen beziehende Regierungsermächtigung.

Die wiederholte Ermächtigung - nach dem Amtsantritt der ersten Regierung der ungarischen Republik - erfolgte mit dem Gesetzesartikel VI von 1946, welcher in Interesse der Schaffung des Gleichgewichtes des Staatshaushaltes, die Erlassung von Verordnungen öffentlich-rechtlichen Charakters ermöglichte. Die Regierung war weiterhin verpflichtet, die Verordnungen der Nationalversammlung zu unterbreiten.[8]

Die an die Zeitdauer gebundenen Ermächtigungen hatten, wie das von der Vorlage der Ministerrates betont wird, ihre Daseinsberechtigung nicht verloren. Ihr Charakterisitikum bestand

[6] Siehe Verordnung Nr. 12.090/1945 ME. Két év hatályos jogszabályai (Geltende Rechtsregeln von zwei Jahren) 1945-1946. Budapest, 1947. pp. 148-151.

[7] MÁTHÉ, G.: A gazdaság irányításának kormányzati szerve (Das Regierungsorgan für die Wirtschaftsleitung). Acta Fac. Pol-Jur. Univ. Sci. Tom. XVIII. Budapest, 1976. pp. 363-376.

[8] UMKL-TO 521/1946

jedoch in einer Beschränkung nach den Gegenständen. Der Gesetzesartikel XVI von 1946 (die Ermächtigung wurde bis 31. Oktober 1946 verlängert), sicherte der Regierung in diesem Sinn freie Hand zur Gewährleistung der Ordnung des Wirtschaftslebens und des ungestörten Gleichgewichts des Staatshaushaltes, sowie in Interesse einer geordneten Verwaltung. Aus der katastrophalen Wirtschafts- und Finanzlage sich ergebend genoss der Staatshaushalt und auch die öffentliche Versorgung absoluten Vorrang. Dadurch wird vielleicht der unübliche und zweitdeutige Gesetzestext erklärt. Während die beschränkenden Bedingungen bisher expressis verbis bestimmt wurden, wird im letzteren Gesetz das Verfügungsrecht folgendermassen formuliert: "... es kann keine Regelung getroffen werden, die von einem durch die Nationalversammlung geschaffenem Gesetz abweicht oder öffentlich-rechtlicher Charakter hat, welche die Verwaltungsorganisation verändert, ein neues Verbrechen festlegt oder hinsichtlich eines Verbrechens eine schwerere als im Gesetz vorgesehene Strafe anzuwenden vorschreibt, mit Ausnahme der Gewährleistung der Wiederherstellung des Gleichgewichtes des Staatshaushaltes und der öffentlichen Versorgung."[9]

Das Zitat an sich ist nicht nur Gegenstand "philologischen" Interessess. Es ist entscheidend von dem Gesichtspunkt aus, dass der Wortlaut des Gesetzesartikels XVI von 1946 in einem halben Dutzend von Ermächtigungsgesetzen, die bis zum 31. Dezember 1949 entstanden, nicht mehr vorkommt, nur so bedeutet die Fixierung der Zeitdauer eine Schranke nur für die Ausübung des Verordnungsrechten. Mit dem Problem wurde die Regierung wiederholt im Laufe der Kodifikation zur wiederholten Verlängerung der Frist der Ermächtigung konfrontiert. Die Kodifikationshauptabteilung des Justizministeriums wandte eine alleinstehende Lösung an. Es wurden zwei Gesetzesentwürfe vorbereitet: die Variante A/ "stimmte von geringeren Formulierungsänderungen abgesehen mit dem Text des Gesetzesartikels XVI von 1946 überein", während dia Variante B/ "einfach über die Verlängerung der im Gesetzesartikel XVI von 1946 enthaltener Ermächtigung verfügte". Die

[9] Ebd. 2880/1946

Textkorrektur der Variante A/ weist restlos die Eindeutigkeit des rechtlichen Verbotes nach: "... aufgrund der enthaltenen Ermächtigung können keine Verordnungen erlassen werden, die von den von der Nationalversammlung geschaffenen Gesetzen abweichen, Verfügungen öffentlich-rechtlicher Charakter haben, ebenso kann die Verwaltungsorganisation nicht verändert werden, kein neues Verbrechen festgelegt werden, oder hinsichtlich eines Verbrechens kann keine schwerere, als im Gesetz vorgesehene Strafe festgelegt werden, es sei denn, dass im Interesse der Gewährleistung des Gleichgewichtes des Staatshaushaltes odee der Ordnung der öffentlichen Versorgung."[10]

Mit der Annahme der vereinfachten Variante des "alternativen Gesetzesvorschlages" B/ durch die Nationalversammlung (Gesetzesartikel XXVIII von 1946 - bis 28. Februar 1947) blieb so die Frage der Rechtsinterpretation der ausschliessenden Bedingungen offen.

Als spezifische Form der Ermächtigung kann die Verpflichtung zur Vorlage eines Gesetzesentwurfes in einem früheren Gesetz durch wiederholte Verlängerung der Frist bewertet werden. Dies erfolgte nämlich in Verbindung mit der Verstaatlichung des Kohlnebergbaus, Gesetzesartikel XIII von 1946. Diese Rechtsregel schrieb als Gegenleistung für die Verstaatlichung eine Entschädigung vor und dafür musste der Industrieminister in einem später einzureichenden Gesetzesentwurf sorgen. Da die Frist des Vorlagetermines an die Nationalversammlung und die Frist der zeitweiligen Ermächtigung der Regierung - zufälligerweise - zugleich ablief, verschmolz die Ermächtigung zum Gesetzesentwurf und zur Verordnung im Gesetzesartikel XXVIII von 1946. Dieser Zwang zur ungewohnten Anpaarung wurde von der ministeriellen Begründung zum Gesetz über die Verstaatlichung umständlich erklärt. Die Gesetzgebung liess sich bei Treffen dieser Massnahme davon leiten, dass es die Zeit noch nicht geeignet dafür hielt, die Frage der Entschädigung durch Schaffung einer Gesetzes zu klären, in dem mit dem Wert und der Einträglichkeit der in staatliches Eigentum übergehenden Vermögen gerechnet werden kann. Obwohl zwischenzeitlich aufgrund der erforderlichen

[10] Ebd. 3721/1946

Angaben die Vorbereitungsarbeiten des Entschädigungsgesetzes beendet waren, beanspruchte dennoch die Ausfertigung des endgültigen Entwurfes noch weitere Informationen. Die Gesetzgebung konnte infolge der Verschleppung der internationalen Verhandlungen die sich aus dem Friedensvertrag auf Ungarn ergebenden Lasten nicht genau kennen. Deshalb nahm sie nicht rasch Stellung, beim Mass der Entschädigung wurde der allgemeine Glaubwürdigkeit des Landes vor Augen gehalten und die Abweichung "von den festen Grundlagen der Wirklichkeit" hätte dem Staatshaushalt solche Lasten auferlegt, deren Tragung ihm nicht auferlegt werden konnten.[11]

Zu einer wesentlichen Veränderung der Ermächtigungsgesetze hinsichtlich des Erlasses von Verordnungen ist es nur noch einmal gekommen. Die Geltung des Gesetzesartikels VIII von 1947 (bis 31. Mai 1947) erlosch mit dem Amtsantritt der Dinnyés-Regierung.[12] Die diese verlängernde Ermächtigung - Gesetzesartikel XVI von 1947 - lautete zwar bis zum 30. September, doch infolge der Wahlen im August verlor sie wegen des Regierungswechsels am 24. September ihre Geltung.[13] In dieser Situation kam es zum Gesetzesartikel XXVI von 1947, der die Ordnung der Ermächtigungen bis zum Ende dieser Epoche bestimmte. Für seine Vorbereitungsarbeiten ist charakteristisch, dass entsprechend des Beschlusses der interparteilichen Konferenz von der Kodifikationsabteilung wesentliche Veränderungen am Entwurf durchgeführt wurden.[14] Im Vergleich zur bisherigen Struktur ist anstelle der im allgemeinen vierteljährlichen Fristen die Systematisierung von Terminen, die ein halben Jahr überschreiten, getreten. Eine qualitative Veränderung bedeutete die weitere Praxis der Parlamentsbilligung des Regierens auf

[11] Bezüglich der Modifizierung des Unterbreitungstermins des Gesetz Entwurfes zur Entschädigung siehe die Gesetzesartikel XV und XVI von 1947. Geltende Rechtsregeln von 1947, (ung.), Budapest, 1918.

[12] UMKL-TO 241/1947

[13] Ebd. 2083/1947

[14] Ebd. 3620/1947

dem Verordnungswege.[15] Wir haben erwähnt, dass die Verordnungen auf der ersten Sitzung nach Ablauf der Ermächtigung der Nationalversammlung zur Billigung vorgelegt werden mussten. Die durch die Wahlen neuentstandene Nationalversammlung (Parlament) sprach sich aber dieses Recht nicht mehr zu, sondern überliess die Kontrolle der Normen der Politischen Kommission. Die im Ministerrat angenommenen Verordnungen war die Regierung zwar gezwungen, zwecks nachträglicher Billigung dieser engeren Körperschaft vorzulegen, was sie natürlich nicht daran hinderte, diese noch vor der Vorlegung zu verkünden. Die Politische Kommission hatte in ihrem Kontroll-Kompetenzbereich die Pflicht, darüber das Parlament zu berichten.

Schliesslich ist als Novum der sich auf die Ermächtigungen beziehenden Rechtsetzung die spezielle Bestimmung des Gesetzesartikels XXVI des Jahres 1947 (§ 3) zu erwähnen. Diese wollte den eigentümlichen ex-lex-Zustand überbrücken, der durch die Regierungsveränderung (24. September) und die Veröffentlichung des neueren Ermächtigungsgesetzes (25. November) in der Zwischenzeit eingetreten war. Für diese Periode billigte des Parlament das Statuierungsrecht der Regierung, also die Tatsache des Erlasses von Verordnungen, nicht also die Verordnungen selbst, welche im Vergleich dazu im Falle des Bestehens der Ermächtigung und in derem Rahmen auch weiterhin auf dem Verordnungswege zu modifizieren waren.

Ermächtigung zur Führung des Staatshaushaltes

Die sich auf die Führung des Staatshaushaltes beziehenden Ermächtigungen bedeuteten ein spezifisches Verbindungssystem von Appropriation und Indemnität. Bis zu Annahme der Verfassung wurden drei Haushaltsgesetze geschaffen. Das erste 1947 (Gesetzesartikel XIV) über das Budget 1946/47, das zweite der Gesetzesartikel XIX von 1948 für das Jahr 1947/48 und das dritte schliesslich das Gesetz V von 1949 über den Staatshaushalt des betreffenden Jahres. Letzteres identifizierte wieder nach einer

[15] Ebd. 1277/1948; 5155/1948 (siehe Gesetzesartikel XXIV von 1948) weiterhin 2266/1949 (siehe Gesetz XVII von 1949)

jahrzehntelangen Veränderung d s Kalenderjahr mit dem Haushaltsjahr. Zu den vorangehenden kamen noch weitere bedeutende Gesetze. So wurde das erste bald vom Gesetzesartikel über den Dreijahrplan gefolgt, während das Gesetz von 1948 durch eine "proportionierte" Indemnität ergänzt wurde.

Die mit der Erfüllung der s aatlichen Ausgaben und der zu ihrer Deckung dienenden Einnahmen zusammenhängenden Ermächtigungen schlossen sich eng an die Ermächtigungsgesetze zur Regierung im Verordnungswege an, richteten sich nach deren Intervallen - mit Ausnahme der ersten Hälfte von 1947.

Für das Jahr 1945 wurde die Regierung befreit von der Unterbreitung des Haushaltes vor die Gesetzgebung. Die Regierungsmassnahmen der provisorischen Nationalversammlung in Sachen der öffentlichen Lasten und Ausgaben waren durch den Gesetzesartikel X von 1945 legitimiert. Zugleich wurde der Regierung das Vertrauen ausgesprochen, durch Führung des Staatshaushaltes, Aufrechterhaltung und Instandsetzung der staatlichen Betriebe, sowie die sich bei der Durchführung des Waffenstillstandsabkommens ergebenden Ausgaben weiterhin zu erfüllen, und die Ausgaben aufgrund der Einnahmen aus den gegenwärtig bestehenden, eventuell zu modifizierenden oder neu zu schaffenden Rechtsregeln zu decken. In Sachen solcher Ausgaben, die durch die Einnahmen nicht gerecht werden können, konnte der Finanzminister - auf dem Wege von Krediten - Massnahmen treffen. Über die Rechnungslegung - bei der das Staatsbudget des Jahres 1944 massgebend war - verlangte der Gesetzgeber lediglich eine Information.

Die Verzögerung der Arbeiten zum Staatshaushalt von 1946/1947 - die zwischenzeitliche Modifizierung des Preisniveaus, die Überschreitung der Ausgaben der einzelnen Ministerien, die Veränderungen der Wiedergutmachungsforderungen, die Verziehung des Personalabbaus - führten zu einer wiederholten Indemnität. Der Gesetzesartikel II von 1947 folgte deshalb dem Gesetzesartikel XXVII von 1946[16], weil - obwohl der Finanzminister am 10. Dezember das Budget der Nationalversammlung unterbreitete -

[16]Ebd. 3767/1946

zu deren Behandlung aber wegen der "reichen Geschäftsordnung" des Plenums keine reelle Chance bestand.[17] Und wie sehr begründet diese Sorge war, wird durch ein weiteres Gesetz nachgewiesen, welches über eine Verlängerung von noch einem Monat verfügte (Gesetzesartikel IX von 1947, bis 31. März 1947).[18]

Im ersten Staatshaushalt (1. August 1946 - 31. Juli 1947) überschritten die Ausgaben noch um zehn Prozent die Einnahmen. Die Appropriation wurde wahrscheinlich "unter Einhaltung der bisherigen Gesetze und Verordnungen beziehungsweise der Einhaltung der Modifizierung der bisherigen Gesetze und Verordnungen" gegeben.

Die folgende jährliche Budget wurde, was seine Vorbereitungen betrifft, nicht in der Weise wie seine Vorgänger angenommen. Damals war die Regierung in Zusammenhang mit der Stabilisierung, jetzt hinsichtlich der Annahme des Dreijahresplanes gezwungen, um die Ermächtigung zu ersuchen.

Die Korrelation der die Planwirtschaft ins Leben rufenden und die Regierungsermächtigungszyklen gewährenden Normen weist ein eigentümliches Bild auf. Das Plangesetz (Gesetzesartikel XVII von 1947) wurde am 11. Juli 1947 verkündet. Das für die Exekutive zum Erlass von Verordnungen ermächtigende Gesetz (Gesetzesartikel VIII von 1947) verlor am 31. Mai, auch wegen des Regierungswechsels, seine Gültigkeit. Das die Permanenz der Ermächtigung deklarierende Gesetz (Gesetzesartikel XVI von 1947) wurde am 19. Juni verkündet. In der Zwischenzeit - am 8. Juni - erschien die Verordnung Nr. 19600/1947 des Ministers für Industrie bezüglich des Entwerfen des Industrieproduktionsplanes, welche im Interesse der Durchführung des Dreijahresplanes unter Berufung auf frühere Regierungsverordnungen herausgegeben wurde.[19] Beachtenswert weiter sind die Verordnungen über die Aufstellung des Amtes für Preis- und Materialwirtschaft, sowie

[17] Ebd. 4464/1946

[18] Ebd. 715/1947

[19] Magyar Közlöny Rendeletek Tára (Ungarisches Amtsblatt, Abt. Verordnungen) vom 8. Juni 1947. Siehe: Verordnungen Nr. 12.400/1945 ME und 5740/1946 ME.

über die industrielle Materialwirtschaft und Preisregelung, da als Aufgabe des Amtes auch die Vorbereitung der industriellen Planwirtschaft vorgesehen war.[20]

Die in dem Planwirtschaftsgesetz der Nationalversammlung enthaltene Regierungsermächtigung konkurrierte, zeitlich gebunden und sachlich beschränkt, mit "parallel lebenden" Ermächtigungsgesetzen.[21] Was die strafrechtliche Repression anbelangt, hat sich das Verordnungsrecht ungewöhnlich ausgebreitet durch die Statuierung von Verbrechen, die Ermessung der strafrechtlichen Verantwortung und die Inanspruchnahme der des ganzen Sanktionensystems (z.B. Todesstrafe).[22]

Nach dem Umweg, der das allgemeine und das besondere Verhältnis der Ermächtigungen darstellen sollte, verfolgen wir nun die sich auf die Führung des Staatshaushaltes beziehende Indemnität weiter.

Der durch dem Staatlichen Planamt veröffentlichte Plan kann im Grunde genommen als ein für mehrere Jahre geltendes staatliches Investitionsprogramm bewertet werden.[23] Aus dieser seiner Funktion ergab sich, dass die bereits zum Teil ausge-

[20]Das Amt für Preis und Materialwirtschaft gelangte unter Aufsicht des Ministers für Industrie. Die allgemeinen Prinzipien der industriellen Materialwirtschaft wurden entsprechend den Beschlüssen des Oberster Wirtschaftrates vom Leiter dieses Ministerium festgelegt. Siehe: Verordnung Nr. 5740/1946 ME, Veröffentlichung am 28. Mai 1947. Geltende Rechtsregeln von zwei Jahren 1945-1946 (ung.), Budapest, 1947. pp. 56-59.

[21]Vgl. Regierungsverordnung Nr. 8530/1947 bezüglich der Aufstellung des Planwirtschaftsrates und des Staatlichen Planamtes; aufgrund der von dieser Verordnung erteilten Ermächtigung die Verordnung Nr. 10520/1947 ME über die Planbeauftragten. Geltende Rechtsregeln von 1947 (ung.), Budapest, 1948. pp. 242, 246.

[22]Regierungsverordnung Nr. 14200/1947 über den strafrechtlichen Schutz bei der Durchführung des Wirtschaftsdreijahrplanes. Ebd. pp. 247-249.

[23]PETŐ, I. - SZAKÁCS, S.: A hazai gazdaság négy évtizedének története 1945-1948 (Geschichte von vier Jahrzehnten der ungarischen Wirtschaft, Teil I: Epoche des Wirtschaftsaufbaus und der Leitung durch Plananweisungen). Budapest, 1985. p. 86-89.

stalteten Planzahlen der einzelnen Ministerien mit den zwischenzeitlich endgültig gewordenen Planaufgaben abgestimmt werden mussten, was wiederum mit mehrfacher Ermächtigung geschah. Nach dem Gesetzesartikel XX von 1947 (1. August bis 31. Oktober)[24] sind für den Gesetzesartikel XXVI von 1947 (bis 31. Januar 1948) die Haushaltkennzahlen in einzelnen Fragen endgültig entscheidend, doch wegen der Höhe der Ausgaben, sowie verschierener Sach- und Übergangs ausgaben war eine die Rahmen offenlassende Entscheidung des obersten Wirtschaftsrates erforderlich.[25]

Auf Auswirkung der politischen Ereignisse, sowie weiterhin unter Rücksicht auf die insgesamt sechs Wochen beanspruchende Haushaltskommissions- und Parlamentsdiskussion des unterbreiteten Haushaltsvorschlages wurde eine Vorlage des Ministerrates für die Zeit bis zum 31. März 1948 eingebracht.[26] Es ist allgemein bekannt, dass in diesen Monaten unter Umgehung der Koalitionsverhandlungen und mit Ausarbeitung der Konzeption der Industriezweiglenkung sich bei den Industrieunternehmen eine erfolgreiche Verstaatlichung abspielte, welche im Verhältnis von Staat und seinen Unternehmen eine entscheidend neue Lage schuf.

Gleichzeitig mit dem Ausbau des zentralen Organisationssystems der Industrielenkung begann die Vorbereitung des Haushalts für das Kalenderjahr. Der Ministerrat nahm unter Berufung auf Erfahrungs- und Zweckmässigkeitsgesichtspunkte Stellung, so z.B. die günstigere Wirkung der "Atmosphäre" für die Investitionen, sowie unter Berufung auf die Vorteile des Steuerjahres. Es wurde die günstige Wirkung der so verbleibenden Zeit für die Planung des Haushaltes von 1949 betont und ein Gesetzesvorschlag initiiert zwecks der Veränderungen, weiterhin um Indemnität für fünf Monate des laufenden Jahres

Es ist nicht uninteressant zu erwähnen, dass der Finanzminister des ersten verantwortlichen Ministeriums für die Zeit

[24] UMKL-TO 2362/1947

[25] Ebd. 3728/1947

[26] Ebd. 143/1948

bis zum 31. Dezember 1848 die ersten Haushaltkennzahlen des ungarischen Staatshaushaltes aufstellte. Nach dem Ausgleich wurden die Budgets ebenfalls für das Kalenderjahr gefertigt. Dies wurde auch durch den Gesetzesartikel XX des Jahres 1897 über den Staatshaushalt bekräftigt. Hinsichtlich des Beginns des Haushaltsjahrs brachte der Gesetzesartikel XXVI des Jahres 1913 eine Veränderung, demzufolge das Haushaltsjahr vom Juli 1914 an - in jedem Jahr - bis zum 30. Juni des folgenden Jahres dauerte. Mit dem 1. Januar 1940 (Gesetzesartikel VII von 1939) bürgerte sich wieder das Kalenderjahrsystem ein, dann richteten sich ab 1. August 1946 als natürliche Folge der Stabilisierung die Haushalte nach dem Krieg an diesen Zeitpunkt.[27]

Schliesslich betraf der die Reihe der zur Führung des Staatshaushaltes gegebenen Ermächtigungen abschliessende Indemnitätsvorschlag die Monate vor dem Haushaltsgesetz von 1949 (Januar 1949 - 28. Februar) und er war auch inhaltlich erneuert. Die Appropriation hat nämlich nicht dem abgelaufenen Haushalt entsprechend, sondern gemäss dem dem Parlament unterbreiteten neuen Vorschlag zur Wirtschaft berechtigt. Es sei bemerkt, dass wir in der Geschichte unseres Haushaltsrechtes bereits einer ähnlichen Lösung begegnet sind (Gesetzesartikel XVII von 1922 und Gesetzesartikel XXXII von 1923). Zu dieser Veränderung ist es wegen der neuen Struktur des Budgets von 1949 -Reformhaushalt genannt) gekommen sowie wegen der "natürlichen" Modifizierung der Ausgaben.[28]

Der das hierarchische Institutionensystem der Wirtschaftslenkung bestimmende Plan hat später nicht nur wirtschaftspolitische Zielsetzungen realisiert, sondern funktionierte auch als ein Mittel, welches detaillierte Anweisungen trug. In diesem Prozess konnte den vermittelnden Ermächtigungsnormen zwischen dem politischen System und der Regierung keine Rolle mehr zu-

[27] Ebd. 2519/1948

[28] Ebd. 5489/1948

kommen. Die lediglich zum Dienst der politischen Entscheidungen reduzierte rechtliche Norm als mittel konnte aber nicht mehr den Zielen entsprechen, zu deren Erreichung sie von vornherein nicht geeignet war.[29]

УПОЛНОМОЧИЕ И УПРАВЛЕНИЕ ГОСУДАРСТВОМ ПУТЕМ ПОСТАНОВЛЕНИЙ

Г. Матэ

В правительственной системе эпохи народной демократии гарантии нормотворчества с особым вниманием были установлены законодательством.

Законы уполномочия с предчетным ограничением относились к нормотворчеству, а также к обеспечению бесперебойного функционирования государственной казни /индемнитет/.

Обязанность представления постановлений на последующее подтверждение возложилась на коалиционное правительство, а с 1947 года право пересмотра постановлений было поручено политической комиссии Государственного Собрания.

На основе архивных документов автор показывает развитие данного правого института в период 1945-1949 годов.

AUTHORIZATION AND STATUTORY GOVERNMENT

G. Máthé

In the governmental system of people's democratic age the guarantees of statutory legislature are shaped by the legislation with special care.

The statutory laws with conteptual limitation aimed the creation of regulations and the security of troublefree operation of the state affairs /indemnity/.

The obligation to submit the statutes for subsequent approval has burdened the coalition government. From 1947 the Political Committee of the Parliament has acquired right to supervise the statutes.

Based upon the documents in the archives the paper presents the development of the legal institution between 1945 and 1949.

[29] KULCSÁR, K.: A jogfejlődés sajátosságai: a jog mint eszköz (Die Eigentümlichkeiten der Rechtsentwicklung: das Recht als Mittel). Budapest, 1983. pp. 22-23.

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STATE STRUCTURE AND GOVERNMENT IN 18th-CENTURY FEUDAL ABSOLUTISM

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"All armed prophets have conquered,
and the unarmed ones have been
distroyed"

Machiavelli

The paper seeks the answer to the question what kind of substantial changes took place in the government of the states during the last period of feudalism. On one hand it seems that the person of the monarch prevailed with more emphasis and his ability to govern became more and more important. All these brought about the conscious preparation of the future king to govern.

On the other hand an important feature of this age that the importance of central government has gained, in the same time its concentrated and uniform character has increased. This uniformisation process can be traced particularly in three areas: the administration of military affairs, the financial administration and the uniformisation of the administration of justice. Meanwhile this new governmental method effectively leans on the special skills, this way it renders obsolete the traditional corporative institutions of the former feudal government. Their elimination shows changing forms in time and space.

Finally we mention the fact that the monolitic power of feudal absolutism — which became its pole — sooner or later requires some kind of institutional control of government, albeit with some limitations. Especially such kind of experiments can be seen where the feudal absolutist governmental form has remained for too long time due to some reasons.

I.

The last phase of feudalism was followed throughout Europe by the period of bourgeois revolutions creating a new state structure, i.e. the bourgeois state, the classic form of which was the bourgeois republic. It is also a generally accepted view that these bourgeois states were built on the ruins of the feudal state structure crushed by the bourgeois revolutions. Exam-

mining,however, not only the process of transformation itself, i.e. the bourgeois revolution and the following few decades, but also the period before, one can find traces of views, institutions and solutions that have been regarded so far as definitely resulting from bourgeois state as early as the last phase of feudalism. In contrast with the traditional views according to which the preconditions of bourgeois transformation develop within the economic and ideological sphere of feudalism, our opinion is that it is worth while seeking such preconditions also in the state organization of feudal absolutism. Hungarian military historians have recently called attention to the degree one has to appreciate the new method of warfare applied first in the French Revolution: "The interesting thing here is (and at the same time important from the point of view of military science and military history) that there was not an element in the revolutionary warfare that had not been well known and urged for by the writers of the 18th century. They remained, however, a pious wish and pure theory quite up to the point, when the very society waging war changed."[1]

The differences and the similarities between the feudal representative monarchy preceding absolutism and the bourgeois republic following it make research into the period of absolutism justified. This concept is defined by the communis opinion of historiography as lasting from the middle of the 16th century to that of the 19th. This lengthy period is further coloured by the significant differences between Western and Eastern Europe. The Austrian and Russian monarchies of the 19th century are both characterized by absolutism or certain absolutist attempts, while in Western Europe absolutism is but a matter of history at that time. In Western Europe, the absolutistic form of government launched not only the unifying process of central administration, but also that of the whole state life, creating by this the preconditions of the unified bourgeois nation state. At the same time, the absolutist regimes of East and Central

[1]PERJÉS, CLAUSEWITZ,G.: Magvető, Budapest, 1983. p. 26.

Europe created the unified central state control within the framework of the state, but they could do this only via a majority or ruling nation. So the bourgeois era found them as typically multi-national states.

Another significant feature of feudal absolutism was that the mechanism of government became a single-pole one. While in the feudal representative monarchies the feudal estates participated in the process of government beside the ruler and also acted as an "official" opposition, feudal absolutism did not allow such an opposition to exist. The ruler of a feudal absolute state relied solely on himself and his own establishment. So the personality of the ruler came to be more emphasized than in the earlier centuries, as revealed also by earlier research.[2] It is no wonder, and we must also take it into consideration that with the ever higher technicalness of administration the number of qualified persons working there also increased, and the rulers of the age were ever more consciously prepared for their future activity from early childhood. Consequently, the chances of the existence of more outstanding historical personalities among the rulers grew, too.

This coming into prominence of the personality of the rulers moved some scholars to render the period of absolutism and the personality of the absolute ruler absolute and seek early or late absolute rulers before and after the given period (the 16th to 19th cc.). A good example of these extremities is Frederick II in the Kingdom of Naples and Sicily in the 1200's whose rule seems for certain scholars to be an early appearance of the absolute way of government.[3] These remarks do not naturally serve to deny the significance of outstanding personalities in the age of absolutism like Louis XIV. Frederick the Great, Catherine II or Maria Theresa and Joseph II, so important from the Hungarian point of view.

[2] HOLDSWORTH, W.S: A history of English law. Vol. IX. London, 1926. p. 4.

[3] The New Encyclopedia Britannica. Macropaedia. Vol. 15. 1974. p. 700.

The predominance of the rulers' personality did not come about abruptly, but was the result of a long process. At any case, it came to the fore practically in the age of absolutism, which can be accounted for just with the above-mentioned single-pole nature of political power. The first steps towards this were actually taken in Europe as early as the 15th century with the formation of the centralized feudal monarchies. The appearence of great historical figures is also a sign, such as the famous Hungarian ruler of the day Matthias Corvinus, remembered by the historians for the repeated strengthening of the ruler's rights, for the deft manoeuvring in the political struggle among the feudal states, and for his efforts to create a strong monarchy and a unified Hungarian kingdom besides a stronger rule in the Danube region. Similar efforts can be seen on the part of the French kings of the day and another famous ruler, Ferdinand of Aragon. It is interesting to know that these efforts influences also the political science of those times. The famous 16th century notary of Florence Niccolo Machiavelli modelled his image of the talented ruler not at all on the basis of the century-old Christian political and ethical principles. His ruler's important feature was a rationality that used to characterize only the merchants in older times, and he held the reason of the state above all other matters. Machiavelli's advices of government did not originate only from the direct events of his age from where he took his examples. The events of the recent past also motivated them. For example, when speaking of the government of a conquered country he says: if the conquered territory differs from the parent country in its language, customs and laws, it is the safest for the king to move there and govern his newly conquered land from its own capital.[4] It seems as if the learned author had studied the fights of our Matthias Corvinus against the Austrian provinces. After conquering Vien-

[4]MACHIAVELLI: A fejedelem (The Prince) In: Machiavelli és Nagy Frigyes a fejedelemről (Machiavelli and Frederick the Great on the prince). Trnas. Juhász Vilmos. Officina, Budapest, 1944. p. 22.

na, he namely moved his seat there immediately. Machiavelli did not refer to King Matthias, for it was customary to quite others in those days, but the rulers he thought famous appear in his work frequently as examples.

It is evidently connected with the new intellectual trend of the renaissance and of humanism (their secular and humanitarian conception of the world) that more and more works of political science were written on formerly taboo subjects such as the ruler and the good way of government. At the same time, ever more authors were lay persons. All this contributed greatly to the change of the early-Middle-Age image of the mystic ruler and the development of the image of the king as a consciously acting organizer, the leader of a community. A good example for this is besides Machiavelli the Utopia of Thomas Moore or the Horologium Principium of Antonio Guevara, the tutor of Charles V. Although some of these contributions look like the so-called early Kings' Mirrors (Királytükrök), their content reflects a new, rational way of thinking. The peak of this process came with absolutism when it was the rulers themselves who began to write on government. Let us mention Frederick the Great or the well-known figure of the House of Habsburg, Joseph II.

The ferment of the teachings on government in the 16th century was certainly caused also by the fact that from that time on the government of a state was considered a public matter. The ancient idea of the origins of the state revived in contemporary theories of state seeking the origins of state life in the human demands for association or unity. The modernized form of this concept became known in the renaissance as the contract formula. Later two kinds of contracts were distinguished, namely that of the foundation of the state and another one submitting the citizens. It is a very-very significant element of these contract concepts that this was the first time the rights of the individual against the representatives of state power were put down clearly. These ideas were thus forrunners of the famous French declaration of the bourgeois era, the Declaration of Rights. The idea itself must have been a well-founded part of renaissance political thinking. Recent research holds it pro-

bable that Werbőczi István, author of our famous medieval book of laws called Tripartitum considered the clause called ius resistendi in the Golden Bull securing the prerogatives of the nobles the right to resist all unlawful measures on the part of the ruler.[5] The roots of this right of resistance go back also to the concept of state contract. Werbőczi himself wrote of the Huns, the forefathers of the Magyars just like Kézai Simon did in the late 13th century in his Gesta Ungarorum. He, namely, mentioned that the Huns elected their king (Attila), while earlier it had been the communitas of the Huns that exercised the rights of legislation, jurisdiction and military control. This transfer of power based on contract was an organic part of contemporary political thinking in 13th century Christian Europe, for one can find parallels of this Hungarian theory in the contemporary French lawbook of Beaumanoir as well.[6] There was, however, a weak point in the contract theory, since the contract could be understood in two different ways. First it could be interpreted so that certain rights remained with the community or the individual. According to the other view, the transfer of power shifted all the rights to the ruler and nothing remained with the subjects — as seen in English legal history. It was but natural that in the course of the development of absolutism the rulers stood for the last variety, while the representatives of the community stood for the first one. A good example for this contraversial state of affairs was the case of our king Joseph II. Naturally, he consciously employed absolutism in the government of the country and was therefore the follower of the view that the trasfer of power by contract left the community completely without rights. At the same time, the Hungarian chancellary planning to modernize Hungary made its opinion clear by its choice of king. It followed Kézai's and Werbőczi's views

[5] DEGRÉ,A.: Az ellenállási jog története Magyarországon (The history of ius resistendi in Hungary) JK, 6/1980.

[6] SZŰCS,J.: Társadalomelm élet, politikai teória és történelemszemlélet Kézai Gesta Ungarorumában (Social theory, political theory and historical thinking in Kézai's Gesta Ungarorum), Gondolat, Budapest, 1974. pp. 413-557.

by stating that the king must govern Hungary not alone, but together with the Parliament.[7]

Some scholars consider the existence or liquidation of parliament a distinctive feature of absolutism in a country. They think namely that absolutism and active parliamentary life are incompatible. It seems, however, that this extreme view is not quite correct, since for example the reign of the Stuarts is considered absolutism by the British historians of law, though parliament existed with shorter or longer interruptions. The nearly absolutistic princes of Transylvania, Bethlen Gábor and Rákóczi György I in the 17th century managed to cooperate with their parliament in a peculiar way: they invited to their one-chamber parliament by special princely invitation as many of their followers as necessary to counterbalance the opposition of the counties, towns and so-called "székek" or districts and secure the majority vote for their own bills. As it becomes clear from these examples, the absolutistic way of government and the activity of the representative organs are not at all incompatible.

There was a great variety in this subject in the Europe of olden times. In Spain the feudal representative bodies of the individual provinces had almost been pushed to the background by the age of Philip II, but a row of separate councils for the provinces existed parallel with the activity of the ruler, probably as a compensation.[8] They were suitable to express views of opposition, though necessarily a bit biased ones. On the other side, these councils were granted the right of supreme jurisdiction in the given province, which further strengthened local right. It is a well-known fact that the French national assembly of the Estates was not convened from 1614 to the Revolution, but the assembly of the Estates in the provinces were still active for some time. At the time of absolutism

[7] HAJDÚ, L.: II. József igazgatási reformjai Magyarországon (The administrative reforms of Joseph II in Hungary), Akadémiai Kiadó, Budapest, 1982. pp. 119-121.

[8] KOENIGSBERGER,H.: The government of Sicily under Philip II of Spain, Staples, London-New York, 1951. pp. 73-116. 149-160.

it was the huge adcisory bodies of the king entitled to levy taxes, etc. that were capable to give voice to certain local interests. It was only the East-Central-European territories of the Habsburgs and Tsarist Russia, where the national parliaments were totally omitted for longer periods. One can thus draw the conclusion that though the existence of a parliament can be taken into account when talking of absolutism, it is not necessarily a criterium. The distinguishing marks of absolutism must be sought elsewhere.

II.

The predominance of the person of the ruler was a general trait in the states of the absolute era. I have already mentioned that power left the medieval crust behind and revealed its new characteristics. This, however, did not mean that they abruptly broke off the medieval procedures of the transfer of power. Just on the contrary. Louis XIV, for example, made use just of the peculiarities of the coronation ceremony (the anointing with holy oil brought by angels) to represent that the only antipole of his earthly power was God. So he was not at all subjected to anybody in his behaviour and activity as a ruler and was guided solely by the morals of faith. Interestingly, the followers of Louis XIV a century later tried to apply this power they thought infinite in behalf of the well-being of their people. The idea of the infinite power of the absolute ruler stands firm also according to experts of state theory. Hobbes, the famous state theoretician of the day deduced the unrestricted nature of royal power just from the contracts.[9]

The guarantee of the unlimited character of royal power was the army.Royal power started to take a really absolute character in some of the European courts when the rulers organ-

[9]HOBBES, T.: Válogatott szemelvények Leviathan vagy az egyházi és a polgári állam anyaga, formája és hatalma

In: Morus, Bacon, Hobbes, Locke. Ed. C.I.Gulian és I. Banu. Bodor András, Művelt Nép, Budapest, 1982. p. 131.

ized a relatively serious standing army. When a king can apply military force to enforce his will, his absolute power is finally unambiguous. The army could secure majority vote in the days of the outbreak of the English bourgeois revolution, too. Namely, the long political struggle between the Parliament and the king reached its decisive phase when the troops recruited by order of the king came to be led by officers sent out by the Parliament, so they served the interests of the Parliament henceforth.[10] In the beginning, the members of the Parliament hoped to force the king to negotiate by this armed force.

The militarization of power resulted significant changes everywhere, for the standing armies needed standing job and wars became permanent all over. Recruiting had to be organized, as well as permanent military districts to secure the accomodation of the soldiers in peace and their replacement and supply in times of war. These districts did not at all coincide with the traditional ones, but took strategic interests into consideration. Parallel with the formation of the military districts or even sometimes earlier districts of financial control were also established. The importance of military and financial affairs from the age of the centralized representative feudal monarchies resulted that the unified central government necessary to implement absolute rule in most countries was administered vie these two branches of administration or through one of them, and not through the traditional territorial administration of the counties or provinces that could operate sometimes also independent from the ruler's wish. This — together with the pushing to the background of the representative organs — resulted that the essential characteristics of the independence of the provinces stopped to exist or survived only as mere forms. The degree of independence of the various parts of a big conglomerate of states brought about in feudal times depended

[10] For the early realization of the importance of the army see MACHIAVELLI: 1944. p. 211. "All armed prophets have conquered, and the unarmed ones have been destroyed." And HOBBES: pp. 122-126, 129. "Without sword the contracts are but mere words."

also on the ways of jurisdiction, for the continuity of the former organs of jurisdiction like separate courts strengthened the independence of the province, too. The absolutist rulers of the day realized this soon and brought about major reforms of jurisdiction alongside the stabilization of feudal absolutism throughout Europe. The aim of these reforms was to establish a unified system of jurisdiction to promote the unity of the state itself. This was the case in the 18th century Prussia and in the Danubian empire of the Habsburgs, as well. An interesting feature of the above-mentioned reform was that the modernization of central jurisdiction usually involved the formation of new juridical districts that generally did not coincide with the old administrative districts. There were new points of view in their marking out, such as traffic and geographic considerations.[11]

So there were three important spheres where affairs were mostly not controlled in the framework of the old administrative districts any more: there were the army, the financial matters and jurisdiction. This concentration of feudal absolutism reflecting an ever growing central control made the activity of the feudal organs of representation irrational. It also follows from this that if the absolutist establishment managed to operate its own state mechanism in the above-mentioned three spheres, it did not have to annihilate the old representative institutions by force. Sooner or later they stopped functioning anyway, having lost their meaning. They survived only in some remote provinces, where strategic points of view accounted for the further independence of the province. A good example for this is Sicily of the Spanish crown or Transylvania after the Turks, when it belonged to the Habsburgs.

Two things follow from the "intervention" of feudal absolutism into the traditional administrative districts. On the one hand, the modern division according to the three branches

[11] The French districts of jurisdiction see The New Encyclopaedia Britannica vo. 7. p. 412. For the Hungarian parallel in Joseph II's times see: HAJDU, L.:op.cit.p.105. The author states that Joseph II dres the new districts of a military map.

of administration offers basis for the future bourgeois state for a new, rational and uniform division of the state's territory. This is clearly reflected in the case of the French departements. On the second hand, the neglect of the traditional feudal territorial division was a great help in breaking down feudal particularism and was at the same time a great step in the development of the modern nation state. It is a matter of further thorough studies why not all feudal state conglomerates tended to become unified nation states by the bourgeois era. Especially in Central and Eastern Europe, these big old groups of countries disintegrated into small nation states, the causes of which fall beyond our present study.

III.

Public administration and the control of the state itself deserve further attention in the state life of feudal absolutism. The decline of the former territorial divisions naturally involved the decline of their traditional forms of activity, as well. It was, however, not only the intervention of the state that brought about changes within the old feudal framework inherited from the early Middle Ages, but also the capitalist tendencies of the age that began to loosen the whole framework of traditional life. Especially the old rural communities started to break up owing to the migration of their members to the industry. Similar changes took place also in municipal life. All this led to a situation, when several functions formerly exercised by the old communities remained unattended. So the number of the poor and hungry increased rapidly in the wake of the great economic and social changes, and the so-called poor relief appreared as a task urgently to be solved after some epidemics sooner or later all over Europe. Public health care had also to be organized in a unified form owing to the increased inflow of workers to the towns and their settlement around the big industrial plants. Earlier the majority of these problems got solved without central intervention. Hungarian landlords of the 17th century, for example, did not forget to mention in their last will the provision of the

hospital and the poor on their estates.

State intervention created new tasks in the realm of the Church and in education, too. The secularization of ecclesiastical property at a number of places meant a need for a unified system of schools and the state control of education. It was characteristic even of the strongest countries of Catholicism that the absolute rulers – just like their colleagues in the early Middle Ages – exercised patronage over the Church. A good example for this is the case of the Spanish empire in formation. Philip II managed to exercise control over the Churches in the Indies as their highest patron via his administrative lay official, the leader of the colony. In the Kingdom of Sicily he even went further by reviving a 12th century papal bull and considereing himself the legate of the Pope as King of Sicily. On this basis he even acted as supreme judge in the appeals of the ecclesiastical courts of Sicily, which meant neglecting the Holy See at all. Under this Catholic disguise he reached an independence in Sicily paralleled by Henry VIII in contemporary England under Protestant flags. Similarly great was his power over the Churches in his Spanish kingdom. And what is even more: when his relations with Rome got worse and worse owing to this broad interpretation of royal rights, the president of the royal council confidently stated: "There is no Pope in Spain."[12] Similarly, the militant Gallicanism of Louis XIV[13] played a significant part in the quick secularization of Church property during the French Revolution and the payment of the priests by the state as if they were civil servants. The state control of ecclesiastical affairs necessarily involved a special administration for this purpose.

Owing to the loosening of the traditional frameworks all this was left now to the state to do. The difficulties were enhanced also by the fact that the absolute state had to increase also its incomes to be able to maintain its standing ar-

[12] KOENIGSBERGER: op. cit. pp. 145-148.

[13] The New Encyclopaedia Britannica vol. 7. p. 639.

my and fulfil its bigger administrative duties. As the state was unable to solve everything by bigger taxes, it had to intervene intensively into economic life as well, not only by granting monopolies, but also by a direct economic activity in certain fields. It even tried to organize intermediate trade and secure the profit for itself. To organize economic life properly, necessarily involved the task of organizing traffic and communication on state level.

One cannot but wonder how the absolutist state apparatus managed to fulfil all these immense tasks that emerged within a relatively short period. The rulers themselves had also a lot of things to do. Their everyday work was far from being easy: they had to handle dozens of cases a day as the supreme clerks of the country. The contemporaries noticed their industriousness, too.[14] Besides this, these rulers even had time to advertise novel agricultural products coming from the New World, such as the potatoe and the sugar beet introduced by Frederick the Great and the silkworm propagated by Joseph II.

The rulers were of course not alone in this huge work. They were assisted by a seriously organized apparatus. As I have already mentioned, Europe witnessed the spread of various councils after Philip II's reign, i.e. government by various bodies. As the role of the old representative and other feudal organs diminished with the strengthening of absolutism, the significance of confidential councillors appointed by the ruler started to grow. Even Machiavelli emphasized their role in his famous work, and other state theoreticians also did so. A good example for this phenomenon was France, where the most important branches, i.e. the financial and military affairs had councils to decide in matters influencing the whole of state life.[15]

[14] GLADDEN, E.N.: A history of public administration. vol. 2. London. 1972. p. 165.

[15] Ibid. pp. 142-158.

The old royal councils inherited from the early Middle Ages remained intact, but owing to their large numbers they were gradually used merely in jurisdiction.[16]

The above-mentioned new councils stood at the head of the most important branches of state administration, at the top of their hierarchy. They had to be highly technical, and their members had to be qualified. They were thus the basic forms of modern public administration. The public administration of absolutism was brought about all over Europe as a hierarchy, a system of organizations centrally controlled from above. This form of control is in itself alien to the feudal representative bodies and cannot be exercised by them. Should some of them survive in certain states, the control of the new network necessarily slipped from their hands, owing to their disadvantage as compared to the qualified administrators. This might have been the cause of Joseph II's neglect of the parliament in his new system. The Chancellery kept, however, proving against his conception that well-prepared parliamentary sessions do have a sense.[17] It was not only Joseph II who felt an aversion to the feudal bodies, but many of his absolutist colleagues, too, which was quite natural, for according to their views they were responsible to nobody but God.

The lack of control was naturally not without any dangers. When the ruler at the top of the hierarchy of administration was not an outstanding personality or was hindered in his activity, one or two omnipotent ministers or the professional head of administration, the chancellor played a very great role in state affairs. Let us mention for example Mazarin, Richelieu or Metternich. The absolutist regimes rerained from every inner control and wished to hinder all forms of opposition, so they established censorship over the press and the publishing of books.

[16] EMBER, Gy.: Az újkori magyar közigazgatás története Mohácstól a török kiűzéséig (The history of modern Hungarian public administration from the Battle of Mohács up to the expulsion of the Turks) Budapest, 1946. pp. 48-60.

[17] HAJDÚ,L.: op. cit. 120-121.

It was thus natural that one of the most important demands of the bourgeois regimes following absolutism was a government responsible to parliament and the abolition of censorship. It is, however, interesting that in the states where the absolutist form of government survived for a long time, the supreme body of administration tried to establish inner control itself, like in the system of prosecution in Tsarist Russia. The Swedish ombudsman may also be ranked here, but let us not go into detail at this occasion.

ГОСУДАРСТВЕННАЯ СТРУКТУРА И ФОРМА ПРАВЛЕНИЯ В УСЛОВИЯХ ФЕОДАЛЬНОГО АБСОЛЮТИЗМА

Л. Рац

В статье изучаются вопросы о том, что какие существенные изменения произошли в управлении государствами, находившимися в последний период феодализма. Кажется, что с одной стороны лицо короля еще более выдвинулось на передний план и все большее значение придавалось его способности править государством. Все это повлекло за собой сознательную подготовку будущего монарха к правлению государством.

С другой стороны, существенным изменением данного периода явились повышение значения центрального управления, его сконцентрированность и унифицирование. Процесс унификации особенно ярко проявляется в трех таких областях, как управление военными делами, финансовая администрация и юстиция. Тем самым новый метод управления, основанный на специальных знаниях, лишает основы существования традиционных институтов прежнего сословного управления страной. Формы их упразднение во времени и пространстве являются разными.

В заключение рассматривается вопрос о том, что однополюсная, монолитная власть феодального абсолютизма, рано или поздно, выдвигает требование к контролю управления, хотя бы в ограниченной мере. Такие попытки наблюдаются в первую очередь там, где по какой-то причине долго сохранилась феодально-абсолютическая форма правления государства.

STRUCTURE DE L'ETAT ET GOUVERNEMENT DANS L'ABSOLUTISME FEODAL DU XVIII^{e} SIECLE

L. Rácz

L'étude cherche la réponse à la question de savoir quels changements essentiels se sont produits dans le gouvernement

des Etats dans la dernière période du féodalisme. D'une part, il semble que la personne du souverain est passée encore plus vigoureusement au premier plan et ses capacités de gouverner ont acquis de plus en plus d'importance. Tout cela implique la préparation consciente du futur souverain à l'art de gouverner.

D'autre part, le changement essentiel de cette période consiste dans le fait que l'importance du gouvernement central, et en même temps son caractère concentré et uniformisé se renforcent. Ce processus d'uniformisation peut être remarqué dans trois domaines: dans la direction des affaires militaires, dans la gestion des finances et dans l'unification de la juridiction. En même temps, cette méthode de gouverner s'appuyant d'une façon efficace sur la compétence professionnelle, rend superflues les institutions traditionnelles du gouvernement corporatiste féodal d'autrefois. Leur suppression revêt des formes variées dans le temps et dans l'espace.

Finalement, l'étude traite la question suivante: la puissance monolitique de l'absolutisme féodal exige tôt ou tard le contrôle institutionnalisé du gouvernement, quand bien même d'une façon limitée. Ces expérimentations peuvent être observées surtout là où la forme absolutiste féodale de gouverner subsiste pendant longtemps en raison d'une cause quelconque.

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LE CONTRÔLE FINANCIER-ÉCONOMIQUE

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L'auteur examine les questions du contrôle financier exercé par l'Etat; Il démontre qu'il faut faire une nette distinction entre son contrôle d'aspect fiscal, le contrôle de la comptabilité et son contrôle exercé en tant que propriétaire. Il analyse d'une façon détaillés les manifestations du contrôle ayant le caractère de contrôle du propriétaire (investissement des capitaux dans une enterprise, retrait des capitaux) et en arrive à la conclusion qu'il est du devoir élementaire des sujets du droit de propriété (et parmi eux celui de l'Etat) de contrôler le rendement de leurs biens. Outre le contrôle fiscal exercé par l'Etat (ce qui équivaut au contrôle des recettes du budget) l'auteur attache beaucoup d'importance aux problèmes relatifs au contrôle des dépenses dites publiques et soutient l'idée selon laquelle même le contrôle le plus rigoureux des dépenses publiques ne peut remplacer la réconsidération de la théorie du contrôle du propriétaire.

1. En connaissance des recherches théoriques relatives à l'organisme de contrôle financier-économique et à la sphère d'activité de cet appareil[1] il faut poser catégoriquement la question de savoir si – du point de vue du droit positif[2] ainsi que du point de vue théorique une interprétation juste est donnée à la notion du contrôle financier-économique, et si les exigences, que la politique économique[3] et le gouvernement formulent à l'égard de la buraucratie chargée des fonctions de contrôle,[4] sont réelles. Selon la littérature de cette question ainsi que selon le droit positif "l'objectif du contrôle financier économique est de déterminer si les aspects financiers des buts de la politique économique et les tâches économiques fixées par les décisions centrales et par les normes juridiques sont réalisés. Il a (en outre) pour mission d'examiner si les dispositions prises au cours de la direction financière, ainsi que les devoirs qui découlent des autres prescriptions des autorités ayant un vigueur général sont executés conformément aux

prescriptions."[5] En résumant l'objectif et le domain du contrôle financier-économique on peut dire que la contrôle financier--économique des divers organes de gestion et de ceux qui sont soumis au régime de gestion budgétaire suit le fonctionnement du système dit régulateur. Cependant en examinant en détail le système régulateur, on découvre que dans cadre de l'économie ce n'est pas un seul et unique système régulateur de revenu (selon le jargon professionnel: système financier)[6] qui existe, mais il y en a plusieurs; par conséquent autant de genres de systèmes régulateurs de revenu, autant de genres de contrôle financier-économique. On simplifie – selon notre avis –[7] la question de ces divers systèmes de contrôle existant en parlant suelement du contrôle financier-économique des organes soumis au régime de gestion budgétaire et du contrôle des entreprises et des coopératives. Cet approche est superficielle et inexacte sous plusieurs aspects.[8] D'une part parce qu'anjourd'hui les revenus et les salaires dans les établissements financiers sont une matière particulière de la régulation et d'autre part car l'activité économique peut être menée non suelement par des entreprises et des coopératives, mais également dans le cadre d'autres formes reconnues par le droit. Cette catégorisation (c'est-à-dire d'un par le contrôle des entreprises et des coopératives, d'autre part le contrôle financier-économique du budget est inexacte, parce qu'outre ces formes il existe encore des contrôles d'autres types, ayant un contenu nettement financier: ainsi le contrôle exercé par la banque d'émission[9] et l'inspection des banques[10] exercés sur les banques commerciales et les coopératives d'épargne ou l'inspection de l'assurance d'Etat exercés sur les sociétés anonymes exercant une activité d'assurance, sur leurs sociétés annexes, les coopératives d'assurance et les associations d'assurance. Outre les systèmes de contrôle énumérés il existe encore d'autres (contrôle des prix, des devises, de douane, contrôle du versement des impôts sur les revenus des citoyens) qui ne peuvent pas être classés de force dans une ou deux catégories.

Il ne suffit pas de faire la critique d'une certaine approche théorique, mais il faut présenter – en tant qu'antipode – un nouveau paradigme, un modèle apte à mettre en lumière la

réalité qui a changé. Nous pensons que nous ne sommes pas dans l'erreur si nous affirmons qu'au fond et effectivement il y a quatre sortes de contrôle financier-économique exercé par l'Etat:

- premièrement le contrôle financier-économique des organismes qui fonctionnent selon le régime de gestion budgétaire;

- deuxièmement le contrôle des entreprises et des entrepreneurs (c'est-à-dire le contrôle de ceux dont la sphère d'activité doit être déterminée sur la base de la Liste des produits industriels ou de la Liste des services[12];

- troisièmement le contrôle de la déclaration des revenus des citoyens (dans ce cas c'est l'impôt général sur les revenus qui est l'objet du contrple et pas l'obligation du paiement de l'impôt prélevé sur l'activité des intrepreneurs)[13] et

- finalement le contrôle financier-économique relatif à la sécurité sociale, qui porte sur la sécurité sociale en tant que fonds financier. L'Etat droit ici contrôler, si les obligations du versement prescrites par les normes ont été observées dans les délais fixés et dans la mesure requise, si les ressources accumulées gardent leur valeur[14] et si les paiements sont effectués par les caisses y autorisées et dans une façon conforme aux règles.

La conception examinée ci-dessus a la défaut que la classification du contrôle financier-économique est basée sur les organismes chargés de fonctions de contrôle, c'est-à-dire elle prend comme point de départ le fait que ce sont deux organes qui jouent un rôle dominant dans le domaine du contrôle des finances publiques: la Direction générale de contrôle du Ministère des Finances[15] et la Division de contrôle du Ministère des Finances. Cette solution reflète la fait réalisé par le XVIII^{ème} siècle que le contrôle financier des producteurs de marchandises, des fournisseurs de services et celui des citoyens doivent être séparé également du point de vue organisationnel du contrôle financier des organismes qui utilisent les ressources publiques.[16] Cette division du travail s'est répendue et s'est renforcée dans le système des organes chargés du contrôle des finances publiques (pas seulement chez nous)[17], surtout

parce que si on contrôle des organismes financés par le budget, il faut contrôler surtout les dépenses, tandis qu'au cours du contrôle des producteurs de marchandises et des citoyens l'accent est mis sur le contrôle des revenus. Selon notre avis le changement important qui résulte du décret-loi No 22 de l'an 1984 modifiant la loi No VI de l'an 1977 a échappé à l'attention de la théorie de contrôle hongroise, changement qui a modifié l'ensemble du système de la gestion étatique des entreprises d'Etat. Par suite de cette norme juridique ce qui a été auparavant évident, – c'est-à-dire que l'appareil de l'Etat[18] exerce le contrôle sur la base du fait qu'il est qualifié d'exercer dans ce domaine l'ensemble des droits du propriétaire, – est devenu théoriquement fortement contestable. (Nous remarquons entre parenthèses que le contrôle exercé par l'Etat en tant que propriétaire a été remis en question non seulement par la réforme organisationnelle des entreprises effectuée en 1984 et déjà mentionnée, mais également par l'apparition de la catégorie "des biens propres de l'entreprise".)[19] A l'appui de notre affirmation sur les différents systèmes du contrôle financier il faut exposer le problème avec plus de détails: notamment il faut préciser: quel est le contenu du contrôle financier-économique.

2. Comme nous l'avons déjà démontré ci-dessus, le contrôle financier-économique – analysé sur la base de son contenu – est le contrôle du propriétaire, notamment le contrôle de l'Etat en tant que propriétaire. La question qui exige une réponse est evidemment la suivante: quelle est la différence entre le contrôle exercé par l'Etat sous l'aspect financier en tant que propriétaire et son contrôle exercé en tant que pouvoir public. Avant de répondre en détail à cette question il semble nécessaire de faire observer tout d'abord que les normes juridiques relatives au nouveau mécanisme économique escamotent ce problème (c'est-à-dire la différence entre le contrôle exercé en tant que propriétaire et entre celui exercé en tant que pouvoir public), ou – parlant d'un ton plus fin – ne traitent pas ce problème conformément à son importance. Nous sommes encouragés d'utiliser une formulation si affirmative parce que cette ques-

tion a été laissée dans l'ombre et par le droit de la gestion économique et par la loi No I de l'an 1972 modifiant la loi No XX de l'an 1949 ainsi que par la loi No II de l'an 1979. La solution qui est muette sur le contenu du contrôle du propriétaire, mais charge pourtant d'abord la Direction général des recettes et puis la Direction générale du contrôle de contrôler au cours de ses inspections l'application des normes juridiques économiques et financières relatives à la réglementation du revenu, des salaires, des prix, à l'établissement des fonds ne constitue pas une expérience réussie. (Cette affirmation peut être prouvée d'un part par des dispositions du droit positif et d'autre part par les publications sur les expériences acquises dans les derniers temps par les diverses sections de la Direction générale du contrôle du Ministère des Finances.)[20] Les dispositions du droit positif pourraient donc donner l'impression de ce que l'appareil financier agissant au nom de l'Etat n'exerce un contrôle que sur les contributions. Si la réalité serait conforme aux apparences, il faudrait poser la question suivante: si les organes financiers de l'Etat n'exercent pas le contrôle qui résulte des droits du propriétaire, alors qui est-ce qui l'exerce?

Par outre nous pensons – et comme il résulte de ce qui suit, nous croyons que notre opinion est bien fondée que renoncer au contrôle du propriétaire (ou le faire disparaître) ne serait pas la meilleure méthode; nous savons que le point névralgique des rapports de production socialistes est le fait que les droits du propriétaire (dans l'économie) ne sont guère précisés ou en d'autres termes: il n'est pas claire quel est le contenu du droit de propriété soicaliste.[21] Dès lors il faut poser des questions complémentaires. Tout d'abord celle: qui sont les sujets du droit de propriété, (qui sont ceux qui doivent être soumis au contrôle); deuxièmement: quel est le contenu du droit du propriété (pour savoir qu'est-ce qu'il faut contrôler) et finalement de quelle façon les propriétaires contrôlent-ils la sauvegarde et le croissement de la valeur de la fortune créée par eux-mèmes. (Cette dernière question revêt une importance à cause du fait bien connu qu'il est typique des sociétés productrices de marchandises que la personne du

propriétaire ne coincide pas avec celle de l'administrateur (des administrateurs) des biens). En dirigent notre attention sur les sujets du droit de propriété (et en désapprouvant la théorie sur le droit de propriété dit sans sujet) il est frappant que ceux-ci (c'est-à-dire les propriétaires qui exercent leur activité dans des conditions de production socialistes) ne diffèrent en rien des propriétaires qui existent dans l'autres formations produisant de marchandises. Ils sont ici comme là des personnes physiques ou des personnes morales. La différence réside dans le fait lequel des deux groupes (c'est-à-dire celui des personnes physiques ou bien celui des personnes morales) dispose de la majorité des objets de propriété et il est également vrai que dans les conditions de production socialistes l'Etat occupe une place éminente parmi les personnes morales. Toutefois la raison pour laquelle il occupe cette place n'est pas celle qu'on lui ait accordé des attributions complémentaires par rapport au statut juridiques des autres propriétaires,[22] ce qui n'est pas le cas. Il occupe une place eminente parmi les autres propriétaires simplement car il a reçu à l'occasion de la nationalisation un part décisif des biens nationaux; il n'a pas obtenu plus de droit et on ne l'a pas chargé de moins d'obligations quant à la gestion des objets de propriété que les autres propriétaires.[23] Il faut remarquer que dans la période de la transformation socialiste d'autres formations juridiques des personnes morales (p.e. les coopératives) n'ont pas obtenu – et de loins – une proportion similaire des biens nationaux. En ce qui concerne la période écoulée depuis ce temps, il faut constater que la répartition des objets du bien national n'a pas subi un changement important, néanmoins il est certain qu'au "détriment" des personnes physiques des coopératives agricoles et industrielles sont devenus propriétaires des biens (des moyens de production) dans une proportion plus grande que dans la période précédente.

Le lecteur a certainement remarqué que parmi les personnes morales nous n'avons pas mentionné les entreprises d'Etat. Nous avons omis cette formation juridique de l'énumération des formations qui disposent de droit de propriété sur des biens, car selon notre avis – et les faits de la réalité sociologique

ainsi que les dispositions du droit positif en sont la preuve – les entreprises d'Etat ne sont pas sujet droit de propriété socialiste (mais ajoutons: les banques commerciales, les institutions d'assurance, les fermes d'Etat non plus). Au cas contraire il faudrait constaté qu'une propriété partagée se crée sur le même objet, propriété partagée entre l'Etat d'un part et les entreprises, banques commerciales, instituts d'assurance de l'autre. Cependant si nous refusons également la théorie de la propriété partagée – comme nous l'avons fait dans le cas de la théorie de propriété sans sujet – la thèse selon laquelle les organes de gestion en possession de l'Etat seraient les propriétaires des biens gerés par eux, ne peut pas être soutenue non plus. Cette thèse ne peut pas être défendue avec succès – bien que la littérature sur la réforme organisationnelle des entreprises (1984), par l'introduction de la notion des droits dits stratégiques ou tactiques inspire l'adoption de cette thèse, – parce que le droit de propriété examiné sous l'aspect sociologique et juridique a un certain contenu objectif (notamment les attributions du propriétaire) et un organisme, une personne ou un groupe de personnes ne disposant pas de ces attributions ne peut affirmer d'être propriétaire. (Sur la base de la théorie bourgeoise classique de propriété on peut déduire que les entreprises d'Etat détiennent et utilisent la propriété d'Etat et en disposent de manière comme si elles étaient les propriétaires des biens gérés par eux.) Par conséquent comme nous l'avons déjà signalé, il y a une contradiction entre l'intention de la politique économique (notamment l'augmentation de l'esprit d'entreprise des entreprises) et la situation juridique; la raison en est que la théorie bourgeoise classique de la propriété ainsi que la théorie socialiste classique – s'agissant de la propriété collective et pas de la propriété personnelle ou privée – ne disent que très peu du contenu du droit de propriété et – ajoutons-l" – du contrôle du propriétaire.

Le premier problème c'est que le contenu des attributions du propriétaire ne peut pas être déterminé de la même façon au cas où les "propriétaires" ou les quasi – propriétaires consistent de plusieurs personnes (p.e. conseil d'entreprise) et au

cas où le propriétaire est une seule personne (personne privée ou l'Etat); sans parler du fait que la dissimilitude des objets de propriété nécessite la prise en considération de réflexions complémentaires. En effet si la gestion concerne différents objets, différents services et s'il s'agit en même temps d'une propriété collective c'est-à-dire sociale, on ne peut plus opérer avec les trois notions possession, utilisation et gestion, mais il faut introduire de nouvelles notions, comme la possibilité du propriétaire d'acquérir du capital, et le contraire: de retirer son capital, sa liberté en ce qui concerne la détermination du prix de ses produits, de ses services, etc.

La question se pose: pourquoi est-ce nécessaire? Voici la réponse (formulée avec un léger timbre philosophique): l'existence dans une entreprise diffère d'une façon essentielle de celle dans un ménage privé, étant donné que dans ce dernier le comportement du propriétaire n'est pas motivé par l'ambition d'en tirer des bénéfices, mais simplement par la volonté de satisfaire ses besoins et ceux des personnes à sa charge, déterminées par la loi sur le droit de famille. Par contre en gérant une entreprise les propriétaires ne s'acquittent pas d'une certaine obligation alimentaire et s'ils produisent certains objets, ils ne produisent pas des objets ayant une valeur affective, mais des objets qui ont outre une valeur d'utilité une valeur (un prix), par conséquent les propriétaires contrôlent ici autre chose que celle contrôlée en leur autre qualité, notamment ils contrôlent la rentabilité du capital investi. Au cours de leur activité la situation de leur main-d'oeuvre ne revêt pas pour eux une importance primordiale (pas si primordiale que pour les pères de famille), et ils n'attachent pas une si grande importance au fait que le produit fabriqué ou le service fourni soient d'utilité d'un point de vue noble (p.e. du point de vue de la survie de la civilisation). L'entrepreneur (la propriétaire) examine une seule chose; quel est le rendement du même capital s'il est investi ici ou là. Il est évident qu'en investissant le capital "ici" (c'est-à-dire p.e. dans le sous-secteur "x"), quand "là-bas" (dans le sous-secteur "y") le rendement d'une unité du capital est plus élevé – en supposant une proportion constante – il doit subir chaque année

une perte de y-x de gain. Ainsi l'intérêt du propriétaire exige avant tout de contrôler si, sur la base de l'unité du capital investi, les gestionnaires de ses biens lui assurent un rendement égal à celui assuré aux autres propriétaires (qui disposent des biens semblables). Il ressort de ce raisonnement que ce n'est pas seulement le droit, mais l'obligation élémentaire des propriétaires de contrôler le rendement de leurs biens, s'ils ne veulent pas s'apprauvrir par rapport aux autres propriétaires qui sont leurs concurrents; cet appauvrissement se produit si les ressources qui peuvent être mises à la disposition des recherches et du développement, de l'accroissement du capital-mobilier sont en régression.

3. La question se pose inévitablement: à l'égard de qui les sujets de la propriété des biens publics sont-ils responsables concernant cette obligation de contrôle. Pour pouvoir répondre à cette question, nous devons jeter un coup d'oeil derrière le paravent juridique et sociologique, où — au moins dans les conditions de production socialistes — nous allons apercevoir les travailleurs qui, selon l'affirmation concordante du droit et de l'idéologie, détiennent tout pouvoir. S'il en est ainsi, alors on ne peut que se placer difficilement au point de vue théorique que les travailleurs ont renoncé à la garantie principale de la détention du pouvoir et la question se pose de savoir en faveur de qui ils y auraient renoncé. On peut affirmer que dans les conditions socialistes la propriété des organismes est dominante, mais on ne peut guère dire que les dirigeants des différents organismes sont devenus des propriétaires par leur élection au poste de direction. Par conséquent — et c'est l'essentiel — théoriquement le cercle des propriétaires ne s'est pas modifié et ce cercle comprend dès la naissance du socialisme d'une part la population ouvrière, d'autre part la paysannerie en ce qui concerne les moyens de production les plus importantes et leurs formes juridiques (c'est-à-dire en premier lieu les entreprises d'Etat et les coopératives de production). Une autre question qui doit être posée séparément: qui est-ce qui gère les formes juridiques des moyens de production. (Signalé déjà plus haut, nous répétons que la séparation de la personne du propriétaire de celle des gestion-

naires de la production est un trait fort caractéristique des sociétés modernes qui produisent des marchandises. Cette thèse bien connue ne fait que rendre plus clair que les rapports de production ne rendent pas toujours nettement visible les sujets du droit de propriété, mais cette observation sociologique n'implique nullement qu'on pourrait refuser au propriétaire (et est-il raisonnable de le faire?) la possibilité de s'acquitter de son obligation fondamentale qui consiste dans le contrôle de la capacité de ses biens de produire du bénéfice.)
En arrivant à cette conclusion de logique il faut répondre à la question de savoir quelles sont les attributions du propriétaire. Parmi ces attributions la fondation des entreprises occupe la première place, en effet un organisme, une personne, etc. devient propriétaire par le fait que c'est lui qui utilise son capital et pas un autre. (P.e. si son capital est placé dans une banque, c'est la banque qui l'utilise.) Il faut mentionner deuxièmement l'attribution du propriétaire concernant son droit, sa possibilité légale et juridiquement reglée d'assurer le concours d'autres capitaux dans son entreprise. (Il est bien connu que sans cela les entreprises ne sont pas à même d'atteindre leur dimension optimale.) La troisième attribution inaliénable du propriétaire est son droit à prendre de son propre chef la décision de faire cesser son entreprise. (P.e. parce que ses biens n'ont pas rendu le gain attendu.) Le motif d'une telle décision peut être le fait que la demande s'est diminuée à cause de la détérioration de la qualité du produit ou qu'il ne vaut pas la peine de continuer la production car le prix qui peut être atteint au marché est trop bas. Il est à noter que la liquidation de l'entreprise par le propriétaire peut avoit des motifs contraires: l'entreprise a déjà produit le bénéfice prévu par le propriétaire. Dans ce cas il est possible que l'autre motif de la décision consiste dans le fait que la continuation du fonctionnement de l'entreprise exige des formes juridiques nouvelles et des connaissances professionnelles étranges aux gestionnaires des biens.[24] Quatrièmement: les attributions du propriétaire comprennent la fixation du prix de la marchandise (du service); la fixation du prix de la main-d'oeuvre /en fonction des négociations menées avec les syndicats/, la détermi-

nation de la proportion des sommes à consacrer au développement aux recherches et à l'amortisation. Cinquièmement: il est évident que le contenu des attributions du propriétaire serait appauvri si le propriétaire ne pourrait pas disposer de la fusion, de la stratégie, (de la production, c'est-à-dire de l'avenir) et de l'organisation intérieure de l'entreprise.

Il va de soi que si ces attributions ne sont que formelles (c'est une autre question de savoir lesquels de ces droits sont transmis aux gestionnaires de la production et pour combien de temps), alors on ne peut pas parler des biens de l'entreprise existant et fonctionnant véritablement comme leurs propres biens (c'est-à-dire on ne peut pas parler d'une propriété de groupe), bien que la règle de droit, comme nous l'avons déjà mentionné, connaisse cette notion.

C'est la première contradiction du droit du nouveau mécanisme économique, qui d'une part cherche à atteindre que les organismes de gestion soient libérés de l'administration publique concernant leurs finances et d'autres questions connexes à leur fonctionnement (direction du développement technique, investissements, embauche et licenciement du main-d'oeuvre, fixation du prix, la mise au point des formes organisationnelles "extérieures" et intérieures de la gestion, les modalités et les moyens de la gestion des entreprises, les instances de direction, etc.); et qui donne d'autre par aux ministères et aux organes de compétence nationale une très large autorisation à réglementer ces mêmes questions, ce qui ne permet pas la progression dans cette voie. (En même temps la structure juridique de l'économie est tout à fait légale et se fonde à travers les délégations du pouvoir sur la constitution.)[25]

En examinant le droit du nouveau mécanisme économique, la deuxième contradiction se manifeste par le fait que les règles actuelles du contrôle qui reflètent une vision macrocosmique — en mettant l'accent sur l'observation des dispositions (des paragraphes) et en insistant sur ce que l'appareil de l'administration publique reçoit autant d'informations que possible sur le fonctionnement du système régulateur de la gestion économique — revêtent un autre aspect que celui exigé par la contrôle du propriétaire (de l'entrepreneur) ayant une vision microcos-

mique, vision qui consiste notamment et surtout dans le fait que le contrôle soit suivi immédiatement d'une intervention de l'entrepreneur. L'essential du contrôle du propriétaire, c'est-à-dire l'examen du rendement du capital se perd au cours du contrôle qui est concentré sur des points de vue de la macrogestion. D'ailleurs, en exagérant un peu, on peut dire que dans la pratique chaque phase du contrôle du propriétaire (de l'entrepreneur) de caractère macrocosmique s'attache à l'amélioration du rendement du capital (p.e. la surveillance et par intervalle la rationalisation des frais d'exploitation, le contrôle préalable et postérieur du choix des buts de l'investissement, l'examen du volume des dettes, de la composition des avoirs et des passifs, l'analyse de la cadence du remboursement des emprunts (des crédits) à contracter, la prise en considération des faveurs fiscales. Mais il serait erronné et prématuré d'arriver de ces observations à la conclusion selon laquelle le contrôle du bénéfice et du rendement des biens involve des décisions ayant un contenu financier-économique similaire.[26] La stratégie financière-économique qui cherche uniquement des bénéfices implique généralement une surexploitation de l'entreprise parce que la diminution continue des biens (du capital) implique la diminution du rendement, ce qui entraîne souvant de grands problèmes dans les relations bancaires de l'entreprise, car le créditeur examine naturellement avant tout l'existence de la couverture du crédit octroyé à l'entreprise.

La troisième contradiction qui se manifeste dans le droit du nouveau mécanisme économique concernant la gestion et le contrôle économique résulte selon notre avis du fait que l'appareil qui contrôle les processus économiques-financiérs a été chargé – d'après les publications sur les résultats de ses contrôles, publications déjà mentionnées – d'un contrôle trop poussé. Un tel contrôle invite forcément à une gestion de caractère interventionniste (bien qu'à cause de la "distance" qui sépare les contrôleurs des organes de gestion cette intervention ne soit pas analogue aux processus qui s'opèrent au sein de l'entreprise) qui se manifeste dans l'instabilité du système régulateur, instabilité souvent critiquée.

Pour conclure l'analyse faite ci-dessus: la gestion étati-

que des entreprises, des coopératives et des institutions bancaires et le mécanisme de leur contrôle sont asynchrones – outre la problématique qui résulte de l'absence de la solution du contrôle du propriétaire – parce que le- contrôle étatique ne porte pas justement sur le système d'organisme qui prend des décisions concernant les attributions du propriétaire (c'est--à-dire des décisions décisives du point de vue économique) ou formulé dans une façon plus nuancée et plus objective: les institutions juridiques du contrôle ne portent pas assez d'effet sur ce système d'organisme. Le contrôle exercé du point de vue du propriétaire sur l'activité de ces organismes de direction ne peut pas être suppléé par le contrôle de caractère budgétaire – existant – exercé sur l'activité des organes ministeriels.

4. Revenant au problème de savoir comment ou peut rendre plus efficace le contrôle du propriétaire, on ne peut pas arriver qu'à la conclusion suivante: plusieurs mille d'entreprises d'Etat ne peuvent pas être dirigées à partir de 8 à 10 centres et un système économique sérieux ne peut pas être basé sur ce qu'un appareil de contrôle financier-économique va contrôler ces entreprises en tant que délégué du propriétaire (de l'Etat). Nous sommes d'avis que les attributions qui constituent le contenu du droit de propriété devront être transférées aux entreprises de petite, moyenne ou grande taille, et l'appareil de contrôle financier-économique de l'Etat ne devrait pas être chargé que de la supervision, c'est-à-dire du contrôle qui n'entre pas dans les détails. Selon notre avis une énergie considérable devient ainsi disponible qui peut être utilisée (outre l'examen du rendement des biens, tâche principale) à ce que l'appareil de contrôle financier-économique de l'Etat concentre ses forces à l'analyse du paiement des impôts et de l'utilisation fructueuse des subventions d'Etat. Il ressort de ce qui précède qu'il est totalement superflu que l'activité de l'appareil central de contrôle financier-économique embrasse les questions de la gestion des frais et des fonds, la constitution de divers fonds et leur utilisation, la calculation d'autres dépenses, des frais de production, de la rentabilité.

En même temps il est incontestable que l'Etat socialiste de la démocratie populaire s'est chargé par l'expropriation des

moyens de production d'une responsabilité particulière: notamment de celle de gérer efficacement les biens devenus capital national.[27] Mais il ne s'en suit pas que l'Etat se charge également d'exécuter à la place des producteurs de marchandises (acheteurs et vendeurs, fournisseurs de services et clients) leur activité; et par "activité" on ne peut pas entendre la production prise uniquement au sens étroit du mot. Jusqu'à ce qu'une décision ne soit prise au sein du système des institutions politiques, selon laquelle l'Etat doit restreindre d'une façon décisive sa responsabilité concernant les processus financiers-économiques qui s'opèrent à micro-échelon, l'Etat doit satisfaire à ses obligations qui découlent de ses attributions en tant que propriétaire.[28] Même dans cette période de gestion et du contrôle économique exercé par l'Etat – période qui peut être considérée théoriquement comme transitoire – l'Etat ne doit pas négliger ses tâches visant la transformation de la structure du bien national, c'est-à-dire les processus financiers-économiques ne doivent pas être évalués et contrôlés uniquement du point de vue de l'accroissement du revenu national. Le propriétaire (c'est-à-dire l'Etat) doit dès maintenant chercher les institutions juridico-économiques,[29] qui indiquent les effets des événements financiers-économiques du point de vue de la production, du marché, du rendement du capital, par des indices (des indicateurs) meilleurs et plus exacts que ceux utilisés jusqu'ici.

Les méthodes de contrôle introduites en relation avec les affaires bancaires et d'assurance[30] montrent que l'Etat est capable de s'acquitter de sa mission de contrôle par des moyens beaucoup plus modernes et plus efficaces que ceux soumis plus haut à la critique,[31] mission de contrôle exigée par l'existence des entreprises dans une société qui produit des marchandises. Comme nous l'avons déjà dit, l'Inspection des banques et l'Inspection de l'assurance n'exercent pas une surveillance de propriétaire, mais une surveillance professionnelle sur ceux qui mènent une activité bancaire ou d'assurance, néanmoins ces organes peuvent garantir ce que la protection de la société exige.

Nous arrivons à la problématique du contrôle des prix, qui

ne peut pas être séparé de la question du contrôle financier--économique; la même remarque vaut – selon notre avis – également à la surveillance du marché. Il y a lieu de remarquer que la fixation du prix appartient aux entreprises, contrairement au contrôle des contributions, de la douane et des taxes, au contrôle de l'utilisation des prévisions budgétaires, où les diverses catégories d'impôt, les tarifs douaniers, les différentes taxes et les titres sur la base desquels des paiements peuvent être effectués à la charge du budget, sont déterminés par l'Etat. Par cela nous ne voulons pas dire que dans un cercle restreint l'Etat ne peut pas exercer une influence sur les prix en offrant une compensation appropriée aux producteurs. Mais théoriquement nous mettons en doute que l'administration publique a une meilleure connaissance que l'entrepreneur des facteurs (des frais) qui doivent se traduire dans les prix. Nous ne voulons pas affirmer par cela que l'entreprise ne peut, ne pourrait pas faire abus de son droit à fixer le prix. C'est en pareil cas que l'Etat doit intervenir, en faisant entrer en action l'institution établie pour combattre le prix déloyal.[32] Par conséquant l'Etat doit concentrer ses efforts sur le contrôle des prix et pas sur leur orientation. Cela revient àdire que le contrôle financier-économique de l'Etat doit empêcher le développement de situations qui engendrent des prix déloyaux ou doit faciliter le redressement de telles situations. Nous pensons que les conditions qui entraînent l'apparition des prix déloyaux (position monopolisée, activités qui ne sont pas exercées par des entreprises) sont bien connues. Il est donc évident quelles mesures l'Etat doit prendre. (Tout d'abord la création du marché, c'est-à-dire la création des entreprises, l'encouragement de leur fondation, l'élimination – par une législation antimonopoliste – des organismes ayant une position monopolisée, l'attrait des capitaux des entrepreneurs aux domaines non approvisionnés.)

Selon les apprences la responsabilité matérielle des dirigeants des entreprises soumises à direction unique et la responsabilité matérielle de la direction collective de ces organismes ne rentre pas dans la sphère de ce thème, néanmoins nous sommes d'avis que san une nouvelle réglementation de cette ins-

titution le contrôle du propriétaire exercé à l'égard des gestionnaires des biens ainsi que le contrôle ayant un caractère de pouvoir public exercé par l'Etat à l'égard des propriétaires restent inefficaces. En effet, les propriétaires ont des obligations qui sont indépendantes de la forme de la propriété (étatique, coopérative, privés). Par exemple celle en vertu de laquelle les biens ne peuvent pas être retirés au hasard de l'entreprise (étant donné que la part productive du bien national serait ainsi réduite); les sommes accumulées en vue de l'amortissement ne peuvent pas être versées au propriétaires, c'est-à-dire jusqu'à ce que l'entreprise ne cesse pas son fonctionnement, il faut assurer le renouvellement des biens de production. (Le droit americain poursuit par des moyens du droit pénal ceux qui violent cette disposition, le droit hongrois supprime l'exonération fiscale.)[33] Dans cette sphère du contrôle rentre également la punition du comportement de l'entrepreneur qui essays de sauvegarder des moyens matériels (la capital) d'une entreprise par leur transfer dans une autre entreprise en spéculant au détriment des créanciers de l'entreprise.[34]

La présentation des problèmes théoriques du contrôle financier-économique serait incomplète si nous ne parlions pas des règles et des opinions concernant le contrôle des devises.[35] Il est bien connu que parallèlement à la nationalisation des banques la conception selon laquelle les créances et les dettes en devises doivent être centralisées s'est renforcée. Cependant l'idée inspiratrice elle-même n'est pas une conclusion tirée de la réalité des rapports de production socialistes (le système de la politique des devises dirigée s'est développé dans le capitalisme); ainsi rien ne justifie que la gestion du bien national soit basée dans un régime socialiste sur ce système. Outre le fait que le point de départ manque de fondement théorique, le système est injuste, parce qu le classement des citoyens en groupe a et en groupe b porte atteinte au principe de l'égalité en droit (les premiers peuvent avoir des comptes en devises, les derniers pas). Pareillement la manière de voir selon laquelle parmi les dizaines de milliers d'entreprises seulement quelques entreprises ont le droit d'ouvrir un compte

en devises, est injustifiable. Ajourd'hui il n'y a guère d'expert qui est d'avis qu'aucune contrôle bancaire des entreprises n'est nécessaires; c'est pourquoi il est indiscutable qu'une des activités importantes des banques est la concentration des actifs en devises et l'enreigstrement des dettes passive en devises. En même temps la conception qui confie le contraction d'un crédit ou l'octroi de prêts en devises à l'administration publique (notamment à l'appareil commercial) est en opposition avec les pensées exposées ci-dessus ainsi qu'avec les règles de l'économie et le système de responsabilité. Il est plus opportun (il en résulte un financement de la production plus souple et plus efficace) si les institutions financières elles-mêmes décident - il est vrai qu'elles décident selon leurs points de vue spécifiques - pour quelles transactions contractées en devises elles donnent une garantie bancaire, que si une ou deux banques disposent de l'ensemble des réserves et des actifs en devises de l'économie nationale. Nous ne voulons pas faire l'impression d'être hostile à ce qu l'Etat se charge du contrôle des transactions effectuées en devises, bien au contraire, nous voulons démontrer que le contrôle de ce type et l'organe étatique approprié sont inexistants dans notre système juridique. Nous n'ignorons pas que le maintien de la solvabilité extérieure du pays - en tant qu'objectif - ne serait pas facilité par la suppression du monopole de devises. Le succès des efforts dépend de la coopération des entrepreneurs et du gouvernement. Mais ces efforts ne seront pas couronnés de succès si - sans appareil de contrôle autonome, sans institution de contrôle - nous cherchons à forcer les acteurs du travail gouvernemental et les entreprises, en obligeant les premiers à diminuer les dépenses en devises et les derniers à favoriser la transformation de la structure de la production. En conclusion des problèmes connexes au contrôle financier-économiques des entreprises, nous faisons la constatation suivante: il faut réduire et limiter les tâches de contrôle et la responsabilité presque totale de l'appareil de contrôle financier-économique et la majorité des tâches de contrôle doit être transmise aux entrepreneurs et à leurs organismes professionnels.

5. Le contrôle de l'utilisation des revenus de l'Etat implique la question suivante: est-ce qu'il vaut le peine de faire contrôler la régularité des dépenses, si cette dépense[36] a été déjà autorisée par le parlement sous forme de la loi budgétaire? Le bien-fondé de cette question n'est guère contestable: il faut accepter le fait qu'aucun pays ne permet la mise en débat de la question de savoir si les prévisions fixées dans les chapitres du budget et dans les prévisions récapitulatives peuvent être dépensées.[37] Dans le cadre de cette question on peut examiner à la rigueur le problème également très sensible du point du vue politique: le gouvernement a-t-il le droit de dépenser les sommes fixées par la budget de dépenses si l'appareil du gouvernement chargé de la perception des impôts, des taxes et de la douane n'est pas à même de réaliser le budget des recettes. La réponse à cette question est la même que celle donnée à la précédente: les lois de finances et le budget ne contiennent pas de telle prescription.

Nous avons exposé ces questions – bien que les réponses soient négatives – pour montrer: la dépense des recettes publiques prévues par le budget est permise, c'est-à-dire en général (globalement) l'activité de financement du gouvernement ne peut pas être mise en débat. (Cela n'exclut pas le contrôle préalable de cette activité; le corps législatif peut faire valoir ces points de vue lors de débat du projet de loi.)

Par contre il n'est pas si évident si le degré de liberté d'action du gouvernement est aussi élevé qu'il peut assumer de nouvelles obligations intérieures ou extérieures, qui surpassent les prévisions des dépenses.

Les lois de finances des pays socialistes règlent la liberté d'action du gouvernement de plusieurs manières.[38] Le problème se pose dans la façon suivante: si les règles de compétence donnent au gouvernement une autorisation sans aucune restriction financière, les organes ayant la qualité de légifere lui ont donné par ce fait le droit de contracter des obligations, et ce faisant ils se sont privés eux-mêmes, ils ont privé peurs membres et leur services auxiliaires (c'est-à-dire les contrôleurs) de la possibilité de contester du point de vue de la légalité le bien-fondé des dépenses. En ce cas à

l'occasion du débat sur l'exécution du budget les députés à la rigueur peuvent poser la question de savoir pourquoi le gouvernement n'a exécuté que le projet des dépenses ou pourquoi il l'a surpassé et pourquoi il n'a pas réalisé le projet des recettes. Dans le cadre de ce système de réglementation les dépenses déterminées par le gouvernement — en ce qui concerne les cas cités — ne peuvent pas être qualifiées d'illégales.

En connexion avec le thème du contrôle économique-financier il faut rappeler la manière de voir généralement connue et adoptée par la constitution de chacun des pays socialistes, selon laquelle le gouvernement n'est pas irresponsable. La conséquence logique en est qu'au cas où le contrôle des activités financières du gouvernement ne s'opère pas selon des principes bien élaborés, selon des règles de compétence et le contrôle est exercé sans le concours d'un appareil spécialisé dans ce domaine (organe auxiliaire du parlement), alors le gouvernement devient irresponsable. Nous sommes d'avis qu'on peut affirmer à juste titre: notre système de contrôle financier-économique ne dispose pas d'un organisme de contrôle externe situé au dehors de l'administration publique, et d'autre part qu'il faut développer l'ensemble des règles de droit concernant le contrôle de l'activité financière (budgétaire) du gouvernement. Ce développement devrait se fonder sur l'idée qu'il faut établir des institutions juridiques de contrôle non formel, mais substantiel et les mettre à la disposition du parlement, des commissions du parlement et des députés, institutions dont les devoirs et obligations concernant le contrôle du budget sont clairement définis.

Au cours de la gestion du budget de nombreuses relations se créent (p.e. contrat d'achat et de vente, contrat de transport, bail, contrat de recherches) qui sont courantes dans la sphère des entreprises. Le contrôle de ces relations est l'un des points le plus sensible du contrôle des institutions financiées par le budget (finalement c'est à ce point que les deniers publics échappent des mains de l'Etat), en effet, l'Etat n'est pas seulement le plus grand propriétaire de revenus, mais également le plus grand consommateur. La vérification des factures acceptées par l'administration publique, le con-

trôle budgétaire de l'exécution de la commande (c'est-à-dire le contrôle des marchandises, des services des fournisseurs, y compris le contrôle des prix et de la qualité) constituent essentiel du contrôle dit budgétaire. Il est donc évident que la mission la plus importante du contrôle étatique du budgét est la vérification de la légitimité des paiements effectués par des institutions financées par des deniers publics. La légalité signifie ici que le paiement donné (paiement des salaires, liquidation des comptes, les paiements en espèce) se fonde sur un titre légal. En analysant ce problème, il faut donner une réponse sans équivoque à la question de savoir si la mission de l'institution financée par le budget a rendu nécessaire la dépense. Il faut donc surtout examiner si la dépense se laisse ramener à une règle de droit qui (en général) ou d'une façon concrète) prescrit que la dépense soit porter au débit du budgét. En outre la dépense doit s'attacher à la mission, aux attributions et à la compétence de l'institution. Une autre question qui entre en ligne de compte avec la même importance est la question de savoir si au cours de l'ordonnancement la solution la plus économique a été choisie. Jadis l'institution des contrats dits de fourniture publique, aujourd'hui les normes qui prescrivent la mise en adjudication[39] servent le choix d'une telle solution.

Le contrôle du type budgétaire, comme décrit ci-dessus, "cherche" en premier lieu la corrélation entre les tâches et les dépenses, et deuxièmement est l'examen de la couverture de la dépense, étant donné que le principe de base est que l'organe de gestion ne peut pas contracter envers ses fournisseurs des engagements qui n'ont pas de couverture financière. Outre ces points de vue gestionnaires l'activité de contrôle porte également sur les prescriptions de la comptabilité (de la tenue des livres). Cependant ce type de contrôle doit être séparé du contrôle de l'activité de l'ordonnancement.

Le grand problème du contrôle budgétaire (d'ailleurs de tout contrôle de type financier) est l'établissement de la responsabilité.[40] Le droit budgétaire hongrois dispose de ce point de vue de trois caractéristiques. Premièrement il reporte la responsabilité pour l'exécution de la dépense à la personne

habilités à ordonnancer. Deuxièmement il n'existe pas de l'autorité disctincte spéciale en vue d'établir la responsabilité de la personne qui contresigne la dépense du point de vue professionnel.[41] Le troisième trait caractéristique découle du fait que le parlement ne dispose pas d'une organe spécialisé au contrôle des mesures budgétaires (organe qui devrait donner un rapport annuel sur les expériences du contrôle).[42] Ainsi les organes corporatifs (commissions gouvernementales, commissions interministérielles) échappent au champ visuel du contrôle. Il s'ensuit que le système de contrôle du budget hongrois concentre son attention aux ordonnateurs, et il n'existe pas de régime distinct de contrôle juridique à l'égard des ordonnateurs, des contrasignateurs et des organes qui prennent des décisions collectives, ni un forum qui examine leur responsabilité.

6. Pour conclure le sujet du contrôle financier-économique, les expériences du fonctionnement du système de contrôle prouvent qu'on n'a pas encore vraiment réussi à trouver les formes de contrôle adaptées aux rapports de production socialistes. Nous pensons que cela s'explique surtout par la manière de voir de la théorie, qui au cours de l'établissement du système de contrôle a mis en vedette l'élément organisationnel (bureaucratique). Mais l'approche du contrôle du point de vue organisationnel ne facilite pas la compréhension de la question de savoir quel sont les éléments qui ne peuvent être controlés efficacement qu'uniquement par des organes de contrôle financier de l'Etat, et quels aspects spéciaux l'Etat doit avoir en vue au cours de sont contrôle, prenant en considération le fait que d'autres organismes ayant un autre caractère exercent également un contrôle. Il s'agit essentiellement du fait qu'il faut d'abord préciser quel sont les activités financiéres-économiques qui peuvent être accomplies d'une façon au sein de l'Etat respectivement quelles sont celles à accomplir hors de l'Etat. Deuxièmement quelles sont parmi ces activités celles ayant un caractère similaire à celui d'une entreprise et quelles sont celles qui ne valent pas d'être incluses dans cette sphère. Par une telle approche des activités menées dans des conditions socialistes de production, le sujet du contrôle financier-économique peut être examiné sur le base d'une manière

de voir nouvelle.

Dans ce modèle le système du contrôle ne dépendrait pas d'une façon décisive du fait lequel des propriétaires de revenu accomplit une certaine activité (l'Etat, les entreprises ou le citoyen), mais la question décisive sera de savoir si l'origine du revenu ou l'utilisation du revenu doit être controlés. Avant de présenter quelles tâches devraient être soumises au contrôle de l'Etat au cours de l'examen des finances et de l'activité économique, nous voulons souligner en tant que condition très importante du renouvellement qu'il faut supprimer la position monopolisée de l'Etat dans le domaine du contrôle financier--économique. C'est-à-dire il faut traiter sur un pied d'égalité l'activité de contrôle exercée par des propriétaires de revenu et le contrôle exercé par l'Etat même dans les domaines ou l'Etat est le propriétaire (notamment le ministère ou le conseil qui créent des organismes de gestion). La conception de l'égalité est selon notre avis en harmonie avec l'autonomie des entreprises et des institutions financières, autonomie fixée d'ailleurs comme objectif. Faire accepter le contrôle des propriétaires de revenu, contrôle n'ayant pas un caractère de pouvoir public, n'est pas avant tout un problème législatif (la littérature des sciences politiques et juridiques serait vraisemblablement prête à englober cette conception dans une règle juridique), c'est plutôt le système des arguments théoriques--idéologiques qui n'est pas assez convaincant, c'est-à-dire il est problématique secle temps du changement du paradigme est arrivé. Il s'agit de la question importante de savoir comment on peut transformer la propriété sociale qui revêt la forme de la propriété d'Etat en une propriété dont le contrôle du propriétaire n'est pas exercé par l'administration publique. Nous pensons, il serait en harmonie avec un marge de manouevre plus grand – marge nécessaire et de plus en plus reconnu – si les travailleurs des entreprises étaient investis des pouvoirs indispensables en vue de la gestion des processus micro-économiques. Par conséquent les principales obligations de contrôle qui découlent des attributions du propriétaire leur seront également transmises (par exemple l'augmentation de la fortune, l'alimentation des fonds d'amortissement, etc.). Ce modèle de

gestion et de contrôle n'est pas en contradiction avec l'idée de la propriété sociale; il énonce seulement que dans l'économie nationale – près d'autres formes de propriété – il existe également la forme de propriété des entreprises et celle des coopératives, où les attributions du propriétaire sont ni capitalisées ni nationalisées. C'est-à-dire le contrôle de l'utilisation de la propriété sociale (du capital national) reste la mission de l'Etat. De nombreuses institutions peuvent garantir l'accomplissement de cette mission: les attributions de contrôle du parlement, contrôle exercé sur l'exécution de la loi portant sur l'économie nationale et l'exécution de la loi de finances; les pouvoirs du gouvernement concernant la surveillance de la concurrence et du marché, les droits de contrôle des tribunaux et du ministère public sur la fondation et la cessation des entreprises ainsi que la surveillance de la légalité.

Un autre problème à résoudre est le siuvant: la création de quels organes de contrôle doit être prescrite par l'Etat, organes, qui, établis par les divers organes de représentation d'intérêts économiques auront la mission – outre leur activité menée en tant que représentation des intérêts – d'exercer un contrôle professionnel pour vérifier si l'activité de leurs membres ne viole pas les intérêts économiques et financiers – protégés par la loi – d'autres acteurs de l'économie. Indépendamment de ces instances de contrôle l'Etat pourrait prescrire l'établissement des organes (des sociétés) chargés de l'évaluation des biens, en vue de l'examen continu du rendement des entreprises.

Il serait nécessaire de faire fonctionner d'une façon séparée des organes mentionnés ci-dessus l'appareil qui protège l'inviolabilité de la position de l'Etat concernant les recettes et qui assure que les sources de la consommation commune de la société, les impôts, les taxes et les taxes douanières couvrent les dépenses jugées nécessaires. On devrait organiser de le même façon le contrôle des biens budgétaires. Etant donné que les biens budgétaires sont gerés selon d'autres points de vue que les biens des entreprises et les organes budgétaires participent pourtant au contrôle de ces derniers, il faudrait donner la possibilité également réciproquement. Nous pensons

que notre position est d'autant plus motivée qu'il faut contrôler également que l'Etat ne dépense pas des sommes anormalement exagérées en retirant d'une façon néfaste trop de revenu de la sphère des entrepreneurs.

Tous ces problèmes justifient que la réforme du système des institutions politiques et celle des institutions économiques (soulignant que la transformation du système de contrôle y est comprise) ne peuvent pas être séparées qu'artificiellement l'une de l'autre. L'examen des processus économiques et leur contrôle y occupent une place prioritaire.

ФИНАНСОВО-ХОЗЯЙСТВЕННЫЙ КОНТРОЛЬ

Э. Ференци

В статье рассматриваются вопросы финансового контроля, осуществляемого государством. Автор устанавливает, что необходимо делать резкое различие между налоговым контролем государства, его контролем и бухалтерском отношении и контролем, осуществляемым им в качестве собственника. В статье дается подробный анализ форм проявления контроля, осуществляемого государством в качестве собственника /ввод капитала в какую-нибудь организацию, вывод капитала/ и автор приходит к выводу, что элементарной объязанностью субъектов права собственности /в том числе и государства/ является контроль за выручкой своего имущества. Наряду с государственным налоговым контролем /а это означает контроль за доходными статьями бюджета/ автор уделяет большое внимание проблемам, связанным с контролем над государственными и коммунальными расходами и делает заключение, что ни самый ригористический контроль государственных и коммунальных расходов не может заменить новый подход к теории о контроле, осуществляемом собственником.

THE FINANCIAL AND ECONOMIC SUPERVISION

E. Ferenczy

The author discusses on the problems of financial control practiced by the state. He ascertains that sharp distinction should be made between the fiscal control, book-keeping control and owner-type supervision of the state. He analyses the aspects of the owner-type control /capital transfer into some organisation, withdrawal of capital/ and draws the consequence that the subjects of ownership rights /therefore the state too/ has an elementary duty to control the income of their property. Beside the tax control of the state /which is actually the control of the income side of budget/ the author emphasizes the problems related to the supervision of the so-called public expenditures and takes the stand that the most rigorous control of public expenditures cannot substitute the rethinking of the theory of ownership control.

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4. Les règles de droit établies par le gouvernement comportant des dispositions concernant le contrôle financier-économique: décret No 50/1977. /XII.21./ MT sur le contrôle de l'Etat (surtout les paragraphes 80 à 104) modifiée par les décrets No 21/1983. /VI.15./, 14/1985. /III.20/ et 85/1987. /XII. 28./ MT; le décret No 23/1979. /VI.28./ MT modifiée par le décret-loi No 25 de l'an 1981 et les décrets Nos 46/1981. /X.8./, 7/1983. /IV.13./, 50/1983 /XII.28./, 36/1984. /X.31./, 24/1985. /V.6./, 55/1985. /XII.27./ et 53/1986. /XII.10/ MT, ainsi que le décret 19/1980. /IX.27./ PM modifié par les décrets Nos 3/1984. /XI.6./OT-PM,. 55/1985. /XII.28./ et 54/1986. /XI.26./ OM, mais d'autres ministères ont également émis des décrets qui touchent le contrôle financier (p.s. le décret No L7/198. /XII.24./Eüm) et finalement le décret No 50/1987. /X.14./MT sur la procéduré administrative concernant les impôts, ainsi que le décret No 68/1987. /XII.14./PM.

5. Bokor, P.: Általános ellenőrzési ismeretek. (Conmaissances générales de contrôle) In: Ellenőrzési eljárások, módszerek, szervezetek. (Procédures méthodes, organismes de contrôle. Réd.: Nyikosc, L. Publication de la Direction générale de contrôle du Ministère des Finances, PM Szervezési és Ügyvitelgépesitési Vállalat, Budapest, 1985. p. 41.

6. Pour comprendre cette constatation, il faut prendre en considération qu'une réglementation de revenu différente a été en vigueur dans la sphère industrielle, agricole et dans celle des institutions financières (c'est-à-dire pratiquement en ce qui concerne les entreprises d'Etat, les coopératives de production, les banques et les institutions d'assurance). Cf. décret No 40/1984 sur la réglementation des revenus dans les entreprises modifié par le décret No 46/1986. /X.31./MT; le décret No. 45/1984. /XI.6./MT sur la réglementation du revenu dans le secteur agraire et dans le secteur de la production de vivres. La situation spéciale de la sphère des services financiers s'est manifestée jusqu'à 1987 par le fait qu'il n'existait pas de régles réglementant le revenu dans le secteur bancaire et d'institutions d'assurances.

7. Kamarás, J.: Az ellenőrzés szervezése és általános mód-

szertana.(L'organisation et la méthodologie générale du contrôle.) PM. Joginform, Budapest, 1987, p. 34-44.

8. Cf.: Décret No 63/1986. /XII.30./PM sur le réglementation des revenus et des traitements bancaires et sur le système de l'intéressement matérial des travailleurs des banques occupant un poste de direction éleve modifié par le décret No 41/1987. /VIII.24./PM, ainsi que le décret No 15/1987. /IV.13./ PM sur la réglementation des revenus et des traitements dans les institutions d'assurances et sur l'intéressement matérial des travailleurs des institutions d'accusances occupant une poste de direction élevé.

9. Décret No 1/1987/VII.28./MNB sur la surveillance exercée par l'institut d'émission.

10. Décret No 55/1986. /XII.10./MT sur l'Inspection des banques et décret No 43/1987. /IX.8./PM sur certaines questions de l'inspection des banques.

11. Décret No 56/1986. /XII.10./MT sur l'Inspection de l'assurance et décret No 14/1987. /IV.13./OM sur certaines questions de l'inspection de l'assurance.

12. Cf.: Avis 9017/1987. /SK.10/KSH sur la modification de la classification sectorielle unique des activités.

13; Etant donné que les dispositions du décret-loi sur l'impôt des entreprises ainsi que certaines règles plus favorables concernant le déduction des frais y sont applicables.

14. Notre système de droit ne connaît pas cette forme de contrôle. Il est à remarquer que les organes de représentation des intérêts (par exemple le Conseil national des Syndicats) ont réalisé l'importance de ce contrôle.

15. Son successeur est l'Office de contrôle des impôts et des finances, (APEH). Cf. décret No 14/1987. /V.13./MT sur l'Office du contrôle des impôts et des finances.

16. Sur ce thème l'étude de Kovács, I.: Az emberi jogok az alkotmányokban. (Les droits de l'homme dans les constitutions) contient une analyse remarquable dans un contexte plus large. In: Az emberi jogok dokumentumokban (Les droits de l'homme en documents), KJK. Budapest, 1976. p. 17-113.; L'article de Ferenczy, E.: Az állampolgár és a pénzügyi igazgatás közötti kapcsolatokról. (Sur les relations entre le citoyen et l'administration financière), Állam- és Jogtudomány, 2/1981. 387 - 891. traite le rapport entre les droits politiques et les finances dans son contexte proprement dit.

17. L'appareil qui contrôle l'utilisation des sommes budgétaires s'est associée relativement tard (on peut dire à l'époque de la naissance des Etats nationaux) aux bureaux des contributions créées assez tôt.

18. Dès le début cet appareil consiste des organes suivants:

a) l'appareil des contrôleurs de l'Office central des impôts (décret gouvernemental No 4186/1949. /VIII.6./Korm.;

b) la Direction générale des recettes du Ministère des Finances,(décret gouvernemental No 16/1967. /VI.18./Korm.;

c) Direction générale du contrôle du Ministère des Finances,(décret No 46/1981. /X.8./Korm.;

d) Office du contrôle des impôts et des finances,(décret No 14/1987. /V.13./MT.

19. Sur la notion et le contenu des fonds propres de l'entreprise voir l'annexe 3. du décret No 32/1984. /XI.5./PM.

20. Communiqué sur les expériences de l'activité de contrôle financier-économique acquises dans l'année 1985 par la Direction générale de contrôle du Ministère des Finances et par l'appareil sous sa direction. Section agraire et d'alimentation de la Direction générale de contrôle du Ministère des Finances, Budapest, 1986, 119 p.; Communiqué sur les constatations du contrôle financier-économique exercé dans l'année 1982 par les section industrielles de l'organe de contrôle sur l'activité des organes de gestion industrielle. Direction générale de contrôle du Ministère des Finances, Budapest, avril 1983, 70 p.; Communiqué sur les constatations du contrôle financier-économique exercé dans l'année 1982 par les sections commerciales et de services des directions départementales (de la capitale) soumises à la direction de la Direction générale de contrôle du Ministère des Finances. Section commerciale et de services de la Direction générale de contrôle du Ministère des Finances, Budapest, mars 1983. 67 p.

21. Selon notre avis la position selon laquelle le contenu du droit de propriété socialiste est sa pratique conforme à sa destination ne saisit pas l'essential de la notion. Cf. Csanádi, Gy.: Polgári jog. (Droit civil) Tankönyvkiadó, Budapest, 1979, p. 125. L'oeuvre de Sárándi, I.: Polgári jog III. (Droit civil. III.) Tankönyvkiadó, Budapest, 1982. ne traite en détail que le contenu du droit de propriété des marchandises. Dans ses notices de conférence /A tulajdonjog alapkérdései/ (Les questions fondamentales du droit de propriété, Miskolc, manuscript, 1987) mises à notre disposition, Novotni, Z. analyse les formes du droit de propriété; cependant II ne parle pas du contenu du droit de propriété, mais "des traits du pouvoir de la propriété" et des manifestations du pouvoir inhérent à la propriété sociale.

22. C'est surtout le droit capitaliste qui connaît une telle attribution supplémentaire et qui autorise l'Etat — à l'opposite des autres sujets du marché — à modifier unilatéralement le rapport juridique. Cf. Harmathy, A. Szerződés, közigazgatás, gazdaságirányitás. (Contrat, administration publique, gestion de l'économie.) Akadémiai Kiadó, Budapest, 1983. p. 115-220.

23. Nous avons utilisé les notions "reçu" et "imposé", car la nationalisation a été une décision politique qui selon notre avis a donné un choc se faisant sentir aujourd'hui encore au sein de l'appareil de l'Etat. Cet appareil a manqué d'expériences et de pratique et surtout des connaissances nécessaires pour gérer une si grande masse de biens et pour être apte à embaucher plusieurs millions de travailleurs.

24. Ce processus se déroule au cas de l'investissement du venture capital (capital de risques). Cf. Venture capitalin Europe, 1986, EVCA Yearbook, Hague, 1986, p. 198.

25. A cause de cela sont remarquable les recherches qui sont en cours dans ce cadre au Centre de Recherches en Droit Public de l'Académie des Sciences de Hongrie.

26. Le volume Vagyonérdekeltség - reform. (Réforme de l'intéressement matériel) rédigé par Szabó, K. (KJK, Budapest, 1987. p. 241.) contient un sérieux matériel prouvant cette thèse.

27. Cf.: les études sur le Trust de commerce de bétail et

de charcuterie (OVK, manuscript, 1987) et sur le Chantier naval hongrois (PKI, 1984).

28. Voir la description détaillée dans le volume déjà cité (note 5) intitulé Procédures, méthodes, organismes de contrôle, p. 159-284.

29. Le contrôle exercé par l'administration publique n'est que l'une des méthodes de contrôle des processus financiers--économiques. La littérature professionelle évoque de plus en plus souvent l'idée de la bourse des valeurs qui exerce un contrôle d'un type analoque sur le rendement des entreprises, ainsi que la proposition concernant l'établissement des institutions destinées à évaluer les biens.

30. Concernant le nouveau contrôle (normatif) appliqué relatif aux services financiers voir p.e. les alinéa 1-3 du par. 4. du décret No 14/1987. /IV.13./PM et l'alinéa 1 du décret No 4361987. /IX.8./PM.

31. Cf.: note No 28.

32. Décret No 31/1984. /X.31./PM sur le prix déloyal.

33. Selon l'alinéa 1/c du par 4. du décret No 38/1987. /X.12./MT les fonds investis dans l'entreprise ne sont pas qualifiés de revenu à l'occasion de leur retrait de l'enterprise; et le gain des fonds investis, gain tiré selon l'alinéa 2 du par. 10 du décret portant sur l'exécution de la loi sur l'impôt sur les revenus des personnes physiques est déductible du bénéfice imposable, en tant que frais. (Les participants de l'entreprise peuvent déduire – en tant que rendement des fonds investis dans leur propre entreprise – une somme conforme au plus haut taux d'intérêt payé sur les comptes d'épargne, mais ls totale de cette somme ne peut pas dépasser les 20% des bénéfices de l'entreprise.)

34. C'est le cas de la faillite dite frauduleuse. Cf. dans la littérature: Török, G.: Csődjog, felszámolási eljárás, állami szanálás. (Droit de la faillite, procédure de liquidation, redressement par l'Etat) ELTE, JTI, 1986, p. 114.

35. Les règles les plus importantes concernant le contrôle des devises: le décret-loi No 1 de l'an 1974 modifié par le décret-loi No 1 de l'an 1979 sur la gestion planifiée des devises, ainsi que le décret No 6/1982. /II.17./PM sur la procédure de l'autorité des devises. Dans la littérature voir Fekete, J.: A devizagazdálkodás szerepe az uj gazdaságirányitási rendszerben. (Le rôle de la gestion des devises dans le système nozveau de la gestion économique.) Pénzügyi Szemle, 1986, No. 8-9. p. 598-603.

36. Pour préciser notre conception nous tenons à remarquer que les utilisateurs directs des deniers publics sont les organes du pouvoir public, de l'administration publique, les organes judiciaires et le Parquet. Les entreprises (les producteurs et les fournisseurs de services) en recevant une subvention de l'Etat ou en bénéficiant des faveurs fiscales ne sont que les utilisateurs indirects des deniers publics. Dès lors il est nécessaire de contrôler ceux qui ordonnancent ainsi que les utilisateurs.

37. P.e. la loi sur les droits budgétaires de l'Union soviétique et des républiques fédérales (Vedomosti Verhovnogo Sovieta, 1959. No 44.); la loi polonaise sur le droit budgétaire (Dzeinnik Ustaw, 1970. No 19.): la loi sur les finances publi-

ques de la République démocratique allemande (Gesetzblatt der DDR, 1968, Teil I. No 23.);

38. P.e. la loi soviétique déjà mentionnée ainsi que la loi yougoslave "Le financement de la fédération" adoptée en 1972.

39. Le décret-loi No 19 de l'an 1978 sur l'adjudication administrative.

40. Szentiványi, I.: A felelősségrendszer és a pénzügyi jogi felelősség. (Le système de la responsabilité et la responsabilité dans le droit des finances) KJK, Budapest, 1983. p. 303.

41. Voir l'article 17 du règlement financier de la Communauté économique européenne du 21 décemtre 1977, applicable au budget général des Communautés européennes, Journal Officiel des C.E. 20e année No L 356. qui stipule que l'exécution du budget est fondée sur le principe de la séparation des ordonnateurs et des contrôleurs (comptables).

42. La soumission du rapport sur l'exécution du budget peut être réglementée de façon que ce rapport soit présenté au parlement ensemble avec le rapport du gouvernement, mais il est également de pratique courante que l'organe de contrôle financier présente son rapport indépendamment de celui du gouvernement.

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STATE IMMUNITY AND LIABILITY FOR DAMAGES

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Laymen used to see in law, as a rule, a system with a not differentiated structure that brings about an effect mostly in a single way. The highest expectation they raise against law is to determine the responsible person and to delimitate the scope of responsibility. The reply offered by the facts reveals, however, that it has been the very field of responsibility in which the general public has been suffering a deception most frequently, recognizing that the highest social expectations against law have been appearing just in relation to responsibility. Legal theory seems to have adapted itself to the institutional crisis of responsibility and the intensive appearance of tendencies of immunity that arise among the symptoms of the said crisis. In fact, the classical way in which bourgeois lawyers put the question on the subjective or objective nature of responsibility could be formulated even adversely in our time. Accordingly, it is no more an unreasonable approach to deal with the problem whether the omission of calling to responsibility can be attributed more to subjective or objective factors in the given cases. In a broader sense, the subjective and objective-motivated cases of the failure of calling to responsibility can be equally regarded as the enforcement of immunity. The actual, and narrower, subject-matter of the present study, i.e. state immunity, represents, however, a symptom of irresponsibility which used to be objectivated in the law.

From the theoretical point of view of jurisprudence, the motivation of the present study is, on the one hand, to prove that, in spite of the heterogenity and the diversificated problems of state immunity, i.e. being partly a legal institution and partly a disfunctional phenomenon, with its problems that may be equally found in the fields of contractual law, delictual law, private international law, and administrative law, the problems of state immunity and state /liability/ may be treated on the basis of a uniform approach and a complex method. In other words, the sections of problems pertaining to different fields of the law can be brought to a common basis. On the other hand, a method of jurisprudence, broadly practised for the time being, should be corrected here, with an approach of principle. Upon the effect of the said method, the problems of state /liability/ and immunity used to be treated in the relevant literature separated from the matters of the state's capacity of subject at civil law state's.

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In his famous work "On the spirit of the law", Montesquieu mentioned a feeling of conflict experienced by Theophilos, a Byzantine emperor who lived in the 9th century A.D. Theophilos ordered to burn the vessel that delivered commodities for empress Theodora, his wife. "I am the emperor, and you wished me become a freighter. How could earn their living the poor if we took over their craftsmanship?" Indeed, he could have added: "Who would force us to comply with our obligations?"[1] The reaction of the by-gone monarch who seemed to be obsessed by philanthropy was a bit anachronistic even as Montesquieu recalled his figure. In fact, the system of government completely reserved toward economy and trade was more or less obsolete already in that time. True, the state approach so alien to the economy was revitalized to some extent casually due to physiocratic tendencies even in Montesquieu's time but not to the degree which was perceptible from the said source. Hence, it can be supposed that the "good emperor" appeared as a model for Montesquieu more from an ethycal than an economic aspect. Furthermore, there is no need at all to prove that the state approach as represented by Theophilos was spectacularly far from the "spirit of the law" as living at the turn of the 19th and 20th centuries. At the same time, the doubts of the monarch concerning his responsibility has been an actual matter up to the present time. In fact, the mechanismus put under the heading "responsibility" and being at the disposal of the society together with its lawyers and judges are still not efficient enough if being faced the state of modern times. Thus, we still cannot claim that responsibility has a considerable role among the legal phenomena following the acts of the state. On the contrary, it has been a characteristic situation frequently that, in fact, the state cannot be called to responsibility for damages it caused, i.e. it has been enjoying immunity.

As the direct participation of the state in economic life became a tipical issue since the decline of liberal capitalism, and the state appeared as the subject of civil law relations more and more frequently, it became imperative also for legal thinking to perceive that something was out of normal order about the justness of legal relations of this kind. Indeed, the

state proved to be unwilling to adapt itself to the substance of the receiving structure of civil law, based on co-ordination and the equality of rights in principle. Adversely, it makes efforts to secure privileged positions and immunity. The problems arise, accordingly, from the inclination of the state to behave as such even in civil law relations, being anxious to transfer its public authority to autonomous relations. With its entry into the structure of civil law, it ought to take care to leave its sovereignty and public authority beyond this frame.

State immunity as a legal institution was an indisputable fact over centuries. It was considered, indeed, to be a highly important legal institution with far-reaching effects, part of the universal legal culture, transplanted to historical conditions and exerting influence in distinct fields in which its existence and functioning could not be explained from economic, social, and political points of view when seen from outside. All this was due to its "internal" force, causing a surprise to the comparative jurisprudence of our time. Since the end of the last century onward state immunity as a legal institution got paled, however, considerably within the context of universal legal development. In fact, its character as a legal institution survived to our time, essentially, only in the field related to international economic relations but its form got modified and took a milder shape even here. As to the internal /domestic/ law of the states, it was ousted gradually as a legal institution, to be replaced by state liability. All what took place in the individual countries below the level of a formal legal institution was, however, not in conformity with the said process. In fact, it could be observed that state immunity as a phenomenon continued to exist or was reshaped but this tendency left already a narrower margin to the law. Rather, this phenomenon was induced by the disfunctions of state activity and mainly informal elements.

Immunity means some kind of a counterpoint to responsibility, i.e. "irresponsibility". More precisely, immunity is a category comprising cases of the omission of calling to responsibility. Accordingly, immunity is a situation in which a given subject at law cannot be called to responsibility for some

reason although, as far as the state of facts is concerned, the required conditions exist. First of all, immunity is connected with the "outer" appearance of a subject at law, and the quality of status of the subject at law concerned will decide whether or not calling to responsibility will be omitted. For this reason, the general problem of the state's capacity at civil law has to be recalled when the matter of state immunity and the liability of the state for damages is examined. Accordingly, this should be the starting point, and the relationship between the specific elements of the liability of the state for damages and the state's capacity of subject at civil law state's have to be taken into consideration throughout the analyses of detail problems.

In connection with the concurrence of the views on immunity and responsibility, a process of changes being protracted for a longer time is taking place in this field. For the majority of the legal systems, responsibility gained the upper hand over immunity formally. nevertheless, the intensive counter-attack of immunity affected state responsibility so heavily that its functioning has been hardly over zero point. The present study should give a summary of the essence of this diversificated and complicated process, not yet terminated to the present day, with the analysis of the fate of the main rule as principal purpose. Looking at the various phases of development of the law, the fundamental problem concerns whether or not the state can be called to liability under given circumstances.

When classifying the legal solutions related to the state liability for damages, the methodological and systematic categories and achievements of legal comparison cannot be utilized directly, as the problem has been elaborated in the distinct legal systems in the respective legal branches with casual differences. Accordingly, there are legal systems in which the state liability for damages is regulated not, or not only, within the frame of civil law but in public law or also in this branch. Indeed, the comparative categorization of legal systems from the point of view of civil and public law does not coincide necessarily. Thus, legal problems concerning the structure gain the upper hand principally facing those making a com-

parison, and the fundamental problems are so frequently concealed. On account of these methodological concerns, mentioned in the foregoing, it is convenient to be careful when making a comparison. It is partly the consequence of this constellation that the specific features of development of the solutions given by the investigated legal systems are not presented in this study in the form of "condensed" formule. With this in view, a general tendency has been adopted refusing to give excessively polished conclusions.

The proscepted comparison has several ways to be considered. Having in mind them, it is easy to see the significance of comparing the concepts of the bourgeois and the socialist models of law on state responsibility, for the view claiming that "legal comparison is not only photography but architecture as well, applicable also to the East-West relationship"[2] appears as raising a requirement also for the present work. Clearly, a constructive work of major size dealing with the problem of state responsibility would be necessary in the future within the socialist model of law, i.e. in the law of socialist economic integration and the internal /domestic/ law of the individual states, more and more inclined to reforms in economic management. It is hardly needed to justify the necessary consideration of the Soviet and Hungarian legal systems. As to the group of bourgeois legal models, on the other, hand, analysis and comparison will be concentrated to the solutions as offered by the British, German, and French law for these legal systems have represented a particularly individually-shaped style within the universal legal thinking.

The concept of state immunity is rooted in the ideology of sovereignty. Unfolding the concept of sovereignty, state immunity in law and jurisprudence will appear as a "partial product", related to both the internal and external side of sovereignty. Thus, problems affecting the internal immunity of the state may be found, among other points, in relation to the consequences of the acts of authorities, the material responsibility of the employees of state administration, in the matter of contracts concluded by state organs, but the assessment of the activity of organs charged with economic management from the point of

view of liability for damages is also part of this context.[3] The problems of the external immunity of the state concern the field of public international law and private international lsw. The concept of state immunity became disintegrated in the legal theory and literature, so the effects of the changes of state immunity, affecting various fields of the law, have been dealt with by the relevant authors from the viewpoint of a partial approach. Hence, the process of formation of the concept of immunity has been reflected at a level conforming to the requirement of actual literary values only in partial processes, coupled to the respective special fields of the law. In fact, there have been remarkable historical parallelisms between the individual partial processes; the more, the partial processes used to support each other in their underlying views. Thus, a statement of facts from the field of private international law gave an impulse to a change in domestic /internal/ law concerning the disfavouring of state immunity and the support the rise of state responsibility, in some cases, or an instance of the law of contracts had a positive effect upon the delictual development of the matter or inversely. Nevertheless, jurisprudence failed to approach positively to these effects and interactions so far. True, problems of some marginal fields of immunity have been dealt with, quite rarely, but it happened more incidentally that the relevant details were summed up in a literary work. As a matter of fact, political problems were raised when the state aspect of the phenomenon was examined from the side of the law. This is a specific element that presented itself equally sensibly at both the historical and the actual approach to the institution of immunity. As a rule, a direct relationship exists between the nature of state policy being enforced in the respective periods and the actual substance of legal phenomena pertaining to the complex of state immunity and state responsibility for damages. The parallelism between the trends of the history of law and politics appears in the subject-matter treated here in a spectacular way. So, state-directed tendencies promote immunity while liberalism favours ideas concentrating to responsibility.

The political ideology protecting state immunity used to

appear in respect of the assessment of statements of facts from the field of private international law in a stronger and more intensive way than in cases of civil law, from the field of the law of contracts and delictual law. This circumstance can be explained, as the state is less bound to ideologize immunity in respect of its own citizens or corporations than foreign subjects at law, figuring in statements of facts within the field of private international law and being beyond the range of subordination of the state in question.

The connection that took shape in the juridical evaluation of state sovereignty and state immunity in a historical process facilitated to be informed in face of the collected data. As much as a researcher of the subject-matter of this study finds assistance from the guiding line of sovereignty when arranging the relevant elements of the history of law, a lawyer obsessed with politics finds troubles, however, in the practical conversions of lessons of principle within the context of immunity, resulting from the respect of the idea of sovereignty, leading to conservation. Just for this reason, it is difficult to make a practival approach to the problem of state immunity, dissolving its absolute concept, as immunity and sovereignty constitute a complex of question with multiple ties.

As regards the processes acting against absolute immunity, the bourgeois legal systems had to face the challenges of their own history while the socialist legal systems had to fight against distortions of approach resulting from the excessive and extremity-bound ideology of their initial period, following their revolutions as well as the practice of state management suffering from the same misperceptions.[4] The concept of absolute immunity got into a confrontation mainly with the idea of the rule of law and the welfare state in the bourgeois states; in the socialist states the confrontation presented itself with the substance of socialism and the requirement of the socialist rule of law. As regards the delictual settlement of problems of the state liability for damages, the socialist law seems to have priority, while the bourgeois law is more perfect in settlements under private international law. As for the contractual law regulation of the state liability for damages, it is almost un-

reasonable to compare the two legal models on account of the differences of the starting positions.

With the decreasing trend of the direct responsibility of state employees and the subsequent appearance of the organizational responsibility of the state ofr its employees, the underlying problem arises now within the context of the legal institution of the civil liability of damages of the employers. In a dogmatical approach, the state liability for damages continues to be belonging in civil law thinking, essentially, to the domain of the liability for damages of the employer, i.e. a legal entity, although this structure suffered substantial changes by the recent facts of development. The specific features of the state's capacity of subject at civil law as well as the particular sociological background of damages caused by the state and the enforcement of claims for damages against the state reflect the substantial loosening of the dogmatical ties between the liability for damages of the employer, i.e. a legal entity and state liability for damages. In our view, the complex of the state liability for damages got already separated from the legal institution of the liability for damages of the employer i.e. a legal entity.

The material of state liability ofr damages under positive law is characterized by the tendency of increasing strictness. For the time being, the legal systems analyzed here have a common speciality, i.e. state liability is established upon an objective basis. Together with the enforcement of the aspects of legal policy aimed at the protection of the injured party, the said solution came into the foreground also on account of the circumstance that a culpability of "antropomorphe" nature could be abbplied to the state liability for damages, of an organizational character, with great difficulty and by means of forced motivations.

The development of state liability in general and that in the field of the law of contracts in particular was more continous and proceeding in faster steps in the legal systems in which the institution of administrative contract took shape. It can be stated, at the same time, that responsibility under the law of contracts has been just the domain in which the in-

stitution of state liability has been most exposed to the restituting tendency of immunity with its legal, and more informal, means.

It is a common achievement of the development of the bourgeois and socialist models of law that the obligation of compensation of states covers not to pay for damages caused by state organs in the course of a lawful action. Although this is a point beyond the subject-matter of this study from a closer view, one may perceive, however, keeping an eye on the development of the solutions in distinct legal systems concerning the state liability for damages, that the said responsibility and indemnity for damages by the state have been on similar bases of legal policy. The more, a connection may be found between the two legal institutions casually even at the level of legal techniques, in the German development in particular.

For the course of development of the relationship between state immunity and state liability for damages the image of the state that took shape in the various legal systems at the beginning proved to have a fundamental significance. Besides, the fact that different methods of the making use of power were practised in the distinct states during the intensive periods of legal development had an outstanding role in the varying solutions of the legal systems concerned.

The basic concept of common law reflects a state with a very high esteem of sovereignty. Several elements from the history of law had an impact toward the absolute interpretation and strong nature of state immunity in the common law. Special emphasis has to be laid on the point that feudalism got stabilized in Britain as a result of foreign rule, with the organization of defence not only in the military field. Furthermore, in early mercantilism that influenced already the development of common law, a strong royal power played an important role already in principle, applying the method of the infiltration of the state into the economy through its centre. Although efforts were made during the bourgeois revolution to overthrow royal and state sovereignty together with immunity coupled to it, a "revolutionary" compromise of classes, established soon between the ascending bourgeoisie and the feudal aristocracy, facilita-

ted the incorporation of state immunity, together with other precapitalist institutions, into the legal system assuming more and more capitalistic features following the revolution. State immunity was then not broken even by phisiocratism, appeared in the foreground of British economic policy in the 18th century. In fact, a loud emphasis on the idea of sovereignty was already required at that time by the cohesion of the British Empire that took shape in the meantime, and the authoritarian external appearances of royal power, together with immunity, were also needed to this end.[5]

The German law presented a contradictory image of state for the course of development of the state liability for damages.Considering the particular atmosphere that was persisting until the coming into existence of German unity, it was much easier to grasp by civil law the central power, with its generally low degree of organization, and the disintegrated principalities as "state factors", than the state organized by the Prussian model, having taken shape in the unified German empire set up in 1871, with which a permanent etatist concept was introduced into German legal thinking. Prior to the realization of German unity, the course of German history of law was shaped so that the concept of the state liability for damages made its way ahead by applying the fiscal category to this end. This was understood to comprise that sector of state activity which was reserved for civil law application by the state. According to the essence of this fiscal theory, the state could be called to responsiblity in a way that its sovereignty was left untouched. State liability for damages took shape, essentially, in the German law already in its phase of development preceding 1871; subsequently a backward step could be observed, however,[6] toward absolute immunity, upon the effect of changes in the "external" appearances of politics.

Contrary to eraly British mercantilism, mercantilism in France as shaped by Colbert did not create an immune status for the state radiated through sovereignty. In fact, territorial and bureaucratic methods were characteristic for Colbert's activity in organizing economy; accordingly, the entry of the state into the sphere of economy took place in France not

through its centre but through local territorial administration.

have been more difficult, indeed, to raise the myth of the state's economic sovereignty and immunity from a bureucratic level closer to actual production than by making use of the body of central administration. Anyway, the birth of French bourgeois law started from physiocratic bases of principle.In fact, the fundamental course of development of French law was determined by the Great Revolution and Napoleon's rule. These two determining forces, near to each other in time but different in their political nature, showed a one-sided and parallel law-forming effect in several fields of French law. The historical approach with the headline "revolution and Napoleon" proved to be, however, not utilizable in connection with state liability for damages. In fact, the two series of events produced controversial concepts concerning the subject-matter dealt with here. The group of ideas originating from the French bourgeois revolution formed, essentially, the frame for approaching the problem of state responsibility. Accordingly, the ideology of the state responsibility was fully developed in France by the end of the 18th century but it got frozen for almost a century by the course of history. In fact, the idea of the imperial and metaphysical substance of the state was conceptualized by Napoleon's rule and the Bourbon restoration, with a simultaneous strengthening of the executive power to an extent that the ideas of responsibility that took shape during the revolution remained inapplicable in front of the state for a long time.[7]

The Hungarian bourgeois law had no characteristic image of state of its own. Besides, it is rather difficult to trace precisely the factors that had an influence on the tendencies of the development of Hungarian bourgeois law. Actually, the formally existing institutions of capitalism had no positive roots in Hungary. Indeed, an "outside" mechanism determining in principle the course of legal development was not operational in the Hungarian development of the 19th century. The more, its structure that could be supposed, besides, only theoretically, broke at two vels. Thus, there was no consistency within the Hungarian economy between the seemingly capitalistic institut-

ions and the even less capitalistic facts of reality, and an active relation adaptation between economy and law was equally non-existent either. Contrary to the contemporary course of development of other legal systems, the initial line of development of Hungarian bourgeois civil law was determined during the last decades of the 19th century not by the increase of state power and the growing number of direct state interference but the forced reception of Austiran, i.e. a foreign law with the lasting solidification of its ideas. Hence, the initial characteristic feature of the Hungarian development was not the denial of calling to responsibility the state with the simultaneous acknowledgement of the individual responsibility of a civil servant but the fact that its basis was formed by the contemporary Austrian law which failed to regulate both the responsibility of civil servants and that of the state. Looking at the historical course of the development of civil servant and state liability the Hungarian bourgeois law did not produce as big differences as it has been alleged by the relevant legal literature.[8]

Two methods were formed in the universal development of law for constituting a foundation to state liability.[9] One of them is based on a distinction among state activities according to their nature, and the decisions judging state activities whether they are liable or enjoy immunity are taken by applying the categories iure imperii - iure gestionis. This approach has been the basis of the functional-relative concept of immunity, that gained broad ground in the legal development during the 2oth century. The formation of this concept may be considered, in fact, as one of the last successful functions of the private law - public law structure with a liberal-capitalistic foundation. Contrary to this, the other method lied on a substantially organization-based view, starting from the opinion that responsibility was applicable in connection with the activity of distinct state organs while calling to responsibility was out of question for toher state organs. The bourgeois legal development has been dominated, indeed, by a concentrated qualification of the nature of state activities. With the decline of the fiscal preponderance in theory, the latter method lost much

from its intensity by the end of the 19th century, but it regained importance in the socialist legal type with a modified nature as the bearing element of new questions.

The process of the gradual weakening of state immunity and the formation of state liability experienced different rhythms in the distinct legal systems within the adaptation frames of the bourgeois law type. The importance of the internal aspects of the law increased during the phase of development from the second part of the 19th century onward. This circumstance resulted in an increased differentiation of development among the various legal systems. Besides, it was also the effect of this differentiation that the assessment of the subject-matter dealt with in the present study and its aspects in the field of the law of contracts, delictual law and private international law in particular could not be assured on parallel lines even within the individual legal systems.

It was common law in which the strongest obstacles arose, within the bourgeois law type against building up state liability for damages. The problem of state immunity got under way in common law first in the field of private international law, at the end of the 19th century. One century later, i.e. in 1978 it was just the same field of law in which, as latest in the sequence, functional immunity was attained. Within the long-lasting struggle of judicial practice in English private international law it was also a point in relevance that the theory was particularly bound to absolute immunity. This fact was connected to the historical circumstance of the theory that the formation of English thinking in the field of private international law was determined by the Dutch school for which, as it has been well-known, the accentuated protection of the concept of state sovereignty was a principal characteristic feature. Absolute immunity was preserved also in English civil law for a long time. With the Petition of Rights Act from 1860, absolute immunity was even granted a procedural guarantee. It was laid down in the said act that, in order to take legal proceedings against the state, a special petition had to be filed, and if it was rejected by the attorney-general, he was not even obliged to justify it. Subsequently to the said provision, the ex-

ceptionally narrow margin of enforcement of the state liability was assured in the judicial practice of the law of contracts by the procedural institution of the petition of right. As to the law of extra-contractual liability, i.e. the law of torts, the situation was still worse. Even a petition of right was not a viable measure to secure an exception from state immunity.[10] This system was in force till 1948, i.e. the coming into force of the Crown Proceedings Act from 1947. It happened only with this act that the old and immovable barriers of English civil law were demolished to make free the way to build up the state liability Nevertheless, English private international law continued to be subjected to absolute immunity for three subsequent decades.

Absolute immunity could be overthrown in English law by shaping the viewpoints of differentiation according to the nature of state activities, i.e. a pair of the categories iure imperii – iure gestionis, even if this was attained with more difficulty than in other legal systems. The fundamental idea of this qualification got familiarized in common law not easily for the absence of a support of approach by the structural model of public law – civil law. It happened as late as in 1921 that a judgement with an immunity relevance, passed in the so called Amphitrite case, with its statement of facts from the field of private international law, effected the separation of principle of trade-based contracts of the central administration from those concerned with public authority.[11] The judicial basis of the judgement passed in the Amphitrite case secured the public law - civil law structure, missing in common law, for the institutionalization of the state liability for damages, thus creating a conceptual basis in English legal thinking for the distinction of state activities from the iure imperii - iure gestionis aspects. This idea was used in the law of contracts but it was not applied in the law of torts, respectively.[12]

The other way of developing the state liability, conceptualized in principle and supported by organizational aspects, has been based upon the fiscus theory presuming also institutional and theoretical elements of Roman law to some extent,

and it did not appear in common law as Roman law as this latter was taken into account in it, anyway, only to a limited extent, and the separation between the private property of the monarch and public property took place with some delay i.e. from the 19th century onward.[13] Thus English legal thinking could consider only the administrative aspect of the fiscus category and could not use it from the approach of responsibility and the prorpietor.

The problems of state immunity and state liability for damages remained within the field of civil law regulation in the development of common law throughout the times. Accordingly, practice was hardly affected by the viewpoints of legal policy, which were enforced principally only in the domain of the law of contracts. As regards, however, the law of torts and private international law in particular, it is striking to see the essential distance of "policy" elements from the course of development. The apolitical English approach favoured previously became, besides, inadmissible in respect of private international law with Britain's entry into the Common Market.

Turning to German legal thinking concerning the clarification of problems affecting state immunity and state liability, the starting point was not a classification of state activities according to their nature. Instead, a fictive organizational concept was taken for basis, claiming for the treasury to be the subject of specific state activities, and the sovereign state with its public authority ought to be considered as subject for other activities. With a distinction between the terms "Regierungssache" /government affair/ and "Justizsache" /matter of the judiciary/, the fiscus theory created order in the law of the German principalities that seemed to be practical. Through the application of this theory, some institutions of civil law got penetrated into public law. This became apparent mainly in the extension of the scope of application of contracts. Accordingly, qualifications of civil law started to appear in relations between the principalities and their subjects also in fields which belonged earlier exclusively to the domain of public authority.[14]

The fiscus as a civil law institution was pushed into the

background in German law at the end of the 19th century by the strong state image of the unified German Empire and constitutional or administrative jurisdiction in particular which was set up just at that time. As a rule, a claim for compensation against the state colud be enforced at an ordinary court only if the claim was judged previously by a constitutional or administrative court. With the introduction of constitutional or administrative jurisdiction the tendency coupled to the fiscus and supporting the concept to extend the competence of the ordinary courts in administrative cases was broken. The effect of the fiscus theory furthering the civil law approach was limited subsequently to the domain of contracts, being manifested in the circumstance that contracts concluded between an administrative organ and a citizen continued to be actionable at ordinary courts according to the rules of civil law. At the same time, the fiscus theory suffered a loss in the fields of delictual law and private international law by the turn of the century. True, the civil courts retained their competence in cases affecting state liability for damages in the fields of delictual law and private international law, but public law aspects came increasingly into the foreground at the judicial assessment of the statements of facts. Indeed, it was unclear whether or not the state liability could be regarded as having a civil law character, and this view is still valid in delictual law and was contested in private international law till the end of the 1950-ies.[15]

A deviation from the qualification practice affecting organization and based upon the view granting the fiscus the status of an independent subject at law was observed in German legal thinking only following the coming into force of the Civil Law Code /BGB/. The purpose and nature of state activities became the fundamental element of judgement concerning liability as late as from 1910 onward. It was, in fact, at that time that Amtshaftung /office responsibility/, as a new form of organized state liability, started to compete with fiscus liability that passed already its zenith. Nevertheless, the aspects of the qualification of state activities are still uncertain even in the contemporary West German juridical practice.[16]

The fiscus theory was never operating in German private international law. As a result of administrative measures taken by jurisdictional government instances, the absolute immunity, protected also by the principalities with their high self-esteem in the field of foreign affairs, could resist to the fiscus theory and the responsibility of the treasury, in spite of the efforts made through judicial conscience, with a view to transplant them also to legal relations in the field of private international law. As a result, absolute immunity stiffened considerably in the judicial practice of German private international law. Apart from the theoretical way of assessment of the problem, with its emphasis on sovereignty and civil law approach, the said course was related also to the circumstance that absolute immunity complied with the interests of German foreign policy, obsessed by expansive trends in the Wilhelmine era, provoking two world wars.[17] When absolute immunity was dethroned in the 1950-ies and 1960-ies, the German courts made use of the qualification viewpoints of functional activity, already in wide-spread use in private international law at that time.[18]

The development of the state liability for damages took place in France in successive steps. The first signs of state responsibility in the law of contracts appeared as early as at the end of the 18th century. The assessment of the matter from the point of view of private international law received its basic impulses from Napoleonic foreign policy at the beginning of the 19th century, while other elements from the field of delictual law gained significance from the mid-19th century onward. As regards its historical rhythm, the development of the state liability enjoyed a relatively regular course, i.e. less deviations presented themselves in the main line of development than in other legal systems. Indeed, the principal problem was, essentially, not if the state were anxious to return to absolute immunity; rather, it was inclined frequently to apply only milder degrees of responsibility against itself.

State activities were qualified in respect of immunity and responsibility according to the nature of the activities concerned. Up to the end of the 19th century, the idea of sovereignty formed the basis. In respect of the judgement of cases

with statements of delictual facts, the Conseil d'Etat formulated its stand, during the lapse of only some decades from the 1850-ies onward, influencing the development of the law of contracts and administrative law, and stating that the judgement of claims against the central administration was subjected to particular rules within the competence of the administrative courts, except in cases in which the public office concerned resigned explicitly of qualifying the respective activity as having public authority. It is for this reason that administrative law has had a predominance in France when problems of the state liability had to be settled. The sovereignty aspect got faded in the 20th century when state activities were assessed, and the basis of classification was then whether or not the activity concerned was within the scope of public service, i. e. aimed at the organization of a public utility. Making reference to the service to public interests, the state assured already a "special judgement" for itself.[19]

The concept of public service took shape within the field of administrative contracts; subsequently, it appeared in the domain of delictual law at the beginning of the 20th century; the more, its elements can be traced, casually, also in French private international law in the second part of the 20th century. The first impulses for judging state liability for damages on the basis of public service came from the field of contractual law. The practice of delictual law received more only support from the domain of the law of contracts at that time. Following World War I, bringing a restrictive tendency in the domain of public service, and a gradual increase of the role of state responsibility for damages in the application of the law, statements of delictual facts appeared more and more frequently in judgements reflecting this new tendency.[20]

Looking at the process of developing the civil law responsibility of the state in France, the fiscus category did not receive a function similar to that of the German treasury as a result of French legal thinking, with its approach to conflict situations in civil law, affecting the state, emphasizing the viewpoints of the citizens concerned. In fact, the

starting element of French theory was the free and independent individual, being not a subject as expressed by the German term "Untertan" but a citizen who, on the basis of a social contract, joined other citizens to form a state. Accordingly, the ideologies underlying the enforcement of claims against public administration have been based upon the natural right of individuals instead of a "gesture" of the state as it has been the case in German law.

As to Hungarian bourgeois civil law, the principle of state liability for damages was operating, essentially, from the end of the 19th century onward. On the other hand, the private international law aspect of the subject-matter dealt with here retained its character of absolute immunity throughout the bourgeois development of the law. Essentially, laying the basis of the material of state responsibility in the Hungarian bourgeois law and its successive development was equal to keeping increasing distance from the legal concept as practised in Austria. It is worth mentioning in this respect that reform-minded Hungarian lawyers looked at the French law, regulating the relevant complex of problems from a liberal concept, with a high esteem and anxious of adopting it, while they were definetely reserved in face of German legal solutions.[21]

As regards jurisdiction concerning the state responsibility for damages, the distinction of state activities according to their nature was taken as basis in the judicial practice. Nevertheless, this group of problems was less emphasized and elaborated within the Hungarian development as it could be observed in the majority of the bourgeois legal systems of Western Europe. The difference resulted from the delay of state interference with the Hungarian economy as compared with the development of the Western European countries. As a consequence of this, state activities in the field of the economy, definitely differing from authority-inspired, sovereignty-based state actions, appeared in this country only at a time when qualifying solutions and structures, to be adopted by the Hungarian judicial conscience from the preceding development of other legal systems, the French law in particular, were already available for perception. For their actual reception, it was a

possibility at hand, i.e. the community of Hungarian lawyers was concerned with the problem of the state liability for almost two decades. It was in line with this that the preference given to the Austrian-shaped model of immunity was overcome in the judicial practice and, at about the 1890-ies, also in the jurisdiction of the Supreme Court. Accordingly, with the actual beginning of the judicial practice of state responsibility in Hungary at the end of the 19th century, the judgement system declaring that state activities in the field of enterprising, the management of corporations and plants, and administrative caretaking ought to be judged according to the rules of private law, was applied at once. As a result, the state had to accept responsibility for the eventual consequences of damages according to the rules of civil law. Thus, it must have followed from the causes of the history of economy and law, referred to above, that elements of the law of contracts became less important in the Hungarian course of development for the overall transformation of the state liability for damages.

Hungarian courts proceeded to lay the foundations of the state liability by making use of the rules and principles of civil law. Hence, the starting was the state's responsibility for its employees in terms of the general rules of civil law, just as this was applicable to an individual for his or her agent or employee. Subsequently, a change took place in the application of the problem of state responsibility within the judicial practice in the 1920-ies. Actually, a decrease of intensity of the civil law character of the matter could be then observed in the judgement of courts and tribunals, and the principle of state responsibility was maintained in the judicial practice separated from the rules of civil law. In accordance with this trend, the institution of state responsibility was not incorporated into the draft Code of Hungarian civil law of 1928, thus strengthening the trend mentioned above. A re-orientation to the civil law aspect of state responsibility presented itself only with the resolution of principle No. 976. of the Supreme Court from 1933. With the stagnation of the problem in the 1920-ies and the subsequent approach to it with the said resolution of principle No. 976 from 1933 from a ci-

vil law aspect in view, it was easy for the representants of Hungarian jurisprudence of the successive period to form the impression as if the institution of state liability appeared in the Hungarian bourgeois civil law in a general sense as late as in 1933, and this date ought to be the beginning of its existence.[22]

As one of the principal problems the bourgeois legal thinking has to face concerned the classification of state activities of various characters, the clear sight of the socialist lawyer was made more difficult also by unsettled organizational and legal problems connected with the state's capacity of subject at civil law.

The idea of state sovereignty acquired a particularly high significance during the early history of the Soviet Union that was characterized by external and internal fights for the very existence of the state. Thus, it was a natural and logical consequence of the political impulses that came from the bourgeois world that the state was elevated to a high pedestal of sovereignty and public power by the Soviet law and, accordinly, it was vested with the ideology of absolute immunity. The successes if the Great Patriotic War and the achievemenets of reconstruction, consistently targeted even in the atmosphere of the coldwar, influenced understandably the formation of principles, beyond the actual events, and have had a significatnt effect also upon contemporary legal thinking. As regards the subject--matter dealt with here, this meant a strong embedding of immunity elements being in contract with ideological spheres and, as a result of this, the establishment of the state liability for damages could take place only with delays. The rhythm of this process was slower in Soveit private international law than in the internal law liability.

The idea of the supervision of state activities arose at the beginning of the existence of socialist-modeled states with an approach from the side of public law. Accordingly, the concept of administrative jurisdiction was in the foreground of the efforts that were aimed at organizing the control of state activities but, ultimately, these failed to get realized. Afterwards, it became apparent by 1922 that the settlement of legal

disputes connected with state administration was left within the competence of the ordinary courts. With this course, interest started to rise also in civil law solutions. The civil law method could not get unfolded earlier for, in a general sense, the very existence of civil law was in doubt for some time, on the one hand, and a civil law-based approach was out of question actually, on the other hand, because of the monolithic nature of the socialist state model, concentrating an important public power, not, differentiated satisfactorily for a civil law viewpoint.[23]

The remnants of the institutions of pre-revolutionary Russian law concerning responsibility for damages were not taken into consideration in the Soviet civil law. Accordingly, the continued applicability of the outlines of earlier rules of the law was excluded from the very outset on account of the incompatibility of revolutionary changes and legal continuity on which a high emphasis was laid from political point of view. Only some dogmatical motives of the institution of the treasury survived in the socialist legal thinking, so that the term treasury was understood to mean the economic-organizational centre of the state. This denomination was of importance for the levels of economic management and actual economic activity were never clearly delimitated in Soviet economic history as the systems of institutions was in an almost permanent change. Apart from the treasury, one could not find, in fact, any category with a historically standard content concerning the economic-organizational centre of the state. Thus the institution of the treasury was placed within Soviet law first and foremost into the positive and theoretical description of the state's capacity of subject at law. From a methodological aspect, the institution of the treasury influenced the formulation of the state's capacity of subject at law but it was not relevant ofr the institutionalization of the civil law liability of the state. The fiscus theory, known from development of German law, was not adopted by Soviet law. The treasury appeared here in the organizational field of the law, disregarding the area of responsibility.

The classification criteria of state activities according

to their nature appeared in the Soviet legal practice from the mid-1920-ies. From that time on, the provisions of the Russian Civil Law Code from 1922 concerning the apparent responsibility of the state but with an immunity-favouring character was applied more to the damage-involving consequences of state activities with public authority. As to state activities without public authority, a preference was given, however, to the general rules of liability for damages. As to the classification of activities without public authority, the economic character became the genus proximum. In respect to the state, delictual responsibility appeared more and more frequently within the scope of economic activities. Later on, the emphasis to the economic factor became the basis of loose extensive interpretations, and the method of differentiation between state activities proved to be inappropriate to create an actual order. Then an other method took shape, first at the judgement of statements of facts in which classification was more difficult, and subsequently with a more general approach, so that the courts examined first not directly the activity that involved damages but, instead, the character of the underlying organ or organization. Accordingly, the determination of the functional character of the state organ or organization concerned became the principal point, implicating the almost automatic adoption to it when the behaviour causing damages had to be judged.[24]

Turning to the Soviet private international law, the aspects related to the character, historical situation, and foreign relations of the Soviet state were relevant for the formation of the theory as far as state immunity was concerned. It was the unequivocal consequence of this approach that the principles of state immunity had to be formulated on a defendant-orientated basis in the Soviet private international law. Accordingly, some kind of a self-protecting function was radiating from the basic model of the Soviet foreign trading, manifested in that, in the rare cases of establishing foreign trading relations, the Soviet state was always careful to secure that the spheres of the internal economy should remain unaffected by the possible disadvantageous consequences of these relations. Understandably, this approach continued to be

preserved in the field of Soviet foreign trading like a reminiscence when the conditions of foreign trading relations got normalized as compared to previous priorities. The self-protecting function of the Soviet state and economy was then realized in the field of foreign economic relations by the institutional system of the state monopoly; in line with this, this concept had a leading role and was considered to be a bastion of the absolute leading role of state immunity in the Soviet private international law. Taking into consideration the changes and challenges of the world economy, the state monopoly in foreign trading is considered in the Soviet theory recently from a comprehensive approach, equally assessing the protective aspects, applicable preferably to the bourgeois partners, and the organizational functions, characteristic for socialist relations. In spite of the organizational restructuration of the state monopoly in the field of foreign trading, the functionalization of state immunity did not get realized, however, in Soviet private international law so far. It seems thus as if the issue of state immunity were coupled to the state monopoly in foreign trading more in the course of the realization of self-protecting functions. In fact, the extension of organizational functions within the state monopoly of foreign trading failed to give impulses to state immunity. The logic of the system ought to result in that, together with the strengthening of the phenomenon of immunity with the realization of the self--protecting function in economics, the broadening of the organizational function ought to have as a consequence the fading of immunity.[25]

The problems of socialist economic integration have been judged in the thinking of Soviet jurisprudence from the aspect of public international law. This theoretical approach, always revoking the sovereignty idea with a reflex-like hint, does not facilitate, in fact, the functional interaction of legal relationships in the fields of public and private international law. With an approach of judgement isolating legal relations between interstate and economic organizations from each other, the issue of state liability is actually under the cover of public law aspects, on a theoretical support based upon a de-

finite sovereignty and immunity-related concept. The conceptual brakes, resulting from a public law-mindedness that is perceptible also in the course of setting up the economic responsibility of the state, have had a retarding effect on the legal unification process within the CMEA as well. Actually, it should not be forgotten that neither the theory nor the practice can get closer to the establishment of a legal security in economics within the socialist integration with the continued preference to the dichotomy of the view seeing public international law versus private international law, too closely linked to the delimitating line of the legal branches. The problems of responsibility within socialist economic integration must not remain isolated matters for public international law and private international law. In fact, the problems of state liability and immunity are phenomena placed to the "grey margin" between public international law and private international law, requiring a complex approach. The recently established forms of direct state action in the field of international economic relations reveal, however, the broadening of the grey margin referred to above requiring, indeed, a complex approach. One has to admit here, however, that, as regards the integrated socialist external economy, and the shaping of complex methods in jurisprudence and actual practice, amalgamating public and civil law aspects, even the level could not be attained so far which, more or less, could be already realized in the socialist legal model in respect of the domestic economy.[26]

The delictual problems of state responsibility have been covered in the Hungarian socialist law, principally but not completely, by the legal institution called liability for damages caused within the scope of state administrative law, placed in the area bordering administrative law and civil law. From the viewpoint of administrative law, the said institution has been considered as one of the legal guarantee of the legality of public administration, not being equal, however, to a guarantee of administrative law. As to the civil law approach, it used to be emphasizeed that liability for damages caused within the scope of administrative law constitutes a special

form of the responsibility of legal entities for damages caused by their employees to the prejudice of third persons.[27] This civil law approach to the problem dealt with here seems, however, inadequate. Claiming for state liability to represent a specific kind of the liability of legal entities is, in our view, incorrect. Taking for starting point that state responsibility is an integral part of the state's capacity of subject at law, with an autonomous structure, a section of the state liability system in the field of the law of property, comparising equally civil law and private international law relevance, will lead much closer to the substance of the institution. The special features which can be experienced within the scope of state liability, occurring in line with state activities, such as rules granting privileges, immunity elements, can be understood more easily from bases of this kind.

It has been a characteristic feature of the law of liability, even from the viewpoint of tis historical development, that the subject-matters to be regulated in a novel way, are approached from a partial aspect at the outset. Initially, fragmented legal bases of compensation used to be applied. Later on, after having influenced efficiently the statements of facts of the phenomenon to be regulated, a generalizing change is effected, turning over to a more abstract method, and integrating the special rules of the legal bases. Some kind of rhythm of the differentiation and integration of regulation can be revealed also from the institutional history of the state liability for damages in Hungarian law. The special rules /of the previous legal system/ concerning state liability were, essentially, integrated in para. 349. of the Civil Code codified by 1959, but this might be a premature measure. At the time of the said integration of the institutional fragments of the liability of the state administration for damages or, simply, state liability for damages, by para. 349. of the Civil Code, referred to above, the majority of the relevant application problems was still unsettled. As to the details concerned, the institution could not take a definite shape till the codification of the Hungarian Civil Code. State activities were, in fact, too many-sided and rather unexplored for the relevant

applicability of liability for damages to give a due basis to the settlement of the problem by means of a single statutory disposition. With this in view, it seems necessary for the future legal regulation of state liability, proposed also by us, to go back to the relevant details. The concept of regulation has to adapt itself to the typical groups of statements of facts concerning behaviours causing damages, occuring in the course of state activities. A return to a uniform, integrated state or state administration liability for damages as a legal basis will be only appropriate, together with charging this basis with the application of the law, if the experiences, indispensable for legal development, will take shape and get established in the actual application of the law, using the routine ways and means taken from fragmented legal bases. Prior to this point, the stipulation of paragraph 349. of the Civil Code seems to be inappropriate to bear the entire political burden of state liability as well as the potential charges of the still informal legal practice.

When incentives should be given to corporations to take risks, the enforcement of a solid system of values for the judgement of their activities is absolutely necessary within the environment of their economic activity. It is just the immunity of economic management that constitutes the most important vacuum and insecurity in the national economy. It is difficult, indeed, to set up stricter demands for the responsibility of corporations or their leaders, respectively, and not to tolerate underhand dealings in the conduct of corporations in their economic activity without the possibility to call to responsibility the economic management. It might occur, indeed, that the interests of the national economy did not disappear at the level of the corporations concerned; instead, they suffered injury, were violated or their consideration was neglected at higher levels. In fact, the entire system of responsibility will fail to operate normally as long as the headlights of law and responsibility, led by courageous volition, will not be directed even to these higher instances. The judgement of economic processes for their responsibility can be imagined, actually, only in a system of the law of responsibility conceptual-

ized so as to connect the conduct of all subjects and factors participating in the given decision-making process, assessing them in conformity with their causative relevance. A responsibility system of this kind can only take shape if all decision-making levels, participating in the economic processes with direct effect upon the achievements, can be integrated to it, the level of economic management included.

The principle of the responsibility of economic management has not been realized so far in Hungarian legislation. Thus, the statutes concerned with the problem omit to mention the problem of responsibility, contain vague phrases or formulate institutions on resulting from ill-shaped concepts. The recognition of compensation claims for the fulfilment of instructions involving a material loss constitutes already a partial result of the orientation referred to above.[28] To sum up, a new and comprehensive regulation of the responsibility for damages in the field of economic management seems to be justified, at a legislative level is possible. It would be a good idea to meet this requirement within the frame of an act on economic management; the regulation of the responsibility of the economic management by means of an act on state liability would be also a viable solution. Anyhow, the possibility of corporate action against the economic management ought to be absolutely formulated as a subjective corporate right.

As to the Communist party guidance in the economic management, the problems of informality appear to be particularly important. It seems inadequate maintaining the actual duplicity, i.e. an institutionalized, formal reality of party guidance for the political practice, and an almost complete informality for the positive law. Hence, the method of legal regulation affecting the Communist party ought to be changed. For the time being, the approach of the law to the problems of party guidance is excessively shy. Evidently, Communist party functionaries having a decisive role in decision-making in the field of the economic policy have also to share political and legal responsibility for the relevant decisions. Besides, the idea of the organizational responsibility of the Communist party may be considered as well. The formulation of this concept

would hardly mean a much more difficult for legislation than to elaborate the organizational responsibility of the ministries.

The concept of absolute state immunity was also an element of the preceding Hungarian system of private international law that survived the changes of liberation in 1945. In fact, no particular emphasis was laid on the matter for some subsequent years.[29] With the establishment of more intensive relations to the Soviet theory of private international law from the 1950-ies onward, the absolute character of immunity was accentuated in Hungary conspicuously, with a growing emphasis to its central importance. Thus, the Soviet model of theory was placed close to the processual dogmatical argument of extraterritoriality in Hungarian private international law; the more, it was replaced by it substantially. Absolute immunity was based in this model upon a concept giving predominance to state sovereignty, and it showed characteristically political features. The Hungarian thinking on private international law was affected by the Soviet arguments of absolute immunity principally from theoretical and ideological aspects. The strenghtening of the principle of absolute immunity had no actual support in the Hungarian foreign trading,[30] as the contracts were not concluded by the state in Hungarian foreign trading as was the case with the Soviet state, through its foreign trading agencies. Instead, foreign trading companies were the contracting parties which could not have been protected by state immunity. The theoretical guiding line of the Hungarian assessment of the concept of immunity started to take a trend toward a functional-relative direction from the mid-70-ies.[31] The change of preference in the ruling Hungarian concept has been connected with the transformation of the immunity theory that presented itself in the international arena. Essentially, the settlement of immunity is shaped by a functional-relative approach in the Hungarian Code of private international law from 1979, although it is difficult to reveal this concept. Nevertheless, the formulation of the Code remained far from generalizing the principle of functional-relative immunity. The rules affecting immunity are laid down in three sectors

of the Code shaped so, however, that the institution proper can be hardly recognized, and the degree of integration is marginal. With this in view, it is absolutely justified to continue to deal with the problem.

ГОСУДАРСТВЕННЫЙ ИММУНИТЕТ И ОТВЕТСТВЕННОСТИ ЗА ВРЕД

Л. Кечкеш

Непрофессионалы считают право такой системой, которая имеет, как правило недифференцированную структуру и может оказать только однородное влияние. Их главное требование к праву состоит в установлении ответственного лица и самой ответственности. Между тем факты свидетельствуют о том, что хотя требования общества к праву являются самыми сильными в области ответственности, все-таки право разочаровывает публику чаще всего именно в этой сфере. Кажется, что юридическая теория также пытается приспособляться к сильному проявлению тенеденций иммунитета, причисляемых к ризису института ответственности и его симптомам. Классическая постановка юристами-цивилистами вопроса о субъективном или объективном характере ответственности в наши дни может оформляться и наоборот. Ныне уже не кажется бессмысленным и анализ вопроса о том, что отсутствие привлечения к ответственности в данном случае имеет субъективную или объективную детерминированность. В более широком смысле иммунитетом можно считать как объективные так и субъективные случае провала привлечения к ответственности. В Настоящей статье государственный иммунитет рассматривается как такого рода явление безответственности, которое часто объективируется правом.

Автор пытается доказать с теоретической точки зрения, что несмотря на гетерогенность государственного иммунитета /отчасти правовой институт, отчасти дисфункциональное явление/ и на разбросанность его проблем /т.е. их в однаковой мере можно найти в области договорного права, деликтного права, международного частного права, административного права/ вопросы "государственный иммунитет – государственная ответственность" могут быть рассмотрены посредством единого подхода, комплексным методом, следовательно те проблемы, которые относятся к различным областям права, могут быть поставлены на общую базу. С другой стороны автор попытается осуществить коррекцию принципиального характера распространенного в юридической науке метода, под влиянием которого вопросы государственной ответственности и иммунитета рассматриваются в специальной юридической науке в отрыве от проблем гражданскоправовой правосубъектности государства.

L'IMMUNITÉ DE L'ETAT ET LA RESPONSABILITE POUR DOMMAGES

L.Kecskés

En général ceux qui ne sont pas du métier voient dans le droit un système d'une structure non différenciée, qui, le plus souvent, n'est aptes à exercer une influence que d'une seule façon. Leur exigence principale formulée à l'égard du droit est qu'il détermine la personne responsable et sa responsabilité. Bien que les exigences de la société à l'égard du droit soient peut-être les plus fortes dans ce domaines, les faits prouvent que le droit trompe justement dans ce domaine l'espérance du public. La théorie du droit semble s'adapter à la crise de l'institution de la responsabilité et à son symptôme, la forte manifestation des tendances d'immunité. Aujourd'hui, la question classique des civilistes concernant le caractère subjectif ou objectif de la responsabilité peut être formulée même inversement. Dans nos jours, il ne semble pas être déraisonnable d'analyser la question de savoir si dans des cas donnés l'absence de la mise en cause est déterminée par des motifs subjectifs ou objectifs. Dans un sens plus large, les cas subjectifs et les cas objectifs de l'insuccès de la mise en cause peuvent être considérés comme équivalents de l'immunité. Par contre, le thème proprement dit de cette étude, l'immunité de l'Etat est un symptôme d'irresponsabilité souvent objectivé par le droit.

L'étude cherche à prouver du point de vue théorique et de celui des sciences juridiques que malgré l'hétérogénéité de l'immunité de l'Etat (en partie institution juridique, en partie phénomène disfonctionnel) et le dispersement de ses problèmes (ils se trouvent dans le domaine du droit constractuel, du droit délictuel, du droit international privé, du droit administratif) l'examen sous un aspect unitaire de la question de l'immunité de l'Etat – de la responsabilité de l'Etat est possible par une méthode complexe, c-est-à-dire il est possible de réduire à une base commune les différents segments du problème qui appartiennent à différents domaines juridiques. D'autre part l'étude essaye de corriger du point de vue doctrinal la méthode des sciences juridiques, méthode très répandue actuellement, sous l'influence de laquelle la littérature traite les questions de la responsabilité et de l'immunité de l'Etat séparées des problèmes de l'Etat pris dans sa qualité de sujet de droit civil.

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INFORMATIONES

THE NEW ELECTORAL SYSTEM OF THE HUNGARIAN REPUBLIC

With Act No. XXXIV of 1989 on the election of the members of Parliament, a new electoral system has been established in Hungary. A pluralistic party system being emerged, the draft of the bill was laid down in the course of political negotiations, between the existing parties. As a result, Parliament approved the proposal based on the compromise of existing the political parties and which had decisive influence. With a view to establish a pluralistic system of representation in legislation and government but taking into consideration, simultaneously, the conditions of political transition, the Draft Bill created for Hungary a particular electoral system containing not only elements of proportional representation but at the same time, it allows, in addition to the concurrence of party lists certain elements of the majority system, and thus the concurrence of individual candidates has been added.

In this way a composite electoral system has been set up in which members of Parliament are elected, a partly in individual constituencies while the major part of the seats is distributed proportionally from lists among the parties. In fact, mandates can be obtained in three different ways. First, 176 representatives are elected in individual constituencies in a system of absolute majority in two rounds. Second, 152 representatives receive their seats from regional lists of the parties, in proportion to the votes cast. Each county and the capital form one constituency, the parties may run lists in 20 regional constituencies, apart from their candidates fighting in the individual constituencies. Third, 58 seats are reserved for the additional proportional distribution, in accordance with the number of fractional votes, that is, those being inferior to required for a mandate or in excess of it, respectively. To have a share in the distribution of these mandates, parties set up national lists. Accordingly, 210 seats in Parliament are distributed on the basis of the lists of the parties out of the total of 386.

It is a characteristic feature of the Hungarian system that each voter has two votes, one for the candidate of an individual constituency and one for a regional list of a party. Votes are not cast for the national lists of the parties which profit from fractional votes. A threshold of 4 % of national votes of a party has been established to obtain mandates on the regional or the national lists. Accordingly, the party not having attained this threshold, calculated on the basis of the total number of votes cast for its all regional lists will not be entitled to have a share from the regional and,of course, na-

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tional lists. Nevertheless, the threshold does not affect the seats obtained by a party in an individual constituency, i.e. the respective party (or more properly, the candidate supported by the party) will retain the mandate obtained in that way.

Nomination of candidates

Contrary to the previous system or compulsory nomination meetings, candidature in an individual constituency becomes effective on the basis of the nomination of voters. Any citizen having the right to vote may become a candidate if he or she collects 750 nomination sheets from the electors of the constituency provided that he or she meets additional conditions laid down in the law, accepts nomination, and has no functions incombatible with the mandate of a member of Parliament or, performing such function, undertakes to resign of it in case of his or her election. Candidates in individual constituencies may run in the campaign of behalf of a party or may be registered by the election committee as independent candidates. No other condition is prescribed for the nomination, i.e. the election committees are bound to register candidates complying with the conditions laid down in the law.

Quantitative criteria are also fixed in the Election Act for the lists of parties, thus, a party is allowed to set up a regional list provided that it succeded in nominating a candidate in minimum 25 % of the individual constituencies of the regional constituency, or at least in two constituencies. Under the law, regional constituencies are established in each county and in the capital. The lists are fixed and the candidates obtain a seat in the order defined of registration. The number of candidates of a list of each party may be, at most, the double of the seats to be distributed in the respective regional constituency.

The parties that succeded to register a list in at least seven regional constituencies that is satisfying the conditions mentioned above are entitled to register also a national list. Having exceeded the national threshold of 4 %, they have the right of a share from the seats on the national list, in proportion to the number of so-called fractional votes cast for them on the national scale. Practically, none of the serious political groups should face any difficulty in registering a national list, since, given the total number of 176 individual constituencies, the required minimum of candidates of a party is as little as 14.

A candidate may run simultaneously in one individual constituency, on a regional list, and the national list too. In case of his or her election in an individual constituency, he or she will be replaced by the successive candidate on the regional list. Similarly, if a candidate runs only on a regional list, without candidature in an individual constituency, in case of having obtained a seat on the respective regional list, he or she will accordingly be replaced by the next candidate on the national list.

Election campaign

Contrary to the former electoral system where political "filters" i.e. dispositions making practically impossible of

the nomination of candidates with radically dissenting political views, nomination became completely free in this sense under the new Election Act. In accordance with the concept of free democratic elections, political differences manifest themselves and compete and openly. Thus, any Hungarian citizen having the right to vote as well as foreign eres having a residence permit in Hungary are entitled to participate in the campaign, collect nomination sheets, popularize candidates and programs, organise election meetings, etc. No special permission is needed to a produce and distribute political posters, leaflets, fly-bills, etc. Special measures have been taken to ensure the equality of chances and to guarantee equal conditions for the communication of lectoral manifestos and political advertisement on TV and other mass media. In fact, publicity is essential in the entire electoral campaign and procedure, together with, of course, the strictest secrecy of voting. Thus, the activity of the election organs is public and the acces of the press and the representatives of parties is ensured. Moreover, the election organs have been formed from the outset in such a way that,beside members elected by the local councils also delegates of the parties are full members of the election committee.

Voting procedure and statement of the outcome of the ballot

Every citizen having the right to vote received two ballot papers: one destined for the individual constituency, contains the names of the candidates, in alphabetical order and the parties nominating them, or, in case of an independent candidate, this fact: the other ballot paper which serves for the regional list contains the parties in the order established by lot, followed by the names of the candidates, in the order ot their nomination by the respective parties. In case of a joint list, this fact has to be indicated. The vote is valid if, in case of the candidates of an individual constituency, the voter gives a mark for one of the candidates; as to a ballot paper for regional lists, a mark "+" has to be put to one of the quadrangular spaces indicating the names of the parties.

Different rules are governing the outcome of the election in the first and the second round in the individual constituency. As to the first, the candidate will obtain the seat if received more than 50 % of the valid votes provided that more than 50 % of the citizens having the right to vote went to the polls. Taking into consideration the high number of candidates (often 8-10) and the possibly important distribution of votes between the candidates, a second turn has to be held in the great majority of the constituencies where none of the candidates succeded in securing absolute majority. In the second round already a relative majority is sufficient to obtain the seat, provided that more than 25 % of the citizens having the right to vote participated in the vote.

No second round is needed in voting for a regional list if more than 50 % of the voters participated in the ballot. On the other hand, voting is not valid, if the proportion of participants is inferior to the limit, and the voting for lists has to be repeated in this case. The candidates of the parties

in the regional lists obtain seats in proportion to the votes cast and in the order of succession indicated on the ballot papers, using the way of calculation set down in an annex to the Election Act.

Candidates obtain mandates from the national list in proportion to the fractional votes counted at national level. Fractional votes come from two souces: in individual constituences, fractional votes are these cast in the first valid round of voting, but insufficient to obtain the mandate; in case of regional lists, the votes insufficient for securing a mandate of exceeding the number of votes required for securing a seat are considered as fractional. The seats from the national lists are then distributed by applying the d'Hondt method.

Remedies

Under the new electoral law, the possibility of judicial remedy is extended to all phases of the electoral process. No separate election courts have been set up, but a recourse to a court is given against any decision of the election organs when a complaint was rejected. Thus, an appeal can be addressed to county on local courts against decisions of the local and regional election committees; in case of a decision taken by the National Election Committee, a recourse can be submitted to the Supreme Court. The courts composed of three professional judges have to take a decision within three days. If the outcome of a ballot was influenced substantially by an infringement of the law, the courts will decide to repeat voting or part thereof, respectively.

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RECENSIONES

DIE MENSCHENRECHTE IN UNGARN. Erschienen zum 40. Jahrestag der Allgemeinen Erklärung der Menschenrechte (Hrsg. von M. Katonané Soltész) Budapest, 1988. 385 p.

Die bisher reichhaltigste Sammlung von Studien ungarischer Rechtswissenschaftler zur Menschenrechtsthematik erschien unter der Ägide des Instituts für Juristische Weiterbildung der Eötvös Loránd Universität (als Ergebnis der Arbeit einer Forschungsgruppe des Instituts) und mit Unterstützung der Patriotischen Volksfront und der Soros-Stiftung. Auf den Themenreichtum verweist die einleitende Studie des inzwischen zum Justizminister gewählten Kálmán Kulcsár, deren Titel bereits das Pensum des Autorenkollektivs ausdrückt: "Menschenrechte und Wirklichkeit" (Emberi jogok és valóság). Die methodischen Untersuchungen, angestellt auf der Grundlage einer kritischen Anschauung und Wirklichkeitsbetrachtung, erstreckten sich auf fast alle Bereiche der Rechtswissenschaft; die Schlussfolgerungen wurden sehr häufig auch de lege ferenda gezogen. Das ist gewiss nicht deshalb so, weil dieses Thema bei uns (bzw. in unserer Zeit) eine Art "Evergreen" darstellt, - sondern vielmehr, weil sich aufgrund moderner Abwägung von Vergangenheit und Gegenwart auch auf diesem Gebiet die Akzente auf die Rechtssicherheit (Siehe S. 15. des ans. Werkes) bzw. auf Garantien verlagert haben (Siehe S. 59 ff.).

Entsprechend dem Gegenstand der betreffenden Wissenschaftszweige stehen natürlich die Rechtsgarantien im Vordergrund der Untersuchungen (Takács). Daraus ergibt sich ganz gewiss, dass der Studienband fast ausnahmslos jene Relevanzen untersucht, in denen die Menschenrechte zum Ausdruck kommen. Schwerpunkte bilden natürlich z.B. die verfassungsrechtlichen Relevanzen (siehe die Studien von I. Szentpéteri, A. Ádám, K. Fürész, I. Kukorelli und J. Sári) sowie die staatsverwaltungsrechtlichen (L. Szamel), bzw. die zivilrechtlichen Relevanzen. Zuweilen kann auch in bezug auf den konkreten Gegenstand (z.B. Rechtsschutz der Persönlichkeit auf dem Gebiet des Zivilrechts, siehe S. 145 des ang. Werkes) von einer communis opinio gesprochen werden.

Die zivilrechtlichen Aspekte unseres Themenkreises sind entsprechend den soeben genannten Schwerpunkten im vorliegenden Studienband präsent (siehe z.B. die Studien von K. Törő, L. Vékás, Katonáné, M. Soltész bzw. E. Nitriny, V. Rosner).Mindestens ebenso schlägt aber zu Buche, dass Arbeiten aus dem strafrechtlichen Bereich fast völlig fehlen. Es ist eine Tatsache, dass die beispiellosen Verletzungen der Menschenrechte, die im nunmehr bald ein halbes Jahrhundert zurückliegenden Weltkrieg und im Gefolge vieler anderer Anomalien des 20. Jahrhunderts geschahen, das politische, bzw. das rechtliche Denken aufrüttelten. So wurden auch Grundlagen für die Suche nach neuen Wegen gelegt. Bekanntlich vereinbarten die Mächte, die sich um die Entfaltung des

antifaschistischen Bündnissystems bemühten, bereits im August 1941 Atlantische Charta bzw. in der Deklaration der Vereinten Nationen (Januar 1942) sowie auch in den Abkommen von Jalta und Potsdam, die den Weltkrieg abschlossen, bestimmte grundlegende Prinzipien für die Beseitigung kollektiv oder individuell erlittenen Unrechts. Auch die weltpolitische Lage diktierte es also, die "droits de l'homme" zur universellen Angelegenheit werden zu lassen. Infolgedessen gelangten einige Elemente (Erfordernisse) dieses Bestrebens z.B. in die Waffenstillstands- und Friedensabkommen als besondere Garantien der Wiedergutmachung von Menschenrechtsverletzungen.

Aus unserer jüngsten Geschichte wissen wir, dass die Entwicklung der Menschenrechte zur universalen Angelegenheit unmittelbare Auswirkungen auf die Erneuerung des Landes hatte. So verlangten z.B. die Rechte, die in der Präambel des Gesetzes 1946/1 über die neue Staatsform formuliert wurden, einen durchgreifenden Wandel im ungarischen Rechtsdenken. Die auf der dritten Vollversammlung der Vereinten Nationen (1948) angenommene Allgemeine Erklärung der Menschenrechte wirkte sich unbestehenden europäischen volksdemokratischen Verfassungen aus. Allerdings wissen wir sehr wohl, dass diese Gesetzgebung die Akzente auf die ökonomisch-sozialen Rechte verlagerte. Diese Linie können wir auch in der Geschichte des ersten (existierenden) sozialistischen Staates zwischen den beiden Weltkriegen verfolgen. Dies geschah aus der Erkenntnis, dass "... (auch) die Verwirklichung aller sonstigen menschlichen (und) staatsbürgerlichen Rechte letzten Endes davon abhängt, ob die wirtschaftlichen, sozialen, und kulturellen Rechte zur Geltung kommen und ob dafür die Voraussetzungen vorhanden sind." (I. Szabó). Die Bedeutung dessen wird nicht verkleinert, wenn wir hinzufügen, dass in der erwähnten Allgemeinen Erklärung der Menschenrechte und ursprünglich sogar in der Atlantischen Charta eine solche Schwerpunktverlagerung zum Ausdruck kam. Mit Recht könnten wir also die grundlegendsten drei Komponenten aus der letzteren Quelle zitieren: "Recht auf ein Leben frei von Unterdrückung, Furcht und Entbehrung", "Recht auf Arbeit und menschenwürdigen Leben" bzw. "Recht auf freie Bildung." Hier liegen die Quellen für die verstärkte Betonung der politischen, der ökonomisch-sozialen bzw. sog. kulturellen Rechte. In unserer jüngsten Geschichte wirkte dies - auch im kontinentalen Massstab - in Richtung einer Neuordnung der konkreten Rechtsverhältnisse. Für die wirklichkeitsgetreue Erschliessung unserer Verhältnisse liefern die Autoren des vorliegenden Bandes ein sehr reichhaltiges Material. Sehr häufig (und methodisch) beleuchten sie auch die Vorgeschichte. Einige Teile des Studienbandes haben ausgesprochen historischen (grundlegenden) Charakter (siehe z.B. K. Fürész - T. Révész: Die Gleichberechtigung der Nationalitäten, Dr. A. Sirkó Ficzerené: Die Gleichberechtigung der Geschlechter usw.), Das gleiche Bestreben ist aber auch in den Arbeiten über bestimmte Bereiche des geltenden Rechts erkennbar, so z.B. in der Auswertung von annähernd hundertjährigen gesellschaftlichen Erfahrungen bezüglich des Versicherungsrechts (siehe S. 279 ff. des ang. Werkes). Mit diesem Bestreben ist in fast allen Fällen eine Stellungnahme gepaart, die der Umgestaltung der Rechtsverhältnisse unserer Zeit dient. Zuweilen handelt es sich sogar noch um mehr, nämlich dann, wenn die Analyse den Leser "zu den erwünschten Richtungen

der Regelung", zur Umreissung der künftigen Wege hinführt (siehe z.B. S. 97-98, 226-228, 309 ff.).

Zusammenfassend kann gesagt werden, dass die ungarische Rechtswissenschaft dem 200. Jahrestag der Déclaration des droits de l'homme et du citoyen mit Recht grossen Erwartungen entgegensieht. Abgesehen von den aktualisierten politischen Aspekten sind auch unsere methodisch analysierenden Untersuchungen weit über die Grenzen des blossen Gedenkens hinausgegangen. Dies resultiert daraus, dass die Erwartungen in Bezug auf die Ideenwelt der Menschenrechte heute schon fast alle Bereiche der theoretischen, historischen bzw. der positiven Rechtswissenschaften erfasst haben, da in den staatlich organisierten menschlichen Gesellschaften im Zeichen des erweiterten Begriffssystems der Déclaration des droits ein universeller ideologischer Kampf geführt wird und sich davon gerade die Rechtswissenschaft nicht unabhängig machen kann. Als gutes Beispiel kann dafür die im Studienband behandelte Lehrfreiheit, bzw. die Freiheit der Wissenschaft (siehe L. Szamel auf S. 179-182 des ang. Werkes) gelten, an deren gewissermassen historischer Erhellung wir auch einigen Anteil hatten.

Noch unlängst waren wir geneigt, die Menschenrechte zu klassifizieren (in einer Rangordnung zu gliedern), und obwohl wir nicht die Bedeutung der ökonomisch-sozialen bzw. der kulturellen Rechte verkleinerten, verstanden wir sie doch als später (nach den staatsbürgerlich-politischen bzw. sozialen Rechten) entstandenes Recht. Historische Wahrheit liegt darin insoweit, als vor allem die sog. kulturellen Rechte in der Frühepoche der Herausbildung der modernen Gesellschaften - im ideengeschichtlichen Sinne - noch unausgegoren waren. Das heisst nicht, dass Hugo Grotius oder gar die Vertreter der französisch-italienischen Aufklärung die Bedeutung der Befreiung der Kultur (der Wissenschaft) nicht erkannt hätten. In den frühen und klassischen bürgerlichen Umwandlungsprozessen stand aber verständlicherweise der Kampf um die politischen (bzw. die sog. staatsbürgerlichen) Rechte im Vordergrund (das "Verhältnis des Menschen zum Staat"), wie I. Szabó feststellt. Eine gewisse Vereinfachung wäre es jedoch, wollten wir - in logischer Folge - behaupten, dass die kulturellen sowie die ökonomisch-sozialen Rechte im Zuge verzögerter bürgerlicher Umwandlungen, bzw. der sozialistischen Revolutionen erschienen. In grossen Zügen war dies zwar die chronologische Folge der Herausbildung dieser Erscheinungen und der mit ihnen verknüpften institutionellen Formen, die Ursachen der Schwerpunktverlagerung sind aber damit noch nicht geklärt.

Viel haben bei uns die theoretischen (in neuerer Zeit die staatswissenschaftlich-politischen) Wissenschaften dafür getan, den historischen Hintergrund vor allem der Problematik der staatsbürgerlich-politischen Rechte, bzw. ökonomisch-sozialen Rechte aufzudecken. Sporadisch sind aber bis heute die analysierenden Untersuchungen geblieben, die de historischen Rollenwechsel der sog. kulturellen Rechte bzw. die diesbezüglichen gesellschaftlichen Erfahrungen erhellen. Zu solchen Erkenntnissen könnten wir jedoch gelangen, wenn wir die Irrwege des preussisch-deutschen bzw.österreichisch-ungarischen Lehrfreiheit-Systems historisch aufdecken und die darin enthaltenen gesellschaftlichen Erfahrungen nutzen. Natürlich tun wir dies nicht im Sinne eines l'art pour l'art, aus blossem Gedenken an den grossen historischen Jahrestag, son-

dern um aus den Erfahrungen der Befreiung der Wissenschaft zu schöpfen. Aus der historischen Betrachtung der "Lehrfreiheit" können nämlich all jene Völker Gewinn ziehen, die einst der Region verspäteter bürgerlicher Umwandlungen zugerechnet wurden. Selbst für das preussisch-deutsche Lehrfreiheit-System, das Typenmerkmale aufwies, gilt der Satz, dass an diesem doch weit "lebenskräftigeren Baum" im bürgerlichen Zeitalter "keine Früchte reifen konnten" (K. Kulcsár). Jene konkreten institutionellen Formen, jene fortschrittlichen Ideen jedoch, die auch durch die gesellschaftlichen Erfahrungen aus einem bis anderthalb Jahrhunderten bestätigt wurden, kann die Gegenwart nicht verleugnen. Unbedingt notwendig ist es deshalb, dass wir die Freiheit der Wissenschaft, bzw. das mit ihr zusammenhängende institutionelle Gefüge endlich in voller Realität sichtbar machen.

Warum wir dies so spät tun, mag der geehrte Leser fragen. Die historiographisch-kulturhistorische Detailforschung macht dies freilich schon kontinuierlich seit mehr als einem Vierteljahrhundert. Die neuerdings aufgetretenen Probleme bei der Vollentfaltung der sozialistischen Universität veranlassen zur methodischen Untersuchung der konkreten Vorbilder und institutionellen Formen, damit uns als Erbe nicht wieder nur "viele leere Formalitäten" bleiben. Darüber hinaus können wir nicht ausser Acht lassen, dass das Zustandekommen des österreichisch-ungarischen Lehrfreiheit-Systems auch durch den Umstand motiviert wurde, dass auch unsere Vorfahren die die fehlenden Bedingungen der damaligen ökonomisch-politischen Erneuerung durch geistiges (gedankliches) Bauen ersetzen mussten. Reich sind wir auch heute nicht, doch indem wir die Antriebskraft der Wertvollsten (intellektuellen) Arbeit auf angemessenem Niveau halten, können wir uns eine gewisse Hoffnung auf die Zukunft bewahren. Deshalb halten wir für besonders bedeutsam, dass der Studienband "Menschenrechte in Ungarn", über den traditionellen Rahmen der kulturellen Rechte hinausgehend, die Aufmerksamkeit auch auf die universellen Interessen an der Freiheit der Wissenschaft gelenkt hat. In diesem Sinne empfehlen wir den Studienband all jenen, die sich im weiteren Sinne für das öffentliche Leben (das Gemeindenken) und das Recht interessieren, den Kennern der Staats- und Rechtswissenschaften sowie den Pädagogen, die grundlegensten staatsbürgerlichen Kenntnisse vermitteln. Die darin implizit enthaltene Möglichkeit mehr zweifellos das Ansehen der namhaften Autoren und des Instituts für Juristische Weiterbildung.

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VARIA

SOCIAL AND ECONOMIC RIGHTS OF REFUGEES

This study deals with the social and economic rights of refugees at the level of international law, i.e. aims to highlight the provisions of those international legal instruments which relate directly or non-directly to the refugee's status. The status of so-called non-traditional refugees, that is displaced persons, is not considered here. The status of these persons and the related legal problems fall outside the traditionally-perceived institution of "refugees". Finally, when speaking about the status of refugees, including their social and economic rights, under the notion of "refugee" I mean those persons who have already received official recognition as refugees. It is an important point, because the list of rights specified in international instruments has to be applied first of all to these persons. The so-called asylum-seekers (refugee-seekers), de facto refugees, persons allowed to stay on humanitarian ground are not covered by the provisions of international refugee instruments relating to substantive rights. As to the scope of rights of these persons there is no unanimous practice, each state has its own policy toward these persons, social and economic rights are provided in discretionary manner[1]. (See, for example, Lohrmann, note 21) In other words, the recognition as a refugee is not simply a declaratory act, in relation to some rights (especially) those of social and econpmic nature). It is a constitutive act, i.e. the listed rights will be provided only upon recognition of refugee status.

Universal international legal instruments applicable to the determination of social and economic rights of refugees

One can hardly claim that there is a great number of universal legal instruments the provisions of which are applicable to the status of refugees. However, modern international law is not absolutly indifferent to those persons who have been forced to leave their own country. It is possible to argue that we have already a catalogue of minimum rights for these persons, including their social and economic rights.

Among the universal instruments the most prominent place belongs to the 1951 Convention (see, note 5). Concerning social and economic rights of refugees the Convention establishes basically three kinds of regimes.

1/ "National regime" (treatment): Article 14 on artistic rights and industrial property, Article 20 on rationing system, Article 22(1) on elementary education, Article 23 on public relief and assistance, Article 24 on labor legislation and social security.

2/ Regime generally accorded to aliens in the country of refuge: Article 18 on self-employment, Article 19 on liberal professions, Article 21 on housing, Article 22(2) on education other than elementary education.

3/ Most-favorable regime accorded to nationals of a foreign country in the same circumstances: Article 15 on participation in trade unions, Article 17 on wage-earning employment.

The provisions of the Convention on the substantial status of refugees have their merits and deficiencies. Their major positive aspect is that they cover a relatively wide range of rights. The Convention actually is one of those international instruments which specifies in detail the relevant rights. But on the other hand by establishing different regimes in relation to the listed rights, it fails to take into account the dinstictive situation of refugees, allows the specific state to discriminate them, especially when it aquates aliens with refugees. It fails to provide protection for them on equal basis. One can only agree with Carvey's remark that "once a sovereign State has assumed the role of place of refuge, excercising extended control over the refugee physically present within its territorial jurisdiction, the right of equal protection must pertain" (see, Carvey, note 16, p. 319-320.). Thus for example, Article 17 of the Convention which is one of the most important one (wage-earning employment) provides basis for discrimination. The regulation of this very important issue is based on the "most favorable treatment accorded to nationals of a foreign contry". This implies a rather serious restriction. Besides, according to section 2 of Article 17, refugees might be restricted in employment on the ground of protecting national labour market. (Only those refugees are exampt from this restriction who were exampt from them at the date of entry into force of the Convention or fulfil some specific conditions). The right to work was one of the most disputed one during the drafting of the Convention (see, Weis, note 25, p. 149-169.), and the majority of States refused to put refugees on a footing equal to that of nationals. But one has to consider also the basic changes in the field of human rights which has occured since the adoption of the Convention. The right to work has been recognized by many international human rights instruments. Hence it is possible to argue that due to these instruments refugees should enjoy this right also, basically for reasons that residents and citizens under modern human rights instruments should be treated as equals.

On the international level there are other universal instruments also which contain provisions relating to social and economic rights of refugees. Thus for example, the ILO Convention 118 on Equality Treatment of Nationals and Non-nationals in Social Security of 1962 (see, note 6.).

Protocol No. 1. to the Universal Copyright Convention (1952) adopted on 6 September 1972 can also be regarded as an instrument which aims at setting up universal standards.

It is necessary to mention also the UN Convent on Economic Social and Cultural Rights (see, note 12). Naturally, there are a lot of controversial issues regarding this Convention. First, the Convention speaks about the obligation of Member States to realize the listed rights progressively (Art. 2. paragr. 1.).

Second, a great number of States, namely the developing countries, may decide freely as to what extent would guarantee the economic rights to non-nationals (Art. 2. para. 3.). Despite these escape clauses, "the rights guaranteed in the Convent should also apply to refugees" (see, note 24, p. 156-157.).

And finally one can mention also the UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live (see, note 8.). Article 8 of the Declaration, unfortunately not without an escape clause, establishes that aliens (who cover all kinds of non-nationals) lawfully residing in the territory of a State Shall enjoy, among other rights, the right, to safe and healthy working conditions, to fair wages and egual remuneration, the right to health protection, medical care, social security, social services, education.

Provisions of regional international instruments

One of the most striking feature of regional international instruments is the absence in them of detailed rules concerning the status of refugees, including their social and economic rights. As we know, regional instruments usually go further than universal ones, contain more elaborated rules and not just simply duplicate them. But this is not the case in relation to refuges problems.

Europe. One can actually find some concrete regulatory instruments only in Europe. Following the adoption of the 1951 Convention the European States in 1953 adopted an Interim Agreement on Social Security Schemes Relating to Old Age and Invalidity which contained a protocol extending the application of the listed rights to refugees (On West-European social security Schemes which cover also refugees see in more detail Holborn, note 20, p. 220-221.).

The European Social Charter, which establishes a wide range of social and economic rights, has also an Annex concerning the application of the Charter to refugees. However, the Annex does not extend the rights specified in the Charter to refugees, but simply confirms the commitment of Europen States to the provisions of the 1951 Convention. (The members of the Charter will grant to refugees "treatment as favorable as possible, and in any case not less favorable accepted under the Convention".) One can also mention the European Convention on Social Security of 1972 (see note 11). Its preamble states the commitment of the members to the "principle of equality of treatment for nationals of the Contracting Parties, refugees and stateless persons", and its Article 4 declares that "the provisions of this Convention shall be applicable to ..... refugees".

America: In the American Convention on Human Rights (see note 2) in Article 1(2) there is a provision which confirms that "for the purpose of this Convention "person" means every human being" (i.e. including refugees). However, the Convention itself does not contain a catalogue of social and economic rights. Article 26 mentions these rights, but only in general terms, as an obligation of States to develop these rights prog-

ressively. It has to be mentioned that the American States in 1988 adopted the so-called Protocol of San Salvador (not yet in force) which contains a wide range of social and economic rights (see note 1) which according to the above-mentioned provision of the Convention should cover also refugees.

Africa: The OAU Convention on refugees (see note 13) contains no provisions on social and economic rights of refugees. In its preamble there is only a general stipulation that "a human being shall enjoy fundamental rights and freedoms without discrimination".

Asia: As it is known, in the Asian region there is no binding regional instrument concerning refugees. There is a non-binding instrument adopted by the Asian-African Legal Consultative Committee on the treatment of refugees. Article VI (1) states the minimum standard of treatment principle: "A State shall accord to refugees treatment in no way less favourable than that generally accorded to aliens in similar circumstances" (see note 3).

Systematic Review

Under modern international law refugees have been recognized as a special group of persons who need protection not as nationals but as individuals. The distinctiveness of this category of persons from other group of aliens (guest workers, migrants, travellers etc.) is evident from these international instruments which has been drafted and adopted for the regulation of refugee's status per se. The philosophy of treating them as simple aliens or just simply as non-nationals has no valid foundation any more. One of the basic questions of course is whether refugees due to their distinctiveness should be treated equally with nationals or there is no foundation for such equal treatment. The answer is not a simple one. Some of the authors argue that they in general should enjoy equal treatment (see especially Carvey and Joung, note 16 and 26). Others take a more cautious stance and point out, that non-discrimination has a normative character only in racial matters, but in other matters distinction against aliens and non-nationals still exist (see, note 17, p. 85).

This latter position is more accurate one, since the practices of States and the relevant international legal instruments clearly demonstrate that the prinfiple of equality of treatment of nationals and non-nationals has not become yet as an absolute principle. In support of this thesis there are ample materials. For example, the European Commission of Human Rights in its decision of 17 december 1976 (see note 10) stated that the petitioner "status as an alien would in itself provide objective and reasonable justification for his being subject to different treatment ... to persons holding United Kingdom citizenship". The UN Declaration of 13 December 1985 (see note 8) also demonstrates that States reserve for themselves the right to treat non-nationals seperatly from nationals. Article 2 reads: "Nothing in this Declaration shall be interpreted as restricting the right of any State to promulgate laws and regulations concerning entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens."

The right of states t establish differences between nationals and non-nationals however does not mean that there should be no distinction between different categories of non-nationals, i.e. that the same treatment should be applied to all of them. The key failure of the 1951 Convention provisions on social and economic rights is that they do not focus on the special position of refugees (being abroad, lack of protection, danger of unjust persecution). The equation of refugees with other aliens clearly entails unfavourable consequences for the refugees. From this point of view the objections against the treatment of refugees on the basis of "aliens' regime", "most-favored refugee regime", and "most favored national" regime seem to be valid. In some fields (for example, special support measures with the aim to facilitate assimilation) even some positive discrimination is desirable in relation to refugees. This need has been acknowledged by the Council of Europa 1976 Recommendation (see note 7). Section 3 of the Recommendation emphasize that de facto refugees "need more favorable treatment than that accorded to aliens". However for the time being such approach is rather an exception than a rule. The minimum standard of treatment that a refugee may expect "is to be treated no less favourably than aliens generally" (see note 22, p. 434).

When speaking about refugees' status, including their social and economic rights, one cannot leave without attention the modern developments in human rights protection. The key feature of the new international instruments is that they treat human rights as rights which belong to every individual, which are not derived from national status (see for example, Article 2(2) of the Covenant on Economic, Social and Cultural Rights, Article 1(2.c.) of the Employment Policy Convention of 1964). This fact has to have some consequences for refugees also. Some of the authors have already pointed out this fact (see note 4, p. 235, note 24, p. 152). But States actually behave as if nothing has happened, they reserve themself the right (as it has been said supra) to treat non-nationals differently than nationals. Hence one can hardly claim that these general human rights instruments improved the position of refugees to a considerable extent.

Conclusions

One of the most challenging questions is wheather it is possible to define a minimum set of social and economic rights for refugees. For the determination of this minimum set of rights is not sufficient to take into consideration only the provisions of the 1951 Convention. What should be the list of these rights, is it possible to find some objective criteria for their determination? I do not think that it is possible to define a final set of these rights, but it seems possible to find a valid foundation for their determination. This foundation is Article 22 of the Universal Declaration on Human Rights which states: "Everyone is entitled to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." In other words, all those rights which are necessary to maintain the dignity and free development of every human being, including

refugees , should be considered as rights which constitute a minimum catalogue for every human being. Without securing the enjoyment of such rights as the right to work, right to social security, right to health and medical care, right to education, right to culture and to preserve cultural identity actually it is not possible to speak about the maintenance of dignity of a human being.

V. Mavi

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JUDICIAL REPRODUCTION OF THE LAW IN AN AUTOPOIETICAL SYSTEM?+

There is an antagonism between two kinds of opinions characterizing judicial decision-making process. Decision is either seen as completely defined by actual facts and legal texts or its novelty and creative nature are emphasized, being in no function of actual facts and legal texts. Both opinions have their own message and roots. Mechanical jurisprudence reflects the thousands-of-years-old dream about regulatory completeness while covering the ideal and official ideology of the functioning of modern formal law, and the concept of free-law stands for the ideal of judicial autonomy, unbound by any law.

In recent times, several trends of thought are to compete with each other in criticism of both extremities. They argue in terms, only to name but few, of the limits of formal determination by the law (Perelman), of the fuzziness of legal language (Wróblèwski), of the inevitability of jumps and transformation in legal argumentation (Peczenik), or, in view of the whole process, of its institutional dependency and the series of ensuing interdependencies (MacCormick and Weinberger). Notwithstanding, there is an underlying idea common to the extreme stands as well as to their critiques, formulated either as an assertion, or as realization of the lack, of something that may be termed quasi-logicality and quasi-epistemologicality. This is the idea of the possibility of an established relationship between norms on equal or differing levels, able to be treated logically and patterned epistemologically. It is the idea adequate to common language patterns describing this relationship by a norm (decision) 'resulting, following from' 'in consequence of, in conclusion drawn from' other norms, in order to be in a relationship of 'entailment, consequence, correspondence, contradiction with' those norms.

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The conception Kelsen has formulated on normative decision-making process in the works leading to and embodied by his Pure Theory of Law can be summarized as follows: for juristic activity, the hierarchical order of the positive law suggests the exclusive pattern of a deductive norm-application, breaking down

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+Based on a research program outlined during the author's Visiting Fellowship in January-April, 1987, at the History of Ideas Unit of the Research School of Social Sciences of the Australian National University, Canberra, for the East/West Colloquium on Legal Theory organized by the President of the European University Institute, Professor Werner Maihofer, between 13-15 July, 1987, at Badia Fiesolana in Florence and, developed in more details, as an invited guest speach in the working session on "Legal and Practical Reasoning", for the 13th World Congress of the International Association for Philosophy of Law and Social Philosophy organized between 20-26 August, 1987, in Kobe.

the law gradually. It implies that between the end-points of the hierarchy of legal order, i.e. a primary creation founding the kegak order and the last application stipulating the execution of the sanction, juristic activity is an act of application amounting to an act of creation. Law-application is creative in filling in the framework defined by any higher hierarchical level of the positive law. It is creative as there are no further limitations and stipulations influencing legally the filling in of the framework. Juristic activity is not only creative in its contribution to the determination of the legal contents through the juristic process; it is also of a constitutivity of legal process has twofold manifestations. First, the existence of both facts or norms and relationships between facts and facts, facts and norms or norms and norms can be acknowledged within the law only provided that juristic activity has established them by stating them in a legal act. Second, in law there is no guarantee of any such official establishment of facts or norms corresponding to any assessment of them made beyond the law. Of course, any such establishment and assessment may be made a function of criteria outside them law (e.g. of criteria of the value of truth or justice), but even such a stipulation will only provide with a title for procedure on the same issue (e.g. revision) instead of being able to offer genuine guarantee. For it cannot modify the fundamental construction of the normative system; it cannot challenge the impact of the procedural possibility resorted to at the last which is going to be the only one to matter within the system. And provided that the last decision is getting the force of the final judgement because it has not been appealed against or run out of the last procedural possibility of getting contested any longer, this last decision is going to be definitive in the legal order.

In the final analysis, the theoretical message reads as follows: eventually only what can be transformed into an internal component of the law because of the effect of the law is to become legal – at least so long as law as a system goes on to prevail. Or, this is to say that /1/ only what is within the law is to share the quality of the legal; /2/ only what is posited by the law as its own element can be within the law; /3/ such a positivation being an internal affair of the legal domain, it can be neither substituted to nor enforced by an external act; in consequence /4/ conceiving of law both as a process and as a formation, it is somehow controlled from within criteria of the quality 'legal' pointing out from the inside in the direction of the outside.

An understanding of these theses needs some preliminary questions to be considered: 1. as a matter of fact, what is normative of the whole range of the normative sphere? 2. as a matter of fact, how can anything penetrate into the normative sphere from the outer world? or, to put it more precisely, what is done with what when, e.g., something gets 'established' as a legal 'fact'?

(Ad 1.) In function of the development level of civilization and of the kind of legal culture and arrangement, the normative sphere can be carried on by any medium or substance, e.g. by human behaviour or objectivation artificially brought into

existence in order to mediate message. In any case, the function of such a medium is to carry signs. Notwithstanding, at a relatively early stage of development a special kind of normativity may be born. It is instrumental normativity aiming at the protection of identity, whilst the reproduction, of the behaviour or objectivation carrying signs. This special, derived kind of normativity may take the form of ritualization of behaviour or of the normative treatment of the objectivation itself. However, it is by far not destined for its own end. It is to protect the message as much as possible from noise and change while its mediation. For the main function of legal arrangement is to serve the unbroken mediation and uninterrupted reproduction of the normative message.

As to its elementary units reasonably considerable and observable in social communication, the normative sphere is made up of sets of meanings attributed to the terms and propositions of, and to the operations with, norms belonging to the given normative domain. To put some basic characters: the connection of sign and meaning is artificial, based on convention at discretion, in no function of the features of either the sign or the meaning. To a limited extent it is pre-codified; spanning from more expressly definite cores of meaning to penumbra areas connected with distant applications, interferences and kinds of marginal cases; defined also by elements of context and of communication situation. Determinations of meaning - its pre-codification and contextuality as well - are embedded in conventionalized social practice.

Or, meaning does not stand for and by itself. It is with us and within us, abstracted from our intellectual practice as an aspect of our language patterns in communication. By reconstructing and interpreting practices of communication, historical meaning may be described retrospectively. However, description in itself and by itself is not substituable to any predetermination. It is a complex process with open chances and alternatives in which the meaning gets defined. Of course, former patterns may have a role in this definition. Hoewver, former patterns having a role in definition get themselves casually reconfirmed in the process of definition through their having exerted an actual influence on the definition. In sum, there is no meaning in abstract generality. It cannot be but actual; it cannot be but actualized. Meaning is that to what and in the connection of what actualization has been made.

(Ad 2.) The transformation into something "inside the law" of the same thing apparently purely "outside the law" may be exemplified by the `establishment' of fact as `legal fact' in explanation of the specificity of normative process. In respect of meaning, I have argued in the following way: a normative definition of meaning is not a transformation of some meaning into the normative sphere since nothing is given independently of the normative process defining that meaning that could be transformed into the normative sphere. In plain contrast to it, fact exist independently of whether it has been established or not by any evidencing process.

In spite of the suggestion of similarities between judicial and cognitive processes as corroborated by the transplantation of terminology as well, the `establishment' of the

existence of a given fact as `legal fact' through the normative process has nothing to do with making a statement about reality. Instead, it is nothing more than a normative enactment stipulating for the fact the existence of which is, by the force of the stipulation, considered to be proved in the process. Hence it follows that the actual existence of the fact is not a criterion here; indeed, it must not be. For the `establishment of fact' in law gets its normative quality by having constituted it in the normative process. The normative quality of the `establishment of fact' is an attribution given to it by the acknowledgement that the operation recognized by the normative order as `(judicial, administrative etc.) establishment of fact' has taken place in due form and order in the normative process. The question of whether it is backed by actual facts or not may at the most be raised as one of the requirements of contents formulated by the normative order, enumerating the criteria of what will be acknowledged as `establishment of facts' in the normative process. But the bare existence of any fact (or establishment of fact) beyond the normative process could interfere with the normative process and have an effect on its result only and exclusively if in itself and by itself it was in a position to become a `fact in law' (or its `establishment in law') without any legal process having previously posited it as a by definition legal moment. However, it is not the case. In the normative order, only normative process can produce normative results as the only ones which are accepted bases for drawing normative conclusions of that order in that order.

Or, it is the realization of the procedural nature of normative processes; a realization that amounts to a complete break with all remnants of an epistemologico-logical approach to the problem. According to the basic tenet of procedurality, what has been constituted by the normative procedure has its sole justification in its getting constituted. In such a way, procedurality is the touching point in understanding the reason d'etre of normative processes. For the whole enterprise of normatively processing has its function in normative qualification. Or, the quality to the establishment of which normative qualifivation has been made is not a consequence, or continuation, of an otherweise featuring quality; it is exclusively the product of the normative process. Of course, the normative order may stipulate what kinds of otherwise featuring qualities are to proved in order to get a normative qualification. However, as we have seen, even such a stipulation is to be understood as translated into procedural language. Practically it means at the most that evidences concerning especially those qualities shall be taken and balanced; legal fact shall not be established except to strong evidence taken; the evidence shall be sufficiently substantiated in the reasons adduced — but it does not follow in any way therefrom that the existence of any quality will induce, while its lack block, any normative qualification.

This is the point where it has to be realized that the conclusions I have formulated above - claiming, first, that in the normative sphere normativity can only be carried by meaning attributed in the normative process to normative signs and operations and, second, that any statement can only become a component of the normative sphere through its proceduralization -

are but differing aspects of the same characteristic, which are to complement each other. Even what we have called `(judicial, administrative etc.) establishment of facts' is not only a procedural product; it is a question of meaning as well. (By way of example, how can and will the meaning of the judicial establishment of those facts that constitute a case in the law be extended to, and interpreted in, a further, appellate phase of the same procedure?) On the level of generality, one could even say: the need for procedurality may only be linked with the mediation of meaning taking place in communicative processes. Or, as formulated the other way round: in a normative context, meaning can only be defined in a procedural way. That is so because the normative process is of a constitutive effect. Only what has been constituted normatively has a relevance in law. The components and processes which, though, have contributed to the determination of meaning without themselves, however, being normatively constituted may at most have a relevance in the sociological characterization of the decision-making process only. And the meaning defined in the normative process will, as a moment of the normative sphere constituted normatively, be the exclusive vehicle of its normativity.

Procedurality in the constitution of facts and meaning is reasonable, and interpretable, within a normative order only. Normative order is itself an abstraction, standing partly for specific kinds of normative expectations and partly for specific kinds of normative results. Procedurality in such a way is preconditioned by procedures of somehow the same kind organizing themselves somehow into a sort of unity. In other words, a unity is preconditioned of which the individual procedures organize themselves to become a component. As there is no external unity which could, in substitution of the normative sphere, have a normative effect in organizing those procedures into the normative sphere, only a unity is conceivable which gets continually constituted by the individual procedures through their constituting the facts and meanings for the normative sphere within the normative sphere. It goes without saying that a system brought about in this way has no own constitution and life. It is a system brought about by reference to the system within the system in order to enable further references in the continued practice of the normative sphere to be made. It is to say that it is self-referential. A system can be constituted self-referentially in a way that any given organ acting in the name, and referring to the norms, of the normative order qualifies itself, its procedure, and the result thereof as the organ, the procedure, and the act of that normative order. In the course of time with the highly complex network of further organs, procedures and acts referring to the normative order while qualifying, thereby cleaning, in the final analysis also reconfirming, each other, a building is being built from the sum total of references through self-references, effecting self-regulated self-reproduction through self-organization eventually.

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Or, having another formulation, Kelsen's theoretical message offers two alternatives for deeper understanding and

further development, explicit and implicit, in exclusion of one by another. For the Stufenbau-theorie projecting a hierarchical system broken down vertically from superior norms to subordinate ones in foundation of, and originating, their validity is not compatible with the perspectives of a procedural theory he has suggested when he emphasized the constitutive contribution by judicial process in establishing facts, declaring a law valid, and applying it to established facts through judicial norm, on the one hand, and the legal force of the final judgement in procedure as the only moment which is able to establish (by producing in a normatively exclusively relevant qay) normative relationship. In this light, normative practice is nothing else but specific (i.e. imputation-oriented) communication through normative references (by making and confirming references as normatively system-compatible ones), and normative relationships between norms and other norms or facts are but outcomes resulted in (and, strictly, not preconditioned by) normative process. For the only relationships that stand for any relevance within the legal system are those that have got established through the processes of that system.

Most of the theoretical attempts aiming at the description of law-applying processes (including the ones by Alexy and Dworkin as well) provide with normative modelling instead of ontological reconstruction. However, instead of antagonism, they are points of view complementing one another. The latter is to explain the general framework of socially practised practice as an objectively conditioned and/or self-conditioning process, and it is within that the question of how it works and ought to work can at all reasonably be raised. In analysis of the normative output resulted from normative 'black box' operations with a whole range of weries of inputs, ontological reconstruction aims at explaining what makes it in what conditions and with what effect.

Some of the points are as follows: 1. fact or relationship in law can "exist" in no but a procedural way; 2. procedural possibility means in-law-referable eventuality in law of making a reference; 3. dispute about 'facts', divergence of 'meanings' or the characterization of the domain inside the law by the domain outside the law as 'unlawful' is nothing but a merely sociological fact so long as the legal system succeeds in reproducing itself as such, and it can turn to be of a constitutive effect in law only and exclusively when it makes the law's further self-reproduction impossible; 4. the conditions of what components in what fields may cause that is not codified by, or determined in, the system. As an end-result, it is the function of the social total structure made up by the interactions of part-totalities at any given time; 5. even the unity of the legal system is nothing more than the conceptualization of the incessantly fed back chain of normative references to the same texts, taken in its social, as well as professional, acceptance.

All this is to suggest that legal system is to be considered a whole which gets continuously reproduced within the total motion of the social total structure. It is a system the individual components of which are made components of the system through the continuous self-reproduction, by those components,

of the system. In view of self-regulated self-reproduction through self-organization, it is autopoiesis itself, of which Maturana invented the name, developed the theory, and forwarded the definition as `systems ... that /1/ recursively, through their interactions, generate and realize the network that produces them; and /2/ constitute, in the space in which they exist, the boundaries of this network as components that participate in the realization of the network'. (p. 21)

Accordingly, legal system is a dynamic social continuum in respect of which 1. only the end-result of its self-reproduction can be observed through its self-referential practice, while 2. its boundaries and elements, as well as the regularities asserting themselves and the roles played by individual components whilst its self-reproduction are getting recurrently defined through the process of reproduction.

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Who watches the watchmen? How is judicial reproduction of the law embedded in social practice in general and in normative (legal, administrative, political, etc.) practice in particular? What does conventionality mean in that context? What are the outer limits and safeguards of self-organization and self-reproduction, and what motive powers and breaks are being built in these processes?

It goes without saying that in a sketchy presentation like this more questions than answers are provided with. Notwithstanding, questions like those above are by far not specific of any definite trend of thought, and an autopoietical approach to them has some promises of offering a social science theory of legal processes that may turn to be of a foundational contribution to philosophy of law and sociology as well.

Cs. Varga

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INTERNATIONALIA

RAISER, Th.: RECHTSSOZIOLOGIE. (Sociology of Law). Alfred Metzner Verlag. Frankfurt/M. 1987. 364 p.

Professor Raiser's sociology of law is admittedly a legal socilogy of the liberal social Rechtsstaat. Thomas Raiser is professor of business law in Giessen: it is small surprise therefore that what he has in mind is the West-German subspecies of the social/liberal welfare state and its law. Another major intent of the author is to create a textbook for students (mainly law students as far as I can see). This attempt seems to be highly successful.

The history of the sociology of law is full of conceptual debates. Raiser points put that some other concepts are broader than his own. He manages remarkably to keep is mind the frame he has imposed on his treatment.

Part One of the book concerns the concept or concepts of the sociology of law. Raiser states that sociology of law is a branch of sociology. The sociology of law tries to discover social laws in the field of law. Law is analysed as a complex system of behaviour patterns. These patterns of behaviour realize different functions: law regulates human co-existence: legitimates and limits domination and power relations, offers quidelines for social conflict-handling, and these same patterns are used as political means of social control. Raiser reviews the relation between legal sociology and legal sciences. An often forgotten element of this long relationship is called to attention: the so-called Rechtstaatsachenforschung,an effort started in Germany in 1906 to research empirically the problems of living law. Raiser's special interest in that tradition is related to his researches in civil law. He is not stating that these are the only possible areas of application for the sociology of law, nevertheless most of the examples used in the book come from civil law, business law and the administration of civil justice.

Part Two of the book is devoted to some of the greatest masters of the sociology of law. With the exception of Durkheim all these masters are of German origin. Their characterisation is very fair and the review of their theories offers good occasion to make us familiar with some important possible approaches to the social problems of law. First a short biography is offered followed by the description or reconstruction of the theory. A separate subchapter contains the critical-evaluative remarks. Raiser analyses Luhmann's theory on social systems as a prototype of grand theory in contemporary sociology. He follows however, Schelsky's criticism to Luhmann. In that opinion Luhmann's theory is unable to grasp the individual and it conceptualizes the person as a function of the social system.

Part Three offers a review of the main topics in contemporary empirical legal sociology with the already mentioned restriction, viz. public law, criminal law etc. are not included. A detailed picture of the German lawyer' social background is offered. The data do not support the thesis that social background determines judicial decision-making (class justice theory). Law-making is analysed as a problem of "juridification" (Verrechtlichung) and the same concept is operationalized in the case of increasing litigation in West-Germany. The observations on labour law litidation are particularly interesting. Germans fear their justice system and they dislike and disrespect lawvers. Notwithstanding the increasing case load of the regular courts there is a growing tendency to make use of extrajudicial conflict solutions. The results of that approach are rather contradictory. One of the major problems is that in certain forms of arbitration or mediation the mediators are not sufficiently independent.

After the very informative survey of empirical findings which makes the reader familiar with a fair number of research methods too, Raiser offers a systematic legal sociology under the title Law and society. Law is placed in the context of social normative systems. After a review of constraint and acceptance theories Raiser offers his own definition of law. Only norms of social communities or organizations (Verband, i.e. association) beyond a certain size, but not only those of the state, may constitute law. The association disposes of power to create norms and it can enforce those norms against its members in a mandatory way. All that requires legal institutions. Raiser points out that one cannot give an absolute definition of law for the sociological approach because the norms which are to be taken into consideration by the sociologists of law represent different levels of juridification.

It would be a major mistake to believe that Raiser has a unilateral consensus-theory oriented view. He is quite aware of the perspectives opened by the conflict approach and therefore a substantive scrutiny of the law's role in social domination and in regulating social conflicts is offered. Law may have an important role in maintaining domination but this function is exercised by safeguarding legitimacy: the law not only supporte the status quo but it restricts the arbitrariness of the powerful. This is not to say that even outrageous one-sidedness and bias are not present in a legal system. The administration of justics is analysed, hoewver, as a way of micro-conflict resolution. In that respect even if the process and the decision are inevitably selective the nature of the conflict is transformed: the conflict is made juridical.

The foreign reader will find particularly useful the last two chapters of the book which offer a review of the legal culture in the Federal Republic of Germany. In Raiser's understanding legal culture is a system of value suppositions, norm, institutions, rules of procedure and patterns of behaviour based on law. From a systems' theory point of view law may be conceived as a differentiated social subsystem.

The West-German legal culture is characterized by territorial pluralism. Constitutionally emphasized religious differences increase the differences in legal culture even more.

Another source of differences is to be found in social relations. Technological developments and international influences on the other hand have homogenizing influences. The German legal culture is positivistic to a large extent which results in an instrumental understanding of law. In Raiser's a final analysis this does not mean that the German legal system gave up all of its transcendental justification.

A. Sajó

AUTHORS' COLLECTIVE: DAS POLITISCHE SYSTEM DER USA
Staatsverlag der DDR, Berlin, 1987. 461 p.

The undertaking of the Berlin Institute for Political and Legal Sciences of the Academy could be called impressing and up-to-date by itself. Libraries are filled with publications on the political, economic and legal development of the capitalist world power in question in the western countries, but valuable comprehensive works, issued in the socialist countries in the recent decades, may be counted on two hands. The volume compiled by the well-known authors' collective - being one of the works of the series introducing the great countries of the capitalist world - is to be called such a book.

The sub-title of the book is "Geschichte und Gegenwart". The foreword of the considerably completed and modified book, published now in its third edition, intends to explain the characteristics of the present development just by the particularities of the historical evolution.

The first chapter of the volume deals with the establishment of the national state in the United States from 1775 to 1783. It enumerates the colonies, remote from each other both geographically and in attitude, the settlers of which got fed up in the seventies if the 18th century with the patronage and extortion of the British crown on the other side of the ocean, and strived after the establishment of an independent state. The colonies of the settlers of English, Irish, German, Dutch, French, Belgian and other origins had different status within the Union: e.g. Virginia was a crown colony, whereas Maryland was a colony, being the property of Lord Baltimore. The state of less than 2.5 million settlers the establishment of which was promoted by the narrow-minded "Proclamation Act" by King George III, was from the very beginning a heterogeneous formation before which several ways of development were open. According to Gore Vidal "the founding fathers did not want either a kingdom or a democracy", consequently, the new republic did not become a civil democracy in the classical sense of the word, in respect of all of its attributes, but rather a confederation rendered possible by compromises which could owe its later successes to a decisive extent to its natural fundamentals, to the consequent expansion that followed in the next a century. The further chapters of the volume analyse the particularities of the development of the Constitution and of the economic and political changes caused by the class contradictions, touching in detail

upon the decades of the struggles between slaveholders and abolitionists.

In the following, the Homestead Bill is adequately stressed, which rendered possible for hundreds of thousands of immigrants to find a home in the unpopulated territories of the far West. The book deals with the role of the Supreme Court which - according to this volume - can be unambiguously regarded as reactionary in this period.

The further parts of the volume deal already with the evolution of monopoly capitalism, with the development of the state capitalism. The measureless greed for power of the capital is emphasized, but too little is said about the populist policy, that blossomed out in America the tendency of in these years these decades, La Follette and his followers appeared in the main current of the American home politics in these years. The volume characterizes the American trade unions in a summary manner as organizations, subordinated to the capital and as those of the class betrayal and class peace. In this method the effects of "cliché—historiography" of the fifties-sixties is strongly perceptible.

The volume deals in a relatively short survey with F.D. Roosevelt and his New Deal policy, with the post-war years, with the consequences of the Korean and Viet-Namese conflicts, with the political changes of the democratic and republic eras following each other.

In the second part of the volume information is given on the political institutional system, on the characteristics of the economic life, on the upshots to be expected, following from the present structure of the United States, supporting the argumentation with many tables, diagrams, statistical statements. The correctness of these data and statements is hardly contestable here, but perhaps the drawing of the "enemy image", borrowed from the arguments of the daily press is rather reducing here and there the elegance, moreover, the authenticity of the presentation of the generally impressive set of information. A valuable part of the volume is the up-to-date documentation completing by highly fresh data the materials contained in the different chapters.

At the compilation of the next, fourth edition of the work it would be useful and interesting to invite two outstanding American political writers (e.g. Michael Harrington as a representative of the left-wing and George F. Will as a representative of the right-wing) to make short contributions to this valuable volume. Thereby the work could call greater international attention, deservedly.

M. Udvaros

FINDLAY, B. - FINDLAY, E.: YOUR RUGGED CONSTITUTION
Stanford University Press, 1987. 282 p.

The United States have recently celebrated the 200th anniversary of the enactment of their fundamental law. This volume helps understand the aims and ideals in the spirit of which the 13 liberated colonies declared their own independence and the principles, having being guided by which they wanted to build up their national existence, to develop their mode of life, their legal order. In 1787 a "constitutional convention" gathered in the Independence Hall in order to elaborate an entirely new plan of government for the sake of the establishment of a "more perfect union". The Declaration of Independence stated: "We think self-evident the following facts: each people was created to be equal and their Creator invested them with certain inalienable rights, among them with the rights to life, freedom and happiness. And for acquiring all these rights, the people established governments which governments received their power from the approval of those governed..." The volume stresses that in the wording of both the Declaration and the Constitution it was Jefferson who had the lion's share.

The book deals much with the theory and practice of the system of checks and balances in the development of the federal government. It gives a survey primarily of the rules relating to the activity, structure, procedural order of the representative organs which allow an inside view into the more and more difficult and complicated operation of the legislation. The legislative system of the country, consisting of 13 states of mainly an agrarian character, has certainly gone, through several essential changes and it is hardly comparable to the state order, serving global objectives, of the present highly industrialized world power and to the legislation functioning therein, but in the course of the development considerable changes have not, occurred in respect of the basic principles declared 200 years ago. The most significant and inevitable change is the consolidation of the federal system to the prejudice of the individual states within the Union.

The next chapter analyses the constitutional regulations relating to the system of elections. It points to the fact, that as a result of the so-called "great compromise", the larger and smaller federal states delegate representatives to the legislation according to the proportion of the inhabitants, and in order to avoid any misunderstandings, a census of the population has to be made at the end of each decade. It is provided by the law, that in correspondence to the result of the census each state has to be informed about the number of representatives to be delegated in the future to the Capitolium.

In the following, the constitutional bases of the Supreme Court and those of the judicial system are treated. It is worth mentioning, that the system of special courts has been established relatively early, including, among others, court of a customs and a court of taxes.

Today, the debate is continued with never seen vehemence both among specialist and in the public opinion on the necessity of the restrictions of the executive power, on its proportions

and tasks. The voter's system, according to which the president of the United States is elected even today, is contained just in the original wording of the Constitution. However, at first it was the person obtaining the heaviest poll (the most votes), who became the president and the person with the next heaviest poll became vice-president. This system was modified already in 1804 when the 12th Amendment of the Constitution declared that the voters had to name the president and the vice-president elected by them, and according to the practice, the persons obtained the most elector's votes on the occasion of the presidential election held in each fourth year could be considered the next president and vice-president of the United States, moreover, from the same political party, having practically identical or at least similar political views.

The volume comments on and elucidates the provisions of the Constitution on the finances, customs, defence, on the development of the internal organizations of the states and their amendments to date. It helps also the laymen by the demonstrative, illustrative style and drawings connected to the comments to understand the provisions of one of the first civil democratic constitutions of the world.

M. Udvaros

AKTUELLE PROBLEME DES INTERNATIONALEN WIRTSCHAFTSRECHTS, Akademie für Staats- und Rechtswissenschaften der DDR, Potsdam, 1988. 131 p.

The volume contains the lectures of the colloquium organized in March 1987 on the occasion of the twentieth anniversary of the Institut für ausländisches Recht und Rechtsvergleichung. The Institut is of high international reputation and has valuable results to look back upon. Its activity is hallmarked by high-level achievements in the conceptual-theoretical analysis of the legal problems of international relations, in the modern comparison of law in the same way as by its role in the post-graduate education. Its publications and conferences, reflecting the sound combination of the theoretical and the practical approach, are well known and recognized by the professional publicity.

The jubliee volume publishes the texts of 9 lectures.

The paper by H. Strohbach surveys the history of the Institut, giving hereby information about the structure of it, on the research staff, on the most significant results achieved in the education and in the research work, on the programmes and the publications.

F. Enderlein analysies the fundamental theoretical questions of the international economic law in his lecture. Based on ample source-material, introducing and evaluating the pros and cons, it investigates such essential questions, as the existence of international economic law, its qualification as a legal branch or as a so-called legal field, and if one considered it a legal branch, should one place it into the international or to

the national legal system, etc. In the opinion of the author, the appreciation of the international economic law as the legal branch of complex character of the national legal system is not only a consequent but also a theoretically established conception (p. 25). He investigates the relation of international economic law to international public law, as well, as the theoretical questions relating to the contents of the legal branch and to the comprehended living conditions.

W. Knüpfer has chosen the conceptual questions of the improvement of the legal foundations of the socialist economic integration, as the subject matter of his lecture. He underlines that the recent development of the integration lays stress upon the inter-enterprise relations, therefore the further development of the legal means, moreover, their transformation is required primarily here. His highly interesting comments on the further development of the legal bases of the co-operation survey the advantages and the disadvantages of the various approaches, namely of the priority of the international regulation or that of the harmonized national regulation, the problems relating to certain concurrence between bilateral and multilateral regulation efforts. He underlines emphatically the role of the comparison of law in the harmonization of laws.

K. Bacher treats the problems of economic safety in international law. The economic safety of states is an integral part of the general safety system and - the author points out - especially two aspects deserve attention here: the freedom from any outer pressure and discrimination, and the necessity of the establishment of the agreements on the economic relations of states of different social systems in as wide a range, as possible pp. 49-50). The author surveys the hitherto achieved results of universal character, first of all the UNO documents serving for the building up of the new universal economic order, stressing, that several partial questions shall still be regulated in this respect, for the sake of the enforcement of mutual advantages.

B. Zimmermann undertakes the analysis of the legal problems of the relations of CMEA and the Common Market. Summing up the agreements entered into by the two economic communities, as well, as the agreements between individual socialist countries and the Common Market, the author raises numerous theoretical questions, such as the problems concerning subjects under international law, the division of the spheres of authority between the integration and its member-states, the qualification of mixed agreements, etc. The author regarded as his task rather the raising than the conceptual answering of these interesting questions.

The lecture of N. Trotz deals with the questions of the establishment of the international law on environment protection. Pointing emphatically to the universal significance of the protection of the environment, he surveys the hitherto achieved results of the international law, first of all the declarations, conventions (of maritime law, the one relating to the air pollution etc.) established under the auspices of UNO, the relative documents of the Helsinki conference, etc. Analysing their legal character, some of their partial rules, he comes to the conclusion that these agreements - in addi-

tion to their significance - deserve rather the qualification "soft-law" and considerable efforts are required for their development into "hard-law", of a really obligatory character.

D. Maskow analyses in his lecture the problems of the universal and the regional (CMEA-level) unification of commercial law, with special respect to the future uniform acceptance of a possible General Part of the Law of Contracts. The author sums up the hitherto achieved results and points out, that while uniform solutions have been achieved primarily in the field of the conflicts of law within the Common Market, in the CMEA more complex results could be reported on. He investigates in details the Vienna Convention, emphasizing that it did not only give solutions but raised also new problems such as the questions of the hierarchy, the priority of the universal and regional, as well, as the international and national law.The diverse theoretical approach of the unification of law justifies - as remarkably wittily formulated by the author - the unification of the unifications. He touches briefly upon the unification prospects of the general rules on contracts within the CMEA, referring to the divergences of views in this connection. (The author has previously elucidated his respective attitude.)

The lecture by M. Müller comprehends the legal questions relating to the execution of the scientific-technical complex programme of CMEA. He stresses that the tasks resulting from the Complex Programme render indispensable also the elaboration of the adequate legal means. He refers to the practical and scientific results achieved in this connection, i.e. to the model contracts, elaborated in the frames of the CMEA Permanent Committee of Law, as well, as to the positions assumed in the course of the research co-operation of the Institutes of Legal Sciences of the socialist countries. He points emphatically to the fact that in the scientifix-technical co-operation, in the relations comprehending the innovation cycle, contractual methods have an outstanding importance and he stresses his opinion that the unification of the general conditions of the contract types, used in this field, is also necessary. He calls the attention with reason also to the fact, that the suitable economic-financial background, the establishment of the real interestedness are indispensable for the efficient application of the contractual methods.

D. Richter-Hannes surveys the results of the necessary unification in the field of the international transport law in his lecture.

The lecture of the colloquium offered a plastic picture of the wide range of research activity of the Institut. Although the views prevailing in the Hungarian literature are not always synchronous with the opinions expounded in the lectures (e.g. the appreciation of the concepcion of economic law, there is a certain scepticism for the chances of the elaboration of a General Part), it is hardly contestable that the papers excellently prove the high level and the sensitiveness of the jurisprudence of the GDR to problems.

The volume contains in the appendix the publications by the research workers of the Institut, as well, as the list of diploma works defended during the 20-year existence of the Institut.

E. Lontai

SPRUDZS, A.: INTERNATIONAL LEGAL RESEARCH PERSPECTIVES. William S. Hein Company. Buffalo, New York. 1988. 154 p.

Adolf Sprudzs name is well-known among specialists of law library profession, not only in the USA but in other parts of the world too. As a lecturer in legal bibliography, University of Chicago Law School, and long-time and active member of the International Association of Law Libraries (in 1986-1989 its President) he has earned international recognition through his writings and publications.

This volume is a collection of his writings dedicated to to him on the occasion of his 65th birthday. It contains reprints of articles from different legal periodicals, which has been written by him mainly on the topic of sources of information and research work in the field of international law. In a short review it is not possible to examine in detail all of the studies listed in the volume, therefore, I would like to draw the attention of the reader only to some interesting topics.

Article I serves as a useful guide to the basic U.S. sources for research in international law. The author presents a concise summary of available and accessible international law documents, paying special attention to official government publications. Locating the text of a specific international treaty or agreement and finding answer as to the actual status of this treaty, as we know is not an easy task. This article however, provides a clear guide as how to find the related official U.S. sources and the relavant informations on up-todate treaty developments. The documentary sources of judicial decesions concerning international law are being precisely defined also. In light of wide-ranging documentary sources examined by the author, one cannot but agree with his conclusion: "the existing U.S. system, with all its weaknesses, still manages to: provide one of the most up-to-date and complete coverages of contemporary practice in the fields of foreign relations and international law" Öp. 14.).

Article II is devoted to problems concerning the sources of multilateral treaty status information. Though it was published in 1972, the questions examined in it retain their actuality in our days also. To find adequate status informations (members, subsequent modifications, reservations etc.) on a specific multilateral treaty is still time-consuming. The author made his best to highlite the national and international documentary sources of those publications, which permit ascertaining the availability of published status information on multilateral treaties. His criticism of the existing state of relevant informational network is still valid: "... the road to this information does seem to be clouded with mystery ... and to most researchers the search for the up-to-date answer presents itself as a muddle-through, with uncertain results" (p. 27.)i

Article III and IV are actually dealing with the same problemes, namely: accessibility to world-wide treaty information. They are well-conceived and detailed studies, including a number of suggestions for possible improvement, on the state

and sources of treaty informations, both international and national. The author deserves special credit for the critical assessment of the system of treaty registration and publication within the League of Nations and the United Nations. He pinpoints the existing problems (non-diligent performance by States of their duties to register treaties according to Article 102 of the U.N. Charter, chronic delay in publication of treaties in the UNTS, widening gap between national treaty collections and the UNTS) and makes several suggestions for improving the cooperation of States and intergovernmental organizations in order to facilitate treaty research. National treaty collection, treaty indices, chronologies and treaty-in-force publications are also presented in a comprehensive manner.

Article V provides important clues for researchers as how to start and proceed with research work devoted to international law. Actually, it is a short research methodology guide about "how and where to find what". It gives very useful suggestions to those who intend to approach their subject from the point of view of States' practices. The sources of court decesions and digests of State practice on international legal matters are solidly presented. The author gives a clear picture about the difficulties and conditions for researching treaties, and he is not very optimistic about the possibility of ending in the near future the reseracher's involment into an "infinite paper chase". His only hope is the possible use of modern technology, but for the time being, as he puts it, "everybody must swim as he or she can" (p. 64.).

In the volume one can find some other informative articles on such subjects as bibliographical assessment of the International Encyclopedia of Comparative Law, law library profession in the USA, activities of the International Association of Law Libraries. Besides, it contains also two bibliographies. One is about the writings of Max Rheinstein, and the other is a selected bibliography on international trade, investment and organization. The bibliography on international trade contains entries only up to 1965. It would have been much more useful if the entries had been updated by the author.

All in all, the collection is a valuable addition to the international law researcher's and librarian's bookshelf, it contains expansive references to sources and might serve as a useful guide for further exploration of the subject.

V. Mavi

VIDLÁKOVÁ, O. - ADAMOVÁ, E.: PÉČE O ZIVOTNI PROSTREDI VE STÁTNI SPRÁVE CSSR. (Care for the environment in the state administration of the Czechoslovak Socialist Republic), Ústav státni správy, Praha, 1987. 246 p.

The Czechoslovak legal literature has paid more and more attention to the legal questions of the protection of environment since the middle of the seventies. Utterance is given generally to the notion that the effective law does not provide

for the protection of environment with due efficiency, and an increasing disproportion appears as against the social requirements determined by the development of the industry and other economic activities.

The circle of authors dealing intensively with the law on the protection of environment in Czechoslovakia is wide enough and this fact can be traced back to several institutions regarding the care for the law on the protection of environment as primary task. Among them the State Administrative Institute of Prague takes up an outstanding position, where the care for the law on the protection of environment has been the task of Vidláková, O. for many years. Recently, her book, written together with Adamová, E. as co-author on the state administrative tasks of the care for the environment has been published. This book is timely just because most of the works to be done devolve upon the state administration in this field, as it is to be read also in the legal publications of other states. Thus, reference should be made by way of example to the work of Bothe, M.: Verwaltungsorganisation im Umweltschutz (Linz, 1986, Institut für Kommunalwissenschaften und Umweltschutz, p. 80) which gives information on the administrative duties of the protection of environment in the German Federal Republic, in Switzerland and in the United States of America.

The book of Vidláková and Adamová is divided into five parts. Part I Contains an introduction of general character. It outlines that the right to the protection of environment is not investigated "an sich" but from the point of view of the state administration, primarily in the field of the management of water-supplies and of the protection of earth (soil), all the more because a close connection exists between the water and the soil. Further on, the book comes to the analysis of the notions of environment, and of the care for environment, respectively, of the formation and protection of environment.

Part II of the book begins with the survey of the effective law, namely in the domain of the constitutional law, economic law, civil law, criminal law, international law and administrative law. Then, the detailed analysis of the ministerial directives follows, with special attention to the protection of the water and the soil.

The governmental regulations play an important role in the protection of environment. The decisions of the federal government serve as directions for the governments of the republic which particularize the tasks in the protection of environment in order to implement the decrees of the federal government. In the future, the complex character of the legal regulation, the enforcement of the principle of prevention in the legal rules and the efficient attainment of the regular control shall be striven after to a greater extent.

In Part III of the work the authors categorize the administrative tasks and distinguish the preventive, controlling and planning activities in the protection of environment. They point out that the care for the environment is an organic part of the entire planning system, therefore, it should be approached in a complex manner.

The essential ideas from legal point of view of the book are contained in Part IV which discusses the structure of the

organs dealing with the protection of environment. The tabulations comprising the organizational structure on central and local levels are especielly useful since in this way the breakdown by spheres of activity is easy to survey. It becomes evident that on the federal level the main activity of the state administration consists of the legislation, the planning and the elaboration of conceptions, whereas on the level of the republics all these are completed by the directing and controlling activities, again, on regional level - i.e. on the level of districts, towns and villages - the essential work is the executive activity

Part V of the book contains appendices, namely the summary of the research works in the protection of environment and the critical analysis of the hitherto achieved research results. The work is closed by a detailed list of legal rules and a bibliography.

The work is rendered accessible for the foreign specialists by the abstracts in Russian and English languages.

Tom sum up, we are of the opinion that the authors render a good service primarily to the employees of the administrative apparatus by that they describe their task in detail, supported by legal rules, whereas for the research workers the book lends a significant help because in contains positive legal material hitherto inaccessible or only difficultly accessible and in this way a comprehensive information is given on the development and on the regulation of the protection of environment.

L. Trócsányi

COING, H.: EUROPÄISCHES PRIVATRECHT
I. Alteres Gemeines Recht (1500-1800) Beck, München, 1985. XVI+665 p.
II. 19. Jahrhundert (1800-1914) Beck, München, 1989. XIX+678 p.

For more than a lifetime Helmut Coing is one of the greatest personalities of Roman legal sciences. At the same time, interestingly enough, he has acquired his great reputation in another field. Though the history of antiquity owes so much to him, too, he has created a new school, a new way of research by working out detailedly the story of the survival of Roman law in Europe.

He has famous foregoers: first of all, Savigny, with the works titled Geschichte des römischen Rechts im Mittelalter und System des heutigen römischen Rechts. But the pandects were living law in Germany up to the end of the 19th century; it meant that the practical point of view dominated the historical one in examining the Roman law. Having accepted the BGB, Germany needed half a century to be able to open up new historical prospecte in studying the newer European law.

In connection of these researches Coing wrote excellent books, and the Max-Planck-Institute, founded by him for carrying out researches into the newer European history of law, made

great efforts to realize this purpose. However, in spite of having a great number of scientists, it seemed impossible to answer all the questions of the survival of Roman law and to describe the usus modernus, in a lifetime.

When professor Coing retired, leaving his chair and the directorship of the Institute, this work and already begun but nobody saw its end. Of the great handbook of Coing it was only the first part that was ready. The describing of the European ius commune, based upon the recent studies of soures seemed impossible.

Professor Coing was unwilling to accept this impossibility. He admitted that the complete dogmatical systematization of the European private law needed much and detailed work but he wanted to prove if a plan like this could be carried out at all. More than fifty years of a researcher's past enrichened him with knowledge and experience. With an overwhelming spirit he devoted all his time to the work: and now we can happily report the ready book being published.

With its organic system, clearly arranged method and cathegorical way of description Coing's work can easily be called a kind of school-book or manual.

Though it containes the private law of Europe of the newer ages, it belongs to the domain of Roman legal sciences. In the first volume we can read the dogmatical description of certain institutions; at the same time we can follow their development as well from Justinian's time up to the early codifications. In the second volume the author describe the course of development starting from a general legal basis and following its was through the 19th century up to the newest codes. So the dogmatical description plastically represents the way by which the Roman law became integral part and supporter of the European civilisation; at the same time reveals its (often unrecognizable) presence in our ideas and manners of a lawyer - not only in the realm of the classical private law but in the younger branches as well e.g. the commercial law, the industrial law or law of labour.

The first part of the first volume explains the author's intentions and gives a general introduction to the birth of the European ius commune and to its analysis, too. It examines the reception of Roman and canonical law - and not only what we can call "lawful" reception but that historical progress, too, that led to the application of Roman canoncial law in the everyday practice. According to the author, this line of development - in spits of all the differences between certain details - is homogeneus and integrated.

The reception (in broad sense) was influenced by many fators: for example, the scientifical practice of the usus modernus, or the unsuitability of the medieval legal systems for regulating new forms of community or new ways of commerce. It had material and spiritual factors as well; political formations and the early capitalism. The ius commune helped the development and motion of the latter because it had an organic theory about the state and law; it could give new forms to the commerce and industry starting to flourish. The basic principles of Roman law - the liberty in contracting, the equality of the citizens before the law - and its internationalism extending beyond frontiers and classes of society helped the outbreaking of the

European bourgeois revolutions.

Another part of the antecedents in the adaptation of the Justinianean law in the universities of the Middle Ages and the entering of these new principles into the European legal practice. It was the way the recipiated private law (the Roman and canonical law) could enter an interaction with the local statutes and influence their development, giving them its own forms as model.

We can meet this process in the second volume of professor Coing's work, too, in connection of the intercourse of the international legal systems.

The most interesting parts of the whole work are that of analysing the legal rules, describing methods of interpretation and the theory of the statutes, and the chapters about the general rules of private law. Even the Hungarian readers can recognize certain powers that were silently present in our legal development, too, without being noticed either by the contemporaries or the scientists of our ages.

The dogmatics of private law follows the ancient pandectal system: citizenship and status (personal law), familiar law, property, obligations and inheritance. As the Roman system of "actiones" wasn't recipiated, the processual law, the public and penal law (in spite of all their influence on the modern legal developments) are omitted.

Within these main parts the author analyses the legal institutions; one paragraph describes one institution starting from the Justinianean rules and describing the medioeval development. Then we can follow the institutionalization of the usus modernus and its transformation under the influence of the natural philosophy of law. The paragraph is finished with the norms of the early codes of civil law.

In the second volume the basis for the author is the ius commune, then he describes the French development and its eradiation, then the pandectistics and the German results in codifying the legal norms. We can meet the British solutions serving as a special example, too.

Every paragraph begins with a list of Roman and canonical legal sources together with certain paragraphs of the great codes and statutes dealing with the legal institution in question. We can meet a very rich bibliography in the footnotes.

Very often the author remarks that certain questions are still unanswered, they need further researches to be completely explained. However, in spite of some missing details, professor Coing's book is an immense work with exceptional values. It can be used as a solid basis in the forthcoming work of research and it will make easier to find the European connections of certain legal institutions not mentioned in the book. It offers a possibility to the Hungarian history of private law, too, to make a similar comparison of our institutions.

There is no doubt that the most important part of the first volume is the law of contracts. The norms about the legal position of the persons and family and the legal order of succession are stable and their institutions haven't been changed for a long time. The law of property is filled with feudal restrictions and represents the fight of the ius commune against the social features of the absolutistic systems - the fight that

couldn't be won. At the same time, in the law of contracts we can meet the genesis of the civilian rights, where the existing form helps the new economical factor to succed and win. The author stresses this principle in the general discussion of the contracts as well as in the analysis of each institution, especially when writing about the marine law and the commerce law.

In spite of the fact that the followers of the natural law deny it, the Roman regulation of delicts is an integral part of the European law. This chapter of the first volume could be an introduction to Géza Martos's great work about the development of the theory of responsability in the 19th century. Unfortunately professor Coing didn't use this work at all either in the first or in the second volume - though Marton's book could have been integral part of the bibliography of the European private law.

The second volume is about the 19th century. It follows the development of private law from the codes based on the natural law, to the codifications supported by the pandectal theory. The volume describes the codifications as a phenomenon of private law; it shows their effect of first "meeting" the ius commune, then filling the gap with the idea of a general need of codification.

While analysing this line, the author detailedly writes about the fall of the international legal sciences - the point pf view chosen by the French experts is essentially different from the ideas of the followers of the German pandectistics. The French, with their exegetical conception helped by the practice based on the Code Civil, contradict the German school. The European and international theory of law disappears to let the comparative one to take its plase. At the same time the legal sciences want to preserve their international attitude. The jurisdiction is much more closed. In every European country it's the national system of law that dominates and the comparative law hardly has an influence on the judicial practice of the courts. Knowing this, certain adequacies of the judicial practice of different countries are much more interesting for us and it makes the analysis of the legal facts more important. These adequacies are possibly due to the paralelly existing phenomenons of economical and social development, so the effects are quite clear - though in their identification the comparative method is a very tiresome way.

Among the political ideas having an influence on the legal development, the author mentions the liberalism and its conservative opposition, the nationalism, the classical theory of economy, the socialism and its catholic version. As an economical factor he describes the agrarian and industrial revolution, the genesis of the workers' class and the development of the capital market. On this new field created by the socio-economical trends, new formations appear - the companies regulated by private law. This transformation gives new problems to the legal sciences and new solutions must be found in the constitutional law as well as in the domain of private law.

It means that a new type of private law is being created, besides the classical norms. In the second volume the author describes this "new law", analysing the system of companies,

the defence of patents and other special industrial rights, the labour law and the new rules about real property. His basis is the material mentioned in the third part but he describes the French and German situation only, with certain examples of English law. The Hungarian development isn't mentioned at all.

Professor Coing has strong reasons to do this. Hungary of the 15th-17th century is a blank spot on the map of the European private law. At the same time, the developments of the 19th century serve as an example: the author constates that very often the European legal systems only follow the movements and changes - the Hungarian legislation, on the contrary, precedes this development, e.g. it was free to found a share company in 1840. On the other hand, the handbook itself gives reason for this omission: if somebody would like to read the Hungarian legal rules, he can easily find them following the list given by Coing.

The third part of the second volume is devoted to the classical private law - we can read about the marine law, the law of commerce and the legal regulation of different types of bonds. Like the others, this part is a well-systematized and useful manual, giving a very good basis for further researches.

J. Zlinszky

HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE, Max-Planck-Inst. für Europ. Rechtsgeschichte (hrsg. von COING, H. - München, Beck, 1988) Bd. 3. Das 19. Jahrhundert. Teilb.5. Südosteuropa (d. Autoren: Mikhail Andreev, Valentin Al. Georgescu, Fanny Milkova, Sergij Vilfan, Panagiótés J. Zepos).

The last volume of the Coing-handbook is devoted to southern and Eastern Europe. In the 19th century - similarly to the Northern parts - this territory didn't belong to the general European way of legal development. It has its own history, its own political map with divided countries and it has just become free from the Asian despotism lasting for centuries.

The volume leads us to new fields of political history but legal history as well. From a certain point of view this part of Europe has the oldest legal traditions; on the other hand, it is one of the territories that have joined the European development recently.

In South-East Europe there are two cultures contrasting and living together: certain countries joined the West-Roman traditions and cultivates the Latin culture; the other and greater part inherited the Syzantinian legal traditions. Of course the roots of both ways of development can be found in the Justinianean codification. This origin has a certain Mediterranean character, as Kosschaker says, but the legal and political culture of Europe has grown out of this Mediterranean soil. The two parts of the Roman empire belonged together for more than five centuries; then came a five-century-long period of hostilities. In the end, in the last fifty years, we could

see the contradicitions diminishing.

The general picture of this area is made more colourful by the fact that in two countries these different traditions meet. In the 19th century Transylvania, Croatia, Dalmatia, Slavonia and Carinthia belonged to the Latin "Kulturkreis" and were part of the Austro-Hungarian Monarchy while the other countries mentioned in the handbook cultivated the Syzantinian traditions and became independent again only in the 15th century.

At the same time, Hungary and Austria had a great population of Greek orthodoxes, and the territories that once were part of the Byzantinian Empire, met an influence of the Western (French, Italian, German) legal institutions, too.

The analysis of this way of development is a very temptating but a very great task. These chapters of professor Coing's work cannot be understood without knowing the parts about Austria and Hungary - as I have pointed it out in the chapter about Hungary (3.2) and as the descriptions of Roumania and Yugoslavia mention it as well.

The volume is exceptionally interesting for a Hungarian reader - "de nos fabula narratur", we can say, while reading the history of our country. The authors describe the Byzantinian era and the centuries of the Osman era as without this knowledge the events in the Balkan Peninsula in the 19th century cannot be understood at all. On the other hand, many points of connection can be found with the medieval and later Hungarian history. These contacts are pointed out with the clearness and detailedness of an expoert's work in the essay about Yugoslavia.

This chapter talks about the connections and the existing problems, too, in a frank and objective manner. Unfortunately we cannot say the same about the chapter describing Roumania. We know very well the contradictions between the opinions the Hungarian and Roumanian historiographers have about certain moments of legal and political history. Many of the discussed questions aren't answered yet. Anyhow, a handbook for international use should make known all the points of view, especially if the average reader cannot read the sources as well, because of their difficult and less-nown language. This revision is partly obstructed by the fact that the Hungarian authors and titles mentioned by the Roumanian author of the article are written with misspellings and other mistakes.

On the other hand, we must admit that both the introduction about the legal development of South-East Europe and the article about Roumania are very well edited and composed. Professor Georgescu enrichens us with interesting details and unknown data about his homeland. Georgescu doesn't follow the original plan of the editor and very often sketches the development from the Byzantinian era up to the 19th century in a sentence. This solution gives some difficulties to the reader who wants to read the chapter together with the parts about Transylvania. Unfortunately many facts about the Transylvanian legal development e.g. the Saxon reception or the legislation of the 18th century arent't worked up detailedly. It is rather a great gap as the second volume of the handbook doesn't have an independent Hungarian chapter. Anyhow, we get a wide panorama of the Byzantinian influence on the legal development - and

this is new for the Hungarian law historians, too.

It was easier to write about the Bulgarian and Greek events as their tradition are quite homogeneous. As the chapter about the Byzantinian empire gives a general introduction to all the other parts, these chapters discuss some details, for example the legal rules of the medieval Bulgaria, the late Byzantinian legal renessaince or the influence of Byzantium on the European reneasaince. The development of the private law of both countries in the 19th century is quite short and can be easily sketched. It is a special pleasure for the Hungarian reader to read about the influence the Hungarian commerce law had on the Bulgarian codification as it means the Hungarian code of commerce being appreciated and used like an example.

We are very sorry that the biographical data are omitted from the chapters - it would have made all the facts more understable.

Perhaps the richest study is about Yugoslavia. The author describes the political sphere detailedly and his description about the very difficult system of legal sources is clear, too - it is divided into two, the sources before 1800 and after 1800. This chapter follows the original plan about the handbook and so it is the most usable part of the whole book.

This last volume of the series gives a unique possibility for the Hungarian law historians to know more about this era and area, too, to get acquainted with opposing points of view and to consider well his own mistakes. History can be written only if we know the general connections. It is a mistake of follow only the discussions on the private law only (as we did it in the last few centuries) or to mind only the life of the leading classes, forgetting about the everyday jurisdiction. These errors caused the genesis of a proud ideology about the independent and unique Hungarian private law; later we explained all the historical facts with the struggle of classes.

It is the task of us, living Hungarian law historians to fill the (perhaps intentionally made) gaps and to make possible to analyse the historical facts correctly. For example, according to the Roumanian experts, the union of the three Transylvanian nations was partial - but in this era "nation" meant a group of inhabitants having political rights. The Roumanian noblemen belonged to the Hungarian nation; the peasants, on the contrary, weren't a "nation" at all - and from this point of view the German, Hungarian or Roumanian peasants were in the same position, too. Otherwise, it is a fact that the roumanians living in Hungary didn't have a national independence and it may be strange for the historian of our days. But we mustn't forget that this right was given to the migrating Germans only as a privilege.

Last but not least, the data published in this volume should be used in the re-writing of our textbooks of legal history as the rules of the orthodox church had quite a great influence on the norms regulating the family and the succession even in the Hungarian territories. We have to do it if we wish the historians of other countries to describe the Hungarian influence on their legal institutions - and it would be a "sine qua non" of the good-neighbourly relations and peaceful coexistence.

J. Zlinszky

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CSŐSZ Ferenc: A tanácsok helye, szerepe, különös tekintettel a költségvetés reformjára. (The place and role of councils, especially in the reform of the budget. Место и роль советов в свете реформы государственного бюджета.)
ÁI 6/89:569-573.

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ÁI 3/89:193-203.

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LAKATOS István: A közakaratú településfejlesztés felé. (Toward a community development of people's intentions. О развитии населённых пунктов по воле населения.)
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MÁTHÉ Gábor: Megoldhatatlan szabálysértési felelősség? (Is the minor infringement responsibility impossible to solve? Нерешимые вопросы ответственности за административные правонарушения?)
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MOLNÁR Miklós: Az egyedi államigazgatási döntések jogi meghatározottságának néhány problémája. (Problems of the legal determinationof some single public administrative decisions. Некоторые проблемы юридической определённости индивидуальных административных решений.)
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MÓNUS Lajos: A minisztériumok a változó időben. (Ministries in the changing times. Министерства в эпохе перемен.)
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MÓRÉ László: Gondolatok a tanácsok vállakozási tevékenységéhez. (Ideas on the enterpreneurial activities of the councils. Заметки о предпринимательской работе советов.)
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VEREBÉLYI Imre: A magyar helyi önkormányzatok orzságos érdekszövetsége. (The national associationof the Hungarian local self-government bodies. Вегерское представительство интересов местных самоуправлений.)
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István Kovács
1921 - 1990

István Kovács, membre du comité de rédaction d'Acta Juridica, académicien, professeur d'université, directeur de l'Institut des Sciences Juridiques et Politiques de l'Académie des Sciences de Hongrie, membre ordinaire de l'Académie Internationale de Droit Comparé et de l'Académie Internationale de Droit Constitutionnel, ancien vice-président de l'Institut International d'Administration Publique, membre du Comité exécutif de la Société Internationale de Droit Constitutionnel, titulaire de plusieurs hautes décorations scientifiques et de l'enseignement supérieur est décédé le 29 novembre 1990, à l'âge de soixante-dix ans, après une longue et grave maladie.

István Kovács est né à Nyírbátor, le 21 septembre 1921. En 1943 il a obtenu son diplôme en sciences politiques à l'Université de Debrecen. Au cours des années passées à l'Université il était l'un des organisateurs, puis dirigeant de la Jeunesse estudiantine démocratique, organisation estudiantine antifasciste et démocratique qui s'était formée à l'université. Cette circonstance a contribué à son élection en 1945 parmi les fonctionnaires du Gouvernement national provisoire, plus tard à sa nomination comme sous-préfet du comitat de Veszprém. En 1949 il est entré au service du Ministère de l'Intérieur et a pris part activement à la réorganisation de l'administration publique. En 1950 il a été invité à enseigner à l'Université de Szeged, et à partir de 1954 il y a rempli les fonctions de professeur d'université titulaire de chaire. A partir de 1951 il a été directeur adjoint et à partir de 1981 directeur de l'Institut des Sciences juridiques et politiques. En 1954 il a obtenu le grade scientifique de candidat, et en 1962 celui de docteur ès sciences juridiques et politiques, en 1965 il a été élu membre correspondant et en 1976 membre ordinaire de l'Académie des Sciences de Hongrie.

Son activité scientifique déployée surtout dans le domaine du droit constitutionnel a donné des résultats reconnus à l'échelle internationale. Les domaines principaux de ses recherches sont les particularités du développement de la constitution, les bases constitutionnelles du système des sources de droit, les institutions de base de l'administration publique, les droits des citoyens, le développement de la science du droit

constiutionnel. Ses plus de cent publications parues et en hongrois et en langues étrangères traitent également ces thèmes. Il était l'un des auteurs et rédacteurs de l'Encyclopédie des Sciences Juridiques et Politiques, jusqu'à ce jour la plus grande entreprise des sciences juridiques et politiques hongroises. Un fondement historique profond, une manière de voir comparative et une analyse pénétrant jusqu'à la racine des problèmes caractérisent ses oeuvres, reconnues par de nombreuses décorations hongroises et étrangères et par les fonctions lui confiées dans la vie scientifique hongroise et internationale.

István Kovács, en tant qu'organisateur de la science a également de grands mérites dans le développement de la vie scientifique hongroise, dans la direction des domaines des sciences proches de sa sphère d'intérêt. Comme président du Conseil de Coordination du sujet principal de recherche nationale intitulé "Examen scientifique complexe du développement de l'administration publique", il a joué un rôle décisif dans l'organisation et la direction des travaux de recherches effectués dans ce domaine. Il prêtait une attention particulière à la formation de jeunes savants: en tant que savant qui fait école, il a formé de nombreux disciples pour la recherche et l'enseignement supérieur des sciences juridiques et politiques hongroises, et comme professuer il a donné à des milliers d'étudiants une orientation stable relative aux grandes questions de l'Etat et de la constitution. Il a assumé une part active dans le renouvellement du système de qualification scientifique.

István Kovács a eu un rôle éminent dans le développement de l'Etat et du droit hongrois. Il s'est associé très tôt aux travaux qui ont jeté la base du développement du système d'institutions de droit public et a pris une part active à la préparation des principes et théories au service de la codification constitutionnelle. Sa communication faite à la séance de l'Académie sur les fondements scientifiques de la constitution hongroise a offert une analyse extrêmement profonde des questions en suspens, témoignant de vastes expériences internationales; outre ses publications, il a préparé les voies du développement démocratique également par ses expertises et avis consultatifs non destinés à la publication. Dans ce domaine aussi sa disparition fait un vide difficile à combler.

Dans la personne d'István Kovács est disparu un scientifique éminent des sciences juridiques et politiques hongroises, un savant et professeur d'université qui faisait école, un participant très respecté de la vie scientifique hongroise et internationale.

L'Académie des Sciences de Hongrie conservera sa mémoire.

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LA PROTECTION DES MINORITÉS PAR LE DROIT INTERNATIONAL

G. HERCZEGH

Vice-Président de la Cour Constitutionnelle de la
République Hongroise, Budapest

1. La nécessité de la protection des minorités.

2. Est-ce qu'il s'agit d'une question interne ou d'une question internationale?

3. Les échelons et les possibilités de la réglementation de la protection des minorités par le droit international.

4. Protection des minorités ou protection des langues minoritaires?

En général, la situation des minorités est caractérisée par le fait que par rapport à la majorité, leurs membres sont désavantagés et frappés par différentes règles discriminatives. Leur protection juridique est donc nécessaire, cependant en elle-même la protection offerte par le droit interne n'est pas suffisante étant donné que la majorité peut la modifier de façon unilatérale. Des garanties internationales doivent renforcer leur protection. La relation entre l'Etat et certains groupes de ses citoyens n'est pas un domaine inconnu pour le droit international. Depuis des siècles, il y a des traités internationaux qui contiennent des dispositions garantissant la liberté des cultes et par la suite des règles relatives à la protection des minorités ethniques, dont l'exemple le plus connu était le système de la protection des minorités qui fonctionnait sous l'égide de la Société des Nations. L'interdiction internationale de l'oppression des minorités peut prévenir la naissance et l'aggravation des conflits internationaux, donc le droit international s'acquitte de sa mission par excellence par la protection des minorités. La réglementation du droit international peut se faire à trois échelles; cependant à l'échelle universelle, par la nature des choses - par la dissimilitude de la situation des minorités -, cette réglementation ne peut dépasser les généralités et n'impose aux Etats que peu d'obligations concrètes. L'échelle régionale promet une protection plus efficace, tandis que théoriquement la réglementation la plus efficace pourrait être celle à l'échelle bilatérale, mais les conditions politiques d'une telle réglementation sont rarement réunies. Si le droit international protège non les minorités, en tant que telles, mais les langues régionales ou minoritaires, comme le projet de la Charte européenne élaborées sous l'égide du Conseil de l'Europe cherche à le faire, cela pourrait être également une solution. Du point de vue de la technique du droit, le projet est une oeuvre digne d'attention, son adoption et son entrée en vigueur représenteraient un progrès important dans le domaine de la protection juridique internationale des minorités ethniques.

1. De nos jours il y a des minorités nationales, religieuses, linguistiques, etc. ayant une origine et une situation différentes, par conséquent

les problèmes juridiques qui se posent en liaison avec elles - et les formes de protection présumée être les plus appropriées - diffèrent également les unes des autres. Sans entrer dans l'analyse détaillée de la définition de la notion de minorité[1], je voudrais brièvement rappeler qu'il y a

a) des minorités historiques, c'est-à-dire des groupes de minorités disposant d'un passé historique, d'une culture développée, minorités qui à cause des frontières anciennes ou de nouvelle date vivent sur le territoire d'Etats où la majorité de la population parle une langue différente de la leur. Elles sont attachées à leur identité nationale, elles veulent conserver leurs traditions et développer leurs relations avec la nation (les nationalités) vivant sur le territoire d'un autre Etat et parlant la même langue;

b) les immigrants, qui ont quitté leur patrie originaire pour des raisons économiques et avec l'intention de l'abandonner définitivement. En général, ils veulent s'assimiler rapidement au peuple de leur nouvelle patrie, tandis que l'Etat d'accueil invoque d'habitude fièrement sa qualité de "pot à fondre". Les travailleurs étrangers se trouvent sur le territoire d'un autre Etat également pour des raisons économiques, mais leur séjour revêt un caractère temporaire. Leur groupe est temporaire et provisoire dans ce sens qu'ils rentrent tôt ou tard ou deviennent des immigrés;

c) la population des Etats du tiers monde ne s'est pas encore s'unie en une nation qui forme une majorité au moins relative. La loyauté de la majorité est déterminée par l'appartenance tribale. Leurs gouvernements insistent sur le renforcement de l'integration et sont opposés à la reconnaissance des droits des différentes ethnies, puisque cela entraîne le séparatisme qualifié par eux comme le mal majeur. Par leur grand nombre ces Etats exercent une influence décisive sur les prises de position des organisations internationales;

d) les "aborigènes", les "indigènes" vivant dans les sociétés créées par les immigrés européens.

Bien sûr, cette énumération n'est pas complète, mais seulement exemplative et sert à indiquer que les Etats perçoivent différemment les problèmes des minorités, ils interprètent d'une façon différente son essence et se font des conceptions différentes de la solution, de la protection des minorités. Si un brésilien entend le mot "minorité", ce mot ne lui fait pas penser aux Hongrois de Transylvanie, ni aux Palestiniens vivant sur les territoires occupés par les Israeliens, mais aux immigrés européens qui

pullulent à São Paolo, et un Nigérien pense aux membres des tribus autres que la sienne, ou bien aux membres de sa propre tribu. Nous devons donc renoncer à donner un aperçu global des minorités nationales, religieuses et linguistiques - et des aspects différents de ce problème - et nous devons porter notre attention consciemment sur les questions des minorités "historiques" qui nous intéressent le mieux, en prenant acte de ce que la validité de nos constatations est partielle et l'applicabilité des solutions préférées sera limitée territorialement.

En quoi consiste l'essence du problème des minorités "historiques"?

La stabilité de l'Etat signifie la stabilité de ses composants - territoire, peuple, pouvoir suprême. Du point de vue du territoire, cela signifie l'invariabilité des frontières, et en ce qui concerne la population qui, par le déplacement de la population varie constamment et se renouvelle pratiquement complètement au cours de trois générations - l'élément de la stabilité est son comportement positif témoigné à l'égard de l'Etat. L'Etat exige de ses citoyens non seulement obéissance, non seulement l'observation des lois, mais bien plus: fidelité, attachement, loyauté.[2]

Pendant des siècles, cette fidélité était assurée surtout par la religion, c'est-à-dire par l'Eglise prêchant les doctrines de la religion, en faisant dériver le pouvoir temporel (laïc) de la volonté de Dieu, dont la grâce a élevé au trône certaines personnes et leur a donné un pouvoir sur leurs semblables. "Il faut rendre à César ce qui appartient à César et à Dieu ce qui appartient à Dieu" - a enseigné l'Eglise. Dans ces conditions la fidélité exigée du sujet a été mise en danger surtout au cas où il a pratiqué éventuellement une autre religion que celle de son souverain, puisqu'il pouvait arriver qu'en suite des commandements de sa religion il a interprété la volonté de Dieu d'une façon différente que le gouvernement du souverain. Les sujets ayant une autre religion étaient donc moins dignes de confiance que ceux qui observaient la même religion que le souverain et pour cette raison on pratiquait une discrimination préjudiciable qui, par endroits et par époques s'est dégradée en persécution, en interdiction de résidence massive et a abouti à des guerres civiles d'aspect religieux.

La protection ou le rétablissement de l'unité religieuse a favorisé le renforcement de la stabilité de l'Etat. La religion du propriétaire foncier a défini la religion de ceux qui vivaient sur la propriété, la religion du souverain celle des sujets, cependant le principe cuius regio eius religio se faisait valoir également inversement. Un Etat catholique ne pouvait pas

avoir un souverain protestant et inversement, et si c'était pourtant le cas, cela a impliqué des conflits graves. Le rôle politique de la religion a entraîné la discrimination sur la base de la religion et l'oppression de la minorité religieuse. Le droit de l'époque n'a reconnu la liberté de religion qu'au cas où la réalisation de l'unité religieuse est apparue comme n'ayant aucune chance de succès. Puisqu'il s'agit des événements bien connus, nous pouvons nous passer de l'énumération des exemples.

La route a conduit des minorités religieuses aux minorités nationales par suite du fait que conformément aux idées de l'âge des lumières la source du pouvoir d'Etat est devenue la volonté du peuple[3] au lieu de Dieu. Si la source de tout pouvoir est le peuple, il n'a pas seulement le droit de choisir son système politique et son gouvernement, mais également de décider la question de savoir dans le cadre de quel pays il veut vivre. Mais le peuple n'est pas une masse homogène. Dans de nombreux pays d'Europe son principe ordonnateur fondamental - son classificateur dans le domaine politique - est devenu la langue, le moyen le plus important de la communication. Le peuple s'est réparti en "nation" selon les langues parlées par lui et par suite de ce fait il s'est avéré qu'il y a des pays nationaux (habités par une nation) et des pays "multinationaux" (habités par plusieurs nations).

L'ambiguïté de la terminologie a donné et donne encore aujourd'hui lieu à de nombreux malentendus et prête à confusion.[4] Le contenu de la notion "nation" a subi au cours de l'histoire beaucoup de changements, étant donné que le développement des nations, la création des Etats nationaux s'est opéré sous l'effet intégrateur de la force ininterrompue du pouvoir d'Etat au cours d'un développement historique assez long. Sous l'impact de l'organisme de l'Etat les sujets du roi français ou anglais sont devenus des Français et des Anglais, établissant successivement l'unité linguistique de la France et de l'Angleterre dans une époque où on n'a pas encore attribué une importance politique à la langue. Les rois ne voulaient pas obliger leurs sujets parlant une autre langue que celle du roi à parler leur langue, mais le rayonnement de leur cour a accompli cette tâche sans aucune contrainte, en assimilant le peuple de l'Etat d'une façon inaperçue. A l'époque du féodalisme personne ne s'inquiétait de la variété linguistique de l'Etat si l'unité religieuse existait. L'adage contenu dans les Admonestations de Saint Etienne, selon lequel "un Etat monolingue est faible et fragile" a été vrai dans le XI^{e} siècle mais n'a pas été valable dans les circonstances du XIX^{e} ou XX^{e} siècle, où l'apparte-

nance à la nation d'après la langue a déterminé la "fidélité" politique des gens. Là où l'unité linguistique a fait défaut, les luttes pour l'unité ou contre l'unification sont devenues de plus en plus importantes. La littérature, l'art, toute la culture de l'ère des réformes hongroises se sont dirigés sur le développement et le renforcement des sentiments qui doivent commander la communauté de ceux qui parlent la même langue. Il fallait créer l'art dramatique national, l'opera national, la peinture nationale. Le même processus s'est opéré chez nos voisins.

Si l'Etat se compose de nations et les nations se composent de ceux qui parlent la même langue, alors non seulement la répartition des Italiens et des Allemands entre plusieurs douzaines de petits pays est irraisonnable, mais également l'existence de l'Empire Autrichien ou de l'Empire Osman qui selon la conception dominante doivent être partagés en pays nationaux, en territoires habités par des peuples parlant différentes langues.

La propagation de l'idée nationale a porté en soi la possibilité de grands succès, mais également le danger de la désintegration, de la décomposition, ce qui ne restait pas caché devant les hommes politiques. Ils ont réalisé que le principe national (ou autrement dit: le droit d'autodétermination) renforce certains Etats, tandis qu'il déstabilise d'autres. L'essence de la question nationale en tant que problème politique est la mise en question de la stabilité de certains Etats, le danger du séparatisme latent ou ouvert par suite de l'existence des minorités vivant sur le territoire de l'Etat et surtout au long de ses frontières.

Si - selon le principe reconnu et conformément à la pratique générale - les Etats sont les Etats d'une certaine nation, la loyauté de ceux qui appartiennent à la minorité linguistique semble être douteuse. Que faire avec un Etat qui reconnaît lui-même n'être pas le leur, mais celui de ceux qui parlent une autre langue? Conformément à l'idée nationale ils s'orientent vers l'Etat où la majorité se compose de ceux qui parlent la même langue qu'eux. Le pouvoir d'Etat en place n'a pas confiance en ses minorités et puisqu'il n'en a pas confiance il pratique une discrimination préjudiciable à l'égard de ceux qui appartiennent aux minorités. Mais s'il pratique une discrimination à l'égard des membres des minorités nationales, il est irraisonnable d'attendre qu'ils soient loyaux. (Une contradiction spécifique de la question des minorités nationales consiste dans le fait que plus le nombre des minorités est insignifiant, plus de droits leurs sont accordés.[5] Par contre la nation parlant la même langue que la minorité donnée, mais vivant parmi les frontières d'une autre Etat et constituant

dans cet Etat la majorité, se fait un devoir moral et politique de libérer ses frères opprimés. Au fond ce devoir est indépendant de l'oppression puisque l'établissement de l'unité est l'objectif principal qui découle de l'existence de la nation, objectif dont la réalisation peut être entravée par des circonstances défavorables, mais ne peut pas être définitivement rayé de l'ordre du jour. L'histoire de Piémont et de la Prussie a prouvé que ce qui n'a pas réussi en 1848-49, s'est réalisé quelques années plus tard. Leur redressement au siècle dernier a servi d'exemple encourageant et c'est avec zèle que d'autres et ailleurs - ainsi à Belgrade et à Bucarest - se sont préparés à remplir le rôle de Piémont.[6]

J'expose ces faits en détail parce qu'il y avait beaucoup qui concevaient et il y a encore aujourd'hui beaucoup qui conçoivent l'essence de la question des minorités nationales en tant que problème social qui, malgré ses contextes internationaux, peut être intégralement résoulu dans le cadre des frontières d'un Etat. "Il ne s'agit pas des aspirations vers la création d'un Etat, mais des exigences sociales fondamentales de grandes masses de la population agricole, qui ne peuvent être satisfaites que dans leur langue maternelle. C'est particulièrement vrai en ce qui concerne la question des minorités nationales de Hongrie"[7] - a écrit en 1912 Oszkár Jászi qui s'est préoccupé d'une manière approfondie de la question des minorités nationales. En même temps c'est lui qui a constaté que "toute autre gravitation vers l'extérieur n'est pas une chose sérieuse, pusique dans l'état actuel des forces de la politique mondiale c'est impossible"[8]. Selon les expériences lesproblèmes des minorités persistaient et se reproduisaient en Europe de l'Est et en Europe centrale malgré les changements de formations sociales et de systèmes politiques, à la rigueur les oppresseurs et les opprimés ont changé de rôle par suite de la modification des frontières des Etats, rapportant ainsi la preuve de ce que l'oppression des minorités n'est pas l'apanage du systême social capitaliste ni la spécificité "nationale" d'un peuple.

Comment se manifeste l'oppression des minorités? Pourquoi et dans quelle mesure la situation de ceux qui appartiennent à une minorité est préjudiciable, en suite de quoi il leur faut offrir une protection assortie des garanties réglementées par le droit?

La discrimination des minorités peut revêtir par époques et par endroits des formes extrêmes et peut se dégénérer en génocide.[9] Au cours des tempêtes de l'histoire de nombreux peuples ont disparu, de nombreuses cultures ont sombré, des races ont disparu ou se sont vues contraintes à mener

une vie misérable. Hélas, les horreurs du génocide hitlérien ne sont pas les seules dans l'histoire.[10] Ailleurs il y avait également des interdictions de résidence massives qui ont frappé la population, on a dispersé les personnes appartenant à la minorité, dans l'intention évidente de l'anéantissement de leur communauté. Ces mesures dont plusieurs exemples sont connus dans l'histoire récente[11] ont eu un caractère exceptionnel et ont été en connexion avec des situations exceptionnelles, avec des conflits armés. Mais la situation des minorités est généralement défavorable même dans des circonstances "normales". La structure sociale des minorités prouve - là où nous disposons des données puisées à bonne source - que le taux des agriculteurs, des manœuvres est plus élevé parmi elles que parmi la nation majoritaire, occupant une situation dominante, et qu'elles sont représentées dans une mesure beaucoup plus faible parmi les couches qui disposent d'un revenu et d'un prestige considérables.[12] Sur la base de ces données on a conclu volontiers à la suprématie culturelle de la nation majoritaire (dominante), à ses dispositions naturelles meilleures, qui justifient son rôle dirigeant, bien qu'il ne s'agisse de ce que les personnes de talent originaires de la minorité ne peuvent se faire valoir que par assimilation à la majorité et pour cette raison elles enrichissent les rangs de la majorité. De telles pertes ont été subies avant 1918 par les minorités de la Hongrie, tandis qu'après 1918 la minorité hongroise refoulée dans les Etats successeurs a payé dans ce sens un lourd tribut.

Si l'intelligentia originaire de la minorité veut réussir, elle est contrainte d'émigrer dans l'Etat où la majorité parle sa langue (où sa connaissance de langue, ses capacités, sa culture lui assurent des conditions identiques dans la compétition sociale) ou elle adopte la langue de la majorité de son pays et prouve sa fidelité à sa nouvelle nation avec l'excès de zèle des néophites.[13] Si elle reste chez soi, fidèle à sa propre nationalité, les circonstances défavorables qui découlent du faible nombre des membres de sa communauté assignent à priori des bornes au développement de ses capacités créatrices, bornes que la politique discriminative ouverte ou camouflée du gouvernement peut encore aggraver. Etant donné que la langue est le moyen le plus important de la communication entre les gens, la minorité qui ne parle pas suffisamment "la langue d'Etat" ne peut pas acquérir les connaissances professionnelles offrant la possibilité d'obtenir un meilleur travail et un plus grand revenu, de se procurer des informations relatives à ses activités économiques, et rencontre des difficultés au cours de ses relations avec les autorités. Et pour cette raison elle

n'est pas capable d'user d'une façon satisfaisante de ses droits et occupe dans ces conditions une place toujours plus défavorable. Dans la plupart des cas la minorité nationale présente un image d'une société "mutilée", où les couches bien situées manquent, ou ne sont que très minces, tandis que le nombre de ceux ayant une situation défavorable est hors de proportion.[14]

La situation des minorités est plus favorable là où il s'agit d'un Etat ayant une structure composée, où la structure politique est complexe et les différents groupes trouvent leur place. En effet, dans ces Etats les minorités disposent d'une autonomie, leurs organisations politiques, culturelles et sociales fonctionnent relativement indépendamment et ne dépendent pas du gouvernment. Dans les systèmes politiques monolitiques, dans les dictatures dites totalitaires (et j'y classe les formes du modèle stalinien réalisées jusqu'ici et cells qui existent encore aujourd'hui) les minorités ne peuvent bénéficier et ne bénéficient pas d'autonomie, étant donné que leurs organisations qui n'existent que de nom ne sont en réalité que les agences du gouvernement ayant des pouvoirs illimités et soumises à son contrôle direct. Evidemment le gouvernement met les aspects de la nation majoritaire (dominante) au premier plan, bien plus, souvent il fait appel à son nationalisme pour s'assurer de cette façon la loyauté manquante ou d'une valeur douteuse de la population.

Le système monolitique du modèle stalinien réalisé dans les pays de l'Europe de l'est et de l'Europe du Centre-Est ne pouvait pas offrir une protection appropriée aux minorités. C'est pourquoi ce système ne pouvait pas résoudre la question nation-nationalité, comme sa propagande l'a proclamé contrairement aux faits évidents. Par l'ironie du sort, justement ce Staline a été qualifié dans ces pays comme le principal théoricien de la question des nationalités, dont la pratique politique - par exemple la déportation des Allemands de la Volga et des Tartares de la Crimée - s'est manifestée dans l'oppression impitoyable des minorités et qui a donné son appui à des mesures pareilles prises ailleurs.[15] C'est pour cette raison que les différentes formes de la question nation-nationalité émergent toujours de nouveau dans les pays socialistes - de temps à autre dans une forme très aiguë. Un modèle socialiste pluraliste aurait évidemment offert plus de chances et de meilleures possibilités pour la réglementation de cette question.

Puisque les frontières politiques n'avaient pas été tracées conformément aux frontières ethniques et ces frontières pour quelque cause que ce

soit ne peuvent pas être adaptée à ces dernièrs -, le règlement de la question peut consister dans la prise de mesures qui contrebalancent l'effet des éléments provoquant la situation défavorable des minorités. J'ai exposé les désavantages pour que les exigences et les tâches relatives à la protection des minorités puissent se profiler sur cette base. On les peut résumer brièvement dans ce que l'Etat, dans lequel les minorités vivent, doit garantir aux membres des minorités l'enseignement aux niveaux appropriés dans la langue maternelle, la possibilité d'acquérir des connaissances professionnelles et d'exercer une activité culturelle, l'emploi de la langue des minorités dans les relations avec les services publics, autorités administratives et judiciaires, et en général, dans la vie politique, ainsi que la possibilité de bénéficier proportionnellement des biens matériels du territoire de l'Etat et des revenus du pays.[16] Les modalités dépendent évidemment de l'effectif de la minorité donnée, de sa localisation géographique, de son développement social, et pour cette raison il est difficile de réglementer ces modalités d'une façon générale. Pourtant il est certain que

i) l'interdiction de la discrimination n'est pas suffisante en elle-même pour contrabalancer la situation défavorable des minorités. Donc la protection ne peut pas se limiter à la déclaration de l'interdiction de la discrimination et à sa mise en oeuvre, mais il est nécessaire que l'Etat territorial prenne une série de mesures en faveur des minorités;

ii) ces droits reviennent aux membres des minorités non seulement à titre individuel, mais il faut reconnaître ces droits et réglementer leur exercice en tant que droits de la communauté constituée par eux;

iii) la protection interne (étatique) des minorités, dont les règles peuvent être modifiées ou supprimées unilatéralement, n'est pas suffisante, il faut que cette protection soit accompagnée d'une protection juridique internationale, il faut compléter ces règles par des garanties juridiques internationales.

2. Est-ce que la situation et la protection des minorités est une affaire "interne" ou une question internationale?

La mission du droit international est la réglementation des relations interétatiques, ce qui suppose la protection des acteurs de ces relations - la protection des Etats. En effet, les relations interétatiques ne peuvent être réglementées que si elles sont relativement stables, ce qui dépend de la stabilité des Etats. On peut assurer cette stabilité par l'efficacité de la réglementation des relations internes de l'Etat. L'Etat

peut s'acquitter de sa mission, établir un ordre juridique efficace s'il est le forum suprême de la réglementation des relations sociales dans l'enceinte de ses frontières. La conséquence nécessaire en est une division de travail entre le droit international et le droit interne exécutée d'une façon plus ou moins conséquente et qui se manifeste dans la délimitation des attributions et des compétences.

Comment et sur quelle base peut-on trancher la question de savoir du quel droit relève l'une ou l'autre question? Théoriquement la réponse semble être simple: ce qui est à l'intérieur de l'Etat rentre dans le domaine du droit interne de l'Etat, ce qui découle des relations entre les Etats relève du droit international. Cependant en pratique la démarcation de la ligne des frontières entre les affaires internes et les questions ayant un caractère international constitue un problème difficile à résoudre, provocant de vives contradictions, de conflits internationaux. Cette question ne peut pas être tranchée une fois pour toute, parce que la délimination dépend essentiellement du développement des relations internationales.

L'histoire porte témoignage de ce que la question du libre exercice de la religion a figuré déjà plusieurs fois dans les conventions internationales, c'est-à-dire a fait l'objet de réglementation internationale. Au cours de la querelle des Investitures - qui a été un des grands moments du développement européen - Grégoire VII cherchant à acquérir la suprématie, avait organisé son camps à l'échelon international. Il avait considéré les petits souverains face à l'empereur comme les vasalles de Saint Pierre, c'est-à-dire de l'Eglise, ce qui n'avait pas seulement signifié qu'ils ne dépendaient pas de l'empereur mais aussi que l'affaire de l'Eglise, l'affaire de la religion était une affaire internationale! Cet "internationalisme" a survécu aux querelles des Investitures, au schisme, à la Réforme. La supranationalité de l'Eglise catholique a été reprise par la solidarité protestante. Les souverains protestants ont embrassé la cause des sujets protestants persécutés dans l'autre pays de même que les souverains catholiques ont tenté de faire valoir leur influence s'il s'agissait de l'oppression des sujets catholiques des souverains protestants. Les traités de paix conclus par les princes de Transylvanie et les empereurs Habsbourg comme le Traité de Vienne de 1606 ou le Traité de Linz de 1645 contiennent plusieurs dispositions relatives à l'exercice de la religion, mais le Traité de Westphalie de 1648 parle également de la religion.[17] On trouve des exemples datant d'une époque postérieure ce qui prouve que la religion ne peut pas être classée parmi les affaires rentrant dans la juridiction

interne exclusive des Etats, puisqu'elle est source de conflits internationaux. Pour prévenir et résoudre les conflits, le droit international était amené à s'occuper de cette question, notamment en accordant une protection aux membres de certains groupes confessionnels obligeant les Etats de s'abstenir de la discrimination.

C'est pas seulement à la veille de la guerre balkanique que la question des minorités était un problème international, (problème de politique extérieure), mais dès le début, et comme tel, il touche sans doute au droit international. Un point qui réapparaît dans les traités de paix conclus après les guerres entre la Russie et la Turquie était l'action en faveur des sujets chrétiens de l'Empire turc,[18] - d'ailleurs la Russie tzariste a essayé de s'approprier ce droit, ce qui équivalait pour l'essential à la réglementation des problèmes nationales et des problèmes de minorités déguisés en question de religion, étant donné que sous prétexte de la protection des chrétiens de l'Empire turc il s'agissait au fond de la protection des Serbes, des Bulgares et des Grecs qui étaient en minorité par rapport à l'ensemble de la population de l'Empire.

Il est bien connu qu'après la première guerre mondiale un système de protection des minorités a été créé sous l'auspice de la Société des Nations. La raison en était que dans les traités de paix conclus à et près de Paris on s'était référé de nombreuses fois au principe de l'autodétermination, mais ce principe n'avait pas été appliqué d'une manière conséquente. En ce qui concerne les aspects effectivement suivis, deux objectifs difficilement conciliables avaient été présent dans l'esprit des vainqueurs, notamment la suppression de la prédominance continentale de l'Allemagne et l'éviction de la Russie soviétique de l'Europe. Au cas où le principe de l'autodétermination avait servi ces deux objectifs, on l'a appliqué, au cas contraire on l'a mis à l'écart, c'est-à-dire on l'a subordonné à d'autres aspects.[19] Les anciennes minorités nationales ont disparu, mais de nouvelles se sont créées, ayant un nombre un peu plus faible. On n'a pas réussi à supprimer les problèmes des minorités, seulement les points cruciaux se sont transposés dans d'autres pays.

On justifiait la modification des frontières par la nécessité de libérer les minorités opprimées de la domination des oppresseurs. Mais qu'adviendra-t-il de ceux qui à cause des nouvelles frontières tombent dans l'état des minorités? Qu'est-ce qu'il arriverait s'ils seront opprimés, eux aussi?[20] Supposer une telle attitude de la part des alliés de guerre n'était pas de mise, pourtant pour calmer les esprits et à cause de

certains incidents avertisseurs, les "grands" ont décidé d'établir un système de protection de minorités.

Ce système était basé sur les conventions portant sur la protection des minorités conclues entre les Puissances alliées et associées et les Etats successeurs et sur les traités de paix conclues avec les Etats vaincus, ainsi que sur la déclaration solennelle des représentants des nouveaux Etats faite devant la Société des Nations. Ces documents-ci contiennent au fond des dispositions identiques, concordantes.[21] Les Etats mentionnés se sont obligés à reconnaître les règles de la protection des minorités en tant que loi fondamentale avec laquelle aucun décret, aucune mesure officielle ne peut être en opposition. Laissons les détails de ces dispositions - c'est le sujet d'une autre étude du volume 'Etudes sur la protection juridique des minorités nationales"[22] - et l'évaluation du fonctionnement du système de la protection des minorités ne rentre pas non plus dans le domaine de notre tâche. Ici nous nous bornons seulement à signaler que les dispositions prescrivant des obligations internationales en faveur des minorités ont été mises sous la protection de la Société des Nations, sans son consentement leur modification n'était pas possible et leur respect était contrôlé par le Conseil.[23] Chacun des membres du Conseil de la Société des Nations avait le droit d'attirer l'attention du Conseil à la violation de ces obligations ou à un danger de violation de ces obligations, et le Conseil avait le droit d'agir et de donner des ordres appropriés et efficaces dans la situation donnée. En cas de litige le Conseil a soumis le litige à la Cour permanente de Justice internationale dont l'arrêt a été définitif. Si l'une des parties n'a pas exécuté l'arrêt, le Conseil a dû faire valoir la sentence.

Est-ce que le droit international a dépassé de cette façon ses attributions qui consistent dans la réglementation des relations interétatiques? Est-ce qu'il s'est ingéré dans les affaires internes des Etats? Nous pouvons répondre à ces questions avec un "non" catégorique. Le droit international de l'époque entre les deux guerres mondiales s'est fondé sur le principe de non-intervention, il a considéré la souverainité de l'Etat en tant que valeur fondamentale qui mérite une protection absolue, cependant tout cela - comme nous l'avons vu - n'a pas exclu qu'il réglemente certaines questions fondamentales relatives aux relations entre l'Etat et certains groupes de ces citoyens, groupes qui peuvent être délimités sur la base de la nationalité. Donc la création de règles juridiques internationales pour la protection des minorités, leur respect, le contrôle de

leur respect n'étaient pas une ingérence illégitime dans les affaires internes d'autres Etats, mais une activité légitime ayant un objectif plus haut, la prévention et la suppression des litiges internationaux.[24]

L'oppression des minorités constitue une source de stimulation à agir pour les Etats dont la population appartient à l'ethnie oppressée dans d'autres pays. L'oppression des minorités est donc une source de différends et de litiges internationaux, dont la solution est sans doute un problème international, dans lequel le droit réglementant les relations internationales doit assumer un rôle, notamment qu'en fixant des interdictions appropriées il empêche l'oppression des différentes minorités, garantit leur survie et ce faisant prévient le développement et l'envenimement des conflits internationaux. L'inquiétude gagne les minorités non seulement si leurs membres ressentent à tout instant la discrimination pratiquée à leur égard, mais aussi si on met en doute leur raison d'être, si on réclame leur assimilation et clame l'inévitabilité de leur proche absorption. Le moribond sera peut-être rassuré en sachant que sa disparition surviendra sans douleur, mais le vivant ne veut mourir ni de cette manière ni d'une autre et n'aime pas si on fait des préparatifs de son enterrement. La loyauté de la minorité nationale a des conditions - si vous voulez - "un prix", notamment que la minorité puisse se croire en sécurité en ce qui concerne l'avenir, qu'elle ne vive pas dans une situation plus mauvaise que si elle serait restée dans son Etat d'origine, que la frontière ne rompe pas les relations humanitaires et culturelles qui la lient à ceux qui parlent sa propre langue et qui sont par hasard citoyens d'un autre Etat. En effet, c'est pas peu, mais tout se paie. La coordination des intérêts, le compromis ne veut pas dire que nous subordonnons sans condition l'un à l'autre. Si la source du pouvoir est le peuple, il faut tenir compte non seulement de ce que ce peuple dispose d'une majorité numérique, mais également de l'opinion de ses différents groupes, il faut satisfaire leur exigences légitimes, et la survie appartient parmi celles-ci. Si la minorité n'est pas opprimées, si la minorité croit avoir un avenir assuré, il n'y aura pas de mouvements séparatistes, les tendances irrédentistes resteront faibles et les conflits internationaux ne surgiront point. C'est ainsi que le droit international peut remplir sa fonction relative à la stabilisation et au développement des relations interétatiques. La deuxième guerre mondiale a balayé le système de la protection de la Société des Nations avec ses vertus et ses fautes, cependant le problème lui-même subsiste et des conceptions qui diffèrent des anciennes se manifestent seulement par rapport à

la solution, à la remède de ce problème. L'encouragement du respect des droits de l'homme a été proclamé comme un des objectifs principaux des Nations Unies et on a supposé que la protection générale des droits de l'homme et des libertés fondamentales résoudra également les problèmes des minorités nationales, car elle représente une protection plus générale et plus vaste que celle offerte par le système de protection des minorités de la Société des Nations. En effet, les droits de l'homme doivent être garantis sans distinction de race, de sexe, de langue et de religion protégeant contre toute discrimination également les individus appartenant aux minorité nationales. La protection des droits de l'homme n'était pas inscrite dans la Charte avec un caractère partiel (régional), mais comme ayant un caractère universel, et pas à titre accessoire, mais, comme nous l'avons déjà mentionné, comme un des objectifs fondamentaux des Nations Unies. Il est cependant vrai que pour les garantir, on n'a pas établi un mécanisme pour la protection des minorités semblable a celui incarné à l'époque par le Conseil de la Société des Nations.

L'ONU est fondée sur l'égalité souveraine de tous ces membres, c'est-à-dire sur la souverainité et l'égalité des Etats membres. La Charte des Nations Unies interdit l'intervention dans les affaires qui relèvent de la compétence exclusive des Etats, mais par l'encouragement du respect des droits de l'homme et des libertés fondamentales elle formule en même temps des principes et des règles relatifs aux relations entre les Etats et les individus constituant la population de l'Etat. Le nouveau droit international se propose donc une mission plus vaste que la réalisation d'un système de protection des minorités de l'époque de la Société des Nations, étant donné qu'il ne vise pas seulement des groupes séparés ou séparables selon leurs langue et religion mais l'ensemble de la population de l'Etat.

On peut caractériser l'histoire de plus de quatre décennies des Nations Unies en tant que lutte continuelle pour la réalisation des objectifs esquissés ci-dessus et des compromis raisonnables et appropriés entre ceux-ci. Le droit international sépare mais lie également. Trouver la juste proportion entre la réglementation du droit interne et du droit international et assurer leur relation réciproque c'est pour l'essentiel la coordination de la stabilité voulue avec l'inévitabilité du changement,[25] c'est-à-dire la stabilité relative dans un monde continuellement changeant.

La Déclaration universelle des Droits de l'Homme a été adoptée le 10 décember 1948, mail il fallait 18 ans pour élaborer les Pactes internationaux relatifs aux Droits de l'Homme et encore 10 ans pour qu'ils entrent

en vigueur. Conformément à l'article 27 du Pacte international relatif aux droits civils et politiques "dans les Etats où il existe des minorités ethniques, religieuses ou linguistiques, les personnes appartenant à ces minorités ne peuvent être privées du droit d'avoir, en commun avec les autres membres de leur groupe, leur propre vie culturelle, de professer et de pratiquer leur propre religion, ou d'employer leur propre langue." Depuis 1976, le respect des droits de l'homme signifie que les Etats doivent respecter une série d'obligations de droit international, controlées en matière de droits civils et politiques par un certain mécanisme international. En effet, les Etats membres sont tenus de présenter au Secrétaire général des rapports sur les mesures qu'ils auront arrêtées et qui donnent effet aux droits reconnus par le Pacte et sur les progrès réalisés dans la jouissance de ces droits.[26] Ces rapports sont examinés par le Comité des droits de l'homme, corps composé de 18 personnalités possédant une compétence reconnue dans le domaine des droits de l'homme; ce Comité adresse ses propres rapports, ainsi que ses observations et au Conseil économique et social et aux Etats parties. Ce mécanisme fonctionne effectivement et ses effets ne doivent pas être sousestimés.

Evidemment, il est vrai qu'à titre principal ce sont les Etats eux-mêmes et leurs gouvernements qui assument la responsabilité de la protection des minorités et du respect de leurs droits. L'obligation d'assurer ces droits incombe aux Etats, mais cela ne signifie pas que c'est une "affaire interne exclusive". Les Etats ont des obligations internationales à l'égard de leurs minorités, obligations dont ils sont tenus de s'acquitter de bonne foi. Le respect ou le non-respect des obligations internationales est une question dont également d'autres Etats, les Nations Unies, la communauté des Etats sont intéressés, c'est donc une affaire publique internationale.

Aujourd'hui où des conventions internationales portent sur la protection des espèces végétales et animales en danger,[27] dont la disparition appauvrirait notre monde, la survie et le développement des différentes nations et cultures, des différents peuples, le maintien de la variété de langues de l'humanité, de sa richesse culturelle sont des valeurs qui doivent bénéficier d'une protection accrue. Les différents peuples ont droit non seulement à disposer de leurs ressources naturelles, mais en premier lieu et avant tout ils ont droit à la survie. Les règles en vigueur du droit international doivent être interprétées, appliquées et développées à la lumière de ce principe.

Par la suite nous en examinerons les différentes possibilités.

La règlementation de la protection des minorités par le droit international peut avoir un caractère

a) universel,

b) régional,

c) bilatéral (c'est-à-dire être englobée dans un accord bilatéral).

On peut apporter des arguments à l'appui de chacune de ces catégories. Chacune a des avantages, mais également certains inconvénients non négligeables. Examinons les arguments qui peuvent être invoqués pour et contre chacune:

a) La réputation, le poids politique et moral des règles qui peuvent être considérées comme universelles (quasi-universelles) sont plus grands que ceux des règles dont la vigueur ne s'étend qu'à une sphère plus restreinte. Les règles formulées sous l'auspice des Nations Unies et recommandées par l'Organisation ne sont contestées ouvertement même pas par les Etats qui pour telle ou telle raison ne sont pas d'accord avec le contenu et la manière de la réglementation donnée. Mais ces avantages qui théoriquement ne sont pas contestables, s'accompagnent d'inconvénients en pratique difficilement surmontables.

En esquissant le problème des minorités, nous avons vu que ce problème se manifeste sous différentes formes et est perçu par les Etats de manières différentes. Beaucoup d'Etats pensent que la protection des minorités par le droit international est superflue, étant donné que la population vivant sur leur territoire n'a atteint que le niveau minimal de l'intégration, autrement dit: de l'assimilation des minorités, et pour cette raison ils cherchent à intensifier, à accélérer la cadence de l'intégration. Il y a qui, comme par exemple les Anglais et les Français ont accédé à leur situation actuelle favorable par des processus de l'assimilation rapide et efficace, qui ont gagné beaucoup et n'ont rien perdu et ne comprennent pas pourquoi il faudrait susciter des obstacles artificiels à un processus naturel. Actuellement la majorité des membres de la communauté internationale des Etats ne se range pas à l'idée d'une protection sérieuse et efficace des minorités. Une initiative portant sur la conclusion d'une convention internationale sur la protection des minorités trouvera difficilement un accueil favorable dans les Nations Unies, mais provoquera d'autant plus d'opposition, de doute et de critique pointilleuse. Le succès d'une proposition d'un semblable contenu semble être aujourd'hui fortement douteux.

Il y a encore d'autres contre-arguments. Sur le plan universel la législation internationale est extrêmement lente et difficile, même si la volonté politique existe.[28] Cependant un plus grand désavantage consiste dans le fait que le résultat de la législation ne peut être que le plus grand dénominateur commun de la volonté des législateurs qui est nécessairement très petit à cause du grand nombre et du caractère hétérogène des participants. Cela signifie que même si elle arriverait jusqu'à l'entrée en vigueur, la réglementation d'un caractère universel ne comporterait que peu d'obligations concrètes (et par conséquent n'offrirait qu'une protection très faible). Donc pratiquement seulement une telle déclaration a des chances d'être adoptée qui ne comporte pas d'obligations juridiques, mais qui indique les intentions, les objectifs et ne dépasse guère les généralités énonçant l'interdiction de la discrimination préjudiciable, contenues déjà dans plusieurs conventions et déclarations. Le sort du projet de déclaration yougoslave portant sur les droits des minorités illustre ce qui vient d'être dit.

En 1947 on a établi en tant que sous-commission de la Commission des Droits de l'Homme des Nations Unies, un corps composé initialement de 12 membres, puis élargie à 26 membres, chargé des tâches relatives à la prévention de la discrimination et à la protection des minorités. Cette sous-commission - comme on pouvait constater[29] -, a somnolé pendant deux décennies pour s'activiser successivement en fonction de l'augmentation du poids ce cette question. C'est dans cette sous-commission que le délégué yougoslave a présenté en 1978 son projet de déclaration portant sur les droits des minorités, déclaration qui serait qu fond l'introduction, la préparation d'une convention ultérieure y afférante, comme cela s'est passé dans le cas des droits de l'homme. Que disait le texte de ce projet?

Selon l'article premier "Les minorités nationales, éthniques, linguistiques ou religieuses ont droit à l'existence, au respect et au développement de leurs propres particularités nationales, culturelles, linguistiques et autres et à l'égalité pleine et entière avec le reste de la population..."

L'article second préscrit que les membres des minorités doivent jouir de tous les droits de l'homme et de tous les libertés fondamentales sans aucune discrimination et déclare toute propagande ou activité tendant à discriminer les minorités ou à mettre en danger leur développement contraires aux principes fondamentaux de la Charte des Nations Unies et à la Déclaration Universelle des Droits de l'Homme.

Les articles 3-5 mettent en relief la nécessité de prendre des mesures qui leur permettent d'exprimer librement leurs particularités et de développer leur culture etc. etc. soulignant le respect rigoureux de la souveraineté, l'intégrité territoriale et l'indépendance politique du pays où vivent les minorités et la non-ingérence dans les affaires intérieures de ces pays. Les Etats membres doivent s'acquitter de bonne foi les obligations internationales qu'ils ont assumées aux termes de la Charte et d'autres traités ou accords internationaux. La coopération entre les Etats facilitera l'établissement des conditions favorables pour la promotion des droits des minorités. ... etc.

Nous apprécions entièrement les intentions des initiateurs, nous reconnaissons que les rédacteurs du projet ont cherché de bonne foi et inconditionnellement à améliorer la situation des minorités, mais en lisant les articles ci-dessus il faut constater qu'ils comportent très peu de dispositions favorisant réellement les intérêts et la protection juridiques des minorités. Il est vrai, cela résulte dans une certaine mesure du caractère du "genre" de la déclaration, de ce qu'on a formulé avec la plus grande flexibilité possible ses dispositions, dans l'espoir d'un vaste appui et d'une acceptation générale. Elle dépasse l'article 27 du Pacte international relatif aux droits civils et politiques seulement dans ceci qu'elle parle des minorités en tant que collectivités, et des droits des minorités en tant que telles.

Quel accueil a trouvé la proposition?

Le moins qu'on puisse dire c'est qu'elle n'a pas soulevé une enthousiasme unanime bien qu'il soit vrai qu'elle n'a pas subi un refus catégorique. Les délégués qui ne voulaient même pas adopter une déclaration qui ne comporte pas d'obligations concrètes, se sont engagés dans des discussions interminables sur des questions conceptionnelles, sur des problèmes de définition. En 1984, le délégué sénégalais a proposé dans la commission compétente la suspension des travaux jusqu'à l'élaboration d'une définition d'une validité générale de la notion de minorité nationale. Bien qu'on ait continué les travaux, jusqu'à l'heure actuelle aucun progrès important n'avait pas été atteint.[30]

Au lieu d'assumer la tâche ingrate de résumer la discussion de la sous-commission sur le projet, nous désirons exposer les remarques critiques du professeur Francesco Capotorti, expert reconnu de la protection des minorités par le droit international.[31] Capotorti a approuvé l'idée de la déclaration, mais a qualifié sa formulation "non satisfaisante" sous

plusieurs rapports. Selon lui la protection des minorités doit rester dans le cadre de l'article 27 du Pacte international relatif aux droits civils et politiques qui - rappelons-le - porte sur les individus appartenant aux minorités, c'est-à-dire reflète une conception individualiste; le projet yougoslave semble en départir. Capotorti a imputé ce fait sans équivoque à faute, il a réprouvé le fait qu'outre la minorité ethnique le projet portait également sur la minorité "nationale", ce qui - dit-il - est une répétition superflue. Il a reproché l'absence de l'insistance sur l'obligation de loyauté de ceux qui appartiennent à la minorité[32] et a imputé à faute que le projet ne se référait pas à l'article 27 déjà mentionné du Pacte international.

Je ne partage pas l'opinion de Capotorti. C'est comme si les détails empêcheraient de voir l'essentiel. La minorité n'est pas simplement l'ensemble de ses membres, qui est protégée, si ses membres ne sont pas frappés de discrimination préjudiciable, mais c'est un système de relations vivantes[33] qui pourra se détruire, si on fait obstacle à ces relations ou si on les supprime même sans préjudice directe des droits personnels des individus. C'est une discrimination faite à l'égard d'un individu appartenant à la minorité nationale si, à cause de sa langue maternelle, il n'est pas admis à l'école secondaire ou à l'école supérieure (au cas où il remplit d'aillerus les conditions nécessaires), ou, ensemble avec ceux qui appartiennent à la majorité et à la langue de la majorité il pourra faire la connaissance de l'histoire et de la culture de la majorité avec un tel succès que tôt ou tard il oublie sa propre langue. L'existence de la minorité nationale est garantie si ses enfants se familiarisent avec leur propre histoire et leur propre culture dans le cadre de l'enseignement scolaire assuré dans leur propre langue maternelle. Des individus ne peuvent pas exiger qu'on organise pour eux l'enseignement dans leur langue maternelle, mais un groupe ethnique important peut réclamer un réseau d'écoles primaires, secondaires et supérieures conformes à leur proportion numérique. Non seulement des individus, mais également de groupes peuvent avoir des droits, exercés par les représentants des organisations agissant au nom du groupe, mais le préalable nécessaire en est la reconnaissance du groupe, en tant que tel, comme sujet de droits et d'obligations. Le sort du projet de déclaration yougoslave et les objections formées contre lui illustrent les grands obstacles rencontrés sur le plan universel par la protection efficace des minorités.

b) C'est le système de la protection des minorités de la Société des

Nations qui fournit les plus amples indications relatives à la question de savoir qu'est ce qu'on peut réaliser dans le domaine de la protection des minorités dans des cadres régionaux, étant donné qu'en effet, ce système a eu un caractère régional, et a englobé territorialement les pays de l'Europe centrale et de l'Est.

La détermination des obligations des participants a été au fond juste, bien qu'il y aient été quelques expressions dont le contenu était incertain, en raison de la nature de la réglementation régionale. (Là où il existe des minorités "dans un nombre important...)[34] Cependant cette imperfection n'était pas décisive, la faiblesse était contrebalancée par le mécanisme s'y rattachant et garantissant la mise en oeuvre des dipositions. Mais cela s'est incarné dans le Conseil d'une organisation universelle, dans le Conseil de la Société des Nations, ce qui s'est avéré être une contradiction en soi, niant le régionalisme de la réglementation régionale. Certes, il y avait des personnes qui pensaient qu'il y avait avantage à charger des personnes impartiales de la mise en oeuvre des dispositions de ce système - ce qui est un point de vue certainement justifiable, cependant en réalité la solution appliquée a signifié que c'était des gouvernements, des représentants des gouvernements qui n'avaient pas connu les problèmes internes du système et n'avaient pas été à même de le comprendre qui avaint tranché les questions surgies au cours de l'application des règles pour la protection des minorités.

Cette circonstance était la spécificité atypique (c'est-à-dire ne découlant pas nécessairement de la réglementation régionale) de la protection des minorités de la Société des Nations, mais nous pouvons constater à juste titre que la coïncidence des circonstances particulières est nécessaire pour établir une réglementation régionale qui s'étend à un groupe d'Etat. Une réorganisation politique de grande envergure s'est opérée en Europe centrale et de l'Est après la 1ère guerre mondiale. Presque toutes les frontières ont subi de modifications - des minorités sont devenues de majorités, des majorités de minorités, et les "Grandes puissances associées et alliées" provoquant ces changements ont créé ce système de protection des minorités - en ayant plus ou moins recours à la force, en l'imposant du dehors aux Etats concernés - pour compléter les changements territoriaux, dans une certaine mesure pour les légitimer. Dans le cas des vaincus, les dispositions y connexes ont été des conditions modérées comparées avec les pertes territoriales, tandis que pour ceux appartenant au camp des vainqueurs, elles ont représenté une contrepartie pas très lourde comparée avec

les territoires récemment acquis. Sans une pression extérieure, une dictature venant "d'en haut", les nouveaux et les anciens Etats de la région n'auraient pas pu tomber d'accord sur aucune protection des minorités. Par conséquant: la réglementation régionale ne peut arriver à proximité des réalités que si la nécessité de donner effet à un intérêt impératif dépasse les intérêts individuels de l'Etat donné.

La condition préalable de l'établissement d'une réglementation régionale - la Charte européenne des langues régionales ou des minorités élaborée sous l'auspice du Conseil de l'Europe, dont je parlerai par la suite, revêt l'aspect d'une réglementation "régionale" ou "ouest-européenne" - consiste dans le fait que les questions relatives aux minorités ne soient pas aiguës, ne se trouvent pas dans une situation explosive chez la majorité des parties, mais ne tombent non plus dans l'oublie en tant que problèmes périfériques. On peut même imaginer que les problèmes des minorités deviennent aigus hors de la région donnée, hors du cercle des Etats qui concluent la convention internationale et l'un des objectifs de l'accord régional c'est justement de prouver la supériorité de leur système de relations à l'égard du groupe d'Etats qui ne peuvent pas résoudre les questions de leurs minorités nationales.

Examinant les possibilités de la protection régionale des minorités nationales, on doit en arriver à la conclusion que sa réglementation nécessite un équilibre relatif des intérêts s'y attachant ainsi qu'une occasion extraordinaire qui ne se présente que peut-être une fois chaque siècle. Caresser l'espoir qu'elle surviendra et se basera sur cela n'est une bonne méthode que si on a plus d'une corde à son arc.

c) En ce qui concerne les accords bilatéraux, il ressort de ce qui a été dit qu'au moins téoriquement ce sont ces accords qui sont capables d'établir une réglementation comportant le plus grand nombre d'obligations concrètes et prenant le mieux en considération les spécificités de la situation des minorités. Cependant même dans ce cas, une telle réglementation exige des conditions politiques et autres, notamment, celle que les intérêts des parties contractantes (des deux Etats) s'attachant à la réglementation soient en équilibre. Par exemple, il est évident que s'il existe sur le territoire de tous les deux Etats des minorités qui forment la majorité dans l'autre Etat et occupent une position dominante, et le nombre des membres des minorités est à peu près égal, l'accord peut s'établir sur la base des intérêts mutuels. Cependant si sur le territoire de l'Etat A vit une minorité de 20 milles membres de la nation qui consti-

tue la majorité de l'Etat B, une minorité de 2 millions de la nation constituant l'Etat A, l'Etat B est beaucoup moins intéressé dans la réglementation que l'Etat A, donc, la probabilité d'un accord bilatéral est faible et les succès des efforts y relatifs sont problématiques.[35]

Mais la politique extérieure n'est pas simplement un calcul mathématique, et l'intérêt mutuel, l'équilibre des intérêts ne peut pas être limités à l'équilibre numérique des minorités. Nous connaissons certains accords bilatéraux qui ont fait leur preuve concernant la protection efficace des minorités, comme par exemple l'accord suédo-finnois concernant l'archipel d'Aland ou la concention italo-autrichienne relative au Tyrol du Sud bien que dans l'un et l'autre des cas, l'équilibre numérique des minorités aie des défauts, l'équilibre qu'on pourrait qualifier comme l'une des préalables d'une réglementation efficace.[36] Pratiquement, sur le territoire de la Suède il n'y a pas de minorité finnoise, tandis qu'en Irlande il existe une minorité suédoise importante bien que seulement une partie de celle-ci vive sur le territoire de l'archipel d'Aland. En Autriche le nombre des Italiens est insignifiant et si dans l'ensemble de l'Italie le nombre de la population de langue allemande est minime, en Tyrol du Sud (alias Alto Adige) leur taux est déjà notable. Il ne demeure pas moins que la Finlande s'acquitte - comme il semble - strictement et de bonne foi de ses engagements à l'égard de la population de l'Archipel d'Aland. La population de l'archipel a gardé sa langue maternelle, la région son caractère suédois, le niveau de vie a augmenté depuis qu'il fait partie de la Finlande et ne reste guère en arrière du niveau de vie notoirement haut de la Suède, et les mesures économique efficaces du gouvernement finnois y ont sans aucun doute contribué. Pour autant que j'ai pu l'apprécier au cours de mon bref séjour, rien ne trouble les relations de la population de l'archipel d'Aland avec les Suédois. La force probante de l'exemple est à la rigueur affaiblie par le fait qu'il s'agit d'un petit groupe ethnique d'environ 20 milles d'habitants, qui comparé aux minorités nationales de l'Europe centrale est vraiment infime.

La minorité allemande du Tyrol du Sud est plus nombreuse, le nombre de ses membres dépasse les 200 milles, mais demeure en arrière et de loin du nombre des Hongrois de Transylvanie, des Albanais, de Yougoslavie ou des Turcs de Bulgarie. La réglementation n'avait pas été si efficace que celui concernant l'archipel d'Aland - les séquelles de l'accord Gruber-de Gasperi avaient été des explosions de bombes, des attentats commis avec des engins explosifs - mais il semble que par suite de longs efforts, la question

avait fini par se calmer. Peut-être le moment où non seulement l'Italie, mais également l'Autriche seront membres des Communautés européennes, apportera la solution définitive.[37]

Qu'est-ce qui a rendu possible la conclusion des deux accords et leur application efficace ou au moins satisfaisante bien que l'équilibre numérique n'aie pas existé?

Au début des années 20 pour la Finlande, en tant qu'Etat nouveau il était important que l'établissement de ses relations internationales ne soit pas terni par une question internationale non réglée. Dans la période d'entre-deux-guerres, et après la deuxième guerre mondiale elle avait besoin de l'appui bienvaillant de la Suède (et des autres pays scandinaves). Evidemment, la réalisation d'une vaste démocratie finnoise, ainsi que le développement économique rapide de l'Etat nouvel avaient favorisé ces objectifs. Les aspirations séparatistes de la population de l'archipel d'Aland ont cessé et il semble que l'autonomie vaste qui s'est réalisée à l'intérieur de la Finlande répond entièrement aux intérêts et aux souhaits de la population.

L'Italie a terminé la deuxième guerre mondiale en tant que vaincu et pour cette raison elle ne pouvait pas refuser la conclusion d'un accord portant sur la protection des minorités, comme elle l'avait fait après la I^{ère} guerre mondiale. Elle ne pouvait pas se permettre d'avoir - outre la question des Slovènes vivant autour de Trieste - un problème envenimé relatif aux Allemands de Tyrol du Sud. L'Autriche n'était pas un Etat vainqueur comme la Yougoslavie, c'est pourquoi elle ne pouvait pas faire honorer ses exigences territoriales - mais elle n'était pas non plus un Etat vaincu qu'on aurait pu simplement refuser en matière de la protection des minorités. La condition préalable de la conclusion d'un compromis était donc une aituation extraordinaire, extraordinaire dans la mesure où aucun des Etats intéressés n'était dans une position favorable, dominante et où l'occasion extraordinaire s'est traduite par la terminaison et la liquidation juridique de la guerre mondiale.

Tout cela manquait et manque aujourd'hui encore sur le plan hungaro-roumain et n'existe guère sur le plan serbo-albanais, bulgaro-turc, pour ne mentionner que les problèmes actuels les plus graves relatifs aux minorités. (Dans ce contexte, nous laissons intentionnellement à part les questions des minorités vivant en URSS.) En Ouest, en matière de la question de l'Irland du Nord, de la question basque, un groupe relativement petit, mais d'autant plus actif a accaparé l'initiative et par ses méthodes terroristes

il a réussi à envenimer la situation d'une telle manière que même les contours d'une solution rassurante ne peuvent pas se profiler. Faute de données dignes de confiance nous ne sommes pas en mesure de trancher la question de savoir quel rôle est revenu dans ceci aux Etats tiers, ni celle quelle forme revêtiront l'occasion extraordinaire et la situation exceptionnelle posées comme condition à la réglementation, si jamais elles se présentent dans un proche avenir. La probabilité que cette situation se présente est en tout cas plus grande que celle de l'apparition de la situation indiquée en tant que condition d'une réglementation régionale.

4. Le résumé de notre enquête donne un image assez morne et décevant. Sur le plan universel on ne pourra guère atteindre plus qu'une déclaration prétentieuse mais qui ne comporte que peu d'obligations concrètes. Les possibilités d'une réglementation régionale sont plus larges, mais l'occasion nécessaire à sa conclusion - qui s'est produit après la I^{ère} guerre mondiale en Europe centrale et de l'Est, lorsque les vaincus n'étaient pas en mesure de se faire entendre et les petits vainqueurs n'étaient non plus dans une position dominante - se produit rarement. Les accords bilatéraux ne peuvent être efficaces que dans l'hypothèse de l'équilibre des intérêts s'attachant à la réglementation, équilibre qui cependant ne peut être interprêté comme équilibre qui se limite à la proportion numérique des minorités.

Pourtant les difficultés qui existent sans doute ne justifient pas l'immobilisme dans ce domaine. Ce n'est pas toujours le chemin droit, le chemin le plus court qui est le plus efficace. Evidemment il faut essayer toutes les possibilités - même si elles ne promettent pas un succès rapide - et pour cette raison la recherche d'autres voies, d'autres moyens s'impose.

En ce qui concerne les autres voies, sous l'auspice du Conseil de l'Europe on a mis sur pied la Charte européenne des langues régionales ou minoritaires qui protège les minorités non pas comme telles, c'est-à-dire comme des groupes ayant leur propre profil et leur propre poids politiques, mais les langues régionales (minoritaires) faisant partie de l'héritage culturel européen. Dans le cadre de cette protection elle impose aux Etats futurs signataires de la Charte des obligations concrètes concernant l'enseignement primaire, secondaire, technique et supérieur assuré dans les langues protégées ou au moins l'enseignement de ces langues dans ces établissements scolaires, ainsi que l'obligation concernant d'autres domaines importants de la vie publique et privée. Elle prescrit l'obliga-

tion de publier les lois et les décrets dans ces langues, d'assurer le droit de l'utilisation de ces langues dans les relations avec les autorités, d'assurer le recrutement des fonctionnaires ayant une connaissances appropriée de la langue en question, de garantir l'utilisation libre de la langue devant les tribunaux. La Charte stipule qu'il faut assurer l'utilisation des noms et prénoms et des noms des lieux dans la langue minoritaire, ainsi que l'utilisation de la langue minoritaire dans la vie économique, le maintien et le développement des relations à travers les frontières avec ceux qui parlent la même langue de manière que les représentants des groupes minoritaires puissent faire entendre leur voix. Il n'est pas possible d'exposer ici toutes les dispositions de la Charte, mais on les peut résumer dans ce qu'elles satisfont toutes les exigences imposées par la protection des minorités. Exprimé plus simplement: La protection appropriée des langues minoritaires protège d'une façon satisfaisante les minorités elles-mêmes. Elle garantit leur existence, la sauvegarde de leurs traditions, l'enrichissement de leur culture.

Le projet de la Charte reflète une conception intéressante en matière de technique juridique. La plupart des dispositions ont deux formulation: une minimale et une maximale. C'est en fonction du nombre et de la situation de ceux qui parlent la langue minoritaire qu'un réseau plus large ou plus restreint, une presse plus riche, plus d'émissions radiophoniques, plus de programmes télévisés sont nécessaires. Ce qui sera trop peu dans un certain cas donné, sera dans le cas d'une minorité peu nombreuse une exigence exagérée et une obligation superflue. Les "Hautes Parties contractantes" peuvent donc choisir entre les environ 70 paragraphes de la Charte, mais elles doivent en choisir au moins 35 dont au moins douze choisis parmi les paragraphes indiqués par la Charte. La Charte garantit par ce fait que ses dispositions imposent aux Etats contractants effectivement des obligations concrètes sans que leur maximalisme puisse décourager les gouvernements qui se proposent d'y adhérer.

La Charte sera portée cette année devant le Conseil de l'Europe. En attendant nous n'avons pas de connaissance de son sort, des débats,[38] mais il y a toute probabilité que tôt ou tard elle sera adoptée. Si on arrive à conclure un accord internationale qui protège d'une façon appropriée les langues minoritaires, la création d'une convention ou des conventions internationales particulières portant sur la protection des minorités devient superflue. Il faut donc concentrer les efforts sur la protection de la langue.

Quels sont les avantages de cette solution?

Nous avons déjà démontré que l'atmosphère internationale est défavorable à la conclusion d'une convention internationale globale portant sur la protection des minorités. Peu d'Etats se croient intéressés dans un sens positif dans ce domaine, d'autant plus nombreux sont ceux à qui les éventuels remuement des groupes ethniques vivant sur leur territoire sont sujet d'inquiétude. Sauvegarder et cultiver la langue, cela a une autre acoustique politique. Refuser la protection d'une valeur culturelle est une tâche plus difficile et plus ingrate que de refuser le consentement à une concession politique, or la création des règles juridiques qui servent la protection des minorités sont considérées comme telles. La transposition du point crucial de la protection des minorités à la protection des langues minoritaires (régionales) "dépolitise" la question et favorise par ce fait sa solution.

Pour dissiper les malentendus je précise: il ne s'agit pas d'une panacée universelle, qui porte remède d'un seul coup à tous les problèmes des minorités. Evidemment, les gouvernements qui refusent l'idée même de la protection des minorités, ne seront pas enthousiasmés pour la protection des langues minoritaires et feront tout pour assumer le moind d'obligations juridiques dans ce domaine. Cependant du point de vue tactique, ils seront dans une situation plus difficile, plus défavorable que dans le cas où il s'agirait de la protection des minorités. Pour cette raison la transposition du point crucial, le changement de l'objectif direct de la réglementation est une possibilité qui mérite une considération approfondie.

Notes

[1]On trouve beaucoup de définitions relatives aux minorités, mais aucune ne peut être considérée comme généralement reconnue. Parmi ces nombreuses définitions nous citons celle de F. Capotorti: "Une minorité est un group qui, vu le nombre de ses membres, est plus petit que le reste de la population du pays, un group qui n'occupe pas une position dominante et dont les membres disposent de particularités ethniques, religieuses ou linguistiques, qui diffèrent des particularités du reste de la population, un groupe, dont les membres sont liés par le sentiment de la solidarité en vue de la sauvegarde de leur culture, leurs traditions, leur religion et leur langue." Il n'est pas nécessaire de nous engager dans l'analyse de cette définition, puisque la solution du problème ne dépend pas de la manière dont les minorités sont définies. Il est caractéristique que dans la Sous-commission des minorités constituée au sein de la Commission des Droits de l'Homme de l'ONU "la forme camouflée de l'ajournement et du freinage des travaux se manifeste dans le fait que certains Etats membres cherchent à mettre au premier plan le débat sur la définition des minorités, ce qui vu les questions essentielles équivaudrait à une impasse" - comme le dit László Rehák. V.: László Rehák: Nemzet, nemzetiség, kisebbség Jugoszláviában (Nation, nationalité, minorité en Yougoslavie) Bp. Gondolat, 1988. p. 18.

[2]Dans ce contexte il faut signaler l'autre côté de la question, notamment que l'Etat, l'Etat moderne est - en principe - l'organe exécutif de la volonté des citoyens, le moyen de la volonté des citoyens, également de ceux qui sont d'un certain point de vue en minorité. Nous y revenons plus tard, ici je veux seulement remarquer que contrairement au principe, dans la pratique certains personnes et groupes avaient une position privilégiée en ce qui concerne la détermination et du contenu de la loyauté des citoyens.

[3]En 1776, la Déclaration de l'Indépendance des Etats Unis a proclamé en tant que vérité incontestable et évidente que "Les gouvernements sont établis par les hommes pour garantir ces droits et leur juste pouvoir émane du consentement des gouvernés. Toutes les fois qu'une forme de gouvernement devient destructive de ce but, le peuple a le droit de la changer ou de l'abolir, et établir un nouveau gouvernement en le fondant sur les principes et en organisant en la forme qui paraîtront les plus propres à lui donner la sûreté et le bonheur."

[4]Hélas, la terminologie est non seulement confuse mais aussi peu clarifiable à cause de la différence entre le développement dit ouest-européen et de celui de l'Europe centrale et de l'Est, pour ne mentionner que ces deux, - et à cause du fait que les auteurs s'attachant aux notions établies dans leur propre milieu... Voir József Hermen: A nemzetfogalom meghatározásához: nyitott kérdések és vitatható válaszok (Contribution à la définition de la notion de la nation: questions ouvertes et réponses contestables), Világosság, 1988. No. 8-9. pp. 510-518. Mais dans les mêmes milieux on peut observer également certains changements. Dans l'aire linguistique allemande par exemple au lieu de la notion "nationale Minderheiten" les notions "Volksgruppe" et "Volksgruppenrecht" se répendent de mieux en mieux.

[5]La proportion des personnes dont la langue maternelle est le croate, le slovène ou le hongrois monte à 1 pourcent des habitants de l'Autriche. De temps en temps des griefs sont formulés dans les milieux des Slovènes de la Carinthie, mais en comparaison de leur nombre, leur situation ne peut guère être qualifiée comme préjudiciable.

[6]C'est-à-dire: l'établissement de l'unité nationale selon leur propre interprétation! Il n'était pas possible de le déclarer officiellement, mais tacitement cela faisait partie, même partie essentielle du programme national certes appuyé par la majorité de la population d'un esprit politique.

[7]O. Jászi: A nemzeti államok kialakulása és a nemzeti kérdés (Le développement des Etats nationaux et la question nationale), Bp. Grill, 1912, p. 504.

[8]Jászi: op. cit. p. 509.

[9]Voir Loi No 16 de l'année 1955.

[10]Un demi siècle après le débarquement de Christophe Colomb presque personne n'a survécu parmi les Indiens des Caraïbes. Au cours du XIX[e] siècle le peuple autochtone de Tasmanie a totalement disparu et les massacres subis par des Arméniens de la Turquie dans les années de la première guerre mondiale sont assez bien connus pour qu'il ne soit pas nécessaire de les exposer ici en détail.

[11]Ici je ne pense pas seulement à l'interdiction de résidence appliquée a l'égard des Allemands de la Volga et des Tartares de la Crimée, mais également aux mesures appliquées dans les Etats-Unis et dans le Canada contre les citoyens d'origine japonaise vivant dans les Etats-membres de l'Ouest.

[12]Voir Kálmán Janics: A szlovákiai magyar társadalom ötven éve (Les 50 années de la société hongroise de la Slovaquie), Valóság, 1971. No. 6. pp. 20 à 31.

[13]Ce phénomène est si bien connu que nous pouvons nous passer de mentionner des exemples concrèts, d'énumération de noms.

[14]Janics: op. cit. Valóság, 1971. No. 6. pp. 20 à 321.

[15]Conformément à cette conception stalinienne le représentant de l'Union soviétique a donné son appui au cours de la conférence de paix de Paris au projet tchécoslovaque concernant le déplacement unilatéral de 200 000 Hongrois.

[16]Voir les dispositions de l'article 54 et suivants du Traité de Paix de Trianon. G. Herczeg: A kisebbségek nemzetközi jogi védelme (La protection des minorités par le droit international) JPTE Dolgozatok az állam- és jogtudományok köréből. Pécs, 1987. pp. 90 et 91.

[17]L'article premier de la Paix de Vienne de l'année 1606 stipule que "les Etats qui vivent à l'intérieur des frontières de la Hongrie, dans l'ensemble et par individus, les magnats et les nobles et les villes libres et les villes privilégiées appartenant à la Couronne, ainsi que les soldats hongrois des confins ne seront jamais et nullepart empêchés dans leur religion et leur croyance par Sa Majesté Impériale et Royale et Elle ne permettra pas qu'ils en soient empêchés par autrui. (Voir Recueil des Lois Hongrois, 1526-1608, Bp. Franklin, 1899.) La Paix de Linz a étendu la liberté de religion aux serfs, selon le document de ratification de Ferdinand III comme suit: "En ce qui concerne le fait que les paysans ne seront empéchés dans leur religion, nous avons déclaré et décidé que par amour de la paix et de la tranquillité du pays, en vertu de l'article et de la condition ci-dessus il est interdit qu'ils soient empêchés dans l'exercice libre de leur religion par Sa Majesté Royale ou par ses servants ou par les seigneurs terriens sous aucun prétexte, qu'ils soient habitants frontaliers ou habitants des bourgades ou campagnards sur la propriété de n'importe quel seigneur terrien ou du fisc... Décret de 1647 de Ferdinand III. Recueil des Lois hongrois, 1608-1657. Bp. Franklin, 1905.

[18]La paix de Karlóca de 1699, la paix de Posarevac de 1719 et la paix de Belgrade de 1739 ont contenu des dispositions au profit des chrétiens. La paix de Kücsük-Kainardj a accordé le droit à l'ambassadeur de la Russie à Constantinople d'agir dans l'intérêt des chrétiens. Ce droit a été confirmé par le contrat de Jassi. Sur ces dispositions ainsi que celles contractuelles postérieures voir E. Flachbart: System des internationalen Minderheitenrechtes. Bp. Gergely, 1937. pp. 10 a 17.

[19]L'argument selon lequel les frontières linguistiques sont tellement embrouillées en Europe centrale que la démarcation des frontières politiques est impossible sur la base ethnique ne resiste pas à l'examen. (Voir I. Bibó: Válogatott tanulmányok. Études choisies, Magvető, 1986. Vol. II. p. 243 et suiv.) Il existe relativement peu de domaines tellement embrouillés, mais même dans ces domaines il est possible de tracer une frontière qui crée un équilibre entre les différents peuples et ne met pas un nombre plus élevé des minorités sous la domination d'une autre nation, que le nombre de la minorité qui vit sur le territoire de la nation parlant la même langue que la nation première.

[20]Dans son memorandum du 31 mars 1919, que les soucis entendus au cours de son séjour à Budapest ont certainement influence, Coolidge, homme politique americain a attiré l'atten-

tion du Président Wilson sur les faits suivants: "Toutes les propositions de la Commission relatives à l'adjudication des territoires controversés se basent sans aucun doute sur l'hypothèse que les minorités mises sous domination étrangère bénéficieront d'un traitement satisfaisant. Cependant une telle hypothèse n'est pas suffisante. Au contraire, la conférence doit déterminer d'urgence et doit proclamer qu'est-ce qui constitute le minimum des droits politiques, linguistiques, religieux..." Voir F. Ermacora: Innerstaatliche, regionale und universelle Struktur eines Volksgruppenrechts. In: Th. Veiter: System eines internationale Volksgruppenrechts. B/3/II. Wien-Stuttgart, Braumüller, 1972. p. 6.

[21]Voir Pologne (Versailles, 28 juin 1919), Tchécoslovaquie (Saint Germain en Laye, 10 septembre 1919), Royaume Serbe-Croate-Slovène (Saint Germain en Laye, 10 septembre 1919) Litvanie au sujet de la région de Memel (8 mai 1924), Allemagne (Versailles, 28 juin 1919, articles 85 et 93), Autriche (Saint Germain en Laye, 10 septembre 1919, articles 62 à 64), Hongrie (Trianon, 4 juin 1920), articles 54 à 60), Bulgarie (Neuilly, 27 novembre 1919, articles 49 à 57), Turquie (Lausanne, 24 juillet 1923, articles 37 à 45).

[22]Voir Erzsébet Szalay-Sándor: A kisebbségek nemzetközi jogi védelme a Nemzetek Szövetségének égisze alatt (Protection des minorités par le droit international sous l'auspice de la Société des Nations) In: Etudes sur la protection juridique des minorités nationales. Janus Pannonius Tudományegyetem, Pécs, 1988. pp. 59 à 128.

[23]Idem, p. 95 et suiv.

[24]Le Pacte de la Société des Nations a expressément interdit l'ingérence de la part de l'Organisation dans les affaires internes des Etats membres. L'activité du Conseil relative à la protection des minorités ne peut donc être qualifiée en tant qu'ingérence et la situation des minorités en tant qu'affaire interne exclusive.

[25]Référence à la constatation souvent citée de Roscoe Pound. Voir R. Pound: The Formative Era of American Law. New York. 1950. p. 13.

[26]En vertu de l'article 40, les Etats parties au Pacte s'engagent à présenter des rapports sur les mesures qu'ils auront arrêtées et qui donnent effet aux droits reconnus dans le Pacte, etc. Outre les obligations générales le Pacte contient des garanties partielles - et facultatives - ultérieures. En vertu de l'article 41 "tout Etat partie peut déclarer à tout moment qu'il reconnait la compétence du Comité pour recevoir et examiner des communications dans lesquelles un Etat partie prétend qu'un autre Etat partie ne s'acquitte pas de ses obligations au titre du présent Pacte. Les communications présentées en vertu du présent article ne peuvent être reçues et examinées que si elles émanent d'un Etat partie qui a fait une déclaration reconnaissant, en ce qui le concerne, la compétence du Comité. L'article 1er du Protocole facultatif annexé stipule: "Tout Etat partie au Pacte qui devient partie au présent Protocole reconnait que le Comité a compétence pour recevoir et examiner des communications émanent de particuliers relevant de sa juridiction qui prétendent être victimes d'une violation, par cet Etat partie, de l'un quelconque des droits énoncés dans le Pacte..." Le cercle des Etats qui appartiennent à ce dernier groupe est beaucoup plus restreint. Parmi les Etats du Pacte de Varsovie, c'est uniquement la Hongrie qui a fait toutes les deux déclarations. Les adhésions sont entrées en vigueur le 9 décembre 1988.

[27]Voir les dispositions du décret-loi 21 de l'années 1985, du décret-loi 6 de l'année 1986, et du décret-loi 15 de l'année 1986.

[28]Cf. G. Herczegh: A nemzetközi jogalkotás mai lehetőségei és korlátai (Les possibilités et les limites actuelles de la législation internationale) Bp. Akadémia, 1987. pp. 20 et suiv.

[29]Beaucoup ont déjà présenté la contradiction qui existe entre la ranimation de la conscience nationale et ethnique et entre l'intérêt modéré - c'est la moins qu'on puisse en dire - des Nations Unies à l'égard de l'affaire des minorités nationales.

[30]Les publications officielles des Nations Unies n'arrivent qu'avec un retard considérable chez les lecteurs et les quotidiens ne rendent pas compte des travaux de la Sous-commission des minorités.

[31]F. Capotorti: Die Rechte der Angehörigen von Minderheiten. Vereinte Nationen (Bonn, 1980) No. 4. pp. 113 à 118.

[32]En effet, le projet de déclaration ne parle pas de la loyauté, mais le paragraphe premier de l'article 4 souligne la souveraineté de l'Etat donné, l'inviolabilité de son territoire et le principe de la non-intervention.

[33]Il en découle la reconnaissance des droits collectifs, c'est-à-dire des droits revenant à la collectivité en tant que telle et exercé par ses organes représentatifs élus. D'ailleurs le problème n'est pas nouveau. On l'a déjà discuté au temps de la Société des Nations. Cf. E. Flachbart: Individualista és kollektivista irányzatok a nemzetközi kisebbségi jogban (Tendances individualistes et collectiviste dans le droit international des minorités) A Debreceni Tisza István Tudományegyetem 1936-37. évkönyve (Annuaire de l'Université István Tisza, Debrecen). p. 16. "L'essence de la notion des minorités et surtout des minorités nationales est le sentiment commun de ses membres, leur conscience commune, qu'ils constituent une collectivité différente de la majorité, une personnalité autonome."

[34]Le "nombre important" auquel s'attache l'obligation d'accorder "des facilités appropriées" en matière de l'enseignement donné dans la langue maternelle aux enfants des minorités, n'a pas été défini d'une façon satisfaisante et attire notre attention à ce qu'il faut éviter les formulations qui rend possible l'appréciation arbitraire.

[35]Comme il se manifeste dans les relations hungaro-roumaines, où il existe face au 20 milles Roumains en Hongrie deux millions de Hongrois en Roumanie. La proportion est donc 1 a 100!

[36]Cf. Gyula Gál: A dél-tiroli kérdés nemzetközi jogi vonatkozásai (Les aspects de droit international de la question du Tyrol du Sud) In: Tanulmányok a nemzeti kisebbségek nemzetközi jogi védelméről (Etudes sur la protection pur le droit international des minorités nationales) Janus Pannonius Tudományegyetem, Pécs, 1988 pp. 253 à 293.

[37]Au sein du Marché commun on "spiritualisé" les frontières entre les Etats, et par ce fait on cherche à faire perdre l'intérêt des griefs de la "séparation" des minorités, mais en Europe de l'Est - Europe centrale - hélas - avec peu de succès.

[38]Dans son numéro du 9-10 octobre 1988 le journal Neue Zürcher Zeitung publie une nouvelle selon laquelle la session parlementaire du Conseil de l'Europe tenue à Strasbourg a pris position pour le projet de convention. Il dépend de la Commission des Ministres si on soumet le projet aux Etats membres pour signature et ratification. Il est a supposé qu'on le fera dans un proche avenir.

THE INTERNATIONAL PROTECTION OF MINORITIES

G. Herczegh

It is generally characteristic about the situation of minorities that their members are in adverse situation compared to the majority and burdened by various discriminative measures. Therefore it is a need for their legal protection, however the protection by inner law is not sufficient by itself, because it could be altered unilaterally by the so-called majority. Consequently their protection should be strengthened by international guarantees. The relation between the state and a particular group of its citizens is not alien field for the international law. Since centuries we can meet international agreements securing the religious freedom, later regulations concerning the protection of national minorities, its best-known example was the minority protection system under the aegis of the League of Nations. The prohibition of the oppression against minorities the appearance and aggravation of international conflicts could be prevented, therefore by the protection of minorities the international law can accomplish its most characteristic task. Three various levels of international law regulation are possible. However, the universal level - due to the difference of the situation of minorities - can operate only as general rule and may establish a few duties concretely for the states. The regional level promises to give a more efficient protection, but theoretically the most efficient could be the level of bilateral regulation, although its political preconditions are seldom available. It also can emerge as a solution that the international does not protect the minorities as such, but the regional or minority languages, as the draft of the European Charter under the auspices of European Council tries to achieve. From a legal technical point of view this draft is a very considerable legislation, its adaption would mean a significant step forward in the field of protection of national minorities.

МЕЖДУНАРОДНАЯ ЗАЩИТА МЕНЬШИНСТВ

Г. Херцег

Положение меньшинств в общем характеризуется тем, что по сравнению с большинством их члены находятся в менее выгодном положении, и они подвергаются дискриминативным правилам. Следовательно, имеется необходимость в их правовой защите, но предоставленная внутренним правом защита сама по себе оказывается недостаточной, так как она может быть изменена т.н. большинством в одностороннем порядке. Отношения между государством и отдельными группами его граждан не являются чужой сферой для международного права. Уже столетнее прошлое имеют международные договорные положения, обеспечивающие религиозную свободу. Позже появились правила, относящиеся к защите национальных меньшинств. Их самым известным примером была система защиты меньшинств, действовавшая под эгидой Лиги наций. Запрещение угнетения национальных меньшинств может предотвратить возникновение или ожесточение международных конфликтов, значит, обеспечивая защиту меньшинств, международное право выполняет свою наиболее специфическую задачу. Международно-правовое регулирование может быть осуществлено на трех уровнях, однако универсальный уровень - по природе вещей, т.е. из-за различия в положении меньшинств - может определять только общие черты и мало конкретных обязанностей для отдельных государств. Более эффективную защиту обещает региональный уровень, а в принципе самым эффективным может быть двустороннее регулирование, однако его политические предпосылки редко имеются. Решение может состоять и в том, что международное право обеспечивает защиту не меньшинствам как таковым, а региональным языкам или языкам меньшинств, как для достижения этого делается попытка в проекте Европейской Хартии, разработанной под эгидой Европейского Совета. С юридико-технической точки зрения указанный проект представляет собой заслуживающий внимания акт и его вступление в силу означало бы значительный шаг вперед в области международно-правовой защиты национальных меньшинств.

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THE NON-COGNITIVE CHARACTER OF THE JUDICIAL ESTABLISHMENT OF FACTS

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1. Logic of Problem Solving and Logic of Justification. Finding a solution and checking it may need differing logics. The second is posterior to intuition and also to the issue it demonstrates. The first is most specific in law where every step is tactically related to, as actually built upon, one another. 2. The Difference Between Cognition and Judging. Law selects elements out of events that can be projected back onto the events. It is interested, instead of facts themselves, in their making use of as mere references. Consequently, logic of the events themselves can only be regarded as relevant in so far as it may be turned to be one of the parts of the logic established in the legal judgment of the event. 3. The Non-cognitive Dialectic of Normative Classification. That what is called subsumption in logic is partly of a symbolic effect, partly of a substitutive character in law. The apparently heterogeneous components of the legal process in general can only be treated as merely technical categories of classification, which, beyond the reach of law, have no directly interpretable reference or message whatsoever.

1. Logic of Problem Solving and Logic of Justification

A basic formula - according to the classic syllogistic formula of "All men are mortal /Caius is a man / Caius is mortal" - can be pretended to represent the syllogism of law-application only provided that a series of further propositions presupposing it are also accepted. These are the following ones: (a) operations with facts and operations with norms can be separated from one another; (b) operations with facts and operations with norms follow one another in judicial process as cognitive, respectively evaluative/volitive, components of the process; (c) legal conclusion finally reached is of logical necessity; and (d) judicial process is thoroughly ruled by law.

As a matter of fact, these presuppositions are to mean that: (a) the judge will "start out from the law" in order to "accomplish the law", when he/she reaches his/her decision; (b) the decision is a consequence of the law as reflected to the given case by the gradual breaking down of the generality of the legal order to the individual case; (c) the two propositions above apply to both aspects of judicial activity, namely the

judicial act subsuming the case to the law as a case of the law, and the meting out of legal consequences to the concrete situation.[1]

However, claiming that we do have a start out from the law in judicial process can only be accepted as an argument provided that we do characterise judicial process either as logical deduction or epistemological reflection.[2] Consequently, the claim is by far not convincing if it stands for a general theoretical formulation.

For the logic of problem solving may define just the opposite direction and methods for a process of reasoning, as compared with the direction and methods defined by the logic of justification. Though the same operation can be made use of by both kinds of logic, they are not substitutable to one another. The first is instrumental in finding the solution, the second in checking it. In general and also in law in particular, axiomatic reasoning (deduction or demonstration, i.e. any procedure setting the claim of logical necessity) can at the most be instrumental in having a posterior control of what has finally been reached; and not as a tool of conducting the search for it. That is, formal demonstration is posterior to intuition and also to the issue it demonstrates.[3]

This is to say that justification of decisions is in fact posterior a control of system-conformism,[4] instead of being a tool of reaching them actually. In the same way as: motivation of decisions stands similarly for quasi-logical rationalisation, instead of reporting about thought process which has reached its climax when the decision was taken actually.

In this way, it is by far not away from reality to conclude that "(h)istorically and, as far as the thought process is concerned, also ac-

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[1] Cf. the socio-ontological version of the reflection theory of Marxism, which, by referring to the "ontological fact" of the institutional differentiation between law-making and law-application, emphasizes that the point of departure for applying the law is provided by the law itself as it is made, whenever law is put into action in a legal order. Peschka, V.: Az estnorma, avagy a jogszabály és a jogeset kapcsolatának problémája (The casenorm, or the problem of the connection between legal rule and legal case). Állam- és Jogtudomány 2/1985. pp. 223 et seq.

[2] This is the case when legal process is explained as specific typifying transformation of social relations which, on their turn, will be projected back to social relations. Cf. Peschka, V.: Jogforrás és jogalkotás (The source of law and law-making). Budapest, Akadémiai Kiadó, 1965. ch. III, para. 2; Peschka, V.: A jogszabályok elmélete (also in German: Die Theorie der Rechtsnormen). Budapest, Akadémiai Kiadó, 1979. ch. I, para. IV.

[3] Cf., first of all, Pólya, G.: How to solve it. A new aspect of mathematical method. 1945.

[4] Cf., e.g., Wróblewski, J.: Legal decision and its justification. In: Hubien, H. (publ.): Le raisonnement juridique. Bruxelles, Bruylant, 1971. p. 202.

tually, it is the 'case' necessitating a 'solution' that is the first to have a start out from".[5] For within its reach - that is, having in mind the distinctiveness and discreteness of fact and norm as perceived by the judge -, this stand seems easy to defend. However, when interpreted as a theoretical answer, it proves to be both narrow-minded and simplistic. It is not exempt of having been based on the assumption of the syllogism of law-application, either, as if it were to suggest: "Bring in your fact so that I can attach my law to it!"

A genuine theoretical description has to start on from earlier a stage. It has to depart from the recognition that the event we hold an interest in springs from something differing from and also preceding the "case". For to have a "case" is relatively late a product of the legal process. Properly speaking, it is a relative end-product of abstract institutionalisation. Precisely, it is the outcome of some events formalised, artificially construed, and also simplified. Formalisation is made in a way that - as reduced to (and pigeon-holed as) one definitively defined actualization of the legal order - it can provide the conceptual basis for taking an action within the order.

"When the client pours out his troubles to his solicitor, the first step is to discover the legal pigeon-holes in which the facts are to be placed."[6] Well, again: the merits of such a sensible reportage notwithstanding, the same objection can be raised against. For "facts" are not yet given at this stage. Practice can only start out from the recognition, identification, conceptualisation, and classificatory expression, of a problem. Practice starts out from my realisation that I want to have something, or to do something.[7]

All I may say point to the conclusion that "facts" are in no way given at any primitive stage. That what is given is, first, at least an elementary awareness of what I wish and, second, also the situation which

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[5] Fikentscher, W.: Methoden des Rechts. Band IV: Dogmatischer Teil. Tübingen, Mohr, 1977. p. 202.

[6] Paton, G.W.: A text-book of jurisprudence. Oxford, Clarendon Press, 1946. pp. 155 et seq.

[7] "Any construction of facts sets out from raising a question... The way of how this question is formulated will at all times also determine the way of how it will be responded to." Hruschka, J.: Die Konstitution des Rechtsfalles. Berlin, Duncker und Humblot, 1965. p. 22. Albeit this exposition may be fairly illustrative in its own context, it turns to be one-sided, once regarded as a general theoretical formulation.

I claim it to offer some ground for formulating what I wish. It may be so that, at a rather primitive stage, neither expressed wish nor specifically defined situation that could be referred to, are present. For I have to know: nothing gets isolated by itself from/within the totality. It is us, only and exclusively us, who start the isolation of anything from/within the totality, by the very first act of naming it.

The way in which we perform isolation may vary in function of two factors: 1. the reason of why I am naming, and 2. the variety of names what I dispose of.

Clearly enough: as many nameable facts can be referred to the totality as many variants are given for their naming. That is, as many facts are available as much experience I have to suggest me that I can proceed on by their naming in order to construe them as facts.

The first step to proceed on is to have some kind of wish, even if loosely formed or unexpressed. And here are the items of the next step: tentative decision about the primarily defined goal (and the alternatives to it); selection of the strategy and paths that may be instrumental in that I accomplish them; conceptualisation of the situation in the light of the goals, strategies and pathways defined in respect to it; finally, selection of the facts by which the situation will have been defined.

No need to say that all these operations imply some kind of evaluation of the practical situation with reference to considerations of law. No need to say, either, that both parties to the procedure and also the judge are all faced with distinct, individual roles to play. Being spokesmen of different interests, they bring different points and stands into the process. All this is to mean that neither circumstances, nor motives, nor situations (necessitating a decision) are available as ready-made. None of them offers an undisputable starting point. That is to say that both the factual framework and the references in respect of the dispute are themselves being formed by the acts of the parties ot the procedure. Their establishment and/or shaping by the acts of the parties is generally lead by the tactics by the parties, which they may set and/or realise at any stage of the procedure.[8]

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[8] Cf., e.g., Derham, D.P.: Truth and the common law judicial process. Malaya Law Review, 5/1963, pp. 338-349.

Accordingly, neither case, nor norm is given from the very start. What is given is their "universe" at the most, exclusively logically defined.[9]

In consequence, what is going on is a game, with rules valid in an institutionally established framework. If conditions for it are given, I may start to have a move in any direction at any given time. But I have to know from the beginning that, according to a previously set convention, in order to have a step in one or another direction, I am expected to show up one or another fact. And so on, and so on. The rub is that the fact needed cannot be taken and brought directly into the game. (Not even the play of the game of chess can be reduced to sheerly physical acts of holding pieces and moving them, as it can appear to an outside observer.)

The only way I am permitted to show up this fact is by entering into a second game within the first one. And I may do so only by asserting that what I state as a fact is actually the case, and that this statement of mine can be proved. Of course, this second game, played in order to bring facts into the game, will in the course of the procedure be identified with the game itself. For a judgment upon the fact I have brought into the game will logically imply a judgment touching upon the wish I have intended to realise by entering into the procedure.

As to its structure, the game in law, procedurally played, will be made up by a series of steps, succeeding after, and building upon, one another. This is one of the features which makes it analogous to the game of chess. For, in both, every step is tactically related to, as actually built upon, one another. It goes without saying that each and every step may, and will actually, have a variety of meanings and contextures. That is to say, each and every of them implies the possibility of getting differently actualised, resulting in the display of its own individual meaning and contexture.

As I have noticed already, analyzing the understanding of the "development" of the meaning of any given human behaviour,[10] the meaning of each and every new step, or move, or aspect, of human activity will have been circumscribed, and finally defined, by the previous steps (and moves and

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[9] See Alchourrón, C.E. and Bulygin, E.: Normative Systems. Wien and New York, Springer, 1971.

[10] Varga, Cs.: The fact and its approach in philosophy and in law. In: R. Kevelson (ed.): Law and Semiotics. Volume 3. New York and London, Plenum Press, 1989. pp. 366 et seq.

aspects) through their historically superimposed cumulative contexture. That is to say, any one (apparently single) human behaviour is the (relative) end result of a process. And the progress embodied by this process can only develop step by step, move by move, gaining an attributable meaning posteriorly only. For the contextual position of a given step within the process (that is, its systemic relation to the prospected, or idealised, whole in formation) will only get defined posteriorly. Or, formulated differently, the relative end result of the process at any given time will make any step, or move, the antecedent of what the whole process will eventually conclude to later on.

Turning back to the main question, we can conclude that problem solving by far not contradicts intuition or whatever kind of intellectual experiment. For its logic is heuristic. Its operations are unbound, far from being codified previously. As to problem solving in law, it is, paradoxically speaking, free in all aspects, except to the formal expression of its result. It is only legal decision that is bond. Increasing the paradoxicality of expression, I can even add: it is not legal decision itself, but its formal justification that is at all bond. For in majority of legal cultures, only and exclusively such decisions can be accepted as ones of the legal order that conform to the requirements the legal order sets for the logical and rational justification of the decisions made.[11]

2. The Difference Between Cognition and Judging

As we have seen above, pre-assumptions of judicial process suggest that (1) facts are brought into the process through their cognisance and (2) cognition is followed by their evaluation, that is, a practical reaction to them. What happens in reality is, however, just a sheerly ideal happening with no actual facts involved in it.

For facts can only be isolated and name through their cognition. And exclusively such facts can be isolated from the undifferentiated mass of potentialities (as equally conceivable factual, or factualisable, refer-

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[11] Cf., e.g., Wróblewski, J.: Legal syllogism and rationality of judicial decision. Rechtstheorie, 1/1974; Wróblewski, J.: Justification of legal decisions. Revue Internationale de Philosophie, 1979; Wróblewski, J.: Paradigms of justifying judicial decisions. In: Peczenik, A. (ed.): Theory of Legal Science. Dordrecht, Reidel, 1984.

ences) inherent in any given set of events that are fitting to the context of cognition in question.

There is an apparent contradiction here. Namely, independently of the question of how much directions and contexts of perception and conceptualisation of events and problem sensitivity are limited in a community, cognition is open in principle. It is open in place and time. It is open towards theories and methods, outlooks and concepts. It is open towards paradigms in formation, too. Notwithstanding, within its own framework, it does necessarily follow its own logic. Although its only aim is to identify the individual components of a given phenomenon, as well as the principles of their organisation.

In order to reconstruct the logic of formation and the one of functioning of the phenomenon in question, it does necessarily test a series of presuppositions, working hypotheses, intuitive formulations. In order to be able to reconstruct the logic of formation and the one of functioning of a phenomenon, the whole cognitive process has to be adaptable and open to the particularities of the subject to a maximum degree, notwithstanding. For adaptation and openness are needed so that selection of facts, their interpretation, the definition of their contexture, as well as the explanation of the place assigned to them by the motion of social totality, can be done adequately. Otherwise speaking: the success of cognition is a function of its getting subordinated to the phenomenon, subject matter of cognition.

That what is issued by judicial process is certainly not a monographic description of the situation. That what is referred to as facts of the case is certainly not a kind of epistemologically patterned reproduction (that is, ideal reconstruction) of a given object. For judicial process, that leads to the normative classification of acts (through selecting, naming and asserting them, followed by the control of all this in the same process), aims to realise something more and differing from simply reproducing the own logic of the situation concerned.

First of all, law is par excellence homogeneous a medium.[12] At the same time, any homogeneous medium is specific, differing from any other kind of homogeneity. For instance, if I am looking at an event from the point of view of chemistry, or physics, biology, psychology, sociology,

[12] Cf. Peschka, V.: Gondolatok a jog sajátosságáról. Budapest, Akadémiai Kiadó, 1984. pp. 14-16.

politics or history, the set of facts I shall establish and the logic of development and operation I shall reconstruct will be differing definitely from one another. Even if it will be so upon the basis of some fundamentally common features. And the fact notwithstanding that I shall be free in recognising all these differing features to have equally been derived from (and by far not only to have arbitrarily been merely referred to) the same totality, as differing aspects of the said totality. Their difference lies in (as a function of) the contexture by the consideration of which they have been selected and conceptualised. For cognition is always partial, dependent upon the choice made for a given contexture.

Otherwise formulated, everything legal is, to a certain extent, of a by chance character in respect to its subject. For law is not a reconstruction of the inherent connections (if there are any) of an event. Law provides nothing but a network of criteria exteriorly and posteriorly projected onto the event. The underlying idea is to afford that I can break an event into sets of concepts and conceptual connections (artificially established as seen from any purely theoretical reconstruction of its factors and elements), so that, by their standards, I can issue a judgment upon the event.

In consequence, homogeneity of law (i.e. the statement according to which law has a character and nature of its own) means nothing more than this: the fact, which is going to be established, assessed and tested, and also interpreted, from the law's own point of view, will be gained through the logic of the law's homogenised (and therefore also homogenising) medium, and not from the event itself. Theoretically speaking, this homogeneous medium originates the total set of facts from which facts of any case in law may or may not eventually be established.

This equals to saying that law fulfils the ontological function to mediate among social complexes in interaction through their qualification.[13] Law selects elements out of events that can be projected back onto the events under the guise of factual components of events, able to be qualified by the law according to its classificatory scheme of "facts in law" making up "a case of the law". This is the way in which they can be

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[13] Cf., for the terms and the underlying ontological philosophy, Lukács, Gy.: A társadalmi lét ontológiájáról (Zur Ontologie der gesellschaftlichen Seins). Vol. II. Budapest, Magvető, 1971. p. 92; Varga, Cs.: The Place of Law in Lukács' World Concept. Budapest, Akadémiai Kiadó, 1985. para 5.1.3, pp. 107-110.

quite formally processed as facts of a case, till the end of the procedure when judicial decision is finally taken.

"The law is interested, not in the physical world as such, but in facts as seen by the law in relation to its particular frame of reference."[14] Properly speaking, it could even be added that law is interested, instead of facts themselves, in their making use of as mere references. Formulated otherwise, I should say in a paradoxical manner: no parties to the procedure are interested in the knowledge of facts or anything else. The only thing they really want is to win the match. Consequently, not even the intentions of, or the goals set, by the parties are as such, in themselves, of too much genuine interest to them. For even the question of what intentions can be had and goals set by the parties is answered procedurally at an earlier stage. It must have been determined by considering which selection of facts can be presented (i.e. brought into the procedure) as relevant and provable, and also effectively proved if needed.

Similarly, also the stand that the judge can take is defined by an entirely retrospective strategy. Namely: he/she is expected to reach a decision which, following the established pattern of justification, can be justified in a logical manner to the sufficient depth posteriorly. That is to say that the logic of the events themselves (if there is any) can only be regarded as relevant in so far as it may be turned to be one of the parts of the logic established in the legal judgment of the event. (This is the case when it supports it evidently, or when its relevance is provided for by the law.)

For instance, the cognisance of a violent action will be differing depending on whether - after a lost war, or a fallen revolution, or amidst a permanent terror - I am to construe it as a case for criminal prosecution, or I am solely interested in it in my private quality as a moralist, psychologist, sociologist, or historian. Or, considering the changing chances of human coexistence, it may make a difference whether I am establishing facts as grounds for a legal action to take, or I do construct the logical sequence of events (by construing a definite relationship among them) only in order to justify the decision I have taken, or I act simply as an outside observer (reporter, moralist, or psychologic commentator) of the activity of others or myself.

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[14] Paton: A text-book of jurisprudence. p. 157.

All this holds also for cases in law, which are built up exclusively from material elements. In such cases, law seems to have been directly built upon, and tied in, the life processes as their regulatory medium.

For the sake of simplicity of the management of law, foreseeability of legal actions and effects of the law, and security in daily legal practice, law constructs the formal definition of a legal case through defining the formal signs of human events which constitute a case. With such a construction, aspects of life events can become topical, which would go on simply unnoticed, if any other point of view were to prevail. The homogenising medium of law can superimpose its own logic onto the conceptualisation of the event till the point of absurdity. This tendency of artificiality and estrangement can even be further pushed on by any further intervention in the ways how a case can be constructed or construed in law and the ways in which its facts can be proved. (This especially holds for presumptions, fictions, and the regulation of the burden of proof.)

Is it to mean that cognitive aspects (or effects) of operations with facts are fully negated by legal procedure? By far not, I guess. All what I have tried to prove has the only message to realise that: nothing is specified by recognising that there is something cognitive, or quasi-cognitive, in the legal process. For cognition is one of the foundations of human praxis. It can be detected in both the heterogeneity of everyday life and the various media of social homogeneity. In consequence, what matters here is the specific impact and context of cognition. For it can be taken for granted: once cognition is differentiated, and lifted out from the heterogeneity of everyday life, it will be adapted to the homogenised forms and structures of activity it will find its new contexture.

At the same time, there is a latent contradiction in homogenisation. On the one hand, it will result in differentiation, lifting out, and isolation (for that grasping, processing, and thereby influencing, everyday heterogeneity - in a way that could have not been done from within heterogeneity - can nevertheless be done). On the other hand, homogenisation does not result in epistemological distortion. For homogenisation does not touch upon theoretical cognition. It aims just achieving homogenised reflection in order to be able to offer homogenising reaction.

In a homogeneous context, like law, all components, including cognition with all its homogenised forms, are subordinated to the particular homogeneity they are components of. That is, they matter only as elements of a classificatory system in the qualification of life events. This means

that also the character and the impact of the cognitive moment are subordinated. And this means that each and every element of this cognitive moment is from the very beginning shaped and formed by this homogenising medium. Even its most elementary, primitive components can only be understood as built in and filtered through its classificatory-qualifying structure.

3. The Non-cognitive Dialectic of Normative Classification

Mere logicality, as it follows from what we have seen above, can neither explain, nor determine the intellectual operation going on in the judicial treatment of facts and norms in a legal process. For logicality, even if omnipresent in all intellectual operations at all times, can only exert the function of control. Logic is one of the possible methods of control by the application of which we may see for that optimum coherency and consequentiality can be guaranteed in judicial decision-making.

Similarly, cognition, too, is omnipresent in all kinds of intellectual activity at all times, but not for its own sake. In itself, or directly, it cannot be taken as a factor of explanation or determination.

Evidently enough, both logicality and cognitivity are kinds of homogeneity. They are dysanthropomorphised in order that they can display connections of their subject according to its own nature, independently of the personal traits of anybody taking their cognisance.

And it is to be noted that law represents another kind of homogeneity. It is dysanthropomorphised for that it can channel to issue a decision in abstraction from the personal traits of anybody issuing it. For the decision has to be presented as the unique possibility which concludes from the system with logical necessity. Albeit, at the same time, it has obviously to correspond to values posited in the concrete sociological situation of law-application and, simultaneously, also to requirements of justification posited by the normative system.

In consequence, that what is called subsumption in logic is partly of a symbolic effect, partly of a substitutive character. It is of a symbolic effect in so far as it only expresses with formal emphasis what has otherwise been termed the achievement of "impracticability of doubt", "reflec-

tive equilibrium", or "hermeneutic turning point".[15] That is, it expresses that the reflection of the two sides, fact and law, on one another, is over: it is perfect by reaching a convincingly justifiable result. At the same time, it is of a substitutive character in so far as the evaluation which is a sine qua non contentual element of the decision, is substituted for by the formal necessity of logical conclusion.

It seems that we have admitted the presence of cognitive element. As a matter of fact, we can even add that, by the advance of legal reasoning, there is an advance made in cognition as well. Notwithstanding, that what genuinely intellectual achievement is in the legal process is done in another direction. This is: channelling both the evaluation done in the legal process and its justification into the pathway of rational argumentation. That is, into the system and conceptual framwork of law, previously established by the law.

For, albeit it is only the cognitive element that is emphasised by legal ideology, actually each and every move of both so-called judicial cognition and related judicial activities is in fact subordinated to the practical reaction that can and must in the legal order be issued. That is, law has the only vocation here to justify, through its actualization, the way how practical reaction can, and will finally, be made.[16]

Formulated in another way: on the final analysis, judicial establishment of facts is nothing else than practical reaction resulting from an evaluative approach. It is one unity, in which two questions - one, how do I see an event, real by the way? and two, what components do I see that it is made up from? - are intermingled. The first question concerns the end result. The second question concerns the set of elementary facts inducing the end result, and also the way by which the quasi-cognitive process we

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[15] Cf., in the light of different approaches - Horváth, B.: Bevezetés a jogtudományba (Introduction to legal science). Szeged, Városi Nyomda, 1932. p. 130; Rawls, J.: A Theory of Justice. Cambridge (Mass.), The Belknap Press of the Harvard University Press, 1971. pp. 20-21, 48-51 and 120, referring to Goodman, N.: Fact, Fiction, and Forecast. Cambridge, (Mass.), Harvard University Press, 1955. pp. 65-68; Fikentscher: Methoden des Rechts. p. 100. - Varga, Cs.: A bírói ténymegállapítás imputatív jellege (The imputative character of the judicial establishment of facts). Állam- és Jogtudomány, 3/1989, para. 9, forthcoming.

[16] E.g.: "By his statements of facts, the judge 'makes the statement' of something else than facts. In reality, his statements (...) are the acts of interpretation and understanding of the meaning that legal institutions will attach (...) to human social activity." Petev, V.: Structures rationnelles et implications sociologiques de la jurisprudence. In: Archives de Philosophie du Droit. Tome 30. Paris, Sirey, 1985. p. 183.

speak about can be reconstructed from the end result. All this double composition is reminding to the way in which we have characterised elsewhere legal rule and legal case as co-shaped in a unitary process.[17]

In point of principle, all what we can say about the particularity of the structure, argumentation, sham logicalness, and so on, of judicial decision, is in fact related to the conceptual representation of reality instead of reality itself.

In consequence, the affirmative and negative answer we can formulate in respect of them "will always concern fundamentally the human wish that the being or non-being (including all intermediary steps) of a concrete just-so-being /Gerade-so-Sein/ be established by practice, and not the general nature of being as such or its objectivity in a general sense." "For in practice, each and every moment is preceded by an alternative decision, preparing practice in a way that the acting man has to analyse out of his prevailing situation the 'question' which may determine his future action, and then he will have to 'answer' it. Due to the particularity of everyday life, and also of language which makes the particularity of everyday life conscious, this 'answer' will in most of cases be done in responding either affirmatively or negatively. In the apparently infinite and extraordinarily heterogeneous mass of decisions, this kind of outlook and self-expression is often crystallised by the dichotomy of 'yes' and 'not', and thereby there is an appearance made as if this were a suitable ground for overcoming the logical duality of definition and negation, 'positivity' and 'negativity'."[18] Or, as stated in another context, "they work with the combination of propositions and negations, which conceals ordinarily the genuine facts all they are about."[19]

In accordance of what we have seen above, the apparently heterogeneous components of the legal process in general and the judicial establishment of facts in particular can only be treated as merely technical categories of classification, which, beyond the reach of law, have no directly interpretable reference or message whatsoever. In consequence,

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[17] Cf. Varga, Cs.: The mental transformation of facts into a case. In: Kevelson, R. (ed.): Proceedings of the IVR special session on legal semiotics. Penn State, in preparation. Abstracted in: Bulletin of the International Association for the Semiotics of Law, 5/1989.p.6.

[18] Lukács: A társadalmi lét ontológiájáról. Vol. III. pp. 134 and 132-133.

[19] Ibidem, p. 195.

they cannot be transplanted quasi-mechanically into another system of values, either.[20] All this is to say that they do not represent anything in themselves that should or could be regarded as either good or bad under any legally non-specified respect.[21;22]

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[20] "Moral predilections must not be allowed to influence our minds in settling legal distinctions." Holmes, O.W., Jr.: The common law. London, Macmillan, 1882. p. 148. Similarly, see Luhmann, N.: The coding of the legal system. Florence, European University Institute, 1985. p. 4. (IUE 342/85, Col. 94.)

[21] For a treatment of this dilemma in the light of "the fallacy of white or black", see Thouless, R.H.: Straight and crooked thinking. London, 1930. chapter 9. Cf. Williams, G.: Language and the law. The Law Quarterly Review, 1945. p. 182.

[22] The present paper is a part of the monographic undertaking of the author, which aims to lay the foundations of a general theory of judicial process. For basic questions of theoretical understanding, see, from the author, Hans Kelsens Rechtsanwendugslehre. Entwicklung, Mehredeutigkeiten, offene Probleme, Perspektiven. Archiv für Rechts- und Sozialphilosophie, 3/1990. pp. 348-366; Judicial reproduction of the law in an autopoietical system? Krawietz, W. (ed.): (IVR 13th world congress proceedings). Berlin, Duncker und Humblot, 1990, forthcoming. (Rechtstheorie, Beiheft 12.) For related part questions, also from the author, see The unity of fact and law in inferences in law. Krawietz, W. and MacCormick, N. (ed.): (Proceedings of the 14th world congress of the International Association for Philosophy of Law and Social Philosophy). Berlin, Duncker und Humblot, 1991, in preparation. (Archiv für Rechts- und Sozialphilosophie, Beiheft.); Descriptivity, normativity, and ascriptivity. (A contribution to the subsumption/subordination debate.) Koler, P. and Varga, Cs. (ed.): (Proceedings of the IVR Austrian-Hungarian Symposium). Berlin, Duncker und Humblot, 1991, in preparation. (Archiv für Rechts- und Sozialphilosophie, Beiheft.); The judicial establishment of facts and its procedurality. Krawietz, W. und Weinberger, O. (hrsg.): Sprache, Performanz und Ontologie des Rechts. Festschrift Kazimierz Opalek. Berlin, Duncker und Humblot, 1990, in press; The nature of the judicial establishment of facts. Ratio Juris, 1991, in preparation.

DIE NICHT-KOGNITIVE NATUR DER RICHTERLICHEN TATBESTANDSFESTLEGUNG

Cs. Varga

1. Die Differenz zwischen der Logik der Lösung der Probleme und der Rechtfertigung. Die Logik der Lösung eines Problems und diejenige ihrer Kontrolle sind verschieden. Die zweite Tätigkeit ist eine spätere, als die erste und deshalb geht ihre auch das Objekt der Beweisung voran. Die Suche nach der Lösung ist im Bereich des Rechts besonders eigentümlich, nachdem sich hier jeder Schritt taktisch auf den vorgehenden Schritt bezieht und so auf diesen aufgebaut ist. 2. Die Verschiedenartigkeit der Erkenntnis und der Beurteilung. Das Recht sucht aus den Elementen der Geschehnisse diejenigen aus, welche es nachträglich auf die Geschehnisse zurückspiegeln kann. Daher ist das Recht nicht in den Tatsachen, sondern nur in ihrer Verwendung als Referenz interessiert. Infolgedessen hat die Logik der Tatsachen nur in dem Masse rechtliche Relevanz, wie sie zum Teil der Logik der rechtlichen Beurteilung des Geschehnisses werden kann. 3. Die nicht-kognitive Dialektik der normativen Klassifizierung. Was wir in der Logik Subsumption nennen, hat im Bereich des Rechts zum Teil nur eine symbolische Bedeutung, und steht zum Teil nur anstatt etwas anderes. Die anscheinlich heterogenen Elemente des rechtlichen Prozesses sind bloss technische Klassifikationskategorien, die ausser dem Bereich des Rechts keinerlei unmittelbar interpretierbare Referenz oder Inhalt besitzen.

LE CARACTÈRE NON-COGNITIF DE L'ÉTABLISSEMENT DU FAIT PAR LE JUGE

Cs. Varga

1. La différence entre la logique de la solution du problème et la justification. La logique de la solution d'un problème et celle de son contrôle sont différentes. Le deuxième acte est postérieur au premier et par ce fait postérieur à l'objet de la preuve lui-même. Dans le domaine du droit, la recherche de la solution est d'une nature particulière, étant donné que du point de vue tactique chaque pas se rapporte au précédent et repose sur celui-ci. 2. La nature dissemblable de la connaissance et de l'appréciation. Parmi les événements, le droit sélectionne des événements qu'il peut projeter a posteriori sur les événements. Il n'est pas interessé dans les faits, mais seulement dans leur utilisation en tant que bases de référence. Par conséquent la logique des faits eux-mêmes n'est décisive du point de vue juridique que dans la mesure où ils deviennent partie de la logique de l'appréciation juridique du fait. 3. La dialectique non-cognitive de la classification normative. Ce que nous nommons subsumption dans la logique a d'une part dans le droit seulement une importance symbolique et d'autre part n'est qu'un substitut. Les éléments du processus juridique en apparence hétérogènes ne sont que des catégories de classification technique qui, en dehors du domaine du droit, n'ont aucun référence ou contenu directement interprétables.

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THE LAW AS MODERNIZATION TECHNIQUE

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The normativist legal theory delimits itself on a methodological basis from the investigation of the efficiency of law, including its modernization efficiency. The theory of the sociology of law is sensitive to the modernization, it shows, however, little interest in the normative rationality of means. Legislation and application of law, i.e. the practical definitions of law as a real functioning cannot be interpreted perfectly by itself from either of the said aspects. The technical interpretation of law understands the legislation and the application of law as regular lines of operations. If modernization can be described in regular legal lines of operations, then law may be a modernization technique. The lines of operations mean here the operations of the legal definition. Therein, general questions are the technological representation, the interpretation of the will, of rationality. The law as a technique used for the modernization origins from the professional sphere of the law. This professional sphere is hierarchical: the operation of the legislation is making prognostical decisions in dimensions of space and time, whereas the operation of the application of law is making decisions of realizing nature in situations defined in space and time. The real operation of these two spheres may result in useful changes i.e. in a modernization in the society, if their operations are harmonized and are credible both as a motivation and as a compulsory mechanism, i.e. if they are accepted by the society.

The indication of this subject matter - the law as a modernization technique - involves obviously two assumptions. On the one hand, that law may be interpreted as a technique and, on the othe hand, that law may be brought into connection with modernization in a technical sense, too. Their combination may offer the opinion: the law as a technique may be the instrument of modernization. Explicated this way, however, this is not more than a third presupposition; each of them requires a separate interpretation.

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According to the first presupposition the law may be interpreted as a specific social technique. According to H. Kelsen, the law is a moti-

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vation technique[1] and a compulsory mechanism. The legal norm relates to the conduct of two entities: to that of the legal subject against whose illegal conduct the compulsory measure of the legal sanction is directed, as well, as to that of the executor of the compulsory measure. The law as the compulsory measure relating to the illegal conduct has a "be" quality of binding force. If it is said that the norm "exists" this means only the validity of the norm and does not mean e.g. that it has an "is" nature.[2] Because it does not logically follow from the fact that if something is or happens, it should be or should happen. The norm and the norm-making fact are not identical;[3] it is only a fiction that the norm is always produced by the wilful act directed to the contents of the norm. The theory of Kelsen is only the revelation of the logical structure of the legal norm: accordingly, it is a normative legal theory, and thus a pure legal doctrine.

In this background, the validity of the norm is a quite different question than its efficiency. Consequently, if the legal rule declares that the judge has to punish the thief, this norm will be effective only if the judge really punishes the thief.[4] The effectiveness of the law is, however, not a normative question but that of the sociology of law, just like the contents of law.

The theory of Kelsen does not exclude the necessity of the investigation of the efficiency of law, nor the possibility that the law may have any role e.g. in the modernization of the society; it declares, however, definitely that this is not the specific feature of law but its normative "be" structure.

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The theses of the normativist interpretation of law may be crossed in a specific manner by the history of the development of law which calls the attention not to the immanent logical normalities, to the inevitable form of the law, but to the current contents of the legal rules. Because, as a matter of fact, the contents that manifest themselves in the legal rules in the interval between motivation and compulsory mechanism, are highly varied and alterable and raise the question not without any reason, whether the essence of the law should be searched after not in this variety of contents?

To this effect, it is evident that the law may become really a rationality only as a function of rationalities external to it.[5] In such an

interpretation the criterion of pure legality is selected out: "the law constructed by negliging the logic of the processes forming the rationality of purposes and the system of conditions of the function becomes irrational in its function, no matter how much it strived after the conservation of its inner logic."[6] Or, with another argumentation: the legal order belongs as a wilful order under the laws of the essence waiting for regulation; consequently, it depends on the conditions of tis existence.[7]

In a sociological sense - and in all probability according to the interpretation of the natural law - it is by no means the legal form but the contents rendered legal which is significant. On the contrary, in the normativist sense it is the validity of the law which is essential: only that may function as a legal norm, that is a legal norm. The validity is the existence of the norm, the presence of the fact "constituting" the norm.[8] And all this is not simply the matter of estimation and opinion. The law involves two kinds of different interpretations, approaching the problem either practically or theoretically. The above mentioned aspects may clash, one of them may provisionally outshine the veracity of the other. It is true that "the more ambitious a legal rule is, the more intricate it necessarily is and fianlly it may achieve the level of complexity where it becomes confusing and unapplicable."[9] This ambitiousness may mean the predominance either of the means-rationality or the end-rationality. At any rate, the law - as a specific end-rational system of the socio-economic-political sphere - does not exclude in a sociological sense the making the social modernization to an end-rationality, i.e. it may become the instrument of the modernization.

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Therefore, it would be an ovarhasty idea to propose a synthesis on the basis of the above mentioned theoretical tendencies. :Although the normativist legal theory does not exclude the possibility of law to play a role in the modernization of the society, it considers itself, however, incompetent in this question. The sociological tendency, on the other hand involves, or even puts into thesis the possibility of modernization by legal means. Let us assume, that the systems of arguments of both the normativist and the sociological trends are logically well founded. This is, however, a feeble result even for putting the question into a common framework, not to speak about synthetization. For the logical estimation

namely that is the question to what extent "existence" is a real predicate according to these two kinds of definition. The synthetization of this problem - if we can believe to the dialectic logics based on the interpretation of Hegel, criticizing Kant - can be "solved" only by an unilateral abstraction.[10] This means that between the above mentioned two essential tendencies of the present legal theory a gulf is to be found - for the theory; the consequent deduction can be achieved only separately and not by an argumentation drawn up together.

What may be done in this case? Well - in order to get apparently further from the present - the theses of Mo-Tsi may be read, in the interpretation of Keng Chou: "Chi T'u-jü and Hien Tsi-si asked their master Mo-Tsi: What is the most important thing from the point of view of the correct action? Their master Mo-Tsi answered: This is the same as with building a wall. Who can stamp, they stamp it; who can fill it up with earth, they fill it up with earth; who can lift it, they lift it. The wall is made in this way. In the matter of the just action the situation is the same. Who can speak and discuss, they speak and discuss; who can comment upon a book, they comment upon a book; and who can act, they act. The justness complete itself in this way."[11]

Well then, this is a quite different sphere of the logical judgement, let us say, that of Kant or Kelsen. Maybe Mo-Tsi is wrong. All the same, as an observation, it is disarmingly correct, beginning with that who can stamp, they will really stamp, etc.

That is, each man to his trade. If the legal theory draws up theses, they will be the theses of the legal theory - says Kelsen - they do not produce either rights or obligations. The norms entitling or obliging the people, may result only from the authority of the legislator.[12]

At the same time, "the most efficient help to the improvement of the quality of the legislation can be rendered by the jurisprudence, in the questions reaching both in the sphere of contents and that of the fors."[13] It is, however, a question which of the jurisprudences; whether the jurisprudence of the normativist tendency or that of the sociological tendency, not to mention the others. The antinomies of these two tendencies offer a chance that possibly neither of them would be taken seriously or even both of them, but eclectically. The theory of e.g. the Scandinavian legal realism advocates the last assumption, according to which the law has automatically two criteria: a sociological criterion and a normative one.[14] Here, those aspects, the independent analysis of which cannot be theoreti-

cally synthetized but, can be utilized in the technology of the practice, appear independently. According to Llewellyn, realism is not a phiolosphy but a technology. What did and does exist as realism, is a method and nothing else.[15] It may be, however, added that this method is at the same time a system-forming element. Nevertheless, realism is not a par excellence comprehensive technical theory of law. Our further remark is, that legal techniques of modernization do not especially raise interest with advocates of the realism.

"The relationship between law and modernization can be interpreted in two ways. First of all as a problem of the modernization of law - in this case the criterion, or criteria of the "modernity" of law should be clarified in general - and secondly as the question of law as one of the instruments of modernization."[16]

As regards the law, this is an essential question. The fundamental cathegories are, however, not at all homogeneous. They have specific aspects in connection of each problem. These aspects may come across not only in their concepts revealing in a more detailed way some professional aspects but somehow in the interpretation of the general concept, too.

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Further statements relating to the subject matter rest on the technical theoretical interpretation[17] of the law. Law as an effective technique is a technique specialized as an operational technique of the legislation and the application of law, being of professional character. It solves the problems of its practice and adds practical argumentations to them. "Criterion", "principle" and "conception" mean something else for the practice than for the theory. There is no "pure" theory and "pure" practice.

Although human knowledge is sectioned according to abstraction levels, it is, however, somehow uniform. The interpretation of the law as a modernization technique is at least as much a conceptual-technical question as an actual practical question.

In certain respect the law is its own intuition, its own knowledgein its practical technique. "The rendering professional, the expropriation of the special legal techniques, of the internal problems of the law, may be a guarantee against some threats emerging from different sides in different historical situations. The common feature of these threats is: the neglection of the inherences of the legal system in the name of outer prin-

ciples, e.g. of the economic or technical rationality, of the political expediency, of the moral superiority."[18] The professionality of the technique of the legislation and of the application of law offers a certain internal behaviour, a stability to the operation. It pertains to that that it should have the principle of development; it should be always ready for the tomorrow.[19]

The law has to justify day to day its own existence, its necessity and suitability. At the same time, just due to this continuous practice, this is a preliminary condition in the society; the practice has always some "credit". Taken in this way, law is - as the general regulation of the society - a special purpose in itself, then it may be subordinated to several other purposes, and thus, it does not remain a purpose in itself only. It may be concluded therefrom, that the law may be a modernization technique.

We must not, however, anticipate the argumentation. The necessity of the above mentioned autotelism supposes the necessity of the instrument. This is inseparably connected with the necessity of the purposes attainable by it. The purposes are changeable, the instrument is less variable. The dialectics of the connection consists in the fact that the instrument legalizes the purposes, whereas the authenticity of the instrument consists in the authenticity of the purposes. Apparently, in this way the identity with itself of the essence comes about, in which the reflection is direct. It renders itself homogeneous thereby and not by the reconstruction from anything else, but by the establishment from itself, i.e. by an essential identity. The criterion thereof is that is consists not of a relative negation i.e. not from something accomplished beside it but: it is its own identity according to its own reality.

The sense of the substantiality as of the reflection statement is here that the law produces identities, despite the fact that the rules of the various legal relations establish some dissimilarities. The realization of the identity comes before that of the differences: the identity as the negation of itself is founded on the dissimilarities. The law is therefore law; the identity of that is in general identical with the essence.

The identity may have its full sense in the unity with the dissimilarities, being posed not analytically but synthetically; a maintenance by terminating may stand behind it. Every variation, reform of the law is directed towards the rearrangement of dissimilarities and hardly makes a change in the above mentioned identity; that the life of man is a regular life. The purpose in itself behind it is obviously that the regularity of

this regular life is contained in the law at least as regards its baselines as the essence and as the appearance of the essence in itself. This would be specifically crossed e.g. by a related smaller community by its own purposes in themselves and by its different, narrower norms;[20] in a modern centralized state, however, the probability thereof decreases. The law is not only a technique releasing the social conflicts and settling the conflicts[21] but a technique guiding generally and indirectly the social activities.[22]

When the law is an active guiding technique in the social practice, the significance of the risk factor increases as regards the prestige of the law. The purpose in itself of the law is in a sense its self-assertion. This is, however, the matter of facts. Instead of them, the validity of the law can be posed and enforced. The basis for it is the identical - e.g. concerning the legal subjectivity - and simultaneously the selective method of treatment - e.g. concerning the substantive law - in which the substantiality as a contradiction, as the reflection into itself of the contradiction returns into its own basis. This selectivity[23] renders the law timely actual, though, at the same time, its risk is also contained therein. Under definite conditions, however, this is suitable for risking its substantiality.

The tolerance factor is rather powerful - the justification of this statement will not be given here - but the termination of the purpose in itself may be the termination of the normative legal regularity. I.e. the legislation and the application of law are able to destroy themselves from inside, moreover, to liquidate themselves. As it brings its substantiality in being, though in a negative way, it terminates itself by the termination of its appearance in itself. The termination of e.g. the selectivity, the subordination of the law to a single idea, the lack of real timeliness of the law have an effect in this direction.

Especially in the political state, the legal system i.e. the legislation and the application of law together is therefore in a continuous "compulsion to step". Since reflection is definite, it is the reflection both of legislation and of the application of law. Consequently, if the modernization is possible through the law, the legislation and the application of law have to be understood together.

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The change or the "opening" starts not necessarily from the professional legal sphere in a mass of situations existing in space and time and regulated usually legally, but sooner or later it produces new regularities therein. The legislation is in a key position: it is, however, incapable of working without the active co-operation of the application of law and of the state administration. As regards the legal technique of the modernization, the rule is that it has to cover both the legislation and the application of law, the impulse, however, shall proceed from the legislation which guides the application of law as professional function. It is a fact, however, that the law is not primarily effective in the professional sphere, it is not only valid there. The observance and non-observance of the law have also social technique. The legal regulation to be applied comes out of the professional legislative and law-applying range and the law generally acknowledged exists and functions just hereby.[24]

The balance of the working capacity of the law develops and appears in the relations of the legislation, the application of law and the self-assertion of law. This balance is at least so much a positiveness as a presupposition; therefore, it is always relative. In case of the modern law, this balance may be produced also in the same sequence, several times and in several ways. The demand on the change may proceed from the individual communities of the society, from the political or other organizations, from the political government, etc. Its technical effectuation will apply, however, the same legal technique as the modern political states of our time; the readily given technology identifiable primarily with the governmental legislation. The breaking down or the upsetting of the above-mentioned balance means factually a change or an intention to change as compared to a former - relatively determining - state. One method of the change of the relative balance in the said sense is the modernization.

The explication of the concept of modernization is not the task of the jurisprudence, and still less the task of the technical theory of the law. The modernization is a popular empiric concept or that of the daily policy in which rather the actual objects than the objective scientific standards are determinative. The "modern" is therfore an empiric and practical concept having diverse meanings. It may have e.g. the following meanings: new, novel, up-to-date, timely, foreshadowing, providing for the progress, model for the future, not outmoded, not out-of-date, not traditional. In general, it signifies the motion, the moving away in the direction of the uniform social progress (if such a thing exists), therefore, it is perspective and problem-solving.

Suppose that the general characteristic of the modernity is the conformity to the perspective historical demands, and, at the same time, the moving-away as compared to a former state, therefore exceeding, the negation of a former state, further on, this conformity means the correspondence to the latest; the not-backwardness, approach to the forefront of the world.

The modernization is simultaneity and special reality for the practical action. Therein, the reality existing in the given place and in time is true as an assumption. Each object, intention and idea is an assumption. Further on, the elsewhere existing reality is also ture; this is a real model due to the simultaneity but it is highly relative since it is identical only in time but not in space. The accomplisnment of the task is strictly bound in space and time for the practice. As the history of the future cannot be written in advance, likewise, it is impossible to act moving backwards into the past. The practical tasks - e.g. their correctness in principle, their usefulness - can be fairly interpreted in all certainty by the prospect of a historian - subsequently, of course, - by slackaning the dimensions, by taking up the space and time factors in a broader range. This is the possibility of the scientific interpretation not granted to the decision-makers of the practice. The practical decision is limited by the conditions, the assumption, however, being true as a decision, defines again at the same time the conditions, too. The idea of the modernization is the disengagement from the reality but technically strictly with a comparison with the reality.

From a certain aspect the modernization can be defined as a technology, so as the manipulation with the conditions and assumptions in the dimensions of space and time. Is the mechanism of this manipulation specific or not? Well, the solution is always individual, its conceptual mechanism is, however, not unique. Several analogous mechanisms can be denominated as conceptual-technological models. From among them the models coming nearest the mechanism of the modernization are as follows: the mechanism of the restoration and the mechanism of the law. Obviously, they belong not into an identical logical dimension but it is also evident that they have a relation to each other.

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The negation of the "modern" is the "reactionary" as the expression of the opposition to the social progress. For this once, it should be left out of consideration, how far the "social progress" is an interpretable expression. If the "reaction" aims at the rebuilding of a previous state, the popular expression thereof is the "restoration". This is the alteration of something existing by the revival, by the reconstruction of a previous solution.

The operations of the modernization and the restoration do not differ essentially in many respects. Their content essence - their objective and their results to be expected - show a fundamental difference. At the accomplishment of the operation neither the modernization nor the restoration has a specific guarantee. Both of them have a meaning from the same projective point - as compared to the present factuality - and their effectuation has some chance. Their common feature is their argumentation of critical character: the protest against the existing state of affairs, the insistence upon the necessity of a change. In general, this is a proper basis for discussing politics, but it is not sure that it is enough for the legislation. The modernization, and also the restoration, starting from the political life is directly connected to the legal sphere. The political government aims in its each variation at the legitimation which is held attainable by the law. The reforms have the intention to frame the reformative legal rules in the same way as the restoration has it for the regulation suitable for it. The fact that the matter is the dictatorship - namely a reformative or restoring dictatorship - does not alter the case too much; this wants also to achieve the legitimation and it joins the legal sphere at most dictatorially.

The political sociology sets a too high value on the legitimation and a too low value on the technology of the law and on the normative nature of the law. Practically each modern government - be it revolutionary, modernizing, restoring or even traditional - aiming at its purposes, frames sooner or later the law and operates an official apparatus for the application of law. The "normally working" function of the legislation and of the application of law seems namely from the very first to be suitable for the legitimism both inwardly and outwardly. The regularity, the normalizedness kept in functioning will be properly recognized sooner or later. It is, however, a matter of fact that the legislation and the application of law functioning in accordance with the rules may also lose its political authenticity, its legitimacy. In the case mentioned first the

ligitimation comes into being by the function, in the second case, it gets lost due to the function. According to the political conception, the dominance of the legal sphere is given by the grasp of the power. The law does not qualify but all the same it authenticate the government as political function. During the prolonged exercise of the power, however, also the contrary thereof becomes evident; the already effective law qualifies the function of the government, at the same time, however, it does not render it definitely authentic.

The law put into service of the modernization is often the following of a model: the translation, the adaption of the law supposed to be progresive which is, of course, more than a simple copying being practically probable only seldom. The law put in service of the restoration is similarly the following of a model: the re-establishment of a former law held correct and this is also a non-adequate in integrum restitution of the former law. In political sense it could be perhaps tallying with the model in case both of the modernization and of the restoration. And after all, it is not. By virtue of the observation of the function of law - ireespective of some political-sociological theses - the conclusion may be drawn that the obedience or disobedience to the law does not arise from political considerations. The members of the society, the individual persons acknowledge the law and the various legal rules as valid by no means for political reasons. The conception according to which if something is politically correct, it is also legally correct, is only the expression of the volition, moreover, it is a canvasser's argumentation. The opposite thereof is: if something is legally incorrect, it may not be correct politically either. In a modern society the transformation of the law is politically prompted, its effectiveness is, however, not so. The modern society is a political society. The weakening of the working capacity of the modern society, the reduction of its stability lead to the idea of the alteration - either to the modernization or to the restoration - bound to instable conditions.

The law is not built up exclusively on political rationalities - not even in case of totalitarian autocracies - and functions not on the basis of such rationalities. Any modern law is some kind of algorithm and an axiomatic system in technical sense. In order to promote the modernization processes of the society, to involve a new order into regularities: it has to change as an algorithm and to exchange partly its axioms. The total exchange is impossible. For this purpose, the political volition, the resolutionof the intention to change are not enough: the functioning of the law

is a sphere working relatively independently, characterized by its becoming a profession and the matter is here not the profession of the politician but the profession of the jurist. No essential change is made in the final result if some politicians pretend to be professional jurists or if certain jurists would like to seem simultaneously like professional politicians.

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The legal norm comprises the preliminary assumption that it establishes correctly the rule for each case to be judged. According to the rules of reasoning, the generality, the single and the one appear in innumerable cases: the typical, the special, the general, the tendency-like can be abstracted from them, somehow depending on the fact, with what degree of probability does it function instead of the - practically unrealizable - total induction. The real lawfulness is replaced by the posed probability. This cannot be solved in another way: if the law wants to be general, it can achieve it by the intervention in the individual cases. The incontestable presumption of this intervention is its indispensability. The regularity but not as the declaration but as the volition of the causality. Consequently, the law is not a lawfulness abstractable from cases of infinite number but just the contrary: it is a rule posed in advance decisively for each case.

Therefore, a concrete case shall be settled in such a way that it should correspond to the general expectation hypostased in the legal norm. Presupposing that e.g. lawfulnesses of full value may be stated from the social relations, from the values of the society, from the social motions, it may be also presupposed that if they can be defined, the differentiation of the legislation and of the application of law would become senseless. No doubt, it cannot be excluded theoretically that from the social situations of infinite number the general rule of the possibility of their solution can be analyzed and on this basis the law could be determinable for the people. This theoretical "possibility", however, relegates the problem for the moment into the world of the Turing-machine. This would lead to a conceptual mechanism which would continually reframe the role on the basis of all known parameters of all known cases: as a matter of course, this is practically an absurdity.

Nevertheless, this absurd assumption shall not remain without evidence. The condition of its realizability would be the evaluation of all known

cases: i.e. the complete induction. This may be explained by the complete co-ordination in space. The continuous reframing of the rule is the continuous temporality, or the identical phase.

But just this is wanting from the legal norms: the exact definedness of space and time. Therefore, the legislator concretizes the norm in these fields. The regularity is therefore an abstract image of the object, the conformity to rules, however, originates in the functions of the application. In this sense, the legislator and the applicant of law do not do finally anything else than they reframe continuously the norms, but by no means with full knowledge of all cases but only on the strenght of assumptions and images of objects. This is not a cybernetic evaluation, it is based only on the ground of the social acceptability, authenticity - credibility -: accordingly, it may be utilized, manipulated, exploited: it is always flexible, malleable. That is to say, it is considerably worse and, in a peculiar way, it is considerably better than a particularly objective system being slightly human. In a positive sense neither the humane nor the anti-humane rule can be judged. Humane and antihumane: they are anthropogeneous assumptions and images of objects in the dimensions of space and time, in the same manner as e.g. the useful and useless or the valuable and valueless or whichever variant of the judgement of the approvable or disapprovable conduct. The law is not therefore law because it gives effective voice to all these but there fore, because we regard as its function to give voice to all these. This function is anumated by the technology of the law which then dictates professionally the law for the society as the technique of the legislation and of the application of law.

The law is not simply the totality of hypothetical rules but of rules actualizable to a great extent. In case of the up-to-date law it is not so much prognosticatory as rather programmatical. In the modern political state the governmental legislation is dominating: the legislation of the parliament and of the government. The customary law, the law enacted by a plebiscite is a rarity, the legislation by the local governmental organs and by the organs of the self-government is of secondary character. Therefore, in the modern political state the modernization by the means of the law or the law as a modernization technique mean actual questions. The modernization puts the legislation normally, sooner or later, in the position of being urged: a short time remains for the "maturation"; in case of the modernization (and of the restoration) the legislation gets to a technological emergency.

This technological emergency is poor in traditionality, which is the contrast both to the modernization and the restoration in this sense. Just the denotation "traditional" is an empirical notion. In technological sense, something is a tradition in a case when the people who could make a change thereon, want hardly to make a change, although an other solution than that being traditional could be also introduced according to the presupposition. If the vital element of the modernity is some presupposition, that of the traditionality is then the actuality. The traditional is therefore a specific figuration: such a force is therein which eliminates both the modernization and the restoration. In its nature of this kind it is not ideal, according to its technique, however, it is the most tolerant i.e. it shows an adaptability. The traditional government and legislation are mostly an ideal or a model in principle, they constitute, however, only in very few instances a system to be translated, to be copied. Since the legal rule of a traditional system can be though taken over, its legal and administrative structures can be copied, from this, however, the function does not become already traditional - as known by everybody.

The modernization, the restoration, the preservation of traditions are not normative categories. They are processes starting not from the law but leading all the same thereto since the law and the legal order offer the measure and the form for the attainment of objectives. In this sense, the modernization may be the reason, the purpose, the functional claim of the upsetting, re-establishment, reconstruction of the balance which maintains the working capacity of the mechanism of the legislation, of the application of law and of the self-assertion of the law.

In a certain sense, the modernization is an object rationality. Let us assume that the sense of "rational" in general is first the logical reasonableness, secondly the reflection of thinking or something produced from the mentality i.e. an object in which the spirit realizes its own nature, whereas thirdly it is the self-consciousness of the thinking which blossoms out in actions, deeds, realizes its own essence in space and time, e.g. turns the assumption into fact.

In comparison with that, the "rational" has an extensive playing-field. If you like it, the rationality of people who can speak and discuss is different from that of people who can explain a book, from that of people who can act... (does the rationality develop in this way, say, according to Mo-Tsi?).

How is the rationality of the legislation as a factor in the technical

process of the modernization? This is a hypothesis treated as a fact. Since, if the effect of the legal norm and of its functioning cannot be precisely calculated in advance i.e. in an exact way, it has only probabilities. Theoretically, the legal rule is binding, practically, however, its observance is only probable. If the decision of the legislator is actually a decision "to be badly programmed", the rationality of such decisions is relative and specific. Which is declared to be rational, it is the expression of the presuppositions projected only the future from the estimated and selected facts. The effective expediency, usefulness and correctness will be revealed - in individual cases and tendency-like - only later.

The connection of the facts is rational, whereas the connection of the assumptions may be reasonable. The rationality, as the self-consciousness of actions and deeds may turn the assumption into fact - if it can do so. Finally, the rationality is in its appearance a professional knack; an actually effective interpretation. The legislator uses it if he wants to modify a legal rule and the applicant of law argues in this way if he wants to departs from the legal norm with his decision. The presentation of the rationality is thus a motivation technique - the routinism of the motivation of jurists - in different ways, all the same both for the legislator and for the applicant of law.

The modernization as the alteration of the object rationalities is superposed just due to the fact that the rationality of the modernization has various interpretational segments which are revealed, summarized and declared as valid volition and law not by the same organization. From all these, a modernization technology capable of working evolves only if the single operations have their significance separately, further on, all the operations have their significance also totally, as the system of the harmonized and co-ordinated operations.

The political scientists of Eastern Europe have been inclined for a long time to attach a great importance to the distinction between the modernization initiated by the "people" and that "initiated from higher quarters". From the point of view of the execution of the operations necessary for this purpose, technologically it is inessential whether the modernization is initiated "from below" by the communities of the society or "from above" by the government. A more important question is, with what degree of efficiency the rendering system-like of the necessary operations can be achieved. The professional sphere of the law - the legislation and the application of law - as the authorities defining and administering of-

ficially the justice can be put directly into the service of the modernization. The governmental legislation of the modern political state is able to bring into action the law as a modernization technique. When doing so, it poses the modernization in the law and enforces through the application of law. Thereby, corrections carried out as technique become possible in the interest of the entire society or nation, or in the interest of greater communities which can be changed methodically, and systematized, respectively.

All this is only a possibility, of course. The efficiency of the law, and to a certain extent the validity of the law appears and functions by no means in the professional sphere of the law but in the mentality and conduct of the people. This can be regulated so that first of all a generally acceptable motive of conduct shall be developed which can be then confirmed by the compulsion, by a legal compulsory mechanism. Reasonably, the motivation is not only the matter of the logical comprehension, of the rationality. It means less and more than that: it has to be credible, in space and time, when the modernizing action continues and as long as the rule of modernization is valid.

For the sake of the technical solution, the condition of the modernization is also the excellently functioning legal professional apparatus which is able to utilize all possibilities in the given space-time interval for the most useful systematization possible, to arouse the credibility in the whole society with respect to the regularity thereof, possibly to achieve an active identification. The modernization is the promise of a new stability, too. Among others, this provides a special significance to the legal acts of the modernization. Their unsuccessfulness, assailability, bold "sloganliness", sketchiness, further on, everything regarded as forgivable in case of the so-called "revolutionary legislation", all this is a foreboding in this case. A revolution may modernize but the modernization is not a revolution.

The history keeps in evidence more unsuccessful than successful modernization attempts. It seems that an international modernization paying no attention to the law, not utilizing the legal technique for its purpose, is a temporary illusion. Suppose that the revolution of 1917 in Russia aimed also at the modernization. In the course of this revolution the elimination of the law from the processes, from the life of the society, the so-called "revolutionarly legal consciousness" did not replace for a long time the legal regulation in Soviet-Russia after November 24, 1917.

On the other hand, no successful modernization could be achieved either by means of continuously new regulations, rules, of state measurements, by favouring the legislation and recommending these rules from the position of the legal power - as tried by Joseph II, Hungarian king and German-Roman emperor.

The elimination of the professional sphere of the law, or the real emptying thereof is just as an unfruitful phase as the unilateral, overstrained enforcement thereof. For the satisfactory functioning of the law as modernization technique the total legal order is necessary - especially as the harmonized operation of the legislation and of the application of law - as well as still numerous "partners" are required in the enforcement of law; i.e. the predominant social reception, the social understanding is inevitable.

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DAS RECHT ALS MODERNISATIONSTECHNIK

A. Tamás

Die normative Rechtstheorie grenzt sich aufgrund methodischer Überlegungen von der Untersuchung der Wirksamkeit des Rechts, - mitverstanden auch die Modernisationswirksamkeit - ab. Die rechtssoziologische Theorie ist offen für die Modernisation, interressiert sich aber wenig für die normative Rationalität der Mittel. Die Rechtsgestaltung und die Rechtsanwndung, das heiss die praktische Definierung des Rechts als reale Funtkion kann aus keinem der Aspekte von sich selbst einwandfrei interprätiert werden. Die technische Interprätation des Rechts fasst die Rechtsgestaltung als regelmässige Funktonsreihenfolge auf. Falls die Modernizierung in regelrechten rechtlichen Operationsreihenfolgen dargestellt werden kann, dann kann das Recht als Modernisationstechnik aufgefass werden. Die Operationsreihenfolgen bedeuten hier die Operationen der rechtlichen Definierung. In diesen gelten für allgemeine Fragen der Wille, die technologische Vergegenwärtigung der Rationalität, ihre Interprätation. Das Recht als Technik zur Modernisierung geht aus der professionellen Sphäre des Rechts aus. Diese professionelle Sphäre ist hierarchisch: auf der einen Seite die Funktion der Rechtsgebung, die in Zeit-Raum Dimension prognostische Entscheidungen fällt, auf der anderen Seite die Funktion der Rechtsanwendung, die in räumlich und zeitlich bestimmten Situationen realisierbare Entschiedungen trifft. Die reale Funktion dieser beiden Sphären kann eine nutzvolle Änderung, das heisst eine Modernisation in der Gesellschaft ergeben, falls ihre Funktionen aufeinander abgestimmt und sowohl als Motivation als auch als Zwangsmechanismus glaubwürdig erscheinen, das heisst seitens der Gesellschaft akzeptiert werden.

ПРАВО КАК ТЕХНИКА МОДЕРНИЗАЦИИ

А. Тамаш

Нормативистская теория права на методологической основе отграничивает себя от изучения эффективности права, включая и его эффективность в области модернизации. Теория социологии права чувствительна к модернизации, но у нее мало интереса к рациональности нормативных средств. Правотворчество и применение права - то есть, практическое юридическое дефинирование как реальное действие, - сами по себе не могут быть истолкованы безупречно ни в каких аспектах. Техническое толкование права воспринимает правотворчество и применение права регулярной серией операций. При условии, что модернизация может быть описана в форме серий регулярных правовых операций, право может быть техникой модернизации. Здесь серии операций означают действия по юридическому дефинированию. В этих вопросах воля является технологическим воплощением, интерпретацией рациональности. Право как средство для модернизации исходит из профессиональной сферы права, которая является иерархической: это, с одной стороны функционирование правотворчества, которое выносит решения, являющиеся прогностическими во времени и пространстве, с другой же стороны функционирование применения права, которое выносит такие решения, которые могут быть осуществлены в ситуациях, определенных во времени и в пространстве. Реальное функционирование этих двух сфер может привести к полезным изменениям в обществе, т.е. к модернизации общества при условии, что их функционирование является согласованным и общество принимает как его мотивацию, так и принудительный механизм.

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RECHTSTHEORETISCHE UND RECHTSHISTORISCHE ERLÄUTERUNGEN ZUR EFFEKTIVITÄT DES RECHTS

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Die Studia befasst sich mit einer der ältesten und komplexesten Problemen der Rechtsentwicklung mit der Wirksamkeit des Rechts.

Im ersten Teil der Studie geben die Autoren eine Definition der Rechtswirksamkeit, und betonen, dass dieser Begriff aus zwei Komponenten, aus der gesellschaftlichen und rechtlichen Wirksamkeit Besteht. Danach folgt eine Analyse der Faktoren, die die Wirksamkeit des Rechts beeinflussen.

Der zweite Teil der Studie stellt durch Beispiele aus der ungarischen und allgemeinen Rechtsgeschichte dar, was für eine zentrale Rolle die Art der Gesetzgebung und der Rechtsanwendung und das Niveau des Rechtsbewusstsein in der Sicherung der Rechtswirksamkeit spielen.

Die freien Bürger von Athen im 5. Jh. v.u.Z. durften jährlich an etwa 40-50 Volksversammlungen ihre Probleme oder Vorschläge zu den öffentlichen Angelegenheiten vortragen, wenn einem von ihnen es gelang, die Mehrheit durch logische Argumentation, durch eine gut aufgebaute Rede zu überzeugen, konnte aus seinen Vorschlägen sogar ein Gesetz getroffen werden.

Der Antragsteller verantwortete aber für das derart neu getroffene Gesetz! Erwies sich die Wirkung des Gesetzes in der Praxis als schlecht, schädlich für die Gesellschaft, konnte der Antragsteller sogar zum Tode verurteilt werden.

Die Effektivität bildet aber nicht nur eines der ältesten, sondern auch eines der am meist komplexen Probleme der Rechtsentwicklung. Die Annäherung an ihm konnte deshalb erst dann wissenschaftlich möglich werden, als freier Weg der interdisziplinaren Anschauung durch die Veränderungen im rechtlichen Denken, in der Rechtswissenschaft gelassen wurde.

In diesem Referat möchten wir den Versuch machen, die rechtshistorischen und rechtstheoretischen Annäherungen miteinander kombiniert, einige Grundprobleme der Effektivität des Rechts darzulegen.

I.

In der sozialistischen Rechtsliteratur[1] haben sich in Bezug auf den Begriff der Effektivität der Rechtsregeln folgende Hauptauffassungen herausgebildet.

Von Borucka-Arctowa wird die Effektivität der Rechtsregeln im weiteren Sinne genommen als Einklang der gesellschaftlichen Ergebnisse unter Einfluss bestimmter Rechtsnormen mit dem Gesetzgeberswillen, in engem Sinne aber als Einklang des Verhaltens des Rechtsnormempfängers mit der Regel aufgefasst.[2]

Nach Mollnau ist das Recht gesellschaftlich effektiv, wenn seine Regeln in erwünschtem Masse zum Erreichen der vom Gesetzgeber ausgesetzten Ziele ihren Beitrag leisten.[3]

Nach der Auffassung von Prusák kommt die Geltung der Effektivität der Rechtsregeln in bestimmten Verhaltensweisen zum Asudruck, die durch Regel vorausgesetzt sind, bzw. in den durch dei Verhaltensweisen bestimmten Ergebnissen, in der Wirklichkeit.[4]

Imre Szabó weist darauf hin, dass sich nicht nur das gesellschaftliche Ziel dadurch verwirklichen wird.[5]

Nach Kálmán Kulcsár ist die Effektivität des Rechts gleich mit seiner Verwirklichung in den gesellschaftlichen Verhältnissen.[6]

Schliesslich ist die Effektivität der Rechtsregeln nichts anderes, als das tatsächliche Ergebnis ihrer Geltung und das Verhältnis zwischen den gesellschaftlichen Zielen, zu deren Erzielung sie geschaffen worden sind.[7]

Man kann zwei Ebenen der Effektivität der Rechtsregeln unterscheiden. Einerseits ist es die rechtliche Effektivität, andererseits die gesellschaftliche Effektivität.[8] Das vorher Erwähnte bedeutet, dass das Verhalten der Adressaten der vorgeschriebenen Norm entspricht. Das Letzterwähnte hat das rechtsmässige Verhalten der Adressaten nicht als einziges Mass, sondern es ist die Verwirklichung des durch die rechtliche Regelung erzielten gesellschaftlichen Ziels.

In Bezug auf den Themenkreis von den allgemeinen Voraussetzungen und den auf si wirkenden Faktoren der Effektivität der Rechtsregeln haben die marxistischen rechtstheoretischen Forschungen sehr bedeutende Erfolge gehabt. Nach Mollnau bestehen die allgemeinen Voraussetzungen der Effektivität der Rechtsregeln aus den Folgenden.

Zum Bereich der makrosozialen Voraussetzungen gehören zum Beispiel der Zustand des Klassenkampfes, das Verhältnis zwischen Kollektiv- und Einzelinteressen sowie das Verhältnis unter den objektiven Bedürfnissen der Gesellschaft, usw. Im Bereich der mit den politischen Organisationen zusammenhängenden Voraussetzungen werden die Rechtspolitik der marxistisch-leninistischen Partei, die Qualität der Gesetzgebung sowie dei Teilnahme der Werktätigen und anderer gesellschaftlichen Organen an der Gesetzgebung und Rechtsanwendung erwähnt. Zu den mikrosozialen Voraussetzungen gehören die Anerkanntheit der Empfänger im Kollektiv, in den kleinen Gruppen, in der Familie, sowie das Verhältnis der Staatsbürger zu den Kollektiven an den Arbeitsstellen und zu den Gewerkschaften. Letztlich werden die persönlichen Voraussetzungen von dem elterlichen Charakteren, vom Niveau der

Schulung-Bildung, sowie von der individuellen Wertorientation bzw. Erfahrungen gebildet.[9]

Von Kálmán Kulcsár werden die Einflussfaktoren auf die Effektivität der Rechtsregeln selbst in der Gesellschaft, in dem politischen, wirtschaftlichen System, in der Korrektheit der Gesetzgebung im "technischen Sinne" genommen, in dem rechtlichen Adaptierungsprozess, in der Konsistenz des Rechtssystems, im Rechtsbewusstsein, sowie in der Effektivität der Vollstreckungs- und Rechtsanwendungsorgane angegeben.[10]

Von Prusák werden in diesem Zusammenhang die Qualität und Quantität der Gesetzgebung, das Rechtsbewusstsein, die sozialen, psychologischen, writschaftlichen, ideologischen sowie politischen Faktoren erwähnt.[11]

Auf dieser Grundlage können folgende drei rechtliche Voraussetzungen der Effektivität der Rechtsregeln hervorgehoben werden:[12]

a) Die Vollkommenheit, die Optimalität der Gesetzgebung,

b) Die Effektivität der Rechtsanwendung,

c) Das Niveau des Rechtsbewusstseins.

Das grundlegende Kriterium der Vollkommenheit der Gesetzgebung ist es, dass sie die gesellschaftlichen, wirtschaftlichen, politischen usw. Verhältnisse richtig regelt.

In der Gesetzgebung soll auch die Auswahl der adequaten Regelungsmethoden, Sanktionen, Wirkungsmechanismen, usw. berücksichtigt werden. Schon von Engels wurde darauf hingewiesen, dass es nicht nur die Anforderung dem Recht gegenüber in einem modernen Staat gibt, der allgemeinen Wirtschaftlage zu entsprechen, zum Ausdruck dieser lage zu werden, sondern, dass es ein in sich selbst zusammenhängender Ausdruck sei, der sich durch die inneren Gegensätze nicht ins Gesicht schlägt. Insofern zählt auch die Konsistenz des Rechtssystems zu den grundlegenden Voraussetzungen für die Effektivität der Rechtsregeln. Ebenso bekommt die Gesetzgebertechnik bzw. -styl eine Rolle in der Sicherung der Effektivität der Rechtsregeln.

Auch die Vollkommenheit der Gesetzgebung bildet eine wichtige Voraussetzung für die Effektivität der Rechtsregeln. Sie wird durch zahlreiche Faktoren beeinflusst. Zu den wichtigsten unter ihnen zählen die Qualität der Rechtsregeln, die organischen Faktoren, das Mikroklima, die subjektiven Züge des Rechtsanwenders, sowie material-technische Faktoren.

Bei der Sicherung der Effektivität der Rechtsanwendung spielen die Obersten Gerichte, ihre Normativen eine hervorragende Rolle. Auf dieser Ebene werden zahlreiche dann unter den durch die Gerichtspraxis erarbeiteten Rechtsprinzipien auf Würde einer Rechtsnorm gehoben.

Es ist leicht einzusehen, dass es im Rahmen der Rechtsentwicklung durch die Gerichtsorgane ermöglicht wird, die technischen Fehler, Defekte und im bestimmten Sinne genommen auch die Fehler und Defekte vom inhaltlichen Charakter zu beseitigen, die Kongruenz der Rechtsnorm und der ihr zugrunde liegenden gesellschaftlichen Verhältnisse herzustellen. Dadurch kann die richterliche Rechtsentwicklung einen Beitrag zur Erhöhung der Effektivität des sozialistischen Rechts leisten.[13]

Das Rechtsbewusstsein der Klassen, der Schichten, des Individuums einer Gesellschäft, dessen Entwicklungsstand, Niveau - als realisierung der rechtlichen Vorschriften - gehören zu den wichtigsten Voraussetzungen der Effektivität der Rechtsnormen.

Das Rechtsbewusstsein drückt nämlich ein Verhältnis des Individuums, der Schichten, der Klassen zu den Rechstnormen aus.

Das positive Verhältnis zum Recht bedeutet aber bei weitem nicht, dass auch alle konkrete Rechtsregeln immer positiv von den Staatsbürgern beurteilt werden. Als sehr wichtiger Faktor bei der Geltung der Effektivität der Rechtsregeln soll der Zustand des Rechtsbewusstseins das durch bestimmte gesellschaftliche Faktoren (z.B. Öffentlichkeit) deformiert werden kann, vom Rechtsanwender, besonders vom Richter, beobachtet werden.

Die Gesetzgebung soll auch die eventuellen Defekte des Rechtsbewusstseins der Rechtsanwender und der Bevölkerung nicht ausser Acht lassen, sonst kann die Effektivität der zu schöpfenden Rechtsnorm leicht in Gefahr geraten.[14]

Im weiteren sollten einige rechtstheoretische Erläuterungen zur Effektivität des Rechts betrachtet werden.

II.

Bei der Untersuchung der Effektivität des Rechts kämpft der Rechtshistoriker mit der Schwierigkeit der Fülle, denn er deckt zahllose Fälle aus dem Bereich der Effektivität der Rechtsnormen während der Untersuchung der Jahrhunderte, der geographischen Räume. Es ist das Sammeln von Materialien doch keine leichte Aufgabe, denn die Quellen sind oft verloren gegangen, vernichtet worden und es ist gar nicht leicht aus den lakonisch, verworren formulierten Urkunden, Akten die tatsächliche Effektivität des Rechts zu messen. Es ist auch gewiss, dass das Geltendmachen der Regeln ohne Kenntnis der Praxis aus den Gesetzfassungen kaum festzustellen ist.

Es ist schwer, die Effektivität des Rechts auch deswegen zu messen, weil die Durchführungsorgane über die Erfahrungen bei der Durchführung "gnadenreichen Bestellungen von oben" oft das melden, was "an oberen Stellen" erwartet wird.

Die Einflussfaktoren auf die Effektivität der Rechtsregeln können historisch betrachtet auch in den Gemeinschaften untersucht werden, die die durch die Gesetzgebung, Rechtsanwendung, Rechtskenntnisse und Rechtsnormen zum beeinflussenden gesellschaftlichen Verhältnisse tragen.

Die entsprechende Vorbereitung der Rechtsnormen, die Qualität ihrer Erarbeitung bilden wichtige Voraussetzungen für ihre Effektivität. Es sind bekannt die Vorarbeiten zu den Kodifikationen in den vergangenen zwei Jahrhunderten, die hochgradige Fähigkeit zur Integrierung des Rechtsmaterials bis dahin, ihre Geneigtheit zur Adaptation der internationalen Erfahrungen. Die gesellschaftliche Verobereitung war weder den Schöpfern vom Preussischen Allgemeinen Landrecht (1794) noch den Gesetzgebern des Allgemeinen Bürgerlichen Gesetzbuches unbekannt, einige seiner Teile sind versuchsweise sogar in der Praxis eingeführt worden.[15]

Durch die Techniken der hochgradigen Kodifikation sind die Ergebnisse der Kompillationen des 16/17. Jahrhunderts benutzt worden. In der Steiermark gingen zum Beispiel dem Erlass der Landgerichtsordnung vom Jahre 1574 mehrere Entwürfe vor. Den Ausgang bildete das Sammeln strafrechtlicher Vorschriften und des ungeschriebenen Rechts in der Steiermark, in die später die Strafordnungen der Erbländer in der Nachbarschaft und letzlich die Anordnungen von Carolina eingearbeitet wurden.[16]

Die juristischen Fachkentnisse und der Kunstfleiss können schon in den Rechtszusammenfassungen der Länder nachgewiesen werden. In Niederösterreich gab es zum Beispiel einen Kompillationsprozess zwischen 1651 und 1668. Bei der rechtlichen Regelung bildete sich das folgende Verfahren heraus: Die einzelnen Artikeln wurden von vier Kompillatoren (Funktonären der Landesregierung und Landstände) vorbereitet. Auf der Grundlage der Gerichts-, Verwaltungsakten, die auch das ungeschriebene Recht enthalten, des Strafrechts der Nachbarländer und der Fachliteratur wurden die Diskussionsfragen von zwei Rechtswissenschaftlern begutachtet. Die endgültige Fassung wurde oft durch ein Kollegium angenommen, das aus Beauftragten der Stände und Landesherren bestand, die auch eine juristische Ausbildung besassen. Dann wurde das Verfahren durch die niederösterreichische Regierung überprüft, und schliesslich vom Herrscher als eigene Verordnung verkündet.[17]

In dem blühenden Mittelalter verbreitete sich unter den europäischen Städten die Praxis, dass das alte Recht der bedeutenden Städte durch die neu gegründeten Städte übernommen wurde. Dadurch wurde die Brauch barkeit des Rechtsmaterials gesteigert, und in einigen Fällen konnte sogar die Effektivität des nach der Adaptation weiterentwickelnden Rechtsmaterials zunehmen, denn man sollte in einer neuen Stadt mit den historisch herausgebildeten Gebundenheiten der Mutterstadt nicht rechnen.[18]

Die Übernahme erwies sich im Laufe der Geschichte aber nicht immer als erfolgreich, und die manchmal fast messianistischen Erwartungen, die an das Musterinstitut gestellt worden waren, wurden nicht erfüllt.

Eine der Voraussetzungen für die Effektivität des Rechts bildet es, dass die Adressaten die Verordnungen kennenlernen sollen. Es ist ein klassisches Ereignis, dass das Recht von Drakon oder durch die Tafelgesetze Nr. XII schriftlich fixiert worden sind.

Die Frage ist aber trotzdem nicht so eindeutig, denn die Gegner von der Veröffentlichung des Rechts haben im altertümlichen China folgenderweise argumentiert: "Wenn das Volk seine Rechte genau kennt, steht vor seinen Vorgesetzten nicht mehr mit gefürchteten Ehren. Ein prozessführender Geist wird vorherrschend... Das Volk wird nicht mehr lenkbar sein." Anderswo steht es zu lesen: "Das Volk wird die Tafeln studieren und sich keine Mühe mehr geben, um seine Männer von Rang und Stand kennenzulernen. Und was für einen Beruf kann dann der Vorstehende aufbewahren?"[19] Im mongolischen Reich wurde das Yasa, das Gesetzbuch vom Dschingis-Khan in einem Geheimarchiv aufbewahren, und nur für die ältesten Mitglieder der Dynastie war es zugänglich.[20] Im modernen Japan haben die Gesetzgeber der Tokugawa-Periode das Recht nicht völlig vor den Augen des gemeinen Volkes "versteckt", sie haben aber die Sanktionen trotzdem geheim gehalten, damit "das Volk dem Gesetz folgen, aber es nicht sehen kann."[21] In Europa war vom Gesetzgeber im Sächsisichen Kurfürstentum am Ende des 16. Jahrhunderts ausdrücklich verboten, die Strafnorm für mildere Beurteilung zu veröffentlichen.[22]

Im Laufe der Jahrhunderte wurde aber im allgemeinen die Bekanntmachung des Rechts als eine wichtige Voraussetzung für seine Geltung betrachtet.

Vor der Buchdruckerei waren die Rechtsquellen nur in wenig exemplaren angefertigt, sie sind oft verlorengegangen, vergessen oder fehlerhaft nachgeschrieben worden. Infolge der fleissigen Arbeit des schreibers sind aber zum Beispiel der Schwäbische Spiegel, die Russkaja Pravda unseren Quellen nach etwa in 400 beziehungsweise in 106 verschiedenen Handschriften erhalten. Über den Sächsischen Spiegel wurde in der zweiten Hälfte des 15.

Jahrhunderts ziemlich übertrieben gehalten, dass er über 5000 Abschriften verfügt.[23] Die Handschriften wurden in Kodex gebunden, die eine Rechtsnorm verbreitete sich mit der anderen zugebunden.

Die Rechtsbücher konnten in Form vom Gedicht, auf Fragen zerschnitten, oder aber auch als rechtlicher "Bilderroman" mit reichlichen Illustrationen versehen, erscheinen. Es bedeutete zugleich auch eine Rechtspropaganda auf einer elementaren Stufe. Im Laufe der Bekanntmachung des Römerrechts in Deutschland erzeugte sich Anfang des 16. Jahrhunderts eine popularisierende "Broschüreliteratur", die in die Volkssprache übersetzt, gründlich-unrichtig exzerpiert war.

Man versuchte oft die Bekanntmachung der Rechtsnormen dadurch zu sichern, dass die Anordnungen vor kleineren Gemeinschaften vorgelesen waren, wie in einigen Hansastädten sogar im 18. Jahrhundert, oder in Koscie im 17. Jahrhundert der Fall war. Diese Lösung ist aber in der Neuzeit zu leerer formalität geworden, und bei steigenden Zahl der Normen konnte sie sich für einen gangbaren Weg als geeignet nicht erweisen.[24]

Durch die Erfindung des Buchdruckes eröffneten sich auch im Bereich der Publikation der Rechtsnormen neue Perspektiven. Das erste gedruckte weltliche Gesetzbuch in Europa war das reformierte römische Stadtrecht v. J. 1471.

Ein bedeutender Faktor der Erweiterung der rechtlichen Informationen für heute war die Ausgabe der Amtsblätter. Die Bevölkerung in Ungarn lernte die Nummer von Reichgesetzblatt und Landesregierungsblatt in einer für die Nation schmerzvollen Periode zu Mitte des vergangenen Jahrhunderts kennen, und nach dem Ausgleich hat das Budapester Amtsblatt (=Budapesti Közlöny) die Beamten und das rechtsuchende Publikum über die Rechtsnormen fast achtzig Jahre lang informiert.

Die Rechtsnormen, die viel ausführlicher, weitumfassender sind, scheinen effektiver zu sein. Durch die komplexen Sozialverhältnisse wird die vielseitige Regelung erfordert. Wenn aber die Rechtsnormen primär nicht der harmonischen Gestaltung der lebensverhältnisse dienen, sondern darüber hinausgehen, gelangen bis zur Überregelung, zur Bevormundung - dadurch wird die Toleranz der Gesellschaft auf die Probe gestellt und zugleich die Effektivität des Rechts vermindert.

Für die Überwucherung und Inflation der Rechtsnormen können mehrere Beispiele angeführt werden. Während des Neoabsolutismus zwischen 1850/1859 hat das offizielle Blatt des ungarischen Kronlandes etwa 3065 Rechtsnormen veröffentlicht oder die Veröffentlichung in einem Amtsblatt angedeutet. Im

Jahre 1946, in dem "produktivsten" Jahr nach dem Quantität der ungarischen Gesetzgebung, dürfte die Zahl der Publizierten Rechtsnormen auf 3000 betragen. Dabei wirkte auch die Unübersichtlichkeit des Rechtsmaterials gegen seine Effektivität.

Der Gesetzgeber ist oft eben wegen seiner peinlichen Pedanterie lächerlich geworden. In Salzburg wurde im 17. Jh. vorgeschrieben, dass die Eltern Kinder unter einem Jahr nicht mit ins Bett nehmen sollen.

Die Effektivität der Rechtsnormen nimmt ab, wenn die Adressaten ihre Bestimmungen schwer oder überhaupt nicht, oder missverstehen.

Der Gesetzgeber und der Rechtsanwender fühlt sich verlockt zu sein, die Befolgung des Rechts durch immer strengere Sanktionen zu erzwingen. Lange Zeit versuchte man die Effektivität des Rechts durch Geltendmachen der schroffen kollektiven Verantwortung zu erreichen. Dieses Mittel wurde zum Beispiel im mongolischen Reich und noch am Anfang des 20. Jahrhunderts in Indien von den englischen Kolonisatoren in Anspruch genommen.[25]

Unseres Erachtens bedeutet die Toleranz der Gesellschaft einen Grenzwert auch bei der Grausamkeit der Sanktion, und nach einem Punkt erhöht sich die Effektivität des Rechts nicht weiter, sondern verringert sich.

Die Effektivität des Rechts wird auch von den Rechtsanwendungsorganen gesichert, ihre Personal soll entsprechende Kenntnisse über das anzuwendende Recht, über das Medium der Verwirklichung besetzen, und es soll auch die Zeilsetzungen des Gesetzgebers annehmen.

Vorbildlich kann es dienen, wie die Sachbearbeiter in Frankreich in den Zentralorganen von ancien regime ausgewählt worden sind. Es war für wichtig gehalten, dass die "Meister der Bittschriften" aus allen Ländern stammen sollen, sie sollen nicht nur in den verschiedenen Zentralorganen bestimmte Zeit verbringen, sondern auch auf dem Lande Praxis aneignen sollen Unter modernen Umständen hat einen ähnlichen Charakter das Institut für Berufung zum Probendienst im Ministerium aus den Slebstverwaltungen.

Dagegen ist das Kenntnis der örltichen Verhältnisse während der Bach-Zeit in Ungarn in den Hintergrund gestellt. Damals wollten zahlreiche "rechtliche Ratgeber", Beamten aus den Erbländern die Adoptierung des fremden, österreichischen Rechts fördern. Diese Beamten waren eifrig daran, und sie versuchten oft trotz besten Willens efolglos, die gewaltsame Übernahme zu sichern.

Die Effektivität der Rechtsinstitute kann nicht richtig bewertet werden, wenn die Institute isoliert, von den Zusammenhängen im Rechtszweig-Rechtssystem ausgehoben betrachtet werden. Es ist besonders in den Über-

gangsperioden zu beobachten, dass eine modern Rechtsregelung sich selbst "nicht auslaufen" kann, wenn die Kuppelungselemente des Rechtssystems noch nicht modernisiert worden sind.

Die Tätigkeit der im Jahre 1840 gestellten Wechselgerichte wurde in manchen Fällen dadurch verlangsamt, dass die traditionellen Elemente des feudalen Gerichtsorgans ihre Ersuchungen erst verspätet erfüllten. Die Bedeutung des ungarischen Strafgesetzbuches v. J. 1878 verminderte es eine Zeit am Ende des vorigen Jahrhunderts, dass das Verfahrensrecht ziemlich anachronistisch war.

Das Rechtssystem steht auch mit der Politik und mit der Wirtschaft in Wechselwirkung, und der Grund für die Unwirksamkeit der Rechtsnormen ist in vielen Fällen eben in dieser ausserrechtlichen Sphäre zu suchen. In erhöhtem Grade ist es wahr während der Zeit der verschärften Konflikte, des Krieges und der Wirtschaftskrise. Die zu dieser Zeit erlassenen Rechtsregeln erwiesen sich in erster Linie nicht darum unwirksam, weil sie eilends gesetzt worden waren, oder fehlerhafte Lösungen enthielten, viel mehr aber darum, weil die Rechtsregelung als solche den Erscheinungen von grosser Dimension, vom stürmischen Verlauf unterlag.

Die Bausteine der Gesellschaft, die Makro- und Mikrogemeinschaften hängen mehrfach von der Effektivität des Rechts ab, denn sie vermitteln die Vorschriften zu den Mitgliedern - zu den Untertanen. Wenn die politisch führende Schicht der Gesellschaft die unten befindenden Gemeinschaften ausser Acht lassen, werden sie sich als Rückwirkung darauf von den oberen Rechtsnormen abgrenzen. Dieses Verhalten konnte sich in der Solidarität mit den Rechtsverletzenden, in der Verbergung der Verfolgten, in der hartknäckigen Ausdauer bei den alten Regeln der reformatorischen Bestimmungen gegenüber äussern.[26] Es gab einen Fall, als eine Dorfgemeinschaft noch zu Mitte des 19. Jahrhunderts mit den Mitgliedern, die sich in der verschärften Lage zu den Aufsichtsbehörden geschlagen haben, abrechnete.

Auch die Staatsmacht bestrebte sich b ei dem Geltendmachen ihrer Bestimmungen die örtlichen Gemeinschaften, die über einen grossen Einfluss verfügen, in Anspruch zu nehmen. Dieses Bestreben hat in den asiatischen Dorfgemeinschaften eine Vergangenheit von mehreren Jahrtausenden, es ist sogar neulich nachweisbar. In Japan gab es in der Neuzeit ein System von fünf Familien, das verpflichtet wurde, den Vorbehalt der Gesetze zu beobachten, in den Schutzaufgaben mitzuwirken und Anzeige zu erstatten. Der Gedanke dieses Systems wurde während des zweiten Weltkriegs wiedererweckt.[27]

Trotz der staatlichen Beeinflussung wollten die örtlichen Gemeinschaften ihr eigenes geschlossenes wirksames Normensystem herstellen, wie es über ein Ordnung haltendes szeklerisches Dorf zu sagen Ist: "Wohin weder der Staat noch das 'Gesetz' des Stuhls nicht eindringen konnte, dort haben die Leute Regeln geschaffen, deren Arbeit und das alltägliche menschliche Verbindungssystem unter der Unordnung gelitten hatte. Es waren in Wirklichkeit also Mitglieder der Dorfgemeinschaft... in erster Linie dort, wo das relative Selbstbestimmungsrecht schlecht oder recht aufbewahrt bleiben konnte." "Der Mensch, der mit dem Wohlgefühl der Richtung" zu den oft eine harte Gebundenheit bedeutenden Gebräuchen "auch unter bösen historischen gesellschaftlichen Bedingungen lebte konnte über ein Plus verfügen, wodurch sein Leben noch erträglich wurde".[28]

In den letzten anderhalb Jahren sind aber sehr viele traditionellen Gemeinschaften unter dem Einfluss der grossen Ereignissen der Geschichte auseinandergefallen Solche waren auch die Zünfte mit reicher Vergangenheit. Am Ende ihrer Tätigkeit erwiesen sich schon ihre umständliche starre Regeln als Hindernisse vor der Entwicklung, sie sind zu gut-schlecht eingehaltenen formellen Reliquien geworden und konnten höchstens als Ausserlichkeiten ohne Inhalt bei den Gewerbevereinen anstelle der Zünfte weiterleben.

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HISTORICAL AND THEORETICAL INGREDIENTS TO THE EFFECTIVITY OF LAW

A. Visegrády - I. Kajtár

The study deals with one of the oldest and the most complex problem of the legal development, the effectivity of law.

In the first part of the study, the authors define the effectivity of the law, underlining, that it consists of a social and a legal aspect. They analyze in the forthcoming only the factors, affecting the legal effectivity of law.

The second part of the study shows, in the mirror of many examples of the universal and Hungarian history of law, what a central part the quality of law-making and justice, as well, as the standard of legal consciousness play in assuring the effectivity of law.

ИСТОРИЧЕСКИЕ И ТЕОРЕТИЧЕСКИЕ УСЛОВИЯ ЭФФЕКТИВНОСТИ ПРАВА

А. Вишегради - И. Кайтар

Настоящая статья посвящена изучению одного из самых древних и сложных вопросов развития права - эффективности права.

В первой части статьи авторы дают определение понятия эффективности права, подчеркивая, что это имеет социальные и правовые аспекты. В дальнейшем они подвергают анализу только те факторы, которые касаются эффективности права в виде закона.

Во второй части статьи в зеркале ряда примеров из всеобщей истории права и истории венгерского права показывается, что качество законодательства и юстиции и уровень правосознания в какой мере содействуют обеспечению эффективности права.

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POSSIBILITIES AND LIMITS OF FOREIGN CAPITAL INVESTMENT AS PROVIDED BY THE HUNGARIAN CODE ON INVESTMENTS

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The paper examines the influence of the provisions of Act No. XXIV of 1988 on the investments of foreigners in Hungary upon the appearance of foreign capital, with a particular emphasis on the assessment of the possibilities and limits of legislation in respect of joint ventures. The guarantees, favours, and preferences granted by the positive law are investigated in detail, and the appropriate impulses serving to promote the intensification and efficiency of foreign capital investment, culminating in a comprehensive, market-oriented development of the legal system as a whole are considered.

I.

1. As it is clear from the title of the present study, it examines the legal regulation of corporations with foreign share, i.e. the structure of norms that determine the system of conditions of foreign capital investments. At the same time, the analysis does not aim at giving a comprehensive assessment of the detailed rules concerned. Rather, its purpose is to assess the objective possibilities and limits of legislation in respect of joint ventures. To put it more precisely, a reply should be given to the question concerning the degree of efficiency of the provisions of Act No. XXIV on the investments of foreigners in Hungary (Code on Investments) in promoting an important inflow of foreign capital.[1]

2. Prior to proceed to the analysis of the internal legal material in the stricter sense of the term it is absolutely necessary, however, in order to ensure completeness, to have a look at the bilateral agreements on the protection of investments concluded by Hungary[2] and the international conventions affecting foreign investments to which Hungary adhered in recent years, respectively. Thus, Hungary is member to the Washington Convention offering an independent forum for the peaceful settlement of disputes concerning the investments of states and private persons[3] as well as

the Multilateral Investment Guarantee Agency or MIGA,[4] as it is called in common practice. Through this latter membership foreign investors obtained the possibility of concluding insurance contracts with the MIGA financial fund, supported by the World Bank, to cover the non-commercial risks of their investments in Hungary. Clearly, this is an efficient means to increase the confidence and entrepreneurship of investors considerably.

The bilateral agreements on ivestment protection, referred to above, are appropriate to increase further the protective screen of the multilateral conventions. In conformity with the strictest norms of international law, Hungary undertook the obligation by means of their provisions to protect the property of foreign investors, i.e. to refrain from their expropriation as well as, among other points, to allow the transfer of the profits due to the foreign partner in convertible currency.[5] In addition to the afore mentioned, the intention of the support of joint companies has been formulated in the Agreement between the European Economic Community and the Hungarian People's Republic on trade, commercial and economic cooperation.[6] As a survey of the many-sided system of international instruments would surpass, indeed, the frames of the present study, only references will be made to the relevant recent literature.[7] Rather, we shall concentrate to the Hungarian Code on Investments in the following in which the guarantees as stipulated in the international agreements concerned are laid down in the field of the internal law.

II.

Apart from few exceptions, the provisions of the act on the investments of foreigners in Hungary can be grouped, with a pointed simplification, to two topics, i.e. the categories of guarantees (3) or favours (4). (As a matter of fact, the said distinction is only of a relative nature, in view of the close actual relationship between the two groups of norms. In some cases, guarantees may be regarded as favours or vice versa.) At the same time, restrictive measures appear, necessarily, in limited cases as their excessive frequency would endanger incentives for investments, i.e. the original purpose of the legislator.

3. With the enactment of the Code on Investments, it is, in fact, pronounced in terms of the positive law that "the investments of foreigners in Hungary enjoy full security and protection."[8] This solemn declaration is immediately followed by an obligation promising indemnity[9] for the foreign

investor who suffered damage in case of nationalization, expropriation or a similar disposition, to be paid at the actual value and without delay. In compliance with the previous Hungarian statutory rule bearing upon joint ventures,[10] the Act also provides for ensuring the free transfer of the share of profit, due to the foreign party, in convertible currency.[11] Thus one can claim with full right that the guarantee system of the Hungarian Code on Investments is in harmony with both the international commitments of the country (see 2/.) and the requirements of our time.

Making a short historical detour, it may be of interest to mention that the range of legal instruments of the Codes on investments, formulated in the 20th century, destined to ensure and promote the transnational flow of capital, started to take shape in some of its elements as early as at the beginning of the exchange of goods. Thus, the protection of the foreign deals of merchants arrived from abroad or the codification of their liberties in brighter times used to be the subject-matter of the legislation of several states long since, as it is testified by sources from the Antiquity and the Middle Ages.[12] Even the Magna Charta, this fundamental milestone of British constitutionality, can be mentioned in this context, with its provision laid down in a separate section, reading that "all merchants may enter or leave England unharmed, ... stay or travel within it, ... for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs."[13] On the basis of this eminent declaration, their persons and properties enjoyed protection even in case of war, on the condition that Englishmen could enjoy similar treatment in the country of origin of the merchant in question. In terms of the brief principle of reciprocity, "if our merchants are safe, they shall be safe too".[14]

4. The group of norms concerning favours as stipulated in the Hungarian Code on Investments displays a picture even more varied than the delicate system of concepts relating to guarantees.[15] Nevertheless, it is relatively easy to classify this multitude, so rich in forms, into two subgroups, distinguishing in their examination whether they reflect to the enforcement of national treatment or a divergence from it. It seems to be correct, in fact, to look for the expression of the domestic equality of rights in these rules as a clearer picture can be thus obtained from the Code on Investments through the intermediary of a traditional legal institution of international commercial law. The world of norms as laid down in the Code has, indeed, an essentially bipolar nature in this respect, i.e. some provisions mean the enforcement of national treatment (a) while other

favours display national treatment as overcome (b), offering more important advantages.

a) The assurance of national treatment is formulated, with a general validity, already in the Preamble of the Code and, with the declaration of this intention of the legislator, it is then formulated in several positive provisions.

(i) With the provision that the establishment of a company with foreign share requires a joint licence from the ministers of finances and trade only if the proportion of foreign property within the company concerned is complete or represents the majority, means the facilitation of this establishment and, in fact, the enforcement of national treatment.[16] As a consequence, the overwhelming majority of enterprises i.e. those in which foreign share is inferior to 50 pc may be established according to the same procedure which is binding for economic corporations exclusively in domestic property.

(ii) The declaration of the absolute capacity of jointy companies[17] to acquire landed property[18] that put an end to the vicious views of the recent decades, is of similar importance. In fact, corporations with foreign share needed previously the preliminary license of the Ministry of Finances for acquiring a landed property.[19] Thus, it was of no use for them if they had a domestic place of residence, were registered in Hungary, and were operating according to the Hungarian statutory rules, they were regarded as being foreign in this respect. This regulation was, really, not only controversial from the point of view of legal dogmatics and, the more, contrarian to the dispositions of the Code of International Private Law[20]; in addition to this, it caused considerable actual damages to the economy as a result of its discouraging effect on capital inflow.

(iii) Finally, the modification of section 685 of the Civil Code pronouncing that business associations should be regarded as economic organizations[21] is of prominent importance for giving a foundation to the national treatment, although it is beyond the dispositions of the Code on Investments. Taking into consideration furthermore that the wording of the Civil Code makes no more distinction among economic associations, all associations, including those operating with a foreign participation, are classified as economic organizations. This rules is important, then, not only from the point of view of civil law relations but on account of its multiplying effect as well. It should be noted to this that, for the time being, mainly the term "economic organization" is used in the legal regu-

lation of economic affairs when the range of the relevant subjects at law is delimitated. As a result of the afore mentioned modification of the Civil Code, the complete material of the actual Hungarian economic law would "overrun" the associations or corporations operating with foreign participation in the absence of other, different dispositions (see point b) below). This high number of norms is shaped, however, even now very definitely to the category of state-owned enterprises; accordingly, not only the "commercial" substance of the professional subjects of the economy is expressed in them but the economic interference of the state as well. Apart from the aforesaid remarks, the legal material concerned is amorphous and controversial to the extent that its application to the coroporations operating with foreign participation would mean a profound confrontation with the purposes of the Code on Investments, and the promotion of foreign capital investments in particular. Paradoxically, the realization of national treatment would give birth necessarily to the effort of its limitation or to surpass it in a more positive direction,[22] considering the present situation of the Hungarian legal system, irrespective of all of its useful effects. (See also Chapter IV).

b) The claim mentioned above is met by the provisions of the Code partly by positive favours (i) and partly by applying a general "exempting" clause (ii).

(i) Taking into consideration the positive favours, the Code on Investments offers considerable advantages, notably in the field of taxation[23] and the regulation of customs.[24] In case of a specified minimum foreign share or capital investment the Code grants e.g. a dispensation of the dispositions of the domestic regulation of wages and salaries.[25] In spite of the exemplary nature of these rules, it is clear that they do not represent the maximum rate of favours that could be allowed. Rather, a further extension of same would be justified, with particular attention to the degree of taxation. In view of the intentions of the present expoundings, concentrated to examine the operating capacity of the system as a whole, a thorough analysis of the important problems is here, exceptionally, disregarded.

On the other hand, the many-sidedness of the positive favours, offering an almost eclectical nature, is worth mentioning. In fact, the dispositions in question cover the fields of customs and taxation law just as the rules of foreign exchange regulation or labour law.[26] The more, other topics such as the establishment of an association or corporation or its

capacity of acquiring property were also mentioned in the preceding point 4a). All these points allow to get to the conclusion that the entire volume of Hungarian law became sensitive to foreign trade, essentially, with the appearance of foreign working capital, to be utilized in the domestic economic theatre, financing productive activities as it has hardly any element which would not influence the operation of joint companies.

Admittedly, the exports and imports of commodities can be regulated efficiently by the norms of foreign trade, covering also the specific rules of civil law obligations with international relevance and the deals related to payments.[27] Nevertheless, they are not applicable in respect of the domestic production and marketing of commodities. True, the utilization of the functioning capital of foreign origin is affected by the rules of the national legal system at too much points. Accordingly, if more favourable conditions than those in common use should be created for foreign capital investments, one of the practicable solutions is to find out the points of contact in question, and then to set up special rules for them in respect of joint companies, e.g. to group the norms affecting the most varying branches of law into a single statute. The positive favours of the Code on Investments mentioned in the foregoing represent, indeed, an effort to this end.

(ii) After careful consideration one will be confronted with the fact, however, that there exist actually innumerable restrictions and other rigorous rules in the Hungarian legal system that are not at all investment-favouring; rather, they exert an effect discouraging the capital. Actually, these norms affect the rules of the administration of funds or the management of premises or stores equally. Furthermore, their legal effect includes, in general, the economic organizations, consequently these norms would be applicable also to the activity of corporations with foreign participation in the absence of opposite dispositions (see point (4/a/iii).

Taking into account that there seemed to be no hope for separate dispensations from the restrictions, the legislator of the Hungarian Code on Investments made recourse to a particular measure, stipulating a general clause to find a way out of the choking pressure of the rules referred to above. It was this way that the exempting clause of the Code, of cardinal importance, was formulated, reading as follows: "Unless an opposite disposition of the present Act rules it, the dispositions, not of civil law content, that concern exclusively state-owned economic organizations and co-operatives are not applicable to the corporations in question in connec-

tion with their economic activity."[28] Thus, the precarious situation created an elastic rule which, in case of its appropriate application, offered protection, indeed, against the enforcement of a lot of restrictive dispositions. This flexibility was absolutely desirable as a general rule had to be put down so that it would cover the unknown number of dispositions of not civil law content; on the other hand, it required a sacrifice as well. The general clause that came to birth, indeed, as a result of the ingenuity of the legislator, represented actually such a high degree of a generalization that its normative character faded away to some extent. Since the rules to be neutralized are not enumerated only their nature is outlined, referring to them as "dispositions with a not civil law content", some insecurity is created as an act of deliberation will be always unavoidable to decide whether or not its effect covers this or that law rule.

III.

In addition to the afore mentioned, the extent has to be also examined to which the effect of the favours granted by the Code on Investments is limited (5); (7); also, the contradictions (6) should be considered which may arise in connection with the promotion of foreign investments aimed by the Code.

5. There is good reason to suppose that the double-way legal system, introduced by capital-importing countries such as Hungary, i.e. the application of different rules to corporations completely in indigenous property or owned, partly or completely, by foreigners, implicated necessarily limits by itself, resulting in a not very high rate of economic efficiency. The dispositions of section 4 of the Hungarian Code on Investments present a very good example to this, reading as follows:

(1) A corporation functioning with foreign participation is allowed to take part in the establishment of an other economic corporation, to set up a corporation on its own, and to acquire a share in a functioning corporation, within the limits as specified in indent (2). The dispositions of the present Act are not applicable to these corporations, except those laid down in Chapter IV.[29]

This is a logical and juridically completely justified regulation. Thus, the economic corporations with foreign participation functioning in Hungary are to be considered as domestic subjects at law,[30] consequently the rules of the Code on Investments, bearing upon only to the enterprises

of foreigners, are, accordingly, not applicable to their subsequent capital investments. Hence, the favours granted by the Investment Code are no more applicable to the secondary utilization of foreign capital and do not promote its multiplying effects. It should be emphasised that, given the actual system, this regulation is well-founded and an opposite arrangement cannot be conceptualized even from a pure technical point of view as it would be impracticable to follow up continuously the course of the investment of a capital that, previously, was of foreign origin; this is particularly true if there are several subsequent transactions. From economic point of view, the legal solution outlined in the preceding can be assessed, however, as follows: for the initial investments of foreigners, there is a favourable climate as a joint company can be established and then flourish under the protecting screen of a "legal oasis". As regards, however, the subsequent capital investments of a corporation of this kind, the substantially less favourable conditions of the general rules will be applied. As it is hardly probable that the investors would be ready to opt for this hard way, their capital will not penetrate into all cells of the economy and will be reluctant to induce further investments. Furthermore, this is all the more probable as the scope of subsequent capital investments of this nature is restricted also by the law proper, although to a narrower extent. In fact, it is stipulated in section 327 of the Act VI of 1988 on Economic Associations and, subsequently, in section 4 of the Code on Investments that "a company limited by shares owned exclusively or by majority by foreigners is not allowed to acquire a majority share in an other share company of this kind".[31] True, the Act on associations contains, in general, rules bearing upon the law of concerns, the restriction in question is only applicable to share companies limited by shares with foreign participation.

The question marks that arose previously, in connection with the former restriction of the capacity of joint companies of acquiring landed property (see point 4/a/ ii) are still waiting for reply. Thus, if the company in question is classified as a domestic one, why could not it enjoy national treatment also in this respect?[32] Disregarding the autonomous legal personality of a company of this kind and, instead, concentrating to the nationality of the owners has been occurred repeatedly in the course of the history of the law of associations or corporations. Nevertheless, "piercing the corporate veil"[33] covering the shareholders has been justified mainly if the fiction of the separated existence of the corporation concerned used to be applied for causing damage to the creditors or, in general, to the

prejudice of public order. It is hardly probable, indeed, that the companies limited by shares functioning with a foreign majority could cause a serious danger menacing the national economy if they acquired a majority share also in an other company limited by shares. Apart from this point, the said specific restriction is contrary to the provision of several bilateral agreements on investments ensuring national treatment.[34]

Not taking into account the unnecessary watchfulness of the rule, the principal concern is, however, that the double-way legal system is unable to give impulses to the economy as a whole even in an ideal case; thus, the favours granted to joint ventures remain with a limited range of effect.

6. The attractive "blue islands" created for corporations functioning with exclusive foreign participation bear, indeed, also the theoretical possibility of some abuses within themselves: with the coexistence of two forms of regulation, one being more and the other less favourable, it is understandable if each party of the economic life makes efforts to ensure for itself the use of the system with more favourable conditions or, at least, the transfer of its capital or part of it. Thus, a domestic economic organization, i.e. economic corporation as mentioned in section 4/a/ii above, is allowed, in case of a licence, to set up a corporation abroad.[35] According to the Hungarian legal rules on foreign exchange management and the Code on Investments, respectively, this corporation established abroad but out of a domestic capital will be considered, however, as a foreign party even in respect of its possible activity in Hungary. Consequently, if a foreign company of this kind established a "joint corporation" some time later, re-transferring part of its capital to Hungary or acquired a share in the mother company, the "corporations functioning with foreign participation" would be then entitled to extensive favours. If a process as outlined above took place as a result of the continuous extension and internationalization of the activity of the producing enterprise, the domestic economy would suffer no harm. Much more important damages would arise, on the other hand, if an apparent foreign investment were only motivated in order to obtain a joint venture classification. The practice of the 1930-ies may give evidence that the above theoretical argumentation was more than a mere possibility;" at that time, the method chosen for the alienation of a domestic interest was that the indigeneous proprietor established a holding company in abroad destined to manage the shares of his domestic company."[36]

There is no restriction, in fact, which could offer a safe guarantee to avoid abuses. A remedy could be found easier by unifying the operating conditions of the subjects at law in the economy in a way, of course, which would result, sooner or later, in the extension of the overwhelming majority of the favours and rights already granted to economic corporations functioning with foreign participation to all enterprises.[37] Making market-conform and "enterprise-promoting" the totality of the legal regulation of the economy would mean, at the same time, also a remedy to the macro-economic deficiencies of the double-way legal system outlined above. (See point 5.)

7. One can claim a general recognition for the formulation that the improvement of the legal system as a whole represents the most efficient means of promoting foreign capital investments which has, at the same time, the least controversies. It is impossible, indeed, to set up special rules for joint companies in some specific fields and to incorporate same into the Code on Investments, irrespective of the circumstance that, for the functioning of the corporations in question, the settlement of legal relations of primary importance is concerned.

(i) First of all, the law of obligations pertains to this group which gives the legal context of the day-by-day deals of enterprising. The rules that may be encountered here, possibly anachronistic,[38] are susceptible of restricting the more considerable propagation of foreign investments just as the less inciting rules on taxation. One could ask, indeed, whether it would be advisable to set up specific norms also for the internal civil law contracts of corporations functioning with foreign participation. This seems to be more a utopia than an actual possibility. An opportunity for laying down corrective civil law rules has arisen in the field of international trading transactions, and the legislator availed itself of this possibility, in fact, setting up appropriate provisions in the "Civil Code on foreign trade", i.e. Law-decree No. 8. of 1978.[39] As regards, however, the modernization of the law of obligations applicable to domestic transactions, an adaptation to the international norms of the end of the last century would have gone far beyond the scope of validity of any code on investments. This is reasonable all the more as modernization would be not only in the interest of corporations with foreign participation; building up a system of norms reflecting the demands of market economy would have the same significance for the subjects at law in exclusively national property.

(ii) The activity of the subjects of the economy has been more and more thoroughly influences also by the quality of regulation in the field of consumer protection, environmental protection, and the law of competition beyond the traditional civil law codes on corporations. In fact, the force of international adaptation has been particularly intensive in the said legal branches. This is demonstrated by the integration legislation of the European Communities, with the most far-reaching achievements in the unification of just the said fields of the law, motivated to ensure the free flow and circulation of goods, persons, services, and capital. Clearly, it would be impracticable to set up separate norms for joint corporations here. It is evident too, on the other hand, that the Hungarian norms will have, sooner or later, no other choice than to follow the European legal development proceeding ahead under the slogan of harmonization, in order to their integration into the economic circulation of the continent and the establishment of market economy in particular.

IV.

In spite of their limited possibilities, the investment codes are necessary and important statutes, at least in some given phases of legal development. His statement is absolutely true for the Act No. XXIV of 1988 which is not only a high-level product of legislation; the more, it may an actual "life-saving legal" instrument for Hungary.

The balancing as expressed in the Act between national treatment and favours surpassing it is a result logical, in fact, of the specific, double-face nature of corporations with foreign participation. Actually, joint companies are domestic legal entities, hence subjects of the rights and obligations resulting from national treatment. On the other hand, the said domestic qualification together with the independent legal existence of the corporations in question does not change the circumstance that the utilization of capital of foreign origin is evident, partly at least, in their activity. Clearly, they came into existence by means of international functioning capital investments and, in compliance with the international character of this capital, its activity in Hungary should be adapted to the conditions of a legal system based on international standards.[40] Just this is the demand which enforces favours differing from the national treatment and reaching beyond same (see point 4/a) if the national legal system, as a whole, is still inappropriate to comply with the requirements raised by the international flow of capital.

Accordingly, the duplicity determining the fundamental structure of the Code on Investments is only the result of the said specific regulation system. At the same time, this sophisticated system of favours and guarantees makes it possible to interpret the Code also in an other sense. As it was outlined in the preceding paragraph, the Code represents a critical difference, essentially, from the norms which are disfavouring an efficient and profit-bearing economic management or, at least, fail to give incentives to it. Thus the group of norms affecting the modern joint corporations appears also as a "pulling statutes" indicating the direction of improvement with a general validity. The system of guarantees protecting the property of foreign investors is a good example. One of the causes of the stagnation of Hungary's economy has been that potential indigeneous private investors have been in want of guarantees, consequently they have been refraining to invest their capital in enterprises. Actually, they have been waiting for a declaration that "their investments would enjoy complete safety and protection."[41] Using analogies from the more remote past, the law governing the functioning of corporations with foreign participation could be compared, mutatis mutandis, to the Roman ius peregrini. In fact, the first repsonse of the Roman law to the appearance of foreign elements in legal relations was a self-created duplicity, establishing thus a two-channel legal system.[42] The ius civile was maintained, to be applied to the legal relations of Roman citizens, and the ius peregrini, set up parallel to it, was destined to govern transactions between "aliens" and Roman citizens.[43] With the lapse of time, the institutions of this flexible law (i.e. ius peregrini) concerning the sale of commodities were allowed to penetrate the ancient law, ensuring thus its development. One should only hope that the time will come also for the development of Hungarian law to enter this second, and higher, class.

Notes

[1]For the importance of direct foreign capital investments and Hungary's economic need to seek support from the foreign functioning capital see: Simai: A 90-es évek magyar külgazdasági stratégiája (The strategy of Hungarian international economic relations in the 90-ies). Valóság, 1988/10. pp. 10-20.; In: Magyar Nemzet, Hároméves gazdasági program - külföldi tőke - tulajdonreform (A three-year programme of the economy - foreign capital and the reform of property). May 4, 1989, p. 3.; Kádár: Pályamódosítás vagy pályaváasztás? (Modification or change of the course?) Figyelő, December 1, 1988, p. 3.; G.I.: Bankok és vegyesvállalatok, nemzetközi konferencia a működő tőke bevonásáról. (Banks and joint corporation; an international conference on the inclusion of functioning capital.) Figyelő, December 8, 1988, p. 11.; Becsky: Vegyesvállalati boom? (A boom of joint ventures?) Figyelő, December 22, 1988. p. 8.

[2]Up to the present, Hungary signed bilateral agreements on the protection of investments with the states listed below: Austria, Belgium and Luxemburg, Cyprus, the Kingdom of Denmark, the United Kingdom, Finland, France, Greece, the Netherlands, the Republic of Korea, the Federal Republic of Germany, Italy, Switzerland, and Sweden. Out of the said agreements, the followings came into force so far: the agreements concluded with Belgium and Luxemburg (see decree No. 7/1989 (I. 15) MT), Denmark (see decree No. 6/1989 (I. 15) MT, the United Kingdom (see decree No. 5/1988 (II. 12) MT, France (see decree No. 59/1987 (XI. 29) MT, Finland (see decree No. 91/1989 (VIII. 17) MT, the Netherlands (see decree No 83/1988 (VIII. 1) MT, the Republic of Korea (see decree No. 46/1989 (V. 31) MT, the Federal Republic of Germany (see Law-decree No. 5 of 1988 of the Presidium of the Hungarian People's Republic), Switzerland (see decree No. 89/1989 (VIII. 5) MT, and Sweden (see decree No. 25/1987 (VII. 28) MT.

[3]Law-decree No. 27 of 1987 on the promulgation of the agreement on the settlement of investment disputes between states and the physical and legal persons of other states, signed in Washington DC on March 18, 1965.

[4]Law-decree No. 7 of 1989 on the promulgation of the Convention on the establishment of an International Agency on Investment Insurance, signed in Seoul on October 11, 1985.

[5]"Each Contracting Party guarantees in connection with investments, the transfer of investment profits and the revenues of the investors of the other Contracting Party to their country of residence, with the reservation of the equitable and benevolent use of rights, based on their respective statutory rules, to which each Contracting Party is entitled for a limited delay, with reference to difficulties related to their balance of payments." (Decree No. 5/1988 (II. 12.) MT, article 7, indent (1).)

[6]Agreement between the European Economic Community and the Hungarian People's Republic on trade, commercial and economic co-operation. (88/595 EEC), Article 11, Official Journal of the European Communities, 1988. L 327.

[7]For a comprehensive analysis of the problem see: Dienes-Oehm: A külföldi tőke magyarországi beruházásainak elősegítése a nemzetközi jog eszközeivel (Promotion of foreign capital investments in Hungary by the means of international law). Külgazdaság, 1988/ pp. 17-27.; Mádl-Király: Legal Means of Protecting Foreign Investments. Publ.: Institute of Legal and Administrative Sciences of the Hungarian Academy of Sciences, 1989.; Martonyi: A külföldi beruházások jogi kérdései (Legal problems of foreign investments). Külgazdaság, 1987. pp. 113-122., and Pogány: The Regulation of Foreign Investment in Hungary - some Recent Developments. Manuscript, to be published soon in the periodical ICSID Law Review.

[8]Section 1 of Act XXIV of 1988 on the investments of foreigners in Hungary.

[9]"A foreign investor is entitled to an immediate compensation in actual value, for a damage resulting from nationalization, expropriation or an other measure with similar legal effect that effected his, her or its property." Act XXIV of 1988, section 1, indent (2).

[10]See Decree No. 28/1972 (X. 3.) PM, section 11, indent (1).

[11]"The share of a corporation profit due to a foreigner as well as the amount due to a foreigner in case of the cancellation of the corporation or the sale, partly or total, of the foreign share can be transferred to abroad freely, upon the commission of the foreigner and in the currency in which the investment was effected, provided that the amount in question is at the disposal* of the corporation." Act No. XXIV of 1988, section 32, indent (1).

*The wording "is at disposal" is, actually, an unnecessary stipulation that, regrettably, can be also misunderstood. It was incorporated into the Code by adopting the formulation of Section 9 of Act No. VI of 1988 on corporations. According to the intention of the legislator, the motivation of this condition was, at the same time, only to emphasise the necessity of the availability of a Forint cover, as a financial basis. Consequently, there was no provision at all that a remittance upon the commission of the foreign party could be effected only from the profit share in convertible currency.

[12]Cf. Keller/Siehr: Allgemeine Lehren des Internationalen Privatrechts (General theses of Private International Law). Schulthess Verlag, Zürich, 1986. p. 5.

[13]"All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or by water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs." Magna Charta, point 41, from the year 1215. The original document has been formulated in Latin, and the above text is a translation, published by the British Museum in 1979.

[14]Ibid.

[15]Some formulations of Section 1 of the Code such as "actual value" or compensation payable in the currency in which the investment was effected" are results of the compromises of opposite interests.

[16]Act XXIV of 1988, section 9, indent (2).

[17]The term "joint company or corporation" is used here as a synonym for a corporation functioning with foreign participation, being aware that this latter is, beyond doubt, a more precise formulation.

[18]Act No. XXIV of 1988, section 19 (a). The corporation is entitled to acquire the right of property or other right in relation with land, needed for its economic activity as laid down in the respective contract or statute. Cf. Decree No. 79/ 1988 (XII. 31.) PM, section 2.

[19]Act No. I of 1987 on the land, section 38, indent (1); Decree No. 26/1987 (VII. 30.) MT on the implementation of the Act on the land, section 1, f); Decree No. 37/1988 (IX. 5.) PM on the acquisition of landed property by foreigners, section 2, indent (1) f. At the same time, the approach of the recent statutory legislation on this topic is still not unequivocal. See Decree No. 145/1989 (XII. 27.) MT, section 1, and Decree No. 5/1990 (II. 7.) PM, section 3. For the antecedents of these restricting rules see also Law-decree No. 6 of 1974.

[20]Law-decree No. 13 of 1979, section 18, indent (1). The capacity at law, the economic qualification, the rights coupled to persons, and the legal relations of the members to each other of a body corporate are to be judged by the personal rights in question. (2) The personal right of a body corporate is the law of the state on the territory of which the body corporate concerned has been registered.

[21]Civil Code, section 685 c), according to the formulation of Act No. XXV of 1988 on the amendment of the Civil Code, section 4.

[22]The recognition of the contradictory nature of national treatment is reflected also in the bilateral agreements on investment protection, concluded by Hungary, e.g. in section 4, indent (1) of the British-Hungarian agreement. With an unclear wording, the claim for Most Favoured Nation treatment is also conceptualized beside, or instead of, national treatment. Cf. Pogány, op. cit. in Note 7), p. 11.

[23]Act No. XXIV of 1988, sections 14-17.

[24]Ibid. sections 18 and 31, indent (3).

[25]"The statutory rules bearing upon wage regulation and the system of material incentives of the employees in leading position are applicable to the corporation only if the rate of foreign share is inferior to 5 pc or HUF 5M, respectively." Ibid. section 29.

[26]Ibid. cf. section 31, indent (3).

[27]See Law-decree No. 8 of 1987 on the application of the Civil Code of the Hungarian People's Republic to foreign trading relations.

[28]Act No. XXIV of 1988, section 35.

[29]Author's italics.

[30]Law-decree No. 13 of 1979 on private international law, section 18, (see Note 20).

[31]Author's italics.

[32]As it is clear, one is confronted here with a rare rule of the Investment Code, of a third type, not only surpassing the criterion of national treatment but, rather, of an inferior level.

[33]Lattin: The Law of Corporations, The Foundation Press, Brooklyn, 1959. p. 67.

[34]See Decree No. 5/1988 (II. 12.) MT promulgating the agreement with the United Kingdom on the promotion and mutual protection of investments; article 3: national treatment and the clause of the most favoured nation (1): "Neither Contracting Party will give a less favourable treatment to the investors of the other Contracting Party respecting the investments and revenues on its territory than granted to the investments or revenues of its own investors." Article 3. of the respective treaty between Hungary and the Federal Republic of Germany has a similar provision.

[35]Decree No. 4/1975 (III. 27.) KKM-PM.

[36]Act No. XXV of 1948 on the nationalization of some industrial enterprises; reasoning of the minister to section 11.

[37]Clearly, some dispositions e.g. the freedom of transferring profit can be interpreted only in respect of a foreign investor.

[38]It seems that the Civil Code, enacted now more than three decades ago, is exposed to sharp challenges. Some of them are mentioned in the following for sake of an example, noting, however, that a more thorough analysis of the problem would surpass the frames of the present study. a) It is not sure that the strict rules of the preliminary contract (Civil Code, section 208.), with a very broad range of competences for the courts, fit well into the legal regulation system of a market economy. In view of this it was not an unintentional measure that, together with several other legal provisions, the Law-decree No. 8 of 1978, referred to

above several times, excluded the application of the dispositions in question in case of legal disputes resulting from international trading relations. b) Appearance of transactions of new type such as leasing, factoring requiring a positive regulation sooner or later. c) The Vienna Convention of 1980 on the international sale of goods (CISG) contains numerous modern stipulations which ought to be incorporated into the internal law. The provisions of the Convention on commercial usances could be mentioned as good examples. d) Some "subcodes" coupled to certain contract types of the Civil Code contain several obsolete dispositions, e.g. the Decree No. 7/1978 (II. 1.) MT on the delivery and contractor's contracts of the economic organizations.

[39]Law-decree No. 8 of 1978 on the application of the Civil Code of the Hungarian People's Republic to foreign trading relations.

[40]For the economic analysis of this same problem see: Inotai: A külföldi működő tőke változó megítélése a világgazdaságban (Changing assessment of the foreign working capital in the world eocnomy). Külgazdaság, 1989, pp. 3-16, p. 7. in particular.

[41]Cf. Note 8). This recognition is reflected in the reformulation of the Constitution, see: Act No. XXXI of 1989, section 2.

[42]Cf. Mádl: A külgazdaság és a nemzetközi beruházások joga a szocialista országokban (Foreign trade and the law of international investments in the socialist countries). Tankönyvkiadó, Budapest, 1988. pp. 30-35.

[43]Brósz-Pólay: Római jog (Roman law). Tankönyvkiadó, Budapest, 1974. pp. 46-47.

DIE MÖGLICHKEITEN UND DIE SCHRANKEN DER UNGARISCHEN KAPITALANLAGE

M. Király

Die Studie untersucht die Wirkung der Bestimmungen des Gesetzes 24 vom Jahre 1988 über die ausländischen Investitionen in Ungarn auf die Einführung des wirksamen Kapitals. Nach dem Autor ergaben die Gewährleistungen des Gesetzes wichtige Teilergebnisse in der Stützung der Anwesenheit des ausländischen Kapitals, aber es ist vielseitig zu beweisen, dass die echten anregenden Voraussetzungen nur die Entwicklung der Gesamtheit des Rechtssystems erschaffen kann.

ВОЗМОЖНОСТИ И ПРЕДЕЛЫ ЗАРУБЕЖНЫХ КАПИТАЛОВЛОЖЕНИЙ ПО ПОЛОЖЕНИЯМ КОДЕКСА ВР ОБ ИНВЕСТИЦИЯХ

М. Кирай

В статье рассматривается влияние положений Закона № XXIV/1988 года на инвестиции иностранцев в Венгрии с присутствием иностранного капитала. Особо подчеркивается влияние возможностей и пределов законодательства с точки зрения совместных предприятий. Подробному изучению подвергаются гарантии, преимущества и преференции, обеспечиваемые материальным правом. Подобным образом изучаются соответствующие импульсы, которые призваны сделать иностранные капиталовложения более интенсивными и эффективными, и которые приводят к всеохватывающему развитию всей правовой системы с ориентацией на рынок.

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INFORMATIONES

ON THE NEW REGULATION OF THE EMPLOYEE'S INVENTIONS AND INNOVATIONS

1. The politico-economic transformation is necessarily accompanied by the modernization of the legal system. Therein, especially the following aspects play a part. The development of the market economy, the perfection of its legal conditions require the enforcement of a regulation further consolidating the autonomy of the participants of the market, the economic organizations. In this connection - and in conformity also with the consequent extension of the legal statehood - it comes to the so-called deregulation i.e. to the reduction and simplification of the over-circumstantial legal ruels, restricting and influencing the autonomous decisions. Finally, one should also take into consideration that the - repeatedly declared - ambition of Hungary is the adherence to the European Economic Community, therefore, in accordance therewith, the results and endeavours of the unification of law in the Common Market shall be considerably observed when modernizing the legal system.

The Hungarian system of the protection of industrial property produces a more advantageous starting position for the above efforts, than the average. The recodification of this legal field between 1969 and 1984 established an up-to-date system of institutions and norms of the protection of industrial property which offers adequate legal frameworks for the function of the market economy and, at the same time, which is properly in accordance with the latest - universal and European - solutions and conceptions - in the opinion not only of the home experts but also of the foreign ones. Therefore, the professional general public takes with reason the view that our system of the protection of industrial property will not stand in need of radical modifications within a reasonable time. This does not preclude, however, some improvements, "chiselings" in certain fields. The government accepted in 1989 the "package plan" of such modifications desirable in the short run. (The various professional for organized by the Hungarian Association for the Protection of Industrial Property have played significant part in its preparation.) This programme comprises the introduction of the protection products of the insertion of the protection of utility models into the forms of protection, the enactment of a special legal norm for the protection of integrated electric circuits, as well, as the further development of the effective regulation relating to the innovations and of the emplyoee's inventions. The re-regulation of this latter field was effected in 1989 by the government decrees Nos 77/1989 (VII. 10.) and 78/1989 (VII. 10.).

2. The new regulation maintained the essential principles, reflected in the previous legal ruels of 1983. They are especially the following ones:

- The delimitation of the employee's inventions is established by a definite obligation of the inventor based on a legal relation (primarily on a labour relation).

- In respect of the inventions of employee's character the right of disposal (the right to the patent) is ex lege due to the employer (to the person entitled as from the service relation), this right of disposal may, however, devolve to the inventor, either owing to the explicit surrender of the employer or as a consequence of the fact that the employer does not file the patent application within a definite time.

- In respect of innovations, proposals for improvement can be filed in a wide range further on, i.e. not only for solutions of a technical, but also those of an organizational character. The principle also prevails further on, that the employee's obligation does not mean an excluding circumstance i.e. everybody (also a developing engineer, a research worker, etc.) may file a proposal for innovation. (The employee's obligation may have an effect in other respects. See the next item.)

- The relation between the employer and the creator (innovator, inventor) is a contractual relation fundamentally of a civil-law character. The conditions of the remuneration due - as an entitlement, beyond the wages - to the inventor and innovator is determined by a contract between the interested parties. (As a matter of course, rights of personal character are also due to the creators, the legal norm institutionalizes also the forms of their moral recognition.) Those persons (participants) shall be similarly stimulated who promote by their activities of non-creative character but exceeding their labour-law obligations the introduction and propagation of the inventions and innovations.

- It is further on a guarantee that in each essential question (e.g. authorship, service character, remuneration) the decision of disputes relating to the employee's inventions and innovations belongs to the competence of the courts.

3. The amendments introduced by the legislation of 1989 can be summarized, as follows:

- The regulation has become considerably simplified and is confined to the rules held essential. Thus, in respect of the innovations, regulations alien to civil law, being, so to say, of a "movement" character, relating to e.g. the obligatory enterprise statutes, to the yearly "plans of duties" etc. are neglected. (The legislator wanted by no means to say thereby that they might not be in given cases useful methods stimulating and consciously organizing the creative activities, he considered, however, their obligatory prescription unnecessary and relegated their application to the competence of the enterprises or various social organizations.) The ommission of the so-called directives may be put also here - in accordance with the tendencies of deregulation. Previously, the National Office of Inventions gave recommendations to the statutes of the enterprises e.g. for the method of the calculation of remunerations, etc. in relatively detailed directives. These directives were qualified by no means as legal rules, their application resulted, however, in a certain stereotypifying.

- In connection with the foregoing, the new legal rules neglect the laying down of the - hitherto customary - tariffs of informatory character and of the factors increasing or reducing the cathegories of tariffs. The former regulation was, of course, of permissive character, the practice applied it, however, almost mechanically. The new regulation builds consciously upon the "majority" of the enterprises, upon the deliberation of their interests involved in the creative activity. The legal rules render possible for the enterprises to issue internal regulations settling certain procedural-registering questions, on the one hand, and determining - so to say as "general conditions of contract" - the usual conditions, on the other hand, the enforcement of which is striven after by the enterprise in the individual contracts to be entered into with the inventors and innovators. (Here, it is worth calling the attention to the fact that according to the Civil Code the unilateral general conditions can be contested before the court in given cases.) As for the measure of remuneration, the legal

rules ordain only that it must be proportionate to the advantage ensured by the creation (invention, innovation) (which can be commensurable not only with money but can mean e.g. the advantage reflected in safer labour conditions, in the environment-protecting character, etc.), and to the "contribution" of the creator, respectively. (With this approach, the Hungarian legislator has relied considerably on the conception of the 1957 legislation of the FRG.)

- The new legal rules have rendered more unambiguous the location of the right of disposal depending on the various cathegories of the innovations. In case of innovations the filing of which is qualified at the same time as the obligation of the innovator as an employee, the employer disposes of the technical (or organizational) solution to be considered an innovation, it may utilize it not only in the range of its own economic activities but may sell it to third parties. For the innovations, however, which are not connected with the employee's labour obligation, the employer obtains practically a "simple" licence only, a licence of exploitation, but the innovator is entitled to realize the solution, to put it into the business circulation. All these rules are, however, of permissive character, the contracting parties may agree upon otherwise, too.

4. The above mentioned new decrees entered into effect by January 1st, 1990. Practical experiences supporting the efforts of the legislator, their success are - to an appreciable extent - not yet available. The ideas building upon the majority of the enterprises, upon the careful entering into contract of the interested parties do not depend exclusively on the quality of the legal regulation. For this purpose the contribution of factors outside the law, namely the economic environment promoting the enterprise, the innovation, the creativity, the suitable development and formation of the financial rules stimulating the former ones (e.g. taxation) is also necessary, moreover, primary.

The Hun garian Association for the Protection of Industrial Property, being the social basis of the Hungarian industrial property protection, has advertised - together with the National Office of Inventions - a competition for summarizing and valuating the experiences of the first period and would introduce and discuss the results of the competition in the framework of a Conference.

E. Lontai

ÜBER DIE STAATLICHE VERMÖGENSAGENTUR

Ich muss mit einer subjektiven Bemerkung beginnen, was im Zusammenhang mit der Darlegung eines Gesetzes nicht üblich ist. Infolgedessen, dass diese Darlegungen in einer fremdsprachigen Fachzeitschrift erscheinen, bin ich äusserst gespannt, ob es gelingen wird den Text der Gesetze entsprechend den Absichten der Gesetzgeber zu interprätieren.

Die Tätigkeit der Vermögensagentur - heisst es in der Begründung - erstreckt sich in ihrer ersten Stufe auf das in eine Gesellschaft umgewandelte oder umzuwandelnde staatliche Unternehmungsvermögen. Im Zuge dessen wird es ihr möglihc "die Eigentümerrolle des Staates wirksam zu vertreten, zur gleichen Zeit will sie aber weder durch die Umformungen, noch im Zusammenhang mit den Wirtschaftsgesellschaften in eine ausschliessliche

Eigentümerposition gelangen". Das wird in der Begründung vermutlich deshalb unterstrichen, weil (infolge des gewaltigen Umfangs des verstaatlichten Vergömgens die Vergesellschaftlichung und Privatisierung) desselben, sowie dessen Verwaltung auf staatliche und auch Unternehmen-Initiative realisierent werden soll.

Die Vermögensagentur kann in diesem Vorgang - wie es in der Begründung betont wird - ein wirksames Mittel dastellen.

Es taucht mit Recht die Frage auf: was war eigentlich die Absicht der Rechtsgebung mit der Vorlage dieses Gesetzes. Die Antwort hat mehrere Aspekte: vor allem sicherlich der Umstand, dass die eigentümerische bzw. die behördliche Funktion des Staates getrennt wird, was auch in der sogenannten sozialistischen wirtschaftlichen neuen Mechanismen nicht der Fall war. Andererseits sollte die Eigentümerposition des Staates im Interesse der konsequenten Verwirklichung des staatlichen Eigentums bezw. der staatlichen Privatisierungspolitik gekräftigt werden.

Als Ergänzung zu dieser Feststellung muss man wissen, dass einer der leitenden Fachmänner der früheren Regierung der Meinung war, dass im Zuge der Privatisation unvermeidlich - klar herausgesagt: - Gemeinheiten vorkommen. Dem möchte das Gesetz entgegentreten. Diese Erscheinungen wurden dadurch ausgelöst, dass der Marktwert des staatlichen Vermögens nicht festgelegt war; die Begründung des Gesetzes hat sich auch das zum Ziel gesetzt.

Die Begründung des Gesetzes hat sich noch drei weitere Ziele gesteckt. Das eine ist, dass die zwecksmässigsten Formen der Funktionierung der einzelnen staatlichen Vermögensteile herausgeformt werden; das zweite Zeil wäre, die auf Kapitalinteressiertheit gründende Funktionierung des staatlichen Vermögens, die Auswahl der dazu geeigneten Eigentümer zu fördern; und zum dritten: die Anderung der Wirtschaftsstruktur und die Verminderung der Staatsschuld herbeizuführen. Es sei bemerkt, die Schulden des ungarischen Staates wurden seitens des Staatsrechnungshofes in einem Betrag von 1300 Milliarden Forinten fesgesetzt.

§ 7 bestimmt kategorisch den Kreis des zur Vermögensagentur gehörenden Vermögens, es wird ausführlich aufgezählt, welche Art des Vermögens, beziehungsweise welche Vermögensteilte zum Vermögensfonds gehören. (In der Begründung wird der Ausdruck "Vermögensfonds" angewendet, obzwar in § 7 dieser Ausdruck nicht aufscheint. Das ist offensichtlich ein "Freud"-ischer Fehlausdruck, bilden doch die Vermögensgegenstände des Staates normalerweise eine Vermögensbasis. Um was für ein Vermögen, bzw. Vermögensteile mag es sich hier wohl handeln? - können wir uns die Frage stellen. Zur Vermögensagentur gehören laut § 7 des Gesetzes Vermögen, beginnend mit den zum Vermögen der aufgrund des sog. Umwandlungsgesetzes in Wirtschaftsgesellschafte umgestalteten staatlichen Unternehmen und sonstiger staatlichen Wirtschaftsorgane gehörenden nicht in den Besitz von äusseren Unternehmen gelangsämtlichen Geschäftsanteile und Aktien, ferner, im Falle von staatlichen Unternehmen, die unter der allgemeinen Leitung eines Unternehmenrates und Delegiertentagung funktonierhaben eine 20%-ige Quote des in der Vermögensbilanz figurierenden, den Unternehmen zufallenden Geschäftsumanteils (Aktien), bzw. eine vereinbarungsgemässe Quote (§ 17 Abs. /3/ des wandlungs Gesetzes), ferner - das Recht der Veräusserung unberührt lassend - jene Geschäftsanteile, die die Wirtschaftsgesellschaft aufgrund § 23 Abs. /1/, zwecks Veräusserung zu behalten berechtigt ist. Im weiteren gehört zur Staatlichen Vermögensagentur jenes unter die vorhin erwähnten Bestimmungen nicht gehörende Gesellschaftsvermögen, das sich bereits vor dem Inkrafttreten des Umformungsgesetzes Eigentum des Staates bildete und auch im Zeitpunkt des Inkrafttretens des Gesetzes im Besitz des Staates war. Und schliesslich gehören zur Vermögensagentur (gemäss § 7 /c/) jene nach der Liquidierung der staatlichen Wirtschaftsorganisationen in Staatsbesitz,

verbleibenden Vermögensgegenstände und jenes staatliche Vermögen, welches durch ein separates Gesetz oder Parlamentsbeschluss der Vermögensagentur zugewiesen wird.

Angesichts der obigen kann die Frage gefellt werden, die auch beantwortet werden muss: was gehört dann nicht zur Vermögensagentur? Vor allem das in einer Wirtschaftsgesellschaft befindliche Vermögen der Budgetorgane, mit der Bedingung, dass dessen Quelle ein eigenes, im Budgergesetz oder in einer sonstigen Rechtsnorm festgelegtes eigenes Finanzmittel war, beziehungsweise das in den durch sie für Wohlfahrts- und Betriebszwerke gegründeten Wirtschaftsgesellschaften befindliche Vermögen der Budgetorgane, und es gehört nicht zur Staatlichen Vermögensagentur das in staatlichen Unternehmen und sonstigen staatlichen wirtschaftenden Organisationen befindliche Vermögen.

Es folgt ein schwieriger Punkt: die Ziehung der Konsquenzen. Wir reskieren es auszusagen, dass durch die Errichtung der Staatlichen Vermögensagentur die Teilung des staatlichen Vermögens begonnen hat. Gemeint ist damit, dass ein Teil des für staatliche Unternehmungen bestimmten Vermögens zur Staatlichen Vermögensagentur gelangte, über andere Teile desselben verfügen Gründer von Wirtschaftsgesellschaften und schliesslich gibt es noch unternehmungsbedingte Vermögensgegenstände, über deren Schicksal noch entschieden werden muss. (Darüber verfügt auch § 9 Abs. /2/ des Gesetzes.) Übrigens ist die Konzepiton (nämliche Abmessung der eine staatliche Unternehmung zum Ziel habenden Vermögensteile, die Ausfindigmachung und konsequente Durchfühung der zwecksmässigsten Form ihrer Betätigung) die schwerste Aufgabe.

Auch das ist keine leichte Sache, - was übrigens das Gesetz versucht -, dass das eine Unternehmung bezweckende staatliche Vermögen zwischen dem Zentrum und den Selbstverwaltungen geteilt wird. Diesbezüglich verspricht das Gesetz Nr. VII von 1990 die Schaffung eines separaten Gesetzes, das dann bezüglich des Eigentumsrechts des Vermögens der seitens der Räte (nach unserem Wortgebrauch: Selbstverwaltungen) gegründeten und unter der Aufsucht der Räte stehenden staatlichen Wirtschaftsorganisationen, resp. bezüglich des von dem sich aus diesen Organisationen umwandelnden Wirtschaftsorganisationen dem Staat zufallenden Vermögensteils verfügt. Des erwähnte Gesetz verspricht ein separates Gesetz auch noch hinsichtlich der im Besitz des Staates befindlichen Aktien der Ungarischen Nationalbank betreffend die Ausübung der Eigentümerrechte des Staates, doch durch diese beiden Gesetze ist die Problematik des in staatlichem Besitz befindlichen Unternehmungsvermögens sicherlich nicht erledigt. Wir wollen bloss auf das in der Verwaltung der Ungarischen Wissenschaftlichen Akademie befindlichen Vermögen hinweisen. Es sei uns gestattet in dieser Hinsicht auf Punkt 2 der am 23. August 1990 verabschiedeten Verordnung des Präsidenten der Föderation der Sovjetischen Sozialistischen Republik über die Rechtsstollung der Wissenschaftlichen Akademie der Sovjetunion, im Sinne dessen "Grundmittel und sonstiges Staatsvermögen, die sich gegenwärtig in Verwendung der Institute, Laboratorien, Unternehmen und Organisationen der Wissenschaftlichen Akademie der Sovjetuniun befinden, müssen direkt in ihr Eigentum gegeben werden...".

Nach all dem ist es eine verständliche Neugier, welche Rechte der Staatlichen Vermögensagentur betreffend diese - nennen wir - Vermögensfonds zufallen. Von diesen Rechten wollen wir folgendes hervorheben: vor allem, dass sie die dem Gründerorgan zufallenden Rechte über kann, sie kann ferner das Unternehmen unter Staatsverwaltungsaufsicht stellen; sie kann für die Vorbereitung der Verwertung bzw. der Nutzbarmachung desselben Sorge tragen; ausnahmsweise und provisorisch kann sie Vermögensverwaltung ausüben; sie kann über den sog. Umwandlungsplan Meinung äussern und kann auch

Vorschläge unterbreiten (sie kann an das umzuwandelnde Unternehmen - vor allem wenn die Umwandlung die Interessen der Gesellschaft offensichtlich verletzt, oder der Nationalwirtschaft schadet, - binnen 60 Tage) gerechnet vom Erhalt des Umwandlungsplans, die Umwandlung abstellen. Gegen diese Entscheidung gibt es keinen richterlichen Weg.

Die Rechte der staatlichen Vermögensagentur hören nach der Umwandlung nicht auf. Wenn nämlich innerhalb drei Jahre nach der Umwandlung die Wirtschaftsgesellschaft die Geschäftsanteile (Aktien) derweise verwerten will, dass das die Eigentümerinteressen des Staates verletzt, kann die Vermögensagentur die in Rede stehenden Geschäftsanteile (Aktien) zu sich nehmen (gegen Bezahlung der der Wirtschaftsgesellschaft gemäss des Umwandlungsgesetzes zustehenden Quote; dessen höhe wird aufgrund des Offertenpreises festgelegt).

Es war auch davon die Rede, das die Staatliche Vermögensagentur ausnahmsweise auch Vermögenverwaltung üben kann. Deshalb sollte man wissen, was das überhaupt bedeutet, und auch das, was unter Nutzbarmachung des Vermögens zu verstehen ist. Im Zusammenhang damit besagt das Gesetz vor allem, dass das in staatlichen Unternehmen tätige Vermögen durch jede beliebige inländische oder ausländische Rechtsperson, Wirtschaftgesellschaft ohne Rechtspersönlichkeit, und auch durch individuelle Unternehmer verwaltet werden kann, wenn die Vermögensagentur mit diesen Vertrag geschlossen hat. (Hinsichtlich der Ausländer muss auch das Gesetz XXIV von 1988 in Betracht gezogen werden.)

Das is Unternehmungen tätige Vermögen des Staates Vermögen kann durch Wettbewerb in Verwaltung gegeben oder vermietet, bzw. verwertet werden. Der Wettbewerb wird durch die Vermögensagentur ausgeschrieben - mindestens 7 Tage vor dem zur Einreichung festgelegten Anfangsdatum - und in zwei zentralen Tagesblättern verkündigt. Die Wettbewerbe sind öffentlich, es sei denn die Direktionsberatung der Vermögensagentur hatte einer geschlossenen einladungsbedürftigen Ausschreibung des Wettbewerbs zugestimmt. (In einem solchen Fall müssen die interessierten Parteien unmittelbar zum Wettbewerb eingeladen werden.)

Über das Ergebnis des Wettbewerbs entscheidet die Direktionsberatung der Vermögensagentur. Die Agentur kann nur mit der jenigen Partei einen Vertrag eingehen, die den Wettbewerb gewonnen hat. (Bei einem ausländischen Bewerber ist die Bedingung des Vertrags, dass der Bewerber im Inland Wirtschaftsgesellschaft gründen kann.) Die Vermögensagentur schliesst für die Verwaltung des staatlichen Vermögens mit den obsigenden Parteien des Wettbewerbs Verträge. Inhalt der Verträge wird frei festgelegt (innerhalb der Rahmen des Gesetzes und sonstiger Rechtsnormen, sowie der öffentlich verlautbarten Bedingungen und Vorschriften des Wettbewerbs). Der Vermögenverwaltungsvertrag kann 10 Jahre nicht übersteigen.

In dem Vertrag diesen Typs (d.i. Vermögenverwaltungs-Werkvertrag) verpflichtet sich der Vermögensverwalter, dass er für den seitens der Vermögensagentur zu zahlenden Lohn die Eigentümmerchte über das Vermögen ausübt - mit ausnahme der Veräusserung - und zwar derweise, dass er die Verbindlichkeit eingeht, den entsprechend dem Vermögen im voraus festgelegten Ertrag (Dividende, Gewinnbeteiligung) zu erzielen und verpflichtet sich das im Vermögenswertvertrag festgelegte Niveau zu halten oder zu erreichen. (Die Vermögensagentur und der Vermögensverwalter können auch abmachen, das die Vermögensverwaltung einen Teil des Ertrages dem Verwalter überlässt. Darauf muss aber in den Bedingungen der Bewerbung hingewiesen werden.)

Der sog. Vermögenverwaltungs-Mietvertrag hat einen anderen Charakter als der vorangegangene. Hier zahlt der Vermögensverwalter der Vermögensagentur einen Preis, der Ertrag gehört aber ihm. (Über die Niveauhaltung muss auch hier ein Abkommen geschlossen werden, doch der Verwalter kann einen bestimmten Teil des Ertrags der Vermögensverwaltung überlassen.)

Der dritte Typ des Vertrages, den die Parteien miteinander schliessen können, ist der sog. Portfolio Vermögenverwaltungsvertrag. In diesem Vertrag nimmt der Vermögensverwalter auf sich, dass er gegen einen seitens der Vermögensagentur ihm zu zahlenden Lohn die Eigentümerrechte über das Vermögen ausübt - das Recht der Veräusserung mitverstanden - und zwar derweise, dass er sich verpflichtet, die im Vertrag festgelegte Ertrag- und Vermögenvermehrung zu erreichen (erste Variation). Die zweite Variation ist dass sich der Vermögensverwalter verpflichtet entweder der einen Version (ein festgelegter Ertrag) oder der anderen (eine festgesetzte Vermögenszunahme) nachzukommen. Im Vertrag können sich die Vertragsparteien auch in der Teilung des Ertrags vereinbaren.

Wir finden im Gesetz auch Regeln buchhalterischen Charakters. So z.B. kann der Velwalter den seitens der Vermögensagentur gezahlten Lohn als Einnahme, seine im Zusammenhang mit der Vermögensverwaltung aufgetauchten Ausgaben (für die Vermögensagentur gezahlter Preis usw.) als Kosten verrechnen.

Eine beachtenswerte Verfügung ist, dass der Vermögensverwalter während der Dauer des Vertrags bei der Vermögensagentur beantragen kann, den seinerseits verwahrten Vermögensanteil abzukaufen.

Die Vermögensagentur kann aber die veräusserung auch aus eigenen Stücken, ohne äussere Initiative, beantragen. Das staatliche Vermögen kann für jede beliebige inländische une ausländische natürliche oder Rechtsperson, für jede Gesellschaft ohne Rechtspersönlichkeit und für jeden individuellen Unternehmer veräussert werden.

Zusammengefasst: Diese Rechtsnorm, der im Sinne des § 8 /2/ später noch Gesetze folgen werden, ist eine wichtige Rechtsgebung des ungarischen Privatisationsvorganges. Zweifellos muss die Initiative von Seiten des ungarischen Partners, von der Staatlichen Vermögensagentur ausgehen, ausserhalb der Bewerbung kann nämlich kein ungarisches Unternehmen und auch kein Geschäftsanteil erworben werden. (In der Wettbewerbsausschreibung bestimmt die Staatliche Vermögensagentur den in Verwahrung zu geben den Vermögensanteil (Geschäftsanteil, Aktien), sowie deren Wert, die Verwahrungsbedingungen, die erfordernisse bezüglich der Geschäftspolitik, wie auch den Ort und den Endtermin der Einreichung der Bewerbung, der nicht weniger sein kann also 15 Tage. Falls die Bewerbung die volle oder eine Teilveräusserung zum Ziel hat, muss die Verlautbarung auch die wichtigeren Bilanzdaten und den Veräusserungs-Richtpreis beinhalten.) In der Zukunft kann auch vorkommen, dass die Ausländer einzelne Unternehmen für sich "auswählen". Angesichts dessen, dass die Regierung bis 1994 ein Staatliches Vermögen im Werte von 2400 Milliarden privatisieren will, erschliesst sich für die ausländischen Unternehmen und Investanten eine ziemlich breite Möglichkeit.

E. Ferenczy

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RECENSIONES

ECONOMIC CRIMINAL OFFENCES (A THEORY OF ECONOMIC CRIMINAL LAW)
Wiener, I.A.
Akadémiai Kiadó, Budapest, 1990. 108 p.

Imre A. Wiener is a specialist of economic criminal law even beyond the frontiers of our country. He has dealt with economic criminal offences for several decades and has published in the meantime a lot of studies and expounded his views on the subject matter on many international conferences. The present book is the summary of his œuvre on the subject. The question whether the matter is the product of scientific sensitivity, or a mere coincidence, is of secondary importance. However, it is a matter of fact, that the publication of the book represents not only the completion of the research work of the author in the field of the economic criminal law, but it is also a milestone to the end of the criminal law to be marked with the attribute "socialist", since the transformation of the institutions of the social system called socialism is well going on in the fatherland of the author.

The book consists of seven chapters. The first chapter introduces the general characte stics of economic deliquency and the economic criminal offences in the capitalist countries, on the one hand, and in the socialist countries, on the other. As the above mentioned social process takes place also outside of Hungary, the political actuality of the book may be of question. However, the book is a scientific and particularly a theoretical work, the professional points of view are of primary importance. The picture drawn in this chapter is, however, highly general and sketches the economic criminal laws of the two social systems only in some well apprehensible aspects. The reason thereof should not be searched in the abstraction from the political actualities, but rather in the considerable heterogeneity which may be found with fundamental scientific conceptions, according to the author. The author names the deliquency connected with the economy, the economic deliquency, the economic criminal offences and the economic criminal law, as the four fundamental notions, on the basis of the different scientific interpretation of which, a narrower or broader range of the delicts can be brought into connection with the criminal protection of the economy. By virtue of the introduction of various aspects, tending to the systematization, the tendency takes shape that the economic deliquency is of greater volume in the capitalism than in the socialism.

The second chapter offers a survey of the economic criminal offences in Hungary. The author analyzes the economic criminal offences contained in the prevailing Penal Code - act No. IV of 1978 - which are classed in four groups: criminal offences violating economic obligations, those violating the order of the economy, the forgery of stamps and banknotes, as well, as the financial criminal offences. Following the analysis of the legal facts, it is the criminologist to lead the pen of the author when introducing the economic deliquency of the seventies by the treatment of the data of official statistics. Accordingly, the concept of the economic deliquency is much broader in the criminology than that of the economic criminal offences in the criminal law.

The third chapter is entiteld "The economic criminal law and the economic policy". The author investigates first the relation between the economic and the criminal policies. The particularity of the economic criminal law renders necessary the analysis of this relation. Namely, in

this field the criminal policy is considerably influenced by the economic policy, moreover, this influence directly appears in the special rules of the economic criminal law. The aspects of the economic policy have an effect also on the selection of santions. Consequently, the investigation of the relation between the criminal sanctions and the administrative ones, the question of the criminal responsibility of the legal entity have significant part in the economic criminal law. According to his general method of treatment, the author compares here the practice of the capitalist and the socialist countries, too. The comparison does not seem to be detrimental to the socialist countries here. The reviewer, however, cannot refrain herself from admitting the missing of certain more profound critical analysis. Presumably, the change of the times provokes the reviewer to make this remark, since at the time of the writing of this book it occurred to nobody that the method of the comparison of law may come into question in so far as the identically denominated institutions of the democracy and the dictatorship are compared. It is a matter of fact that it was and could not be the purpose of the author to present a comprehensive and critical analysis of legal institutions being in a loose connection only with the criminal responsibility according to the positive law, so the factual nature of some summary statements can be queried today. Such is e.g. the statement that in the socialist countries the exercise of the employer's rights, the individual criminal responsibility, as well as the administrative sanctions all function well and serve effectively the objectives both of the criminal and the economic policies (pp. 45-46).

The fourth chapter deals with the legal subjects of the economic criminal offences. The treatment in a separate chapter is justified by the hypothesis of the author, presented in the introduction, according to which the economic criminal law is the entirety of criminal provisions concerning this legal subject. The author points to some characteristic attitudes of the criminal science of capitalist countries, and outlines the subject matter more detailed in respect of the socialist countries. This is the reason why this chapter contains statements most exceeded by the life. The author proceeds namely from his assumption that under the circumstances of the socialist economy transgressing the system of plan directives a delimiting line can be drawn between the proprietory and the executive managements of the state enterprises. This delimitation, however, would serve not only the purposes of scientific concept-formation but - as a consequence of the growing independence of the state enterprises - the means of the proprietory and executive economic management also become more and more separated from each other. From the point of view of the criminal defence, however, this is significant for the very reason, because the legal subject of the economic criminal offences, the entity of obligations prescribed in the range of executive economic management become definable. The change of regime in Hungary and its programme of re-privatization render at least doubtful the reality of this theory since the economy based on the state ownership proved unviable in the case of the "socialist" economy based either on plan directives or on the independence of the enterprises.

While the fourth chapter investigated the economic activites of the state and detected therein the legal subject of the economic criminal defence, the fifht chapter treats the questions of the economic activities of enterprises. This, however, stands apart from the range of the economic criminal law. The treatment is justified by delimitation problems, the relation between the obligation to the management of property, on the one hand, and the obligation contained in the norms of the economic management, on the other hand. Further on, the elucidation of the criminal estimation of the assumption of risks gives motives therefor. The significance of the

delimitation is proved by the fact that the reasonable economic risk may lead to the preclusion of the responsibility according to the general criminal provisions, the economic criminal law does not tolerate, however, the assumption of economic risk, i.e. the property growth achieved by the breach of duty does not compensate the breach of the duty prescribed by the economic management of the executive power. The delimitation caused serious practical problems especially in cases when the socialist state, as the owner of the means of production, regulated the questions relating to the management of property in its capacity of executive power, by economy-managing norms. The author analyzes the subject matter with a thorough grounding in economics. Thus, he investigates the questions belonging to the range of criminal offences against the property arising in connection with the obligations to the management of property, with the assumption of risk of the enterprises, with the criminal evaluation of economic decision-making.

The subject of the sixth chapter is the codification of economic criminal law. The survey of the history of Hungarian legislation is highly illuminating and represents an excellent introduction to the chapter from the point of view of raising of the problem, since in our history of economic criminal law very different variants and models of codifying policy are found. The analysis of the practice of the application of law and, parallel therewith, the description of the attempts made for the solution of these problems by prominent scientists convince everybody of the fact, that the application of the skeleton states of facts inevitable in the economic criminal law threatens with the injury of the fundamental criminal law guarantees, or at least produces the possibility of such an injury, requiring therefore a special caution. Consequently, the author investigates further on with full particulars how the principle of nullum crimen sine lege and the principle of criminality can and must be enforced with some types of the formal skeleton states of facts. The expositions of the author lay clearly open to us that the application of rules filling out the skeleton states of facts raises the question of the temporary effect of the legal norm and of the error in law and the correct answer to this question i.e. the correct application of the criminal responsibility is not possible without the consequent enforcement of the two criminal fundamental principles.

The last chapter of the book contains the concepts directing the criminal law and the criminology when evolving the notion of the eocnomic criminal offences, and that of the economic deliquency, respectively. As regards the economic criminal law and the economic criminal offences constituting it, these aspects are, as follows: a) the independent legal subject (the budgetary economy of the state and the economic management of the executive power); b) a connection with the economic policy and with the rules of the economic management (their change directly affects the criminal responsibility, narrows down or enlarges the range of penal offences); c) the special codification technique (the application of skeleton states of facts and thereby the initiation of elements requiring an evaluation into the statement of facts). As against the notion definable with general effect of the economic criminal offences in the criminal jurisprudence, the author considers the criminological concept of the economic deliquency as a concept expressing quite different groups of phenomena depending on the place and time.

The book of Imre A. Wiener was written in a bygone age, under the circumstances of the totalitarian party state. It is possible to write on the economic criminal law of this time in a more critical tone but it is impossible to say something that is new with scientific thoroughness after

the author. The work has been written with theoretical pretension and has formulated these utilizable for the development of the model of economic criminal law independently of the social system.

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THE UN HUMAN RIGHTS SYSTEM AND THE HELSINKI PROCESS: MEANING, ASSESSMENT AND PERSPECTIVES*

I. The UN human rights venture: a general assessement

The notion of human rights is one of the most remarkable achievement of contemporary human thought. The struggle to safeguard and promote basic human rights continues in every society, and human rights actions are in the focus of worldwide interest.

In the process of introducing human rights on the international scene the United Nations has played a crucial role. From our-days-perspective it seems absolutely clear that the establishment in the UN Charter of the principle of universal respect for human rights was a very wise and forward-looking venture. One can fully grasp the impact of this decision only in our days. As a result of this decision, in the second half of the 20th century one can witness the appearance of international legal codes of human rights which enable people to require governments to enforce the protection of human rights. All this happened despite the fact, that during the process of adoption of the UN Charter, it was possible to enact in it only a rather general and abstract rule on the protection of human rights (see, for example Article 1, para. 3; Article 55, para c.). At that time it was not possible to overcome the suspicion in relation to human rights. In the official position of States and in many political and legal writings of that time there was a fear that the elevation of human rights onto the international scene might forster subversive practices, and create tension and conflict among States.

However, since the adoption of the Charter's rather scanty and general provisions on human rights, the organization created by the Charter has made a tremendous effort to promote the international cooperation in this field, and actually has successfully demolished the veil of the above-mentioned suspicion and fear. Human rights nowadays are recognized as a most important constituent element of the international normative system.

It is possible to examine the UN activities in the field of human rights from different points of view (theoretical practical, codificational and promotional activities etc.). However, I would like to point out only some basic achievements which can be considered as milestones in the inter-state practice and in the development of international law.

1. Due to the codificational efforts of the UN the world community has accepted the idea of the universality of at least some basic rights. The attempt to forge a single, collective stand on the necessity of providing to the individuals some essential rights and freedoms was successful. The basic UN documents (the Universal Declaration, the two Covenants) have formulated a universally valid concept of what values should be protected by all States in their domestic system. What is interesting here is that the attitude of the United Nations towards the human rights problem from the very outset was based not only on simple multilateralism (i.e. the involvement into the codificational process as many states as possible) but

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explicitly on universalism. Universalism means much more than multilateralism, it is a transnational, transideological and transcultural generality which presupposes the acceptance of common standards by every state.

2. When assessing the UN relevant actions another fundamental fact should be taken into consideration. This world organization has gradually achieved that human rights problems are not considered any more as matters of domestic jursdiction. According to the modern evolving international normative system, the old principle of considering the relationships between States and individuals as matters of State sovereignty has been seriously undermined. One can actually witness a development when human rights are being considered as some sort of res communis value the protection of which is a common interest of all members of the world community. Hence, when this value is under serious jeopardy, the intervention on the part of others is not an encroachment upon sovereignty but a legally and morally justifiable response.

The gradual acceptance of the idea that States do not have absolute freedom in the domain of human rights, that State autonomy is subordinated to individual autonomy, that other actors of the international community have an inherent interest in the safeguarding of basic human rights, has helped to realize a general and a very important aspect of modern international life, namely: the era of unlimited freedom of States is over and the notion of absolute sovereignty of nation-states should be modified according to the needs of modern interdependent world. When examining the roots of this general conclusion one has to be a realist of course. Human rights actions of the UN were not the only factors that fostered this tendency. Apart human rights problems had appeared many other universal concerns that raised the issue about the limits of nation-states actions. But it is not an exaggeration to claim that the UN human rights initiatives have delivered the first real blow upon the impenetrable arbitrariness of States which for centuries has been grounded on the notion of absolute sovereignty. One can only welcome this result because there are many other important issues which demand the restriction of State actions.

3. When giving a general assessment of the UN actions in the field of human rights one should not disregard another fundamental fact. As a result of its activities in the modern international normative system has been incorporated rules and principles which cover individuals per se, that is recognize their legal capacity, treat them as bearers of rights and obligations at the international level. The legal personality of individuals at the level of the international community has become a reality. This has been recognized even by those who for decades had been denying the possibility of considering individuals as subjects of the international normative system. Individuals alongside nation-states and international organizations are being gradually admitted to the international community as subjects directly enjoying rights and bearing obligations. The acceptance of indiciduals as members of the international community may be considered as a real breakthrough in the modern theory of international law, and it might have very serious consequences for the future development of the whole body of this particular branch of law. Actually both the notion of the international community and its normative base are evolving into a qualitatively new phase. This normative system is no longer constricted by the traditional concept that States alone are the subjects and objects of the system, it goes beyond the traditional perceptions offering the idea that individuals may become "internationals" when a State seriously violates their rights. We are at the very beginning of the process of universal recognition of individuals as independent members of the international community, hence it is difficult to make long-term predictions as to it real

consequences. But one thing seems to be quite obvious: this is a process which weakens the traditionally perceived international system based on nation-states, undercuts the dangerous and selfish claim for omnipotency of States in this system.

II. The Helsinki process in light of UN human rights initiatives

I have no intention to examine in considerable detail the nature of the Helsinki process itself, and the adopted documents. It has been done by others in relevant writings and analysis. The only aspect which I want to stress is that one can hardly question the political and moral significance of these documents. But for those who are involved more closely into the legal realities of modern international life is absolutly clear also that even from formal legal point of view one can hardly declare them as non-existent, as such instruments which have no legal force behind them at all. When States adopt an international instrument by consensus, when through their official representatives pledge themselves to follow a specific way of conduct in their mutual relations, the result of their actions (whatever are the forms of this actions) do have legal significance also.

As for the substantial aspects of the Helsinki process, especially from the point of its correlation with the UN human rights initiatives, I would like to draw the attention to the followings.

First, when assessing the human rights provisions of the Helsinki process one should not forget that the background for them has been prepared by the UN human rights initiatives. Without the continuous efforts of the United Nations, and without those preliminary results which had been reached by this organization from the adoption of its Charter up to the seventies, the human rights dimensions of the Helsinki Final Act probably would have received much less attention. So we have to give due credit to the UN efforts because they prepared the way for the treatment of human rights as essential factors in modern international life.

Second, both in Helsinki and at the follow-up conferences (Madrid, Vienna) human rights have been interpreted in a wider context. Suffice to mention the acceptance of the idea that such other important notions as peace, security, cooperation are directly linked with human rights. This wider interpretation of human factors by the participants of the Helsinki process has had its rammifications within the UN human rights actions. Since 1977, United Nations organs have been engaged in an effort to broaden the issues of human rights, and to bring the related initiatives to the mainstream of international social and economic concerns. This new tendency in the UN human rights activity to some extent is a side-effect of the Helsinki process.

Third, the Helsinki process not only recognized and extended the role of human factors in modern international relations, but legitimized the general importance of human rights in the relations of those States who participate in the process. Actually one can witness a process when in a particular region of the world there is a general consensus, that the ultimate justification of the existence of governments is the protection and promotion of human rights. From this point the Helsinki process can be considered as a supporting mechanism of the UN initiatives aimed at the universal recognition of the importance of human rights.

And finally, the last issue which I would like to raise here is the qualitative assessment of the two systems, that is the UN human rights system and the system established by the Helsinki process. It is of course, is the most challenging question because it demands an answer to the fol-

lowing: has the Helsinki process introduced radically new elements in the domain of international human rights, has it overstepped the relevant UN system. The difficulty of the answer lies in the different nature of the two systems and in the divergency of aims and purposes. The UN human rights system has been moving on a track of legal formalization (standard-setting, introduction of a reporting system and some embryonic complaint mechanism) while in the Helsinki process the purely formalistic approach until now has not received much attention. In it a much more general aim has been persued, namely, the legitimization of human rights concerns. From this follows that it would not be correct to counterpose the two systems in a manner that one of them is better or more elaborate than the other.

Apart the legitimization of human rights concerns the Helsinki process has of course other positive elements also. Some of the commitments adopted within its framework should be considered as a real step forward on the way of creating an operative system of human rights protection. Here I want to pinpoit only those which reinforce the UN relevant actions.

The participating States of the Helsinki process have in fact accepted and normatively confirmed the idea of the UN initiatives that human rights are res communis values the protection of which is a common interest. The raising of the issues of human rights by any of the participating States is not considered any more as an interference into domestic matters. It has been explicitly confirmed by the Vienna Concluding Document under the terms of which "any participating State which deems it necessary may bring situations and cases in the human dimension of the CSCE to the attention of other participating States through diplomatic channels".

For the effective enjoyment of human rights is very important another commitment also, according to which the participating States should introduce the necessary changes into their domestic legislation with the aim to enforce fully their treaty obligations (see also the Vienna Concluding Document). This commitment shows that human rights are not only promises and declarations. Every State should devise a system of machinery capable to supervise, control and enforce the compliance with its international obligations. Non-compliance with this commitment creates justified ground for intervention on the part of others.

The Helsinki process is preparing the ground for the acceptance of another important principle, that is the requirement of third party adjucation in international human rights issues. In the Vienna Concluding Document the parties have recognized in principle the need of involving third parties into dispute settlement. I think that this general acceptance of third party's role relates also to human rights disputes. The requirement of a potential third party adjudication derives from the fundamental principle of justice that no one can be a judge in his own case. The absence of third party in an international human right dispute leave governments in a position to judge unilaterally the limits of their obligations.

All this represents undoubted achievements, but clearly much remains to be done. A really operative international human right system needs an enforcement mechanism at the level of individuals. I think that within the Helsinki process the time has come to introduce some sort of such mechanism. The sweeping changes in East European countries have created favourable conditions for the introduction of such mechanism. The most serious obstacle which for many years had blocked the possibility of raising the issue about an all-European enforcement mechanism disappeared. I mean the ideological convictions, the ideological rhetoric over human rights issues. It seems obvious that within this future system a simple reporting mechanism on the part of States would not be sufficient. It is necessary to open the doors before individuals to have access to an international machinery.

The extension to the individual some sort of an international remedy for violations of his rights has to be the most urgent task within the Helsinki process. What kind of machinery would it be depends on the willingness of States to exploit the present favourable conditions. It might be in a form of an all-European judicial body or commission on human rights, or at least in a form of an all-European ombudsman. Lessons of history show that the broader the international control the less the chances for discriminative practices in the hidden and dark corners of State policy.

III. The role and tasks of NGOs in the protection and promotion of human rights

There are thousands of NGOs throughout the world dealing with human rights issues. They play an important role both in promoting the aims of UN related initiatives and in the actual practice of enforcement of human rights. Their key role is to raise the awareness of human rights importance. In many respect NGOs are in a more favourable position than State organizations and organs because in the process of formulating their stand on a specific human right issue they are not constrained by political and other considerations of high politics.

The activity of human-rights-oriented NGOs has received legitimate framework within the Helsinki process. One has to mention especially the Vienna Concluding Document which recognized that everybody has the right in an individual capacity or in association with others (i.e. in the form of an organization) actively participate in the promotion and protection of human rights. The recognition of this right means that they ceased to be unwanted adverseries of official organizations. States should not only tolerate their activity but regard them as partners in the process of promoting human rights.

The actions of NGOs should be aimed at:

- using fully the potentials provided to them with the aim to raise the awareness of human rights and the role of human factors in every society;
- maintaining permanent vigilancy among the population in relation to the rights and freedoms of individuals with the aim of creating a meaningful framework for monitoring the activity of State machinery concerned with the enforcement of human rights;
- participating in the monitoring of States' compliance with their obligations under international human rights instruments; (It is a very important task since States usually do not admit the violation of their obligations. On the basis of ill-perceived "corporate solidarity" States prefer to lie about their conduct.)
- taking an active role in illuminating human rights illiteracy. (In this respect it is necessary to point out that not only the access of human rights instruments are of paramount importance but an objective and meaningful educational activity is also vital. What I mean here is that individuals should be aware of the real meaning and possibilities of human rights institutions. The generation of unrealistic expectation among the population, the sowing of the seeds of illusions as for the social role of human rights should be avoided. Thus for example, one could witness some sort of exaggerated expectations among the population of developing countries in the seventies, and in our days the same is true for the emerging democracies of East-European countries, where one can discern a strong general bel f that human rights automatically bring prosperity and well-being. The maintenance of such illusions may have an adverse effect.

Human rights, their promotion and enforcement do not create well-being but prepares the ground for a meaningful life, creates the necessary conditions for prosperity and well-being.)

V. Mavi

ON THE PRINCIPAL CHANGES OF THE LEGAL ADJUSTMENT OF THE ECONOMIC ACTIVITY OF SOCIALIST ORGANIZATIONS (SELECTED QUESTIONS)

The main aim of the amend of the Economic Code, which came into effect the 1st July 1988 is to create a larger space for the working of the state enterprises, cooperative, social and other socialistic organizations, in the branch of relations, directed by this code. The rules which regulate working of the state enterprises must be laid down in such way, that ensures its harmony with the interests of the whole society and increased responsibility for satisfying requirements of the society and expresses the new conception of relations among organs of economic operation and economic organizations by means of law (e.g. in special cases it will be possible for organizations to claim a recompense towards the organs of economic operation).

The amend uses a new term the "right of management" instead of the former "administration of the national property", too. In comparison with the former state, the term "property of the organization" was extended and now also contents rights to the results of the research, development, projecting and others. Very important fact is, that the "right of management" is not limited by time. The amend also extends the possibility of the economic organizations to enterprise in a harmony with the needs of the society and in special cases even to exceed the framework of the basic subject of production. The independence of the economic organizations to decide about changes and transfers of the productional programmes is strenghtened. On the opposite, the compulsory conclusion of contracts and the right of the organs of economic operation and the arbitry to interfere with obligation relations is restricted.

The extended independence of the economic organizations caused the extended protection both of their economic activity and their property, too. The increased independence is, of course, connected with the increased responsibility of the organizations. Therefore the amend lays down stricter penalties for losses (besides the real loss, the lost profit must be recompensed), and for non-quality production.

Great requirements are newly imposed on the quality of the capital constructions deliveries; there were laid down new duties for the purveyors, e.g. to remove the defects of the delivery during the construction. The customer may remove the defect himself, if the purveyor falls behind with it. The charges of the reparation bears the purveyor.

The amend of the Economic Code besides hitherto factual substances of the economic penalties newly lays down penalties for abusing the position in the economic relations against customers, especially in such case when it concludes in gaining unqualified profit and monopoly position on the market.

The amend complied with the demands of the theory and practice and gave up the obligatory accounting and levying the pecuniary santions. (Accounting is facultative except the sanctions caused by defective filling

and dwelling. The latter case is connected with special tasks of the state plane. Even accounting of these sanctions is obligatory when the rate of one sanction reaches over 5,000 crowns.) Construction of the sanctions connected with defective filling and dwelling enables to reduce the penalty in case the purveyor provides the effort to remove or minimalize the defects.

New conception of the relations between organs of economic operation and the economic organizations is characterized by determining the conditions on which the directive measures are submitted. Economic organization is protected against contingent unlawful measures.

In connection with the "state enterprise law" the amend adjusts in detail the institute of the "direct administration" which has to consolidate the enterprise. Also it solves the process of the winding up the enterprise in complex.

The amend strenghtens the role of the Register of Enterprises and removes hitherto dispersion of the codification of that institute in our law system. Today all the economic organizations and especially their subject of production are registered in the Register. The result of this codification is further legal security and protection of the organizations. After this brief survey we can deal only with some selected questions.

The amend enables new systems of the inner organization of enterprises, because the particular organization bodies inside the enterprise are not determined by law (§ 17, art. 2). In other cases the hitherto regulation was kept. It concerns especially the social organizations and the little places of business directed by National Committees. This kind of regulation, however, does not concern the state enterprises, which are directed by the "state enterprise law". The inner unit of the state enterprise cannot be the subject of law and acts in the name of the whole enterprise.

The new regulation says: Inner units and bodies of the socialist organizations have the right to act in the economic relations and can bear the property responsibility only in cases and on conditions laid down by the law. The enactments of this law and other rulings can be applied also to their ability to have rights and obligations, to their economic activity, legal acts and obligation relations.

The new regulation of the subject of production (§ 18a) is very important for the development of the socialist enterprising. The socialist organizations can carry on their economic activity in the framework of the subject of production laid down by the statute, founder instrument or other act; the subject of production covers also the sale of products, the adjustment or other processing of the sold products, giving works and services connected with the sale, complementary sale of products connected with works and services which are given by organization. Socialist organizations, although, can carry on other economic activities, too, if the fulfilling of obligatory target of the state plane and economic obligations are not affected.

For the strenghtening the legal certainty, the amend regulates the case when the authorized organ refuses the approval or does not decide. The Economic Code requires the approval for different types of contracts. In case that the authorized organ does not give its standpoint in one month after the receiping of the application, it means that the approval was given.

The regulation of the "Measures of the organs of economic operation" (§ 26a - 26e) is also completely new. The main sense of this regulation is to create legal conditions for greater independence of the state enterprises and other organizations and to provide the legal certainty for these subjects. The possibility for the organs of the economic operation to involve the working of the state enterprises is limited. This possibility

is deliminated by qualification norms. The interference is possible only in case and on condition mentioned by the regulation.

The organs of economic operation have the responsibility for the damage caused by the measure which is not in harmony with the regulations: this responsibility cannot be refused.

Other significant regulations (§ 27a - 27g) deal with the questions of the regime of consolidation, direct administration and the liquidation. These special methods of management mean the certain interference into the management of the state enterprises which can be applied commonly. The possibility of the liquidation is necessary, but the proposal is, that it is the exceptional measure. The yield of the liquidation will be used for paying the debts in this order: the debts of the employees, the state debts (duties, taxes, deliveries), other debts.

New legal regulation extends the term "national property" and adjusts it to the "state enterprise law". Also it contents the new conception of the "right of management". The national property contents not only the property of the people, debts and other property rights, but also debts and other property rights of the state organizations.

Changes in the 3rd part of the Economic Code mean, that the position and the legal situation of the cooperative organizations will be adjusted both in the Economic and in the Agricultural Codes.

The significant changes are connected with the Register of Enterprises, too. The Register of Enterprises is the public book in which the organizations, their organization bodies and facts concerning these units are written. The Register of Enterprises helps the check and ensuring function of the economic law.

The special functions of the registration in the Register of Enterprises are:

- constitutive function - the registration is the condition on which the certain right rises, changes or expires,
- declaratory function - the registration is not the condition on which the right rises, changes or expires, but it certifies, that in time of registration certain facts existed,
- informative function - it is possible to look into a Register or to take out the excerpt.

Besides the state enterprises, also other socialist organizations are written in the Register of Enterprises, e.g. cooperatives, enterprises and economical bodies of the social organizations and other subjects which carry the economic activity (foreign trade corporations, national committees carrying economic activities, etc.). The registration is the proposal of the inception of the state enterprise. That means, that the Register of Enterprises is the important medium of the state supervision upon founding enterprises, working of which might not be in the harmony with law.

For better information of the economic center, the Register of Enterprises extends the data about working of the socialist organizations, strenghtens the certainty of the subjects of entrepreneurial activity. New legal adjustment determines the constitutional type of the registration for the foreign trade corporations, too. There are also new facts, which must be registered. It is, especially, the datum about the extent of the property of the organization in the moment of the foundation and the subject of production.

The duty to discuss the purveyor-customer relations remains in force. It's extent will be concreted by the special regulation. If the discussing is without discrepancies, the organizations are obliged to conclude the contract. The record about the results of the discussing the purveyor-

customer relations is valid only in case that the discrepancies appeared. The discrepancies are solved by the organs of economic operation; in case that the discrepancy is removed, the contract about the preparation of deliveries is to be concluded (the contractors are obliged to close the contract on delivery).

The change in the construction of § 18 is very important, too. The organs of economic operation can force the organization to close the contract in exactly determined cases: protection and security of the state, obligations of foreign contracts, protection of the life and health of the people, protection of the life environment, removing the results of natural catastrophes and serious crashes; (the arbitrary has not even this common right - its decision can be based only on the legal regulation). On the same condition the organs of economic operation can change or cancel the obligations of the organizations.

The contract of the transferring the right of management (§ 347) has the obligatory content which must be concluded as a condition on which the contract arises: the transferred property, the day of the transfer and the price must be determined in advance. That means that the transfers of right of the organizations are principal venal. (The organs of economic operation must not give their approval to the transfer.)

In the § 352a, there appears a brand new conception - the transfer of the program of production. The organizations can make this agreement on strictly determined conditions: the transfer must be effective and purposeful and the fluent supplying of the national economy must be ensured as well as fulfilling of the foreign obligations. The responsibility of eventual damages must be strictly determined in contract in order to protect the rights of the customers.

Some changes appeared in the contract of association, too. All the socialist organizations can associate; they join their activity or their fiances to reach the certain purpose. The contract must be written, the approval of the organs of economic operation is not necessary.

In the finish, it is necessary to say, that further stage of the codification of the economic law and the appearance of the new Economic Code is planned on the 1st January 1991.

L. Tamás - J. Bejcek - K. Marek

INTERNATIONAL ROUND-TABLE CONFERENCE ON THE BINDING FORCE OF CONTRACTS

The Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences with support of the Hungarian UNESCO Commission organized a round-table conference on questions of legal ruling of contracts. The conference took place in Budapest, between 10-14 September, 1990.

The foreign guests invited were experts involved in the harmonization works of contract law of the EC countries (Prof. Beale, Warwick; Prof. Drobnig, Hamburg; Prof. Hellner, Stockholm; Prof. Lando, Copenhagen; Prof. Denis, Louvain-la-Neuve, Prof. Tallon, Paris) and theoretical jurists from Yugoslavia (Sarcevic, P. rector, University of Rijeka), Poland (Stepniak, L., research officer, Warsow), and from Czecho-Slovakia (Pauknerova, M., research officer, Prague).

On behalf of the Hungarian participants, Prof. Mádl, F. Minister without portfolio; Kecskés, L., deputy Minister of Justice, Martonyi, J. deputy Minister of International Economic Relations, Prof. Vékás, L. rector, University of Budapest, lecturers of the Hungarian Law Schools;

practising lawyers from enterprises of foreign trade, from ministries, from courts of justice and the research officers of the Institute for Legal and Administrative Sciences took part in the work of the conference. Professor Harmathy, A., Professor of the Eötvös Loránd University, deputy director of the Institute for Legal Sciences, Budapest, performed the part of host and he had a lion's share in the organization of the meeting.

The aim of the conference was, that with help of discussion on basic problems of contract law, the participants could create a better understanding of fundamental concepts, categories of the law of contract in different countries of Europe. This could promote future economical connections, may establish further harmonization works, and may help to solve the problems raising in connection of contracts in the routine work of lawyers.

The form of the conference was free discussion, without formal lectures, although Prof. Beale, Prof. Harmathy, Prof. Hellner, Prof. Lando, Prof. Philippe és Prof. Tallon presented their paper for the participants.

The main topics on the agenda of the conference were: 1. specific performance, 2. adaptation of contracts to changed circumstances, 3. non-performance and remedies.

F. Mádl, Minister without portfolio opened the conference, after that rapidly active discussion developed on the questions of specific performance.

Prof. Drobnig, examining the European law systems, separated three categories: The first one is represented by the system of common law, where specific performance is rather an exception, claim for damages is regarded as normal remedy. Specific performance is only applied, when there is no other way of compensation - because of the feature of the market or of the contract itself. The second category is represented by the continental systems, where the main principle is the one of "pacta sunt servanda". The third category would be represented by the former socialist countries, where the principle of real performance was dominating.

In the course of the discussion it was remarkable, what a considerable difference existed between the aspects of Prof. Tallon and Prof. Beale - as representatives of the continental and the English law. While the French professor argued from an ethical-moral point of view - promises should be binding" -, the English professor made rather a business-based approach. The English law even knows the case of "economically effective breach of contract", - this means, that if one of the contracting parties gets a more advantageous offer, he may terminate the contract, if the innocent party desists from his claim in return for sharing the surplus profit developing from the more advantageous offer.

The differences, which occur even in the practice, could not be abolished by the harmonization efforts. The Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods was not able to unify the law of contracts on the field of specific performance.

The nature of the contract also exerts an influence over specific performance. Prof. Hellner emphasized that in this point of view specially problematical are the long-term contracts, cortracts, which contain obligations that are fulfilled by repeated actions, or by prolonged performance and contract of personal services. Boytha, Gy. summarized the problems arising on the field of contracts on intellectual property.

In connections with specific performance one of the most important questions is: how can it be enforced? In some of the countries very efficient means are available for the court. The English courts can order specific performance of an obligation to do or to convey: if the defendant does not comply, he may be imprisoned or fined for contempt of court.

French and Belgian law associates the specific performance with "astreinte", and this also provides very efficient judicial results. Astreinte means, that the court can order the defendant to pay fine, but not for the Treasury, but for the innocent party.

Is the innocent party expected to turn immediately to the court or rather to make alternative arrangements (typically by going out into the market)? This might be an essential point in connection with specific performance, and there are great differences on this field among different law systems. Professor Hellner pointed out, that even the Scandinavian laws are different in this point of view: in the Norwegian system it is considered as an obligation for the innocent party to make alternative arrangements, in the Swedish system it is not.

Of course this cover transaction can only be effective in those countries, where real market exists, so in the former socialist countries the possibilities of it are more restricted - as Professor Sarcevic pointed out. Prof. Harmathy stressed, that in our country there are great difficulties with alternative arrangements, especially on fields of building contracts and flats.

The second subject on the agenda of the meeting was adaptation of contracts to changed circumstances. The first concept discussed was the one of f stration. In English law - as Professor Beale pointed out - a contract will be frustrated if the substance of it has become impossible or illegal, or the commercial purpose has been completely destroyed. The frustrating event must also have been unforeseen by the parties; and the impossibility must not be "self induced". The effect of frustration is, that the parties are released automatically from liability to perform further. But the parties are free to put in their contract express terms, under which the contract may subsequently be adjusted. The parties are given considerable latitude in this respect, and the courts have gone quite far in providing support for what has been agreed. The courts usually do not modify the contract.

Professor Tallon briefly summarized the French practice. According to it the courts do not adjust the contract, only the administrative courts have adopted a different rule, grounded on the specificity of administrative contracts, but even in this case it is hotly debated, to what extent it is acceptable.

Professor Lontai emphasized the importance of maintaining the contracts on the fields of licensing contracts.

On the last day of the meeting the third topic was discussed: non performance and remedies. The existing national laws differ considerably both in terms and structures to be used, even on fields of remedies - as Professor Lando pointed out. In common law damages are the rule, specific performance is the exception, in the Continental system it is just the opposite.

One of the most interesting topics discussed in the domain of remedies was the right to terminate the contract. Here the different law systems apply different solutions. The Belgian Civil Code - as Professor Philippe pointed out - similar to the French solution compels the creditor to ask for intervention of the judge in order to obtain the termination of the contract. The judge appreciates, whether the non-performance is of such a seriousness, that it justifies the termination of the contract.

In the German law the innocent party has the right to terminate the contract, the judge is only involved in case of debate. According to common law, the question of terminating the contract falls into the domain of the autonomy of the parties and usually there is no judicial control above it. The parties usually fix the conditions of terminating in the contract.

Pauknerova, M. and Stempniak, L. summarized briefly the efforts made and the results reached on the fields of contract law in Czecho-Slovakia and Poland in the recent time.

In summary we can say, that the conference was a most profitable experience.

Á. Dósa

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Stefanovič, M.:

POROVNÁVANIE PRÁVA - SOCIALISTICKÁ PRÁVNA KOMPARATISTIKA
(COMPARISON OF LAW - SOCIALIST LEGAL COMPARATISTICS),
Bratislava, 1987, Veda, p. 170

In the foreword, the author refers to the fact that in the Czechoslovakian legal literature this is the first work, which gives a comprehensive picture of the socialist comparative jurisprudence.

The book consists of five chapters.

The first chapter investigates the function and place of the comparatistics in the Czechoslovakian socialist jurisprudence. It starts with defining fundamental conceptions. It seeks for the place of the comparatistics in the jurisprudence. It states, that the comparison itself is only a method, known since the oldest ages. It turns into a science if it results in new scientific results - this is written in the second chapter. In the opinion of the author, the new knowledge is something which did not exist hitherto, or refutes or completes or enriches our knowledge gathered hitherto (p. 49). If the existence of the new scientific branch of knowledge - the comparative jurisprudence - should be proved, the arguments supporting this independence have to be first evaluated. In this connection the author investigates in details the single phases of the development from a method to a scientific branch of knowledge.

The author comes to the exhaustive introduction of this process in the third chapter. The origins of comparative jurisprudence are dated back to earlier times, than the 19th century. The Civil Code of Napoleon is regarded as its first document, compiled by the application of the accessible materials of different legal rules. A further document is the declaration of human rights in 1789. A milestone, significant from the point of view of the development of the comparative jurisprudence, was the establishment of the professorship for the general legal history and comparative law at the Sorbonne in Paris in 1831. In respect of the development of comparatistics, Montesquieu's "L'Esprit des lois" is a highly significant composition because its explications are founded mainly in the comparison of law (pp. 68-69).

In connection with the development, to be observed in the Western countries of the comparative jurisprudence, the author emphasizes the activity of the Association Internationale de Droit comparé which - as it is well known - has established in Strasbourg an international faculty for the teaching of comparative law (pp. 75-76). In the socialist jurisprudence, the legal comparatistics serve primarily for the stabilization of the mutual relations of the socialist countries and for the exchange of the gathered experiences. In consequence of the historical development and of the national traditions namely numerous institutions and notions are to be found in each country which are different, causing often difficulties for finding the correct common solution. Steps may be taken only gradually for the unification of the legal rules and institutions. In this respect, the author attaches great importance to the international meetings organized in the recent decades in some socialist countries for discussing various questions of the comparative law. He stresses the results of the Xth International World Congress on Comparative Law, held in Budapest in 1978.

From the fourth chapter the comments of the author on the character of the subject matter of comparison of law are worth emphasizing. Since it

concerns a scientific research, the purpose is the search for the objective laws of the development of the examined phenomenon - writes the author (p. 99). In this way, the investigation may comprise the legal rule, the legal institution, the legal branch, the national law as a system, the great legal systems and legal cultures and the types of the law (p. 102). Relating to the method of investigation the author observes that the pure dogmatic analyses or the explications of totally descriptive character are not very likely to be successful. The scientific investigation requires the absorption in the essence of phenomena, since new, utilizable knowledges may be acquired only in this way (p. 121).

In the modern comparative law, the division of legal systems into three great branches, namely into the Romanist-Germanic, the Anglo-Saxon and the socialist law is a current conception, the international teaching of comparative law is also on this basis - wrote Imre Szabó in the foreword of the Hungarian edition of René David's Great legal systems of the contemporary age (1977). These three legal families are, however, in close connection with the European evolution and civilization - we read in René David's book. In addition to them, there are other legal systems in other parts of the world among which the religious and traditional legal systems are the most significant. From the latter ones the fifth chapter of the reviewed book gives special attention to the Islamic law since, in the opinion of the author, this is the most characteristic one and the political relations of the East European countries are the closest with the Arabian countries. In addition, the book deals with the Arabian countries. In addition, the book deals with the English law, with respect to its several particularities.

In the concluding expositions the author gives utterance to his conviction that the knowledges acquired by comparison always enrich the stock of informations on the corresponding legal branch and on the sectoral jurisprudence, if their application within this legal branch is concerned. The scientific research work relating to the law as an entity, the knowledgeacquired through it and its conclusions belong to the legal theory, in the framework of which they take up their position as a specialized scientific legal branch of knowledge.

The work of the author introduces comprehensively, systematizing and analytically the socialist comparative jurisprudence, being a pioneering work in the socialist relation.

The scientific editor of the book was K. Rebro, the reviewers were V. Knapp and E. Kučera. The activity in the comparative law of Š. Luby and L. Bianchi was also of great help to the author. A summary of the essence of the book in Russian, German and French languages renders the work more easily accessible in a wider circle.

L. Trócsányi

Folsom, Rlaph H. - Minan, John H. (Edit.):

LAW IN THE PEOPLE'S REPUBLIC OF CHINE

Martinus Nijhoff Publishers (Dordrecht - Boston - London), 1989. 1076 p.

The political and legal development of the gigantic country of more than one thousand million inhabitants engages the attention of several scientists over the world. The Chinese history looks back upon millennia and the philosophy originating with Konfucius, according to which a just

regime of good people, whose virtuous attitude is the best mode of conviction, is able to result in the desirable social behaviour and social harmony, exerts a remarkably strong influence on the development of the political and legal institutions even today. The application of severe measures and severe punishments may be only secondary. The European legal schools have had and have, of course, also considerable influence on the practice and theory of the Chinese law. In China, the jurists were educated traditionally rather on philosophical bases and were familiarized with the masterworks of the classical Chinese literature. The education of legal experts is a relatively new phenomenon. In 1982 only one qualified jurist could be found among 50,000 inhabitants. The conflict of the written law and the "revolutionary" law is not novel, though the fist-law, wrapped up in extreme left dogmatic phraseology, asserted itself doubtlessly on the nadir of the Maoist revolution, in the time of the so-called cultural revolution. Since 1976, when Mao deceased, the legislation and legal education have come again into prominence and this fact has not been changed even by the tragic and aggressive incidents of this summer. The existing leaders of China are aware of the fact that no modern power can effectively function without a solid and coherent legal system and without a system of legal institutions. Teng Hsiao-ping's aim is that by the end of the century there will be two million Chinese jurists acting in official capacities and in the support of this a wave of jurisdiction has started. The development of an up-to-date Chinese state and law would, however, take years, decades, reaching considerably into the next century, even in the opinion of the authors.

The thorough-going volume treating profoundly all aspects of the Chinese law analyzes the peculiar relations between the Chinese constitutional law and the Communist Party. The authors point to the fact that though the Chinese constitution is similar in its form and structure to the constitution of the United States, the similarity, however, does not go further on the whole. The authors analyze in details the achievements, the objects to be attained of the constitution of 1982 (the fifth communist constitution) and they emphasize that the constitution reflects the increased importance and role of the law in the People' Republic of China. The detailed expositions of the constitution on human rights inhibit, however, not in the least degree the possessors of the power from acting brutally again st the otherwise thinking people, against the refractory national minorities. An endless multitude of examples proves unambiguously that the struggle for the constitutional state, against the autocratic application of the state power has by no means come to an end in China. Both the spirit and the letter of the new constitution are imbued with the doctrine of the four modernizations and the governmental system is transformed in the spirit thereof. In the opinion of the authors, the constitution of the People's Republic of China - at least in its wording - adjusts itself in a special way rather to the theories of the creator of the modern China, Sun Jat-sen, than to the theory and practice of the regime of Taiwan, since Dr. Sun has always believed, that political power should be distinguished from the governmental power. As a matter of course, the present Chinese Communist Party is not any more an illegal group of a few fanatic revolutionaries but, among others, it is the domination of a million of smaller and greater bureaucrats. The majority of the present inhabitants of China has never lived under an other regime thus, they regard as a fatality that the way to the career leads through the party membership and the party bureaucracy correspondingly determines the governmental policy and the daily practice, too. In spite of the institutional changes goind on, so to say, continuously in the Chinese state machinery, which prove that the "ruling élite" is not homogeneous in this respect either,

there is a struggle for the positions, for the influence under the surface - just like before.

In the following the book introduces the development of the institutions of mediation and conciliation. Their importance is duly proved by the single data that the conciliating bodies acted in 1981 in cases about thirteen times more than the courts of first instance, i.e. in about 8.2 million cases. In the estimate, 90 per cent of the civil actions were settled by these committees, about 4 million mediators participated in this work, whose number increased by 50 per cent in the last few years. The Chinese Communist Party advocates the settlement of such kind of the legal disputes for all that it symbolizes the corporate obligations and refuses the traditional formal courts which were tried to be introduced as the instruments of the class manipulation of the overthrown capitalist system. Doubtlessly, mediation is the most cost-saving method of the administration of law in a society in which the number of jurists is low, the infra-structure is in embryonic state, the competence of the courts is highly limited, as well as the Party traditionally intervenes directly in the decisions of courts. Several legal processes, e.g. the divorce suit come obligatorily before the conciliating committees as first instances. Although a good part of cases is solved through the channels of informal mediation, the rules of mediation have, however, been laid down at first in 1954, whereas confirmed and partly modified in 1979. This legal institution is, of course, dominated by the thesis of "chia-t'ing ch'u-shen" (class origin) which fits in the Maoist doctrine of the mobilization of classes. The mediation and conciliation have also didactic functions in a mass society where the individual is constantly subject to the "social education". To furnish illustration, the volume introduces several decisions taken in concrete cases.

In the next part, the Chinese methods of settling business disputes are to be found. The majority of disputes is presented before the state administrative office of commerce and industry (the arbitrage forum), the operational development and the changes of which are treated in details by the essay, completed by the introduction of the connection between the settlement of disputes and the market mechanism. The increasing role of commercial market incentives is obviously accompanied by the modification and evolvement of the role of arbitrage. The paper also introduces the relationship between the rules of Chinese arbitrage and the mediating rules of UNCITRAL.

A separate chapter deals with the people's tribunals which discontinued their activity in the chaotic period of the cultural revolution. The task of these fori is, in addition to the judgement of civil and penal cases, also the "training for the loyalty to the socialist fatherland and the propagation of the respect to the constitution and laws among the citizens". The paper mentions that in the last decades the number of litigated cases increased by leaps in the People's Republic of China. The chapter also contains the legal norms regulating the operation of the people's tribunals. The volume deals with the methodology of the legal education, with the role of "popular legal advisers", with the public prosecutor's office, the construction of which was developed on the basis of the construction of the Soviet public prosecutor's office.

The next chapter treats the specifically Chinese institutional system of the law of procedure,the relative legal norms.

The volume renders possible to get acquainted with the fundamental provisions of the substantive law, with the novel changes of the criminal law, civil law, family law in the recent years. One of the papers mentions, as a point of interest, that the law of nationalities enacted in 1980 combines the principles of ius solis and ius sanguinis, accordingly "any

person born in China from Chinese parents or from parents one of whom is Chinese, shall be regarded as of Chinese origin".

Last but not least, the papers of the volume deal with the specific legal status of Hong Kong and Macao, with the relevant legal institutional system, apparently reflecting the principle of "two systems, one country". The collection of essays of outstandingly high level may be considered a fundamental work for those investigating the present life and society of the most populous country of the world.

M. Udvaros

Davies, Keith:

LOCAL GOVERNMENT LAW

Butterworths, London, 1987. 352 p.

Walter Bagehot has written in his classical work on the British constitution: "We love independent "local authorities"... The degree of the local freedom desirable in a country varies according to many circumstances, and a Parliamentary government may consist with any degree of it."

In the first chapter of the comprehensive work on the British local government an extensive list of laws and legal norms, as well, as a list of legal cases are to be found, the latter representing the mile-stones in the different periods of the development of the British administrative and constitutional laws.

The first chapter of the volume analyzes the evolution of the local government in England and in Wales. It points to the fact that the concept of the local government is paradoxical because it supposes a central government to which the local government is subordinated to a certain extent, but which is also independent and free to a certain extent. This presumes some kind of balance between the dependence and the authonomy but if it is so, this delicate equilibrium is nearly constantly in danger from whatever direction. The question comes up whether a real local self-government can be made, consistent with the requirement of stability. Several modern states do not accord this chance or rather this risk. In the French history e.g. waves of decentralization and centralization followed each other, and at present, President Mitterand tries just the decentralization in order to equilibrate the long tradition of centralization in France.

In Chapter II information can be gathered about the present local self-governmentes. The author points out, that the administrative reforms after World War II introduced considerable changes practically in 1948, in 1958 and in 1966, but not without resistance. The counties have been maintained on the whole, but in several matters of details changes have occurred, and - in the first place - the formation of larger and simpler administrative units has been striven after. The local government law of 1972 aimed already at stating the sphere of activity of the authorities of various levels more precisely than hitherto.

Chapter III introduces the local authorities as corporate bodies. This is deduced in fact from the Latin word "corpus" (Body) since the law treats these entities as corporate bodies further on. The author refers to the very long pre-history of this concept in the British development of law.

Chapter IV deals with the constitutional responsibilities of the local organs, with special regards to the specifica of administrative juris-

diction, as well, as introducing the connections between the activities of the administrative authorities and the courts, with the following remark: "This also serves to prove how much affected the doctrine of the separation of power is." The reader may get acquainted with the possibilities of legal remedies.

In Chapter V of the volume the order of civil responsibilities of the local organs is described. Treating the contractual liabilities of the local organs the author states, that the contract of a local organ, concluded in an area outside its sphere of activities is to be considered null and void. He deals with the liability for damages and with the criminal responsibility of these organs.

In Chapter VI information may be gathered about the possibilities for initiative of legal nature of the local organs. The restrictions of the initiation and of the interpretation of legal norms imposed on the local organs are introduced.

The next Chapter deals with the financial matters of the local government. The Law on the local self-government of 1972 declares as a general rule that the local authority is entitled to do anything, may it carry costs or not, implying loan or the purchase of a real estate, but it must not acquire money by incrasing the rates. The publicity of the financial transactions is a primary requirement, the responsible organ of the self-government informs the general public, the voters to the proper degree. The same Chapter outlines the methods of lending amounts utilizable for communal works, the organs and methods of the financial control.

In Chapter VIII the author makes us acquainted with the formation and work of the local municipalities. He deals with the establishment of the election districts, with the organization of municipal elections, with the particularities of the activity of the councils, with the work of the committees.

Chapter IX outlines the governmental (central) control of local organs, introducing the limits of the ministerial supervision of the various fields of activities of the local municipality.

Chapter X introduces the activity of the local organs of self-government aiming at the confirmation and protection of the law and the legal order. It makes clear that in the insular country the local development of the protection of the public order, the constable system, looks back upon a tradition of several centuries. By the way, the establishment of the organization of the police authorities has been regulated by a law in 1964 and the Minister for Home Affairs has been entrusted with its national supervision.

The next Chapter deals with the local governmental tasks related to the leasehold. It points to the British speciality that some kind of public roads may be built also by private persons, without, of course, the injury of the rights of others. By the development of the present up-to-date road-system the tasks of building, planning and maintaining roads were inevitably more and more centralized. The executive power has undertaken the performance of the sanitarian tasks relatively late, after the cholera epidemic of the thirties in the last century. The harmonized central and local efforts for the safeguarding of environment belong rather to the results of our days.

Last but not least, Chapter XII deals with the services of personal character, especially with the performance of social and educational tasks. The same Chapter treats also consumer protection which started on British territory in 960 A.D. when King Edward strictly ordained the use of scales in the trade. Though the legal norms of the weights and units of measurement were uniform in the country, their enforcement, however, was considered more or less a local task, just like the tasks of the control of food-hygiene.

The Appendix of the volume contains the list of counties and districts of England and Wales, completed by an index.

The book is a highly thorough analytical work supported by legal history antecedents, the study of which may be recommended especially to persons showing an interest in the Anglo-Saxon public administration and law.

M. Udvaros

Kempf, Udo - Uppendahl, Herbert:

EIN DEUTSCHER OMBUDSMAN

Leske Verlag und Budrich GmbH, Opladen, 1986. 267 p.

The ombudsman active in the territory of Rhine-Pfalz (according to the German terminology: Bürgerbeauftragte) could look back upon a successful time of service of 10 years in May 1984. The interest in the institution, functioning until now only in this territory of the FRG for the protection of the rights and legal interests of citizens, commenced in the Western world actually in the early sixties and has prospered primarily in the countries, where an effective system of the administrative courts existed.

The following factors promoted the world-wide propagation of this institution, founded in Sweden in 1809:

- the increasing participation of the state in all fields of social life, the spreading of the relative administrative apparatus, as well, as the widening of the range of conflicts between the citizens and the state;
- the increasing helplessness and misgivings of the citizen in the jungle of state administrative regulations;
- the extensive foundation of state activities and administrative work by legal norms;
- the demand, arising due to the special development of the parliamentarism on the confirmation of controlling rights of the popular representations;
- the intention to the development of the self-regenerating capacity of the parliamentary decision-making process and the parliamentary government.

It is beyond question, that the ombudsman provides for the continuity of control since neither his activity, nor his office is bound to the duration of the legislative period. Further on, the ombudsman can reveal also the structural fragility, the disaccords of the administrative activities and the insufficiencies of the information furnished by it. For this purpose, especially well educated and highly qualified co-workers are required.

The book also deals with the West-European and North-American experiences but, first of all, the German experiences are treated by famous authors, among whom e.g. chancellor Helmut Kohl himself and other well-known German statesmen are to be found.

The activity of the civil spokesman of Rhine-Pfalz gave rise in the recent years to a keen interest beyond the borders of the Federal Republic of Germany, too. Foreign and German theoretical and practical experts investigated the social-psychological elements and the economic-financial background of the activity of the ombudsman. They were especially anxious

about the social strata, the social groups, which have had primarily recourse to the ombudsman, since these data have evidently shown the anomalies to be remedied of the society and, within this, those of the state administration, both in territorial and institutional respects.

The tables enriching the book contain informative numbers on the facts which legal remedies were employed b the citizens, in which fields such demands arose, which efficiency could be achieved in respect of the legal remedies, which institutions were most able and willing to co-operate and which institutions obstructed successfully the activity of the ombudsman, advocating the rights and interests of the citizens.

The book offers an overall picture of the personified method of such character of the administrative control, of the consistency of the control activities and sometime of their lack.

The description of the activity of the ombudsman, functioning at the military forces, the organizational and functional picture of the military ombudsman, as well as the effort to furnish the Bundestag with continuous information on the legal protection of the members of military forces are especially interesting.

The book deals also with the foreign (Austrian, Dutch, etc.) experiences. In Austria, the institution of Volksanwaltschaft has been existing since 1971, the legal norms relating to its activity have been summarized in 1981 in the amendment of the Federal Constitution. The explicit description of the activities, the working order for the Austrian ombudsman has been available actually from July 1, 1977 and its relation to the other sources of legal remedies and to the informative sources, responsible factors have been regulated recently. The Dutch ombudsman is rather a "social administrator of justice" than an investigating judge, his activity aims, however, at the termination of the administrative anomalies, at the restoration of civic rights.

The work deals also with the ombudsman system of the United States of America and of the United Kingdom. Here, the particular ombudsman-system of specialized safeguarding of interest is worth mentioning. In some American federal states namely there is a specialized ombudsman functioning in prisons and hospitals.

The "socialist" states show also a more and more intensive interest in the questions concerning the ombudsman and this book helps to a considerable extent to throw light on the nature and the specialities of the functioning of this essential institution of the social democracy.

The book is completed by the author's "who is who".

Jongen, François:

LE DROIT DE LA RADIO ET DE LA TÉLÉVISION

De Boeck-Wiesmael, Bruxelles, 1989. 312 p.

Three legal regulations apply to the Belgian radio and television, connected with French-, Flamish- and German-speaking communities - the author points out in the foreword. There are, of course, common rules, too, in so far as the technical conditions, the statements of the national government, the trade advertisements are concerned. The comments of the author are centralized on the law of the French community, whereas the laws

of the other communities are introduced with a comparative character. The author also pays attention to the provisions of international law, relating to radio and television, if they show any special features as against the Belgian law.

The book consists of three parts. The first part treats emission, meaning - in the opinion of the author - the programming and the transmission to the frequency bands used for broadcasting, the second part deals with transmission, under which broadcasting itself is to be understood, whereas the third part deals with the reception of broadcasting stations.

This division - as it may be read in the foreword of the author - necessarily involves disproportions, since the most detailed regulations relate to the emission, but the logical structure of the explications and the suitable elucidation of the questions have required this method after all.

Coming now to the discussions on the merits, the first chapter of the first part deals with the delimitation of the right to emission, as reflected in the rules of the international law and the Belgian law. The provisions relating to the boradcasting and the television of the European Convention of Human Rights and of the Treaty of Rome of 1957 on the European Economic Community (e.g. the prohibition of the misuse of superiority) are introduced among the rules of international law. In case of the Belgian legal rules, it starts with the constitution and then it introduces the special legal rules relating to the radio and television. The radio and television have been cultural institutions since 1971, belonging to the Councils of the relevant communities.

The second chapter treats the addresses of the right to emission. Among them, the most significant is within the French community the Radio Télévision Belge de la Communauté culturelle française (R.T.B.F.) being a public institution, its television having four channels, its radio having four wave-lengths, moreover, it broadcasts on a separate wave-length to remote countries. The author deals with the organization, means, permanent staff and control of R.T.B.F. in details. Since 1987, private televisions can also function, partly with regional programmes and partly with programmes for the entire French community; their name is correspondingly: Les télévisions privées de la Communauté française. Up to the present, one private television is functioning, transmitting programmes of business character for the entire community. In addition, the establishment of private television stations for performing regional tasks - Les télévisions régionales privées - is also possible, the functioning of which is restricted to special regions. Until the closing of the manuscript - May 1st, 1989 - no such television was registered.

Since the sixties, various social and cultural groups experimented with audiovisual technics within narrow decentralized limits. Thus, nine communal television stations have started functioning between 1976 and 1979. The decree of 1985 laid down the conditions of the establishment of local and communal televisions - Les télévisions locales et communautaires.

In 1983 the institution of the so-called paying television services - Les organismes de télévision payante - was introduced within the French community, the addresses of which may be the general public (in case of films, sporting events, programmes for young people, etc.) or narrower professional circles (stock-brokers, estate brokers, farmers, etc.) in subjects interesting them. These transmissions can be received by means of decoder ("décodeur"). The organs of the community have the duty to settle the method and the amount of the payment.

Finally, in this context the private radios - Les radios privées - are mentioned, the legal frameworks of which were regulated in 1987.

These types of radio and television have the full right to emission which means that they may transmit their programmes to the wave-lengths serving for transmission. This is the so-called indirect right to emission which is due to definite institutions, such as the government, the executive organs of the community, associations, foundations. The contents of this right can be summarized in the fact, that these organs determine only the contents of the communications, the transmission is, however, the task of the public institutions of radio and television. Among them, the corresponding institutions of the Flamish and German communities are to be found in addition to R.T.B.F.

The third chapter treats the conditions of the right to emission. These conditions are general, partly for all media (radio, television, press, theatre, cinema), whereas some of them relate only to the radio and the television. The general conditions are: the security of law, and that of the state, the respect for the public order and for the public morals, the obligation of abstaining from acts committed to the injury of foreign states. In addition, there are common rules decisive for the radio and television, thus, among others, in respect of promotion, the commercial and non-commercial promotions included, further, there is the requirement of the objectivity of information ordered already by the law on the radio of 1930, declaring that the Institut national belge de radio-diffusion (I.N.R.) is obliged to function in the spirit of the "strict impartiality" and it must not take up positions in favour of any ideology or philosophy. It must have respect for the interests of third parties and ensure the right to answer. The protection of copyright must also be guaranteed. In respect of some radios and televisions - corresponding to their character - there are further rules, too, thus e.g. the R.T.B.F. - similarly to the other radios and televisions functioning in the form of public institutions - has to promote the cultural development the continuous education and entertainment (film projections, transmission of theatrical performances, sporting events, etc.).

The second part of the book deals with the problems of the transmission which is, in the opinion of the author, primarily an economical-technical activity, though the law has also a considerable part in its regulation, namely both on the central and on the community levels. The transmission of programmes is an activity subject to licence. The licence is granted by the minister of telecommunication on national level and by the competent executive organ of the community on the community level. The authorization to the establishment and the maintenance of the emission distributing network is subject to certain conditions, such as Belgian nationality, or residence in Belgium for the legal entities, respectively, the provision of technical, financial and moral guarantees and, in addition to that, the loyalty to the given community on a community level. The author studies thoroughly the question which programmes must be, may be and must not be transmitted.

The third part of the book deals with the right to the reception of programmes. It follows from Article 10 of the European Convention on Human Rights that the freedom of expression of views comprises the freedom of gathering information, knowledge or ideas without the intervention of the authorities and irrespective of the national boundaries. Article 14 of the Belgian Constitution also mentions the freedom of expression of views, the reciprocal side of which is the freedom of gathering information. The exercise of this right necessitates the suitable technical infra-structure, thus, a receiving apparatus is needed, moreover, an organizational structure suitable for the reception of programmes and transmissions is also required. The acquirement and maintenance of radio and television apparatuses is not subject to licence. The programee transmissions may be re-

ceived through Herzian waves, through cable or through earth satellites. The cable transmissions require authorization, the establishment of aerials, however, is free.

Summing up the merits of the book: it treats the subject in a historical approach so that the development of the various institutions can be easily followed. In addition, a quickly changing subject is concerned here, proved by the fact, too, that in spite of the short time the book got through the press (hardly a half year from the closing of the masnucript) the compilation of an Addendum and its insertion in the book in form of a supplement, containing the legal rules amended in the meantime, became necessary. The legal analyses of the author are clear, unambiguous, each chapter is introduced by a brief summary. The comprehensive, quick information is considerably facilitated thereby. Its style is simple, its idiom is clear. The up-to-date treatment of the law of radio and television is welcome since it may open new vistas in several questions for the development of our home law.

L. Trócsányi

McWhinney, Edward:

UNITED NATIONS LAW MAKING

Holmes and Meier Publishers, New York - London, Paris, 1984. 274 p.

In 1974 UNESCO planned the publication of a new series entitled "New challenges to international law" with the intention of stimulating the critical attitude to international law and the investigation of the methods of a better adaptation of international law to the demands of a changing world. This volume is the third essay of the series.

The keystone of the inter-state structure of the world has been since 1945 evidently the United Nations, as well, as the specialized agencies of the world organization. Professor McWhinney has undertaken to analyze in this volume all processes, fori and persons which and who have slowly but surely remodelled the previous order of the world in the "age of changes". As a member of the Institut de Droit International, as a leading authority of the constitutional law, he investigated the political and legal aspects of the "bipolar" world following the war, as well as the events having led to the transformation of this bipolar world system. The present international law reflects not only the momentary state of the bargain between the two superpowers but both the new legal norms concerning development between North and South and the special institutions of the Western hemisphere or even the results of the "socialist" international law belong also to its elements.

The volume deals with the historical relativism and the spacial dimensions of the international law, and in this range it investigates the juristic solutions reflecting the special demands and legal traditions of the individual geographic areas which frequently appeared as the legal forms of compulsory compromises in the recent past. The author analyzes the aspects international of law of the Far-Eastern principle of "Pancha Shila" which acts against "unequal agreements", requiring namely the earliest possible elimination of norms and agreements which were forced in previous historical ages by the colonizing European powers to the Asian and African countries. The author points to the fact that the "socialist" theory and practice of international law have also undergone considerable

changes since the appearance of the theses of professor Korovin, argumenting with the "social structure" and valuating the synthesis of identical norms of the legal superstructures as rules of international law. The volume introduces in details and with due criticism the views of Krilov, Tunkin and others, mentioning the principle of "peaceful co-existence" in the range of fundamental principles of the international legislation.

Professor McWhirter deals with the correlation between the historical relativism and the temporal dimensions of the international law, emphasizing the pro and contra arguments of the discussion in connection with the "old" and "new" international law. He deals with the essentially eurocentric views of international law worked out by the Swiss jursit Max Huber and with the particularities of the so-called "intertemporal law". He gives a historical survey of the examples of the creative jurisdiction, mentioning the decisions of the International Court of Justice in connection with Namibia, on the Western Sahara (1975), and the one relating to the Lybian continental shelf (1982).

The volume deals with the process of the international legislation and with the various sources of law. The author mentions here the concept of Begriffsjurisprudenz, which emphasizes the importance and the primacy of the identification and clarification of legal principles and rules as against the valuation according to ethical or even sociological points of view. An analysis introducing the present tendencies of the international law is to be found in the volume in the same manner as the memorandum presenting the international customs. The author touches especially upon the resolutions of the United Nations General Assembly as the outstanding acts of the international legislation, as well as upon the decisions of the International Court of Justice.

In the following part, professor McWhirter makes the reader acquainted with the fundamental principles supporting the international legislation being generally recognized by the nations. They have been and are developed, on the strength of the comparative law, from the principles proved to be of remarkable and lasting significance during the development of the civilization and being therefore indispensable.

In the following the author makes the reader acquainted with the scenes of the legislation: the United Nations General Assembly, the Security Council, and the Committee of International Law. He points out, that in the beginning, the membership of the world organization confined itself to the "peace-loving states", namely, to the anti-fascist block struggling against the axis powers. This caused difficulties at the very start, since the views of the after-war Soviet foreign policy as to the question, which state may be considered peace-loving, were entirely different from the relevant opinions of the Western powers. Consequently, the world organization was transformed in the first after-war years into a cold-war front line. Long and desperate discussions were held also on the question, whether the United Nations Charter was actually a convention of limited character or a fundamental law of constitutional character.

The volume deals with the procedure of electing judges to the International Court of Justice, with its political and legal aspects, with the "activity" of judges. Light is thrown upon the particularities of the functioning of the special chambers established by the institutional reform within the Court.

Worth mentioning are the antecedents of the negotiations of several years preceding the birth of the Manila Declaration (1982) promoting the peaceful settlement of the international discussions, being subject to a separate chapter. Here, the author emphasizes the confirmation and the making more effective of the field of activity of the Security Council. The

volume treats, in addition, the present international legal values, first of all the right of self-government of people, as well, as the support of the world organization to the decolonization process, and the attitudes relating to the evolution of the international economic order.

The volume is completed by a comprehensive bibliography and subject index.

M. Udvaros

Arkhipova, L.B.:

TREATY RELATIONSHIPS OF INTERNATIONAL ECONOMIC ORGANIZATIONS OF SOCIALIST COUNTRIES

Dogovori mezhdunarodnih ekonomitsheskih organizacij sotsialisticheskih stran. Nauka, Moskva, 1989. 175 p.

Arkhipova's book is divided into three chapters. The first chapter under the title "The law of treaties concluded by international organizations" is a general introductory survey of international organizations treaty-making capacity. The second chapter covers issues related to the status and treaty-making capacity of socialist international economic organizations. The third chapter which is the most volumous one deals in detail with such questions as the conclusion, entering into force, effectuation and termination of treaties concluded by socialist international economic organizations. The last 15 pages include the author's concluding observations and a short list of abbreviations used in the book.

In the first chapter Arkhipova provides a short, precise and informative review of problems related to the evolving role and nature of modern international organizations, examining the views of both Western and Eastern scholars. She provides the reader with enough examples to understand the differences between the notion of "international legal personality" and "treaty-making capacity" of international organizations. She is of the opinion that all interstate organizations have their separate will and should be treated as subjects having independent international legal personality. This international legal personality is actually an objective phenomena, and neither third states, nor other international organizations - whether they recognize it or not - can influence its essence (18-19 p.). As for their treaty-making capacity, the author support the idea of those who denies its customary law basis (23-24 p.), and the 1986 Vienna Convention on the treaties of international organizations is being considered by her as a major codificational step towards clarifying the issue on the basis of written rules.

In chapter two she examines basically two main issues, namely: the treaty-making capacity of existing socialist international economic organization (41-61 p.) and the organs and persons officially empowered to conclude treaties (61-72 p.). She considers in detail both statutory provisions of the related organizations and their actual practice of treaty-making. The chapter is provided with a good scholary sources, too.

In chapter three, which is the main part of the book, Arkhipova discusses a wide range of issues, including such as the aims and principles, the form and structure, entering into force, registration, modification, termination of the involved treaties. Like the other two chapters this one also contains a lot of useful informations. However, some of the author's

conclusions may be questioned from the points of present-day realities. Especially those which relate to the role of aims and principles of "socialist international economic treaties". Particularly disappointing that there is no critical assessment of the shortcomings and failures of the inter-state relations within the CMEA. She still believes in the usefulness of such principles as "socialist internationalism", "fraternal mutual assistance" and suggests to extend them to all economic treaties concluded by CMEA-countries (88. p.). As it is well-known, the legal content of these principles has never been concretely specified, and it is not likely that the present-day tendencies in the relations of East-European countries would contribute to their extension.

It is obvious, that the author when preparing here manuscript was not in a position to foresee the dramatic changes in the countries belonging to the so-called socialist world. Hence it is not her fault that the book fails to reflect these events. The reader will actually find in the book a thorough and conscientious presentation of the practice belonging to the past and present. It is difficult to foretell the possible future tendencies in this important field of co-operation between East-European countries. Perhaps for the shaping of the future one has to know the past. For those who want to venture into such future speculations this book provides a useful background.

V. Mavi

Mertanova, Stefania:

IUS TAVERNICALE

The Slovakian Academy of Sciences, Bratislava, 1985. 254 p.

Recently, the hardly countable blank areas of the science of Hungarian legal history was reduced by one. The young, but already mature legal historian, active beyond our frontiers, Stefania Mertanova has written her work on the development process of the right of the treasurer in the 15th to 17th centuries. The debts of research in this field were formulated early in the century, more precisely in 1912, when Gyula Szekfü forcefully urged, among others, the monographic study of the position of the treasurer in his work "Servientes and Familiares", when enumerating the tasks of legal history. After nearly two decades, possibly the most efficient legal historian of our century, the school-founding Ferenc Eckhart treated a pressing necessity the task of the revelation of the civil-law development of the feudal age in his programme-setting essay entitled "Law and Constitutional History".

Presumably also due to the appearance of these scientific notabilities, Imre Szentpéteri jr. investigated the early period of the germs of the treasurer's jurisdiction and of the function of the treasurer's court in a longer treatise entitled "The development of the treasurer's tribunal" published in the 1934 volume of Századunk (The Century), although (following also from the setting of task in his paper) his analysis was concentrated to the organizational and procedural moments of the first century of this judicial forum. For a long time, however, nobody could be found to continue the way shown by Szentpéteri, until finally Miklós Vermes, the famous archivist offered to survey a further three centuries of the existence of the institution of the treasurer. He published the results of his

research work in 1968 in his work entitled "The treasurer's authority and the treasurer's court (1526-1849)" exemplarily describing the development of the jurisdiction of this authority, the differentiation of its official organization, the development of its management. The amply documented work intending to call the attention of the scholars of history to source values of the legal history, town history and economic history of the "already more easily accessible material of the treasurer's archive", did achieve its purpose.

The monography dealing with the history of the office could be a real challenge for Mertanova, who was at the start of her career at the publication of the mentioned book, that in the knowledge of the tableau of the structures of the office and the tribunal of the treasurer and the journal of its functioning, shw could submerge to a thorough examination of the legal material taking shape systematically and gradually, which mobilized originally the appellate forum, the treasurer's tribunal of the seven towns of the treasurer - Buda, Kassa, Pozsony, Nagyszombat, Bártfa, Eperjes and Sopron. The task was obvious: to get acquainted with the mass of legal rules having grown for nearly three hundred years and influencing the everyday life of a considerable part of the Hungarian towns, and having a direct effect on the actions of their inhabitants.

The foregoing may explain that the promising representative of the Slovakian legal historiography could not be satisfied with the presentation of the system of norms definitely growing richer and increasing in elements and rules of the treasurer's law but she investigated thoroughly its effective application. And she did so by enumerating such sources which could be done by a home research worker only with great difficulties since four of the first treasurer's towns are to be found on the territory of the present Slovakia.

The work, following the development of the treasurer's law and the sentencing practice of the appellate forum of the citizens, treats, analyzes and evaluates the legal material, applied to the jurisdiction of the treasurer and the practice following therefrom in two main parts. The author sees and renders perceptible the process and its early phase, in which the magister tavernicorum regalium, a high dignitary of the royal court performing economic and financial tasks, turned more and more into a dignity of a judiciary and in which the treasurer passed judgements in legal disputes on appeal instead of the nobiliary judge fellows, later by the aid of the judge fellows delegated by the town magistrates. The above changes served surely the matter both of the competency of jurisdiction and of the independence of the judicial forum. It is perhaps needless to say that the consolidation of the position of the treasurer produced an advantageous effect on the unification of the legal material of towns under his authority. The homogenization to a certain degree of the substantive law was followed by the codification of the law of procedure. The collection of procedural rules of 1456 was quickly followed by the article of the law of the treasurer, hall-marked by the name of treasurer János Laki Thuz - it disappeared without a trace in 1541 - which standardized for the first time the rules of the procedure before the treasurer's court by putting the basic procedural principles and fundamental institutions into writing. Then, the collection relating to the procedure of the Chief Justice's Court, put down twenty years later, unified the process in the cases appealed in the third instance of the treasurer's towns.

The treasurer's law homogeneized in this way until the middle of the 16th century, facilitated the application and enforcement of the law of towns, produced an animating effect on the everyday life of civitatis, promoted the liveliness of the trade, the strengthening of the craftmanship, the appearance of the germs of manufactures.

In addition to the description of the process of the unification of law, Mertanova deals comprehensively with the practice of the treasurer's courts before the battle of Mohács, forming a favourable opinion on the level of the jurisdiction, on its competence, in its beneficial effects on the sense of security of the citizens.

The Turkish occupation rather destroyed the law and the tribunal of the treasurer, points out the second main part of the work, which makes the readers acquainted with the changes of fortune between 1526 and 1723 of the institution chosen as subject matter. Not only the records of the treasurer's court were lost but also the once uniform legal procedure dissolved. Thus, it is understandable that in this serious situation, in the drumfire of the more and more frequent attacks of nobles, the towns enjoying the supervision of the treasurer started their struggle with renewed efforts for the putting of their rights in writing again and, if necessary, for their "modernization".

And the desired result had not to be waited for at length. Towards the middle of the 16th century namely, first the delegates of those towns which escaped the Turkish rule reconstructed in a new code the regulations fragmentarily survived or not fallen through the sifter of memory whereas later a new collection of the statutes of the treasurer's court- having been completed several times - was finished in 1602. The work, following also the enforcement of articles confirmed by King Rudolf, investigates in details the practice of the courts of the privileged towns, not forgetting, however, the analysis of the judicature of the treasurer's court, either. Relying upon two cathegories of sources, upon the sources of law and the documents of judicial procedures, Stefania Mertanova defines the treasurer's law, further the territorial and personal validities thereof in a manner, differing from the hitherto prevailing attitude.

According to the view, generally accepted until now in the legal history, the treasurer's law was a civil by-law i.e. it covered only the treasurer's towns from among the royal towns, and their civil-law relations (real property, testament, debt), respectively. After analyzing the practice of the courts, the author comes to the statement that the activity of the treasurer's court comprises, in addition to the treasurer's towns, also other settlements, moreover, in addition to the civil law, certain penal cases fell also under its competence. The personal effect of the treasurer's law could cover, in addition to the citizens of the corresponding towns, also the clergymen and the nobles.

The work of the legal historian of Bratislava contains several novel statements, and relies upon the sources of archives, thereby a great asset not only for the science of the neighbouring country but the Hungarian legal history may surely take advantage of her results and seemingly surprising recognitions. As a matter of fact, this latter could be realized without restraint if the work of Stefania Mertanova will be published also in Hungarian.

T.M. Révész

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